MAYER·BROWN

UK Employment Round-Up

September 2015

Our monthly review of key cases and new law affecting employers

Scope of associative discrimination claims widened?

Decision: This case, heard by the European Court of Justice involved a claimant who owned a shop in a district where the electricity provider installed electricity meters at an increased height compared to other districts, which it said was to avoid people tampering with the meters. The district was predominantly inhabited by people of Roma ethnicity, and although the claimant was not of Roma origin herself, she claimed that Roma people were disproportionately affected by the electricity provider's policy since they were unable to monitor their electricity usage (as a result of the height at which the meters were located) and she suffered the same disadvantage.

The ECJ confirmed that the electricity company's policy was discriminatory, even though it applied to non-Roma living in the district as well as those of Roma origin. It has been well established in the UK, since the case of *Coleman v Attridge Law*, that an associative discrimination claim can be brought in relation to direct discrimination. However, it is in relation to indirect associative discrimination that this decision is radical – the ECJ held that the claimant could bring a claim of indirect discrimination, even though she was not of Roma origin, because she had suffered the same disadvantage of the increased height of the electricity meters as those of Roma origin in her district.

Impact: Although this decision relates to the supply of goods and services, it may have a significant impact on discrimination law under the Equality Act 2010 (the "EqA"). This decision blurs the lines between direct and indirect discrimination, and it would appear that section 19 of the EqA is out of step with the UK's European obligations since it restricts claims of indirect discrimination to those claims where individuals share a protected characteristic with a group who are disadvantaged by a particular provision, criterion or practice (i.e. it does not allow claims of indirect discrimination by association). This means that tribunals will be invited to read words into the EqA to disapply that particular requirement or work around it so that it will be sufficient for an individual to show that they have suffered alongside the disadvantaged group even if they do not share the same protected characteristic. This decision widens the class of who will be able to claim for unlawful indirect discrimination. Employers will need to think carefully about how a group of individuals might be disadvantaged, even if they do not possess the characteristics protected by the EqA.

CHEZ Razpredelenie Bulgaria C-83/14

The View From Mayer Brown

MAYER·BROWN UK Employment Law

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Episode 78

In this podcast, the first case is the ECJ decision in relation to working time, the second case considers whether an absent employee transferred to a transferee under the Transfer Regulations, and the third case seems to restrict the assistance HR can give in disciplinary procedures.

Episode 77

In this podcast, the first case establishes that unlawful indirect discrimination covers associative indirect discrimination, the second case explains why employees cannot claim back holiday pay from many years ago, and the third case covers the EAT's decision that an employer is not allowed to rely on "special circumstances" for failing to collectively consult ahead of a redundancy.

UK Employment Law: for HR and in-house lawyers

LinkedIn

Join the discussion on LinkedIn

Our LinkedIn group is an excellent source of up-to-date employment law knowledge. We'd like to encourage you to post your own relevant discussions and contribute your own comments on the discussion page.

Employment Tribunal fees challenge to go to the Supreme Court

Decision: The Court of Appeal has dismissed Unison's appeal against two High Court decisions on judicial review of the employment tribunal fee regime introduced in July 2013. In their appeal Unison challenged the lawfulness of the fee regime on three grounds: firstly, that it breached the EU principle of a right to an effective remedy (i.e. access to justice) due to the high level of fees which it argued has resulted in the sharp decline of claims brought since the regime was introduced; secondly, that the fee regime indirectly discriminates against those with protected characteristics since the fees are higher for discrimination claims due to the split structure of Type A and Type B claims; and thirdly, that the Lord Chancellor has breached his public sector equality duty in preventing discrimination and fostering good relations between those who share protected characteristics and those who do not.

The Court of Appeal dismissed the appeal on all three grounds, although it is notable that the Court found the first ground attractive. The court found the apparent 81% decline in the number of claims brought since the introduction of the fee regime "startling" and that the statistics should speak for themselves. However, the statistics alone were not enough since, ultimately, the court could not find a sound legal basis on which to hold that the fees were making it impossible or excessively difficult for individuals to bring claims to enforce their rights.

Impact: Unison has vowed to take the case to the Supreme Court and has applied for permission to do so. If, as Unison suggest, an inability to pay fees is a key factor for claimants in deciding not to bring a claim, then the abolishment of the fees regime is likely to return the levels of claims to those seen before July 2013. However, if, as the Court of Appeal implied, it is not quite so simple, since other factors are likely to have played a role (for example, increased settlements and mediation), there may not be a big increase in claims if the fee regime were to be abolished. A separate inquiry into the effects of tribunal fees is also being conducted by the Justice Committee and so this is an area to watch.

R (Unison) v Lord Chancellor and another

"Improper influence" from HR may lead to an unfair dismissal

Decision: In this case, the EAT looked at the influence of an HR team on the decision to summarily dismiss an employee for gross misconduct. The case involved a disciplinary investigation into an employee's expense claims. Whilst the investigating officer found that there was misconduct on the part of the employee, he did not believe that it was so serious as to warrant dismissal, and he instead made a recommendation that the sanction for the misconduct involved should be a final written warning. Following a six-month period of extensive communication between the investigating officer and the HR

30 seconds with...

Ann Smith

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How long have you been at Mayer Brown?

28 years!

What is the best thing about your job?

Being part of such a great team! I also love being in London.

What job would you be doing if you weren't a legal secretary?

Something to do with horticulture – maybe Garden Design.

Where are you next going on holiday?

Following the recent "Big Blue Live" series, we'd love to go to Monterey Bay in California to see the whales, sharks, dolphins and sea otters.....come on Camelot it's time my numbers came up!!

What talent or skill do you have that not many people know about?

I can play the piano (rustily!).

What was the last album you down-loaded/bought?

It's been a while but the last album I bought was "Guilty" by Barbara Streisand and the last one I downloaded was "21" by Adele.

department, which included the circulation of various drafts of his report, his findings were changed to one of gross misconduct with the sanction of summary dismissal. The employee brought a claim for unfair dismissal which failed in the Tribunal since it was held that the investigation had been reasonable and the decision to dismiss fell within the band of reasonable responses. However, in a somewhat confusing decision by the EAT, the employee's appeal was allowed and the case was remitted to the same Tribunal to consider whether the influence of the HR team had been improper, and if so, whether this had had any material effect on the ultimate decision of the investigating officer.

Impact: The decision of the EAT appears to suggest that, in light of the case of *Chabra v West London Mental Health NHS Trust*, HR's advice in disciplinary investigations should be limited to matters of law and procedure only and should not stray into culpability, since an investigating officer's report should be the product of the investigator. Whilst this is a sensible point, and it is unlikely to be disputed that it would be unfair for anyone apart from the investigating officer to write the report or make key decisions in the investigation, it is unclear from this case the extent to which the investigator may ask for advice or assistance in coming to his/her decision. Despite having reams of written evidence before it, the EAT was not prepared to make a decision on the HR team's influence in the current case, and instead remitted the case. This indicates that it was not necessarily unfair for HR to have done the things that they had done, on paper. Whilst we wait for the Tribunal's decision on remittal or an appeal of this decision, employers should be aware that to the extent their HR advice goes beyond policy and procedure, there is a danger it will be used as evidence of an unfair dismissal, and investigators must take ownership of their decisions. Advice which goes beyond policy and procedure should be given by a lawyer, since it will then be covered by legal privilege.

Ramphal v Department for Transport

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

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Upcoming Events

Our current calendar of events is below, all to be held at our offices. Invites are usually sent out one to two months in advance.

15 October 2015

Breakfast Briefing: Top 10 tips employers need to know about – A Globally Mobile Workforce

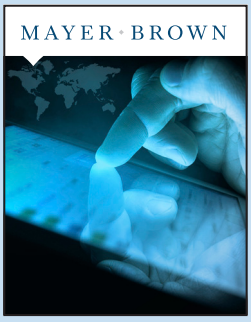
Time: 9:00 a.m. – 11:00 a.m.

18 November 2015

Seminar: Social Media - The Employment Relationship

Time: 3:00 p.m. – 5:30 p.m.

Global Tools & Resources



Click here to view our range of global tools and resources which highlight topical workplace issues across multiple jurisdictions , including our global guides, traffic lights and app.

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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