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UK Employment Round-Up

February 2016

Our monthly review of key cases and new law affecting employers

Managing an ageing workforce

Decision: In *Donkor v Royal Bank of Scotland*, the EAT found that a prima facie case of direct age discrimination had been made out by Mr Donkor who missed out on voluntary redundancy during a restructuring exercise at RBS in 2012 because of the cost involved of having to offer him access to his early retirement pension benefits. He was one of four regional directors affected by the restructuring; two aged under 50 were offered voluntary redundancy, whilst Mr Donkor and one other, who were over 50 and eligible for early retirement pension benefits, were not. The EAT held that the Tribunal was wrong at first instance to find that the two regional directors under 50 were not appropriate comparators; there was no material difference in their circumstances apart from age. The EAT also found that there was less favourable treatment because the comparators had been given the opportunity to apply for voluntary redundancy, whereas Mr Donkor had not, which was enough to amount to detrimental and less favourable treatment. It did not matter that the comparators were not eligible for early retirement benefits, as this was simply a consequence of their age. Finally, the EAT rejected the Tribunal's finding that the reason for the treatment was not age, but was other factors such as cost, legal risks and the need to obtain approval from a higher level of authority for the redundancy package it would have needed to offer Mr Donkor. The EAT found that all of those factors clearly related to Mr Donkor's age and, therefore, it was his age that was the main reason for the detrimental treatment. Following the clear line of case law on the topic, the EAT held that there was no need to enquire as to why RBS treated Mr Donkor as it did; merely whether RBS had treated the him differently on the grounds of age, which it found to be the case here. The EAT remitted the case to the same employment tribunal in order to consider whether RBS could objectively justify such treatment.

Impact: Whilst this case does not establish any new legal principles, it is a useful reminder of the necessary components of a direct age discrimination claim (and how these can get confused). It is also a warning to employers who are facing similar issues with their own ageing workforce. The pension benefits were materially different for the claimant in this case, and it was a significant additional cost for the employer. Why should an employer, when

The View From Mayer Brown

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Episode 88

The three cases covered in this podcast episode look at obtaining an interim mandatory injunction regarding unlawfully obtained confidential information, transferring under TUPE, and conducting a fair disciplinary process.

Episode 87

This episode covers the correct tax treatment of termination payments, the recent case on the checks for employers done by the Disclosure and Barring Service, and whether a Claimant could add a new respondent to a Tribunal claim without going through ACAS early conciliation.

UK Employment Law: for HR and in-house lawyers

LinkedIn

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faced with a finite pool of resources to allocate to a redundancy, be forced to make someone redundant when that was going to be significantly more expensive? In this case, it was because the enhanced pension cost was directly linked to the employee's age. As such, it would be very difficult to argue that there was not a comparator, when one employee is simply paid a higher salary because of his age to the other employee. In those circumstances, there would clearly be an age link, and so the EAT was right, in this case, to call out that link, making the younger employee a valid comparator. Recognising that it is likely that an employer will be forced to justify its actions in this regard should help employers to plan ahead so that they are seen to have justified their policies and considered any consultation exercise/communications that are done before the exercise gets underway.

Donkor v Royal Bank of Scotland

The advantages of blanket policies

Decision: In the case of *Sirunyan v NCO Europe Ltd*, the Court of Appeal considered two points on appeal from an Armenian employee who claimed she had been directly discriminated against when her employer dismissed her for failing to demonstrate her ability to work in the UK: (1) whether she had been treated less favourably than a relevant comparator, and (2) whether her nationality was the reason for that less favourable treatment. In respect of point 1, Mrs Sirunyan argued that the Tribunal and the EAT had failed to establish the correct comparator and that the appropriate comparator in this case would be a British national who was permitted to work in the UK but who was unable to provide the requisite documentary evidence of their eligibility. However, the counter-argument to this, which the Court followed, was that the comparator here was immaterial, as NCO Europe Ltd operated a blanket policy requiring all employees to provide documentary evidence of their eligibility to work in the UK. The Court concluded that in order to succeed, Mrs Sirunyan would have to demonstrate that although NCO Europe Ltd had such a policy, it did not in fact operate the policy in this way. The evidence demonstrated, however, that NCO Europe Ltd did in fact operate a blanket policy that required all employees, regardless of nationality, to provide evidence of their eligibility and that this was specifically intended to avoid any claims of discrimination. In addition to this, NCO Europe Ltd had acted on information provided by the UK Border Agency which confirmed they would be in breach of the relevant legislation if they proceeded with her employment and would be liable for a fine. As such, the Court concluded that there was no basis in the evidence for a finding of discrimination on grounds of nationality. Mrs Sirunyan's appeal was dismissed.

Impact: This case is a helpful reminder of the law in this area and the requirement to ensure that, under the Immigration (Restrictions on Employment) Order 2007, all employees are entitled to work in the UK. Otherwise, in the event of a breach of the Order, employers face potential penalties. This case also provides useful guidance on how to implement policies in this area to ensure that any risk of discrimination is limited. By ensuring that

30 seconds with...

Sherilee Nairn

Legal Secretary
E: snairn@mayerbrown.com
T: +44 20 3130 3152

How long have you been at Mayer Brown?

Forever or 7 years, I can't remember which..

Why did you become a legal secretary?

I fell into it by accident, working for a labour broker in South Africa. I discovered I liked employment law and went from there.

What is your favourite box set/book/film?

The Guernsey Literary and Potato Peel Pie Society – a book I have read over and over and still love.

What is the best holiday/trip you have been on?

That has to be Iceland – an amazing country with super-friendly people. Witnessing the aurora borealis for the first time was incredible.

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

I have just learned to wakeboard, which I am thrilled about! Not much opportunity to wakeboard in London though. I have also just discovered a knack for flipping pancakes! Who knew?

such policies are applied to all employees and applicants uniformly, regardless of nationality, the risk of any potential claim is significantly reduced. In addition, what appears to have been significant in this case was the employer's ability to demonstrate how this policy applied to its workforce and applicants in practice. The evidence that the employer was able to produce on this point helped it to successfully defend the appeal, and this case shows how helpful it can be for employers to maintain clear and up-to-date records of how its policies are implemented and who they are being applied to.

Sirunyan v NCO Europe Ltd

Disclosure of historic offences under the Criminal Records Disclosure Scheme

Decision: The High Court has held that the current Criminal Records Disclosure Scheme (the "Scheme") is incompatible with Article 8 of the European Convention of Human Rights, which provides that everyone has the right to respect for his private and family life, his home and his correspondence. The Court considered a challenge to the Scheme that had been brought by way of a judicial review by two applicants who had both been required by the Scheme to disclose to prospective employers in the teaching and finance sectors, details of convictions for two or more minor offences that had occurred many years ago. The key focus for the Court was on the exceptions to the disclosure of convictions rule, which provides that, in certain circumstances, all prior convictions are discloseable, regardless of the nature of the offence or how long ago it was committed. The applicants argued that the requirement under the Scheme to disclose their offences, which were minor, committed a long time ago and had no relevance to their employment today, demonstrated the arbitrary nature of the disclosure provisions which leave no room for discretion to be applied in any individual case. The Court held that there should be some mechanics in place to test the proportionality of an offence for the Scheme to be in accordance with Article 8. Moreover, the single conviction exception to lifetime disclosure, which was introduced in 2013 with the intention of alleviating some of the harsh effects of the Scheme, was considered by the Court to be arbitrary, disproportionate and therefore contrary to Article 8. In his judgment, Lord Justice McCombe said that *"it was not justifiable or necessary for any individual to have minor offences disclosed indefinitely, from many years ago merely because there is more than one minor offence"*. It was therefore held that there was no logical connection between the application of the Scheme to ensure suitability for employment, and the interference with the applicants' Article 8 rights. The Scheme will require amendment to deal with this decision.

Impact: So, until such time as the government takes steps to amend the Scheme, where does this leave employers? Employers relying on DBS checks should ensure that, subject to any sector-specific guidance, they exercise careful, independent judgment in considering what weight to attach to disclosures which relate to old or trivial convictions. Employers should also

Events

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

10 March 2016

Seminar: LLPs: Recent Developments

Please do join us for our discussion, which will be of particular interest to those with responsibility for the legal or operational aspects of running an LLP, and will be followed by drinks.

Time: 4:15pm – 5:30pm

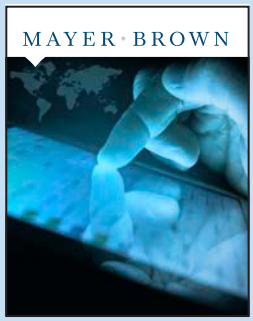
27 April 2016

Seminar: Looking Back/Looking Forward

As usual, we start the year with a review of the key employment law developments from 2015 and look ahead to what we can expect in 2016, enabling you to plan effectively for the coming year.

Time: 4:45pm – 5:45pm

Global Tools & Resources



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consider the relevance of such convictions to the employment in question, particularly where the conviction is a spent conviction. As advised by Lord Justice McCombe, it is important to assess the factual background on a case-by-case basis, and to draw distinctions between the nature of the offence, the time elapsed, the disposal by way of sentence or otherwise and the absence of any independent review of a decision to disclose the offences. Employers, should, therefore, exercise a degree of perspective and judgment before rejecting a job applicant who has historic and irrelevant convictions.

R (on the application of P) v Secretary of State for Justice

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.

Nick Robertson
Partner, London
E: nrobertson@mayerbrown.com
T: +44 20 3130 3919

Imogen Finnegan
Senior Associate, London
E: ifinnegan@mayerbrown.com
T +44 20 3130 3441

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