



## Our monthly review of key cases and new law affecting employers

### Motivation of decision-makers in discrimination cases

**The case:** Dr Reynolds was appointed by CLFIS (UK) Ltd as Chief Medical Officer under a consultancy agreement. Her agreement was terminated by her general manager following a presentation by other managers which raised various concerns about her performance. Dr Reynolds, who was 73 at the time, claimed that the termination of the agreement constituted direct age discrimination.

The Employment Tribunal approached this case by focusing on the mental processes of the general manager, notwithstanding the involvement of other managers. It concluded that the decision to terminate Dr Reynolds' agreement was taken solely by the general manager and that there was a non-discriminatory reason for his decision.

The case was appealed to the Court of Appeal which upheld the Tribunal's decision. It considered this to be a case of "tainted information" (e.g. where a manager decides to dismiss an employee on the basis of an adverse report from another employee (the "informant") who is motivated by her age). When considering liability in such a case, the Court disagreed with the "*composite approach*", which involved bringing together the decision-maker's act with the informant's motivation to assess the motivation for dismissal. It is a fundamental principle of discrimination legislation that an employer can only be liable where an individual employee/agent for whose act he is responsible has done an act which satisfies the definition of discrimination. The Court considered that the individual employee who did the relevant act must himself have been motivated by the

protected characteristic. It would otherwise be unfair in this case for the general manager's act to be held to be discriminatory on the basis of someone else's motivation. The Court therefore concluded that the "*separate acts approach*", which involves treating the informant's report as a discrete discriminatory act, was correct in this case.

**The impact:** This useful decision is likely to be welcomed by tribunals and employers alike. Had the Court of Appeal preferred the composite approach, this would have potentially widened the field of employees being considered when assessing motivation in a discrimination case. The case does, however, highlight the importance for employers of choosing decision-makers carefully. Claimants may still attempt to look beyond the relevant decision/act and allege that the information on which it is based was discriminatory, to capture each "separate act" within their claim. Ensuring there is clarity around the decision-making process in advance is vital.

### Overlapping disciplinarys and grievances

**The case:** The Employment Appeal Tribunal (EAT) has recently examined a question which often arises for employers: should a disciplinary process be put on hold to deal with a grievance? In this case, Ms Jinadu was employed as a bus driver by Docklands Buses. As her driving was considered to be below an acceptable standard, she was instructed to attend a driving assessment at a training centre. Ms Jinadu repeatedly refused to comply and, following disciplinary proceedings, was dismissed for gross misconduct. During the disciplinary process, Ms Jinadu raised a

number of grievances about some of the managers involved in the disciplinary proceedings. Despite the grievances raised, Docklands Buses did not put the disciplinary on hold but instead continued with, and completed, the disciplinary process.

Ms Jinadu brought a claim for unfair dismissal against Docklands Buses. The Employment Tribunal dismissed the claim due to Ms Jinadu's repeated failure to attend the driving training centre and held that Docklands Buses had acted fairly in dismissing Ms Jinadu. Ms Jinadu appealed. One of the grounds of her appeal, the focus of this summary, was that the dismissal was unfair because Docklands Buses had failed to put the disciplinary proceedings on hold until her grievance had been investigated. This particular ground of appeal was firmly rejected by the EAT. Docklands Buses was not obliged to put the disciplinary on hold until it had dealt with Ms Jinadu's grievances.

**The impact:** Although the EAT's finding on this particular point is brief, it is helpful for employers. It supports the view that there is no automatic need to postpone disciplinary proceedings to deal with grievance allegations. However, this is not to say that it will never be necessary or appropriate for an employer to do this. Such cases often turn on their facts and the decision to delay a disciplinary hearing may depend on the relationship between the grievance and the disciplinary hearing, including whether the employee conducting the disciplinary is involved in the grievance.

## Queen's Speech – employment law implications

The recent Queen's Speech has provided some insight into the government's plans for employment law. Here are the key areas to note:

- *European Union Referendum Bill* - the government will renegotiate the UK's relationship with the EU. The Bill will provide for an in-out referendum on EU membership before the end of 2017.
- *Bill of Rights* - the government will bring forward proposals for a Bill of Rights to replace the Human Rights Act 1998.
- *Trade Unions Bill* – new legislation will be introduced to reform trade unions and protect essential public services against strikes. Key provisions will include the following:
  - The introduction of a new 50% turnout threshold of those entitled to vote.
  - The introduction of a new requirement that 40% of those entitled to vote must vote in favour of industrial action in certain essential public services (health, education, fire, transport).
- *Immigration Bill* - this new Bill will make illegal working a criminal offence and provide that wages paid to illegal migrants will be seized as proceeds of crime. It will be illegal for employment agencies to recruit solely from abroad without advertising those jobs in Britain and in English. A new enforcement agency will also be created.
- *Finance Bill/National Insurance Contributions Bill* - this will ensure that individuals working 30 hours a week or less on the national minimum wage do not pay income tax. There will also be no rises in rates for income tax, VAT or National Insurance contributions for the next five years.
- *Enterprise Bill* - this will introduce measures to reduce regulation on small businesses to help them create jobs. It will also introduce a cap on exit payments made to public sector workers.
- *Childcare Bill* - this will give eligible working parents 30 hours a week of free childcare for their three and four year olds for 38 weeks of the year.
- *Extremism Bill* - as part of the government's new strategy to defeat extremism, it will introduce a range of measures, including the ability of employers to check whether an individual is an extremist and bar them from working with children.
- *Full Employment and Welfare Benefits Bill* - this will include statutory duties on ministers to report annually on progress against meeting the target of 3 million new apprenticeships, as well as progress on meeting the government's objective of achieving the highest employment rate in the G7.

## Review of tribunal fees

When Employment Tribunal fees were introduced in July 2013, amidst significant controversy, the government made a commitment to review their impact. The government has now announced the start of that review.

The review will take into account a wide range of evidence including tribunal data on case volumes, case progression and case outcomes, the general trend of the number of cases appearing at tribunals before the fees were introduced and to what extent there has been discouragement of weak or unmeritorious claims. The review is expected to be completed later in the year and the government will consult on any proposals for reforms to both the fees and remissions scheme.

The government's announcement is particularly timely, given that Unison's appeal against the High Court's dismissal of their application of judicial review of the introduction of fees was heard by the Court of Appeal earlier this month.

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

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