GateWay

HBJ Gateley Wareing

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Welcome to our February GateWay newsletter.

1. IN THE NEWS

Sex Discrimination

A cut too far!

A male employee who was instructed by his employer, the Metropolitan Police, to cut his shoulder-length hair because it wasn't smart enough, has failed in bringing a sex discrimination claim.

The EAT held that when assessing whether or not a dress code is equally balanced between the sexes the legal test is to consider contemporary standards and conventions as well as the profession in question. If the dress code, assessed as a whole, requires a level of equivalent smartness, it will not be discriminatory.

Comment

Business image is important. It is therefore reasonable for employers to put reasonable constraints on an employee's appearance and what an employee can and can not wear to work. However, so far as possible, dress codes should be gender neutral. It is also important to ensure that, if you have a dress code, it is complied with. As with any policy, if employers don't ensure compliance, it may become difficult to rely on the policy when you need it most. Also, with the popularity of dress down days, now might be the time for a review.

Misconduct

White collar fraud increasing.

As the effects of the recession continue to be felt, and businesses scrutinize their cash flow statements, a worrying trend has started to emerge - white collar fraud.

The Guardian has reported a 78% increase in white collar fraud in 2009 compared to 2008 based upon figures produced by BDO. According to the article, the "cost of management fraud was up 48% and the best sales staff often turned out to be the best fraudsters".

According to the survey, few perpetrators have mitigatory circumstances and most (81%) are carried out to fund a more lavish lifestyle.

Comment

BDO have also warned of a lag effect - that is to say that these figures may only illustrate the tip of the iceberg. A lot of fraudulent activity takes years to uncover and therefore much of it may only be discovered as we emerge from the recession.

If fraudulent activity is suspected, clearly the police will be involved. Employers are, however, reminded that when it comes to dismissal a proper investigatory and disciplinary process should still be adopted - in line with your own policy and the ACAS Code of Practice.

Practice and Procedure

Guidance published on how to implement time to train requests

The Department for Business Innovation & Skills has published guidance to help employers implement employees' time to train requests.

Employees working in an organisation with more than 250 employees, will from April 2010 be able to request time to train. This could be a request to undertake accredited programmes leading to a qualification, or an unaccredited course to help them with a job specific skill. The right will be extended to all employees from April 2011.

Similar to flexible working requests, employers will be required to consider any requests made by employees and respond within a set timeframe. Employers can reject requests if they have a good business reason to do so, including where they do not see the benefit of such training to their business.

Comment

Employers are recommended to read the guidance in preparation for April 2010. The guidance is only applicable to England, Scotland and Wales (and can be found at: http://www.businesslink.gov.uk

Apprenticeships

Scottish Government's "Invest in an Apprentice" scheme is time limited

The Scottish Government has announced that as part of its ScotAction scheme, which aims to help business and individuals through the recession, it will offer businesses in Scotland £1,000 to take on a new apprentice.

The scheme will run from January 11 to March 26 and will be made available to up to 4000 employers.

Further details can be found at: http://www.scotland.gov.uk/News/Releases/2010/01/11081926

2. CASE LAW

Disability Discrimination

Garett v Lidl

The EAT has held that it is not unreasonable for employers to conclude that adjustments can be best achieved at a place other than a disabled employee's usual place of work, particularly where that employee has a mobility clause in their contract and has already worked in several locations.

In this case, the employee was a store manager and had already worked at different stores. She suffered from Fibromyalgia Syndrome which caused her pain, fatigue and muscle stiffness. The employer had considered adjustments at her current store but concluded, after first obtaining an occupational health report, that those adjustments could be best achieved at a different store. The employee, not wishing to move stores, disagreed and brought a claim for a failure to make reasonable adjustments.

The EAT held that it would be best industrial practice to first consider whether adjustments can be put in place at an employee's existing place of work. However, if the best way to implement adjustments is to move the employee to a different location, then this will not be unreasonable, particularly when the employee has a mobility clause in their contract and/or has already worked in several locations.

Comment

Employers are reminded that if reasonable adjustments can not be implemented at the employee's existing workplace, the employer's other locations should also be assessed. Whether or not moving a disabled employee to a different location, with a view to implementing adjustments, is reasonable will depend on all the facts and circumstances. For example, had significant travel been required to the new store, this would have been another factor for the employment tribunal to consider.

Pregnant Employees; Health and Safety

O'Neill v Buckinghamshire County Council

The EAT has clarified in the case of O'Neill v Buckinghamshire County Council that an employer is not under a general obligation to carry out a risk assessment for a pregnant employee but must do so if certain circumstances exist.

The law affords pregnant employees, as well as employees that are breastfeeding or have given birth, a protected status in the workplace. This is because working conditions that may normally be deemed acceptable, may no longer be suitable if a employee is a new or expectant mother.

In this case, the employee was a school teacher who had informed her employer that she was pregnant. The school had initially started a risk assessment but had put it on hold for various reasons. The employee alleged sex discrimination on the grounds that a risk assessment had not been completed.

Having regard to the wording of the Pregnant Workers Directive and the Management of Health and Safety at Work Regulations 1999, the EAT accepted the employer's argument that in order for the employer to be under a duty to conduct a risk assessment:

- the employee must have notified the employer that she is pregnant in writing;
- the work is of a kind which could involve a risk of harm or danger to the health and safety of a new/expectant mother or her baby; and
- the risk arises from either processes, working conditions or physical, biological or chemical agents in the workplace.

Comment

Whether or not a workplace "could" involve a risk will need to be assessed in all the circumstances. Ultimately an employment tribunal will decide if an employer has failed to take potential risks into account when determining this point. Whilst it would be prudent for employers to be aware of the above preconditions, it is recommended that employers carry out risk assessments for all new and expectant mothers to avoid potential claims. A useful guide on how to carry out a risk assessment is available on the Health and Safety Executive's website at: http://www.hse.gov.uk/pubns/indg163.pdf

Age Discrimination

Beck v Canadian Imperial Bank of Commerce

The employment tribunal has rejected an employer's defence that the word "younger" in a job advertisement was meant to describe seniority as opposed to age.

The employee had been Head of Marketing at the employer's London office when he was made redundant. The employer had identified the employee as being at risk of redundancy and at the same time described the need for a Team Head in an internal email. It stated that one of the attributes that this person should have is to be "younger". Despite the employer's HR team warning that "younger" was inappropriate, the employer used the word on the basis that it did not relate to age but to seniority.

The employee brought a claim for, amongst other things, unfair dismissal and age discrimination on the basis that the redundancy was a sham.

At the employment tribunal hearing, the employer tried to argue that it could not be guilty of age discrimination because the four candidates that were short-listed were all aged over 40, one even being 50, compared to the employee who had been 42 years old when he was made redundant.

However, the employment tribunal upheld the Employee's age discrimination and unfair dismissal claims. It held that the use of the word "younger" in the recruitment brief called for an explanation and the employer was not able to provide a convincing explanation. The employment tribunal did not consider it relevant to consider the ages of those recruited at a later date, as the issue was what influenced the employee's dismissal at the time.

Comment

This case has been widely reported and some commentators have suggested that the employer's reported lack of credibility may have contributed to the failure of their age discrimination defence. Notwithstanding that, this case serves as a reminder

to all employers that they should carefully check their recruitment policies, briefs and advertisements. Use of any language which could raise a presumption of discrimination should be avoided at all costs.

It is also worth noting that there a number of age discrimination claims which are due to be heard by the EAT and the higher courts this year. Like many of the discrimination strands, there is often a lag between the introduction of the claims and reported decisions coming through. It is fair to say that 2010 may well be the year of age discrimination cases. We will keep you updated on cases as they are reported.

3. NEW AND PROPOSED LEGISLATION

Data Protection

New civil penalty for serious breaches by data controllers

With effect from 6 April 2010, the Information Commission can impose a civil penalty of up to £500,000 for serious breaches on data controllers under the Data Protection Act.
The Commissioner can serve a civil monetary penalty if
it is satisfied that:

- there has been a serious contravention; and
- that contravention has or is likely to cause serious damage or distress; and either
- it was deliberate; or
- the data controller ought to have known that the contravention was likely to cause serious damage or distress and failed to take reasonable steps to prevent it.

Before serving a penalty notice, the Commissioner must serve a notice of intent which will inform the date controller of his/her right to object. The Commissioner has also published guidance on this issue which can be viewed at:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/ico_guidance_monetary_penalties.pdf

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