SIMONS MUIRHEAD & BURTON

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Coming Of Age In A Harsh Winter

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January has proved to be a month not only where we have had to cope with Siberian weather conditions and severe travel disruption, but also where age discrimination has hit the headlines.

Harriet Harman announced that the national default retirement age (DRA) of 65 is arbitrary and bears no relation to people's ability. Therefore, the DRA will be scrapped altogether under the Equality Bill and employees at age 65 and beyond will get a legal right to ask to work part-time or from home, or to request flexible working hours.

The ECJ, however, served up a reminder that sometimes ability can be linked to age and that under EU law age discrimination can be justified where it is a proportionate means of meeting a legitimate aim. On this basis, German law which restricts applications to the fire service to those under 30 and sets a maximum age limit of 68 for dentists to be accredited to work in the German national health service was not unlawful (Page 4).

A Canadian bank, did not, however, fare so well (Page 3). Here a 42 year old employee being made redundant was not considered for a new role where the person specification set out a requirement for someone with a "younger, entrepreneurial profile". As no convincing explanation had been given for the use of the word "younger", a tribunal decided the employer had discriminated on grounds of age. If there was ever a time for management to have heeded HR's warning that the word "younger" was inappropriate, this was it!

News In This Edition

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HMRC publish new parental and SSP standard pay rates

HM Revenue and Customs have published the likely new standard rates for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay, due to come into effect in April 2010.

The new rates are as follows (previous rates in brackets):

- SMP: Six weeks at 90% of the employee's average weekly earnings followed by a further 33 weeks at the standard rate of £124.88 (£123.06) per week or 90% of average weekly earnings - whichever is lower.
- SPP: One or two weeks' at the standard rate of £124.88 (£123.06) per week or 90% of average weekly earnings - whichever is lower. If the employee opts to take two weeks' leave, they must be taken together.
- SAP: 39 weeks at the standard rate of £124.88 (£123.06) per week or 90% of weekly earnings - whichever is lower.
- The rate for SSP remains unchanged from 2009-10, i.e. £79.15 per week.
- The weekly lower earnings limit applying to National Insurance contributions, will increase to £97 (£95).

The revised SMP, SPP and SAP standard rates will apply for complete pay weeks commencing on or after 4 April 2010 (the first Sunday in April).

Draft Equality Bill Codes of Practice published

The Equality and Human Rights Commission (EHRC) has commenced consultation with invited legal specialists on two revised draft statutory Codes of Practice, on Employment and Equal Pay, which are designed to cover the relevant provisions of the Equality Bill when it comes into force as the Equality Act 2010.

The draft Employment Code runs to 366 pages and is divided into 12 chapters and one appendix. It covers discrimination in employment and work-related activities set out in Part 5 of the Equality Bill. The Code explains the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation, the different forms of unlawful acts and good practice measures that should be taken by employers in order to prevent discrimination.

The draft Code of Practice on Equal Pay covers the provisions of Chapter 3 of the Equality Bill and the equal pay measures found in Part 5. This draft is 63 pages long. Part 1 deals with equal pay law. Part 2 covers good equal pay practice and guidance for carrying out equal pay audits.

Both drafts are based on the Equality Bill as introduced to the House of Lords on 4 December 2009. Some changes may be required depending on amendments made to the Bill as it progresses through Parliament. The EHRC will also be producing separate practical guidance notes on the Equality Bill for employees and employers which assumes no knowledge of the law. This looks to be a very wise move considering the Codes run to 430 pages in length and one of the aims of the Equality Bill is to simplify and streamline anti-discrimination legislation!

Right to fair trial not breached when adjournment refused

In Khan v Vignette Europe Ltd the EAT held that a tribunal's decision not to grant an adjournment to accommodate a Muslim claimant's wish for a period of mental and spiritual purity during Ramadan was not a breach of the right to a fair trial established by Article 6 of the European Convention on Human Rights (ECHR). The tribunal's decision was carefully balanced and considered all relevant factors.

Mr Khan lodged numerous claims at an employment tribunal following his dismissal. No objection was made to the hearing dates, but midway through the hearing, Mr Khan applied for an adjournment as he wanted to enjoy a period of 'mental and spiritual purity' during Ramadan. The tribunal rejected his application on two grounds. First, Mr Khan was well aware of the dates for Ramadan when the hearing dates were set, but did not object. Second, his right to a fair trial under Article 6 of the ECHR was not a 'trump card': it was a factor which had to be balanced against the employer's right to a fair trial within a reasonable time, and the public interest in bringing litigation to a close.

The EAT rejected Mr Khan's appeal that he had been denied a fair trial. The tribunal had accepted his religious beliefs and taken them into account when balancing his rights with those of the employer. The decision had been arrived at after careful balancing of all the relevant factors and contained no error in approach or reasoning.

No good reason for using "younger" in the person specification

In Beck v Canadian Imperial Bank of Commerce a 42-year-old, who was supposedly made redundant while the bank was seeking to recruit a replacement with a "younger, entrepreneurial profile", won his age discrimination claim after the employer failed to give a reasonable explanation for the use of the word "younger" in the recruitment brief.

Mr Beck, aged 42, was Head of Marketing. He reported to a Mr Risler who was aged 35. Mr Beck and Mr Risler did not get on. The Bank decided to restructure and hire some senior marketers with different client relationships to reflect a different target client base and product suite. Mr Beck was informed he was at risk of redundancy and put on gardening leave. One of the key attributes in the person specification for a new team leader position was "younger, entrepreneurial profile." While Mr Beck had indicated that he would consider all alternative job options, he was nevertheless made redundant at a time when the Bank continued to recruit actively.

The tribunal found that the redundancy was a sham. The plan was to replace Mr Beck with another person who had the same key skills to perform the same type of work. As to age discrimination, the use of the word "younger" in the recruitment brief required an explanation. The reason given - that younger simply meant less senior or experienced - was unconvincing. The Bank had not discharged the burden of proof by showing, on the balance of probability, that the decision to dismiss was not influenced by Mr Beck's age. Therefore, the tribunal, as it is entitled to do, concluded in the absence of an adequate explanation that the employer had discriminated against Mr Beck on grounds of his age.

Risk assessment is not required for every pregnancy

In O'Neill v Buckinghamshire CC, the EAT held there is no general obligation to carry out a risk assessment on pregnant employees. In order to trigger the obligation, the work must be of a kind which could involve a risk of harm or danger to the health and safety of an expectant mother or her baby.

When Ms O'Neill became pregnant, the Head Teacher started a risk assessment. Because of school holidays, sick leave and maternity leave, the risk assessment was not discussed with Ms O'Neill. She claimed this was a failure to conduct the risk assessment fully and amounted to sex discrimination under S.3A of the Sex Discrimination Act, which makes less favourable treatment on the grounds of pregnancy unlawful. The tribunal disagreed. The evidence demonstrated that Ms O'Neill's work involved no risks to her or her baby, so the duty to conduct a risk assessment did not apply. Ms O'Neill appealed, arguing that there is a general obligation to carry out a risk assessment on pregnant employees.

The EAT rejected Ms O'Neill's appeal. The Court of Appeal in Madarassy v Nomura International Plc [2007] IRLR 246 made it clear that there was no general obligation to carry out a risk assessment on pregnant employees with the result that failure to carry out such a risk assessment would be automatic sex discrimination. The duty only arises where risks to the health and safety of any new or expectant mother, or to that of their babies could arise from specified activities relating to work processes or conditions. In this case Ms O'Neill was simply not exposed to any such risks.

'Elder' fire-fighters and dentists lose age discrimination claims

The ECJ held in two separate discrimination claims that first, restricting fire service applicants to those under 30 is a genuine and determining occupational requirement, and, second, setting a maximum age 68 for dentists to work in the national health service was a proportionate means of achieving a legitimate aim.

In Wolf v Stadt Frankfurt am Main, only those aged under 30 could apply to join the German fire service. The ECJ held that the age limit is a genuine and determining occupational requirement which is a proportionate means of achieving a legitimate aim. Unchallenged scientific evidence proved that very few people over 45 would have the exceptionally high physical capacity to fight fires and a maximum recruitment age of 30 was proportionate as recruitment at an older age would mean that: (i) too many fire fighters could not be assigned to the most physically demanding duties; and (ii) those over 30 could not be assigned to those duties for a sufficiently long period.

In Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, German law sets a maximum age limit of 68 for dentists to be accredited to work in the German national health service. The ECJ ruled this was not unlawful since: (i) it had the legitimate aim of protecting public health; and (ii) it was proportionate as limiting the pool of dentists ensured the national health service remained financially viable and it was the only way younger dentists could be given the opportunity of working as national health physicians.