This newsletter is for circulation among the Equality Liaison Officers. Please note that this does not form any legal advice or conclusive views on employment law matters. Merits of a claim will turn on its own facts and circumstances. Please seek legal advice for individual member cases. The intention of this newsletter is to keep ELOs abreast with the changes in the dynamic field of employment law.

August 2014

Reasonable Adjustments

In Horler (C) v Chief Constable of South Wales Police (R) [ET 2013/2014] C suffered from severe problems in his knees from around 2009 which was later diagnosed as a form of arthritis. It was accepted by R that this was a disability under the Equality Act.

After several restricted duty placements the SMP decided that he was permanently unable to undertake ordinary duties. In 2011 C was working as a temporary CCTV operator when the ACC recommended ill health retirement. C did not want to retire and C’s Fed Rep made countless written submissions to HR providing them with alternatives. C also raised a grievance but was told in the grievance outcome that the CCTV role was going to be reviewed and budgetary cuts meant that other available posts had diminished.

C was retired for ill-health on 31st December 2011. He appealed the decision with another full letter in January 2012 providing R with alternative options but received no reply. Finally, in May 2012 (after Tribunal proceedings had been issued) R curtly replied that all options had been considered

The Tribunal found that reasonable adjustments would have included:

• Retaining C in the CCTV role until the role was actually removed – giving more time for alternatives to be found.

• Retiring C and redeploying him to a staff role on staff terms and conditions.

• Questioning current officers who had been retained beyond retirement as to whether they still wished to stay.

• Current vacancies should have been drawn to C’s attention, even if the new jobs required an element of training.

• “Bumping”: moving C into a role occupied by an operationally fit officer (a role that C could do) and moving the fit officer into a vacant role that C could not.

Interestingly, R admitted that HR procedures for bringing vacancies to C’s attention had failed but they tried to suggest that HR had assumed C’s Fed Rep would be “diligently searching for appropriate positions”. The Tribunal were not impressed with this argument and informed R that this was too high a burden for the Rep.

Judgment on Remedy has now been produced. The parties had agreed compensation in principal of just over £230k before tax but had asked the Tribunal to determine whether C had unreasonably rejected R’s offer of reinstatement made around the time of the liability judgment in early 2013. If he had, then compensation could be reduced to reflect this failure to mitigate.

The Tribunal concluded C had reasonably rejected the offer noting that:

(1) the offer of reinstatement had been subject to repaying the pension lump sum of approximately £60,000

(2) He had made sterling efforts to mitigate his loss, searching for over 10 months for a job and
(3) C’s trust and confidence had understandably been undermined by the Force’s actions and by 2013 his life had moved on.

As a result of the agreement we do not know how the losses were broken down but we can assume that the injury to feelings would be less than £30,000.00 and that the rest would be made up of loss of earnings and loss to pension.

Obesity and Disability

*Kaltoft (C) v Municipality of Billund (R) 2014*

Last month the European Advocate General (AG) published his opinion on the controversial case of the morbidly obese Danish child minder.

The AG’s role is to provide independent legal opinion on cases to the European judges. The judges are not bound by the opinion and the opinion itself does not create a precedent however, it is hugely influential. We still await the final ECJ decision.

In this case C claimed that his employment was terminated by R due to his obesity and that this amounted to discrimination on the grounds of disability.

The ECJ have been asked to decide if:

(1) Obesity itself is a protected characteristic or

(2) If obesity could be deemed to be a disability, and if so

(3) What is the criteria that will be decisive?

The AG concluded that obesity itself was not protected but that it could be considered to be a disability. In his opinion, only morbid obesity (BMI of over 40) would be so problematic to the employee that the condition would reach a point that that employee’s endurance, mobility and mood were hindered. The AG opined that cause of obesity was irrelevant.

This opinion isn’t much of a surprise to UK employment lawyers as our own EAT Judges said pretty much the same thing last year in *Walker v Sita Information Networking Computing Ltd 2013* ruling that obesity in and of itself did not amount to a disability reminding judges to look first at the impairment and not the cause.

Religion and Belief discrimination

Discrimination on the grounds of belief is the lesser known cousin of religious discrimination. The leading EAT case is *Grainger plc v Nicholson 2010* but recently there has been a short run of Employment Tribunal cases that have given some insight into the application of Grainger.

The EAT in Grainger determined that for philosophical belief to be protected by the Equality Act 2010 it must:

• Be genuinely held,

• Be a belief – not an opinion based on present information,

• Be a belief as to a weighty and substantial aspect of human life and behaviour,

• Attain a certain level of cogency, seriousness, cohesion and importance, and

• Be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

In *Harron (C) v Chief Constable of Dorset Police (R) [ET 2014]*, C (a member of police staff), claimed he had been discriminated against because of his philosophical belief in the proper and efficient use of public money in the public sector. The Tribunal was asked to determine if this was a philosophical belief. They accepted met all but one of the criteria. The considered it was not about a weighty, substantial part of human life, at best it was a set of values that manifested itself as a goal in the workplace. Conversely in *Anderson v*
Chesterfield High School [ET 2014], C claimed that his commitment to public service was a philosophical belief. The Tribunal were satisfied that this was a protected belief as it met the criteria and the concept went to the heart of community and society, and was therefore a weighty and substantial part of human life.

This seems rather an arbitrary distinction to the previous case but it should be remembered that this is only a preliminary point. C still has to prove discrimination on the grounds of his belief.

Less surprisingly in Ellis v Parmagan Ltd [ET 2014], the Tribunal confirmed again that the homophobic and Anti-Semitic beliefs of C were therefore not protected. They were not worthy of respect in a democratic society and furthermore C’s Holocaust denial was not cogent; he had just ignored anyone who did not accord with his beliefs and made no effort to objectively research the matter.

Compensation

Cadogan Hotel Partners Ltd (R) v Ozog (C) EAT 2014

Last quarter the President of the Employment Tribunals confirmed in the Presidential Guidance that the Vento Injury to feelings brackets had been updated by a 10% uplift. It was thought that this may be the case following a personal injury claim in the Court of Appeal (Simmons v Castle 2012/13) but lawyers were not sure until the guidance. Ozog appears to be the first reported case that has endorsed the view.

The bands have therefore been revised as follows:

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<thead>
<tr>
<th>Band</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Lower band</td>
<td>£660.00 to £6600.00</td>
</tr>
<tr>
<td>Middle band</td>
<td>£6600.00 to £19800.00</td>
</tr>
<tr>
<td>Upper band</td>
<td>£19800.00 to £33,000.00</td>
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In Ozog, C complained that a colleague had, over a period of a few months, kissed her hand, touched her back and arms inappropriately, asked her if she had a boyfriend and then in a final incident undid his belt whilst thrusting towards her saying “Do you want this body? Come on, you’re a woman: You should want this body!”

C’s evidence was that she felt uncomfortable by the earlier incidents and very uncomfortable by the belt incident. R did not however investigate C’s complaint or take any action against the harasser.

The Employment Tribunal had originally awarded £10,000.00 (middle band) and took the following into consideration when awarding this sum:

(1) that discriminatory acts had been committed on more than one occasion, albeit over a relatively short space of time;
(2) the belt incident was a particularly unpleasant and serious act;
(3) the other incidents were relatively mild;
(4) the fact that there was no evidence before the Tribunal that the Claimant’s complaints were taken seriously or investigated in any way.

R appealed on the basis that the lack of investigation was not found to be a discriminatory act and compensation was intended to compensate the victim, not to punish the employer. The EAT agreed that the Tribunal should not have taken the lack of investigation into account for injury to feelings and that feeling ‘very uncomfortable’ would not justify an award in the middle band. The EAT substituted the award for £6000.00 but increased this to £6600.00 in line with Simmons.

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