XpertHR Podcast: Case law update

Original XpertHR podcast: 7 July 2017

Ellie Gelder: Hi and welcome to this week's XpertHR podcast with me, Ellie Gelder and Laura Merrylees. Now Laura, normally at this time of year we would have a mid-year discussion on key legislative developments on the horizon for those working in HR, but given the continuing dominance of the Brexit negotiations, not to mention the outcome of last month's General Election, perhaps not unsurprisingly, any concrete changes to employment legislation are fairly thin on the ground right now. [0:00:37.3]

Laura Merrylees: Mm, absolutely. So actually not a lot has changed since our last discussion at the beginning of the year when we recorded a podcast on the employment law agenda for 2017.

Ellie Gelder: Obviously though, gender pay gap reporting's now in force as from April this year, with large employers having until April 2018 to publish those gender pay gap figures. So far not many employers have published their gender pay gap information on the gov.uk site, but interestingly just last week we did see the first government department to publish its gender pay gap, the Department for Education, which reported a relatively small mean pay gap of 5.3%. [0:01:13.3]

Laura Merrylees: Yes, and it will be certainly interesting to see if there's a sudden barrage of reports being published in the run-up to the deadline of April 2018.

Then the other significant change which is going to have a big impact on businesses is of course the GDPR, or to give it its full name, the General Data Protection Regulation, and that comes into force in May of next year. Now we recorded a podcast on this recently, so for more detail please do listen to that, and also to our recent webinar with experts from DLA Piper solicitors.

Now the GDPR will really transform data protection legislation across the board for employers, not least for HR professionals. The key point to take on board at this time is to start getting ready for its implementation in May of next year, and it's clear that Brexit will not affect that in any way. Our recently published how-to guide on getting ready for the GDPR is a great place to start.

Ellie Gelder: Okay, so obviously the GDPR and gender pay gap reporting aside there's definitely a lack of legislative change at the moment. However, that's not the position as far as case law is concerned, and we've seen a number of high-profile cases already this year on a range of

topics – practicalities of absence management, recruitment, shared parental pay and religious dress. [0:02:25.3]

Laura Merrylees: That's right. I mean, the courts and tribunals as well as the European Court of Justice have certainly been busy. Shall we kick off with disability discrimination then? Now one of the trends we predicted in our key employment cases for 2017 podcast at the end of last year was the continued increase in claims for discrimination arising from disability.

Ellie Gelder: Yes, we predicted this because over the last three or four years claimants have been regularly winning this type of claim, and our crystal ball was obviously working because claims for discrimination arising from disability have continued to feature frequently in the courts and tribunals this year. And one notable case that was actually heard in the Court of Appeal back in March is *O'Brien v Bolton St Catherine's Academy*. [0:03:05.4]

Laura Merrylees: Yes. Now that involved the employer's decision to disregard new medical evidence and dismiss an employee on long-term sickness absence.

Ellie Gelder: That's right. Miss O'Brien, a teacher, had been on long-term sickness absence for over a year when the employer decided to dismiss her on the ground of capability. [0:03:20.9]

Laura Merrylees: And that was because of the length of her sickness absence.

Ellie Gelder: Yes, and also due to the lack of any convincing indication of when she'd be able to return to work. [0:03:29.2]

Laura Merrylees: And she appealed that decision, didn't she?

Ellie Gelder: Yes, she did. At the appeal hearing, Miss O'Brien told the appeal panel that she'd fully recovered. She presented a fit note from her doctor, as well as a letter from her psychologist. [0:03:39.9]

Laura Merrylees: But the panel wasn't convinced?

Ellie Gelder: No. The appeal panel wasn't satisfied that the fresh medical evidence conclusively established that she was fit to return to work, so it upheld the decision to dismiss. And she subsequently brought various claims in the employment tribunal, including claims for discrimination arising from disability and unfair dismissal. [0:03:58.9]

Laura Merrylees: And the claims ended up in the Court of Appeal?

Ellie Gelder: Yes, the Court of Appeal found that while Miss O'Brien's case could fairly be regarded as "near the borderline", the essential point was that by the time of the appeal hearing there was some evidence – albeit not entirely satisfactory – that she was now fit to return, and in the court's view the tribunal was entitled to hold that it was disproportionate and unreasonable for the school to disregard that evidence without holding a further medical assessment. [0:04:24.7]

Laura Merrylees: And the Court of Appeal held that that decision to disregard the new medical evidence and dismiss Miss O'Brien amounted to discrimination arising from disability and unfair dismissal, so the

employer in this case should have waited to get up-to-date medical evidence to confirm whether or not Miss O'Brien was, as she claimed, fit to return?

Ellie Gelder: Yes, exactly, Now employers aren't expected to keep an employee's job open indefinitely, but they do need to be able to demonstrate that any decision to dismiss for long-term sickness absence is justified and fair. [0:04:52.8]

Laura Merrylees: And another disability discrimination case that came out in March this year was *Government Legal Service v Brookes*, which looked at disability in the context of recruitment.

Ellie Gelder: Yes, this case generated a lot of interest. It involved an employer requiring all job applicants to complete an online multiple-choice psychometric test, and the purpose of the test was to test the candidates' ability to make effective decisions, and it was the first stage of the recruitment process.

Laura Merrylees: Now on the face of it that sounds like quite a reasonable tool for recruitment selection. [0:05:21.1]

Ellie Gelder: Yes. Employers commonly use it and in theory it should be reasonable. However, one of the job applicants – Miss Brookes, who has Asperger's Syndrome – asked if she could submit her answers in a short narrative form because of her condition. However, she was told that an alternative test format wasn't available. She brought an employment tribunal claim, arguing that the requirement to complete the test constituted indirect disability discrimination, a failure to make reasonable adjustments, and also discrimination arising from disability.

Laura Merrylees: That's pretty unusual these days, isn't it, to bring a claim for indirect disability discrimination? [0:05:56.1]

Ellie Gelder: Yes, you're right – it's extremely rare these days. Usually people will allege that there was a failure to make reasonable adjustments and that there was discrimination arising from disability, simply because these claims are generally easier to win. But this case is really interesting because Miss Brookes did go on to succeed with her claim for indirect disability discrimination.

Laura Merrylees: Yes, just talk us through briefly how the tribunal came to that conclusion. [0:06:17.5]

Ellie Gelder: Well the tribunal decided that the requirement to complete the online multiple-choice psychometric test placed Miss Brookes at a particular disadvantage compared with non-disabled candidates who didn't have Asperger's Syndrome, and her condition meant that she lacked social imagination and she would have difficulties in imaginative and counterfactual reasoning in hypothetical scenarios. The employer appealed to the EAT but the EAT upheld the tribunal's decision.

Laura Merrylees: So some of our listeners may think that that decision is rather harsh, given the fact that the requirement to complete the test had a legitimate aim, and that was testing applicants on a competency that was fundamental to the job. [0:06:54.6]

Ellie Gelder: Yes, that's true, but in this case the means of achieving that aim weren't proportionate and the employer should have made an alternative assessment available.

Laura Merrylees: And it's worth saying that Miss Brookes also succeeded with her two other claims, which were the failure to make reasonable adjustments and discrimination arising from disability. [0:07:10.6]

Ellie Gelder: Yes, so really this case serves as a strong reminder to employers: be flexible when it comes to your assessment methods and disabled applicants. You may well need to alter your existing methods.

Turning to a case now that has sent a bit of a ripple among employers, *Ali v Capita Customer Management*, and enhancing shared parental pay.

Laura Merrylees: Well yes, this case has been widely reported, but before employers become alarmed about whether or not they should be enhancing shared parental pay, it's important to look at the facts of this particular case. [0:07:39.0]

Ellie Gelder: So can you just remind listeners of the background to this case? [0:07:42.0]

Laura Merrylees: Yes. In brief, Mr Ali was a new father and following the birth of his child, his wife had been advised on medical grounds to return to work, and that was to assist her recovery from post-natal depression. And as a result of this, Mr Ali then wanted to take the time off to care for their child. He had been paid paternity leave by his employer in full for two weeks following the birth of the child, and he was told that he could then take shared parental leave.

Ellie Gelder: But according to his employer's policy that would be at the statutory rate of shared parental pay only. [0:08:12.9]

Laura Merrylees: That's right, and Mr Ali wasn't happy about this, and complained that he should receive the same fully-paid leave that his female colleagues received while they were on maternity leave, which was fourteen weeks' enhanced maternity pay.

Ellie Gelder: And this eventually led him to bring a claim of direct sex discrimination in the employment tribunal, which succeeded. So on what basis? [0:08:31.5]

Laura Merrylees: Well the tribunal found that a policy of paying fourteen weeks' full pay to women on maternity leave but only two weeks' full pay to men taking paternity leave and shared parental leave amounted to less favourable treatment of men taking leave for the purpose of caring for their child compared with women taking leave for the same purpose.

Ellie Gelder: But doesn't s.13(6)(b) of the Equality Act 2010 allow, and I quote, 'special treatment to a woman in connection with pregnancy or childbirth'? [0:08:58.5]

Laura Merrylees: Well yes it does, but the tribunal nevertheless found that it was unclear why enhanced pay should be exclusive to female employees only for longer than two weeks after the birth of the child.

Ellie Gelder: On the face of it then that's quite an alarming decision for employers who don't currently provide enhanced shared parental pay. What can we take from it? [0:09:16.7]

Laura Merrylees: Well at first glance, yes, it does ring alarm bells. But we have to bear in mind, of course, that this is a first-instance decision of the employment tribunal, so it isn't binding, and currently there's no legislation or binding case law that specifically requires employers to enhance shared parental pay. And in fact, there are conflicting first-instance decisions on this.

Ellie Gelder: So the safest course of action is for employers to monitor future case law at appeal level for further guidance? [0:09:42.2]

Laura Merrylees: Absolutely, and of course we'll be reporting on any developments and we understand, in fact, that Capita, Mr Ali's employer, is expected to appeal against the decision.

So moving, Ellie, now to religious discrimination, in March the European Court of Justice handed down its decisions in two similar cases: *Achbita and another v G4S Secure Solutions* and *Bougnaoui and another v Micropole SA*.

Ellie Gelder: Yes, these cases both concerned the issue of religious dress. In *Achbita*, the Belgium courts asked the ECJ where the employer has a rule that bans all employees from wearing outward signs of political, philosophical or religious belief, does a ban on Muslim women wearing headscarves in the workplace amount to direct religious discrimination? [0:10:27.7]

Laura Merrylees: So what was the verdict?

Ellie Gelder: Well the ECJ decided that as long as those rules are applied consistently across the board, such a ban can't be directly discriminatory. But the ECJ said it is potentially indirectly discriminatory. [0:10:40.2]

Laura Merrylees: And just explain what happened in the case of *Bougnaoui* then.

Ellie Gelder: Well this was a French case where a Muslim IT Engineer who wore an Islamic headscarf was told by her employer to remove it while visiting clients after a client staff complained, and the French court asked the ECJ whether or not the need to adopt a neutral appearance for the client – i.e. a third party – can be a genuine occupational requirement of a job. [0:11:03.1]

Laura Merrylees: And what did the ECJ decide?

Ellie Gelder: Essentially the ECJ said that the one-off removal an employee who wears a religious item from a customer-facing role can't be defended purely on the basis that a customer objects to that religious item. That defence is available only in very limited circumstances. [0:11:29.7]

Laura Merrylees: So that really begs the question, doesn't it, what do the ECJ decisions in *Achbita* and *Bougnaoui* mean for employers in the UK, then?

Ellie Gelder: I think the first thing to say is be very wary when relying on these decisions. Both *Achbita* and *Bougnaoui* involved French and Belgian

laws which give employers – especially public sector employers – much more leeway to require employees to present a neutral, non-religious appearance. The ECJ decision in *Bougnaoui* means that an employer could defend a direct discrimination claim if it can show that it has a rule in place requiring all staff of whatever religion to dress neutrally. But the issue will then be, 'Is the rule indirectly discriminatory as per the decision in *Achbita*?' [0:0:12:00.2]

Laura Merrylees: So implementing a blanket ban on religious dress isn't necessarily the way to go?

Ellie Gelder: No. And actually, at the time these decisions came out there were a number of misleading headlines saying that bans on headscarves at work are automatically legal. What the ECJ actually said in *Achbita* is that a ban on all political and religious symbols based on maintaining neutrality can be justified, depending on the facts of the particular case, i.e. it is justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. [0:12:30.6]

Laura Merrylees: For now, though, this issue is untested in UK courts and tribunals.

Ellie Gelder: That's right. And both *Achbita* and *Bougnaoui* will return to the domestic courts in Belgium and France to apply the ECJ's guidance. [0:12:42.0]

Laura Merrylees: Okay, so let's also run through some of the big cases coming up later this year. We're expecting the Court of Appeal to publish its decision in the whistleblowing case *Chesterton Global Ltd and another v Nurmohamed*.

Ellie Gelder: Yes, the Court of Appeal heard this on 8th June and you can hear a detailed explanation of the issues involved in this case in our 'Key employment cases for 2017' podcast that we recorded in December. Essentially, *Chesterton* concerns how the phrase 'in the public interest' should be approached following changes to whistleblowing legislation in June 2013. Those changes were designed to stop employees from disguising normal grievances about their own contracts of employment as protected disclosures, and as you say, we're waiting for the Court of Appeal to publish its decision. [0:13:26.2]

Moving on now to an area that continues to receive a high profile in the media, the gig economy, and in particular questions around the employment status of those who work in it.

Laura Merrylees: That's right, and I think *Uber* tends to spring to mind when this subject comes up. [0:13:40.4]

Ellie Gelder: Absolutely, and just as a reminder for our listeners, this was a case where a group of individuals who drove for Uber were successful in claiming before an employment tribunal that they were workers and not self-employed, and that meant crucially that they have certain basic employment rights, such as the right to receive the National Minimum Wage and paid annual leave.

Laura Merrylees: Exactly. Whilst Uber argued that the contractual arrangements between it and its drivers reflected self-employed status, the tribunal

were emphatic in rejecting those arguments. The contracts simply didn't correspond with the reality of the working relationship, and that is a key point for employers to take from the case. The contract and working practices need to align, otherwise a tribunal will pretty much disregard whatever is said in the contract. [0:14:24.2]

Ellie Gelder: And we've also seen other claims hit the headlines, haven't we, where individuals have succeeded in establishing worker status? So we had *City Sprint* in the employment tribunal in January, and then *Pimlico Plumbers* in the Court of Appeal in February. So when are we likely to see the next key decision on employment status?

Laura Merrylees: Well Uber is appealing the employment tribunal decision and the appeal is due to be heard at the EAT on the 27th and 28th September. [0:14:49.4]

Ellie Gelder: So at that stage the decision will of course become binding, which means that the principles that are established will have far greater significance for employers. And we're also expecting the Taylor Review of Employment Practices in the Modern Economy that the government commissioned to report over the summer, and employment status in the gig economy is within its scope, so we may see some recommendations there.

Laura Merrylees: Yeah, absolutely. And in the meantime for listeners who want to delve deeper into these cases and explore the practical steps that employers can take to protect themselves from claims, we have a podcast that I recorded earlier this year on this very issue with Fiona Rushforth at Wedlake Bell solicitors. [0:15:25.1]

Ellie Gelder: Now the issue of employment tribunal fees has remained controversial since they were introduced four years ago in July 2013, and Unison has been pursuing a challenge to the fees regime through the courts, and the latest stage in that challenge was heard in the Supreme Court in March, wasn't it?

Laura Merrylees: Yes it was, and we're still awaiting the judgement, so we'll report on that as soon as we have it. [0:15:45.5]

Ellie Gelder: Any view on the outcome?

Laura Merrylees: Unison has been unsuccessful in their three attempts to date to overturn the regime so perhaps that doesn't bode well for the Supreme Court decision. That said, at the last Court of Appeal hearing the court did say that the decline in claims is sufficiently startling to merit a review of fees, so let's wait and see.

And then finally, Ellie, the ECJ decision in *Sash Window Workshop Ltd and Another v King* is still outstanding also. [016:11.3]

Ellie Gelder: That's right. In *Sash Window Workshop Ltd* the EAT suggested that workers should be allowed to carry over untaken holiday into the next year if they are genuinely prevented from taking annual leave for reasons beyond their control, other than sickness absence. The EAT decision was appealed to the Court of Appeal and the Court of Appeal has asked the ECJ for a preliminary ruling on the above issue.

Laura Merrylees: And we've had the Advocate General's opinion on the case, haven't we? [0:16:36.6]

Ellie Gelder: Yes, that came out on 8th June, and the Advocate General's view (which we must remember is non-binding) is that where an employer hasn't provided a worker with paid leave the worker's right to that paid leave carries over until he or she has the opportunity to exercise it. It's unlikely, though, that the ECJ decision will come out this year, but we'll obviously keep the site updated.

Laura Merrylees: Yeah, indeed, and that includes everything that we've discussed today, as developments continue throughout the year. In particular, look out for our round-up of tribunal decisions on discrimination arising from disability that will be out shortly, and in the meantime you'll find links to the resources that we've mentioned in the Key Resources box on the left-hand side of the audio and video page.

That brings us to the end of this week's podcast. Thanks for listening. We're back again next Friday but until then it's goodbye from us.