SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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USE OF TALENT POOL FOR PROMOTION WAS INDIRECT AGE DISCRIMINATION

Summary: The Employment Appeal Tribunal found that an employee who was unable to apply for promotion because she was not in the employer's "talent pool" had suffered indirect age discrimination. The evidence showed that there was a lower likelihood of employees aged 55-70 (including the claimant) being members of the pool. In order to justify the apparent discrimination, the employer had to show that the discriminatory effect of its policy did not apply to the claimant (*Ryan v South West Ambulance Services NHS Trust*).

Key practice point: There is a risk of inadvertent indirect discrimination if a recruitment policy adopted by the employer, even if for legitimate reasons, puts those who share a protected characteristic such as age, including the claimant, at a disadvantage. The discrimination will then require justification by the employer.

Facts: The Trust had set up a "talent pool" for promotion, in order to fill some vacancies without the need for a full recruitment exercise. Employees could gain access to the pool through the appraisal system (if rated as "exceeding expectations" or on appeal from a lower ranking) or by self-nomination considered by an independent manager. Although 12% of the workforce (including the claimant) were aged 55 to 70, only 6% of the pool were in that age bracket. The claimant was rated as "meeting expectations" and did not appeal. Nor did she self-nominate. She was unable to apply for two promotions because she was not in the pool and claimed indirect age discrimination.

The Employment Tribunal found that the Trust had applied a policy of appointing managerial staff based on their membership of the pool and that this put those aged 55 to 70, including the claimant, at a disadvantage. However, it concluded that the disadvantage suffered by the claimant was not caused by the policy; the reason she was disadvantaged was that she had not applied for the pool. In addition, the Tribunal concluded that the Trust had established that its policy was justified.

Decision: The EAT overturned the Tribunal's decision. While there were legitimate reasons for the policy, it had a prima facie discriminatory effect on a group of older employees, including the claimant, and it was for the Trust to prove that the discriminatory effect of the policy was not at play in her case. There was no evidence as to what would have happened had the claimant appealed her appraisal mark or self-nominated to the pool, so it could not have been her failure to do either which prevented her from being in it. In order to show that the disadvantage she suffered had nothing to do with the policy, the Trust would have had to have proved that it was her performance, or some other reason, that prevented her from being the pool.

The EAT also found that the Tribunal should not have concluded that the policy was objectively justified. It had not carried out the necessary balancing exercise between the need for the policy and its discriminatory effect. It should have considered issues such as:

- Why there was a need for the two positions to be filled quickly.
- The effect on the claimant – in this case, the decision to recruit only from the pool prevented her from being considered for a role for which she had in the past been interviewed and on a pay scale at which she had previously been employed.
- Whether any lesser measures (such as membership of the pool being a desired rather than a necessary condition of eligibility) could have achieved the same aim.

Analysis/commentary: There may be good reasons for a particular policy or practice, but employers should consider whether it may put employees of a particular age, sex, race or other protected characteristic at a disadvantage. It may be possible to modify the policy to remove that impact while achieving the desired result.

GUIDANCE ON RESPONDING TO DATA SUBJECT ACCESS REQUESTS

The Information Commissioner's Office (ICO) has published detailed guidance on the right of individuals to access their personal data under the General Data Protection Regulation (GDPR). The guidance has been expanded to provide additional information on circumstances where organisations (including employers) can refuse to comply with a "data subject access request" (DSAR) or extend the time for response.

Refusal to comply

An employer can refuse to comply with a DSAR if it can show that it is "manifestly unfounded or manifestly excessive". A DSAR may be "manifestly unfounded" if it is malicious or the individual clearly has no intention of exercising their right of access. To rely on "manifestly excessive", the employer must assess whether the request is "clearly or obviously unreasonable". This is a difficult balancing act, based on whether the DSAR is proportionate when weighed against the costs of compliance, with the employer's resources a relevant factor. An important point to note is that a request is not necessarily excessive just because it asks for a large amount of information.

Each request should be considered individually; employers should not have a blanket policy. Justifications for the exemption must be "strong" and capable of being "clearly demonstrated" to the individual and the ICO. (An employee can ask the ICO to investigate a failure to meet GDPR requirements.)

Charging a fee

Employers can charge a "reasonable" fee for manifestly unfounded or excessive requests (as an alternative to refusal to comply) or where an individual requests further copies of their data following a DSAR. The guidance explains that the fee can include costs of providing the information and staff time charged at a reasonable hourly rate. The costs should be explained to the employee and be capable of justification if there is a complaint to the ICO.

Clarification

The guidance confirms that the time limit for responding (ordinarily within one month of receipt) can be paused while waiting for clarification of the DSAR, but only if the business processes a large amount of information about the individual (relative to the employer's size and resources). The employer can ask for additional details about the DSAR (such as likely dates and context of the processing to which it relates) but cannot make the individual narrow their request. If the employer requests clarification, this "stops the clock" until clarification is received. If it becomes apparent during the course of the search that further information is required, the employer should record why it was not possible to request clarification at an earlier stage. Where clarification is sought but no response is received, the employer should wait a reasonable time (at least one month) before considering the request closed.

Extension of time limit

The one-month time for response can be extended by a further two months if the request is "complex". An employer wishing to use the extension must notify the employee within one month of the receipt of the DSAR, stating reasons.

The employer would need to be able to demonstrate why the request is "complex". Again, the guidance says that the employer's size and resources will be relevant. Factors listed as adding to the complexity of a request include:

- Technical difficulties in retrieving the information

- Specialist work involved in obtaining the information or communicating it in an intelligible form
- Needing to obtain specialist (not routine) legal advice.

However, a request is not complex merely because it asks for a large amount of information, or the employer has to rely on a third party processor to provide the information.

BREACH OF IMPLIED DUTY OF TRUST AND CONFIDENCE MAY INCLUDE A FAILURE TO ACT

Summary: The High Court confirmed that an employer could potentially be in breach of the implied duty of trust and confidence by failing to take action to ensure that an employee received a contractual bonus due from companies in the group (*Nair v Lagardère Sports and Entertainment UK*).

Key practice point: As a striking-out claim, this decision does not contain an analysis of whether, on the facts, the employer had breached its implied duty of trust and confidence. However, the Court suggested that the duty should be interpreted widely, potentially covering a failure to take action in a matter over which the employer has some control.

Facts: The claimant was employed in the WSG group of companies from 2006. He sought payment of substantial contractual bonuses (of at least $25million) from two WSG companies relating to the establishment of the Indian Premier League in 2008. He had moved to LSE, a UK company in the WSG group, in 2015 but claimed that he had been led to believe for many years that he would be paid the bonuses. He resigned in 2017 and brought a claim for breach of contract against LSE, arguing that it was an implied term of his employment contract that LSE would not conduct itself so as to "destroy or seriously damage the relationship of trust and confidence", and that the term operated to require LSE to take reasonable steps to secure that the two WSG companies paid the bonuses due to him. He argued that the corporate structure was such that LSE had the necessary control to procure payment - for example, the WSG group CEO was employed by LSE. LSE applied to strike out the claim.

Decision: The High Court refused to strike out the claim. A very significant bonus fell due from the WSG companies and, at the time the claimant's employment at WSG ended, entitlement to the bonus was clear. The evidence indicated that the claimant was effectively strung along over a prolonged period. The Court confirmed that a failure to do something could be a breach of the implied term of trust and confidence, pointing out that conduct can take the form of a failure to do something or of positively doing something, and often the difference is semantic. In any event, the prolonged course of prevarication in this case could be seen as destructive conduct rather than a failure to act.

Analysis/commentary: Previous claims for breach of trust and confidence have typically been based on unreasonable behaviour by the employer, such as unfounded suspension or unreasonable changes to terms and conditions. This case indicates that the duty may extend further to cover a failure to take action. However, whether the claim is ultimately successful will depend on the evidence, such as whether the employer had sufficient control over the connected companies to enable it to require them to make the payment.

FAILURE TO RETURN TO WORK WAS COMMUNICATION OF ACCEPTANCE OF BREACH

Summary: The Employment Appeal Tribunal held that an employee's failure to return to work after her maternity leave amounted to communication of her acceptance of her employer's repudiatory breach for the purposes of a constructive unfair dismissal claim (*Chemcem Scotland Ltd v Ure*).

Key practice point: It is possible for an employee's acceptance of a repudiatory breach of contract by the employer to be implied from the circumstances. If there are ongoing disputes during family or other leave, employers should confirm the reason for failure to return on the scheduled date.

Facts: The claimant did not return to work for her employer after maternity leave and brought a constructive unfair dismissal claim. The Employment Tribunal found that, while she was on maternity leave, her employer committed breaches of contract which were sufficiently serious to entitle her to resign and claim constructive unfair dismissal. The breaches were committed by the claimant's father (B), the majority shareholder, with whom she had a fraught relationship. The employer appealed, arguing that the claimant had not communicated her acceptance of the repudiation.

Decision: The EAT confirmed the Tribunal's decision that the claimant had accepted the breaches by failing to return to work after her maternity leave. While in normal circumstances non-appearance might not be an implied communication of acceptance, in the context of this case it plainly was. The Tribunal had found that her failure to return was because of B's treatment of her. When she did not appear on the date scheduled for her return, no one got in touch to ask why she had not returned. The circumstances were "eloquent of the true position" and she did not need to communicate with the employer.

Analysis/commentary: Even if an employer's breach is sufficient to entitle the employee to resign, it does not end the contract automatically. The contract is not terminated until the breach is accepted by the employee. However, the employee does not have to communicate their acceptance expressly, as long as the fact that they have accepted is unequivocal and unambiguous.

HORIZON SCANNING

What key developments in employment should be on your radar?

December 2020	Closure of the Coronavirus Job Retention Scheme /start of the Job Support Scheme
31 December 2020	Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended
6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies
6 April 2021	Changes to income tax treatment of some post-employment notice payments on termination

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)
- **Discrimination / equal pay:** *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Royal Mail Group v Efobi* (Supreme Court: shift of burden of proof); *Page v Lord Chancellor* (Court of Appeal: whether magistrate was discriminated against for expressing faith-based views in media)
- **Trade unions:** *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Unfair dismissal:** *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)
- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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