

## NeTWork

2 September 2010

### Age discrimination

#### *Canadian Imperial Bank of Commerce v Beck*

The EAT has held that use of the word "younger" in a recruitment briefing note was sufficient to shift the burden of proof to the Respondent in an age discrimination claim.

The Claimant, Mr Beck, was employed by the Respondent Bank as Head of Marketing. He did not get on with his colleague, Mr Risler, although he did work well with the Global Head of Marketing, Mr Meloche. Mr Risler and Mr Meloche decided that the department required restructuring, a plan which involved reducing the size of the team from 12 to 8, including making the Claimant redundant, and recruiting a Head of European Marketing. The briefing note for the new Head included the phrase: "seeking younger, entrepreneurial profile..." despite several warnings from a recruitment agency that use of the word "younger" was inappropriate in this context. Mr Meloche maintained that "younger" merely described someone less senior. The Claimant was aged 42 at the time of his dismissal and the candidate appointed to the position of Head of European Marketing was aged 50.

The Claimant brought a claim in the Employment Tribunal for Unfair Dismissal. He later amended his claim to include age discrimination.

At first instance the Employment Tribunal found that he had been unfairly dismissed by way of redundancy, finding that the redundancy was a sham although they noted that age discrimination was unlikely in the circumstances. The Tribunal also found that the use of the word "younger" in the briefing note was enough to shift the burden to the Respondent to prove that the use of the word was objectively justified. They found Mr Melouche's explanation for the use of the word in the briefing note unconvincing. The Tribunal were also not persuaded by the fact that the candidate appointed was aged 50, as they noted that different individuals were involved in the redundancy and recruitment processes.

The Respondent appealed on the ground that the Tribunal's conclusion of age discrimination was inconsistent with its findings of fact, which were unfavourable to the Claimant's claim of age discrimination.

The Employment Appeal Tribunal held that the Tribunal had had regard to the evidence before it and was entitled to conclude that the use of the word "younger" in the briefing document was potent enough to shift the burden to the Respondent, notwithstanding the earlier observations that the allegation of age discrimination was an unlikely one in the circumstances.

## **Employment status – what constitutes a worker?**

### *Community Dental Centres Ltd v Dr G Sultan-Darmon*

The EAT has held that a dentist was not a worker as there was no obligation on him to provide services personally. He was not therefore entitled to claim unlawful deduction of wages.

The Respondent company had a contract to provide dental services to a Primary Care Trust in Devon. The Claimant entered into a "licence agreement and contract for service" to provide dental care as a "self employed contractor dentist with full clinical freedom and accepting full clinical responsibility". The Claimant was obliged to be registered with the General Dental Council and to have appropriate insurance. The Claimant also had complete clinical responsibility.

The Claimant brought a claim for unlawful deduction of wages and, at a hearing to establish the status of the Claimant, the Employment Judge held that the Claimant was not an employee as there was no mutuality of obligation. The Respondent undertook to introduce patients to the Claimant but there was no guarantee that any particular number would be introduced. There was also no obligation on the Claimant to treat any patient that he did not want to treat. The Judge also held that the Respondent did not have sufficient control over the Claimant for the Claimant to be an employee, and the fact that the Claimant had to have his own insurance cover was also indicative of his status as something other than an employee. The Judge held that the Claimant "had by provision of work or services, personally to ensure the dental work he contracted to carry out was achieved." The Judge held that he was a worker.

The Respondent appealed the finding on the grounds that as there was no mutuality of obligation, the Claimant could not be an employee or a worker. The Claimant was entitled to decide whether and when he would turn up to provide the necessary services. The unfettered right of the Claimant to appoint a locum substitute without any sanction also meant that he could not be a worker. The EAT concluded that he was neither a worker nor an employee.

## Compensation in discrimination cases

### *Blundell v St Andrews Catholic Primary School & Another*

Teacher's compensation for injury to feelings reduced by Employment Appeal Tribunal as the bullying she suffered was not serious enough to merit the highest award.

The Claimant was a teacher at the Respondent School who had taught the reception class for the previous year. In June 2003 she told the Head that she was pregnant. The Head subsequently asked she if she would undertake a "floating role" rather than teach a specific class, until she went on maternity leave. The Claimant refused. Upon her return from maternity leave, the Claimant was not asked her teaching preference, as was usual practice, but was offered either a floating role or to teach year two, which she had never done before. The Claimant chose to teach year two, although she complained of the heavy responsibility due to the SATS tests taken at that age.

The Claimant brought a claim for sex discrimination and included other less favourable treatment such as a frosty and abrupt manner towards her from the Head, an incident where the Head raised her voice at the Claimant and the fact that she did not return to work in the same job following her maternity leave. The Claimant was also subjected to further bullying, was told that her teaching abilities were inadequate and that her future as a nursery teacher was under review. The Claimant attributed this behaviour to the fact that she was pregnant. The Claimant went on sick leave in November 2006 and was dismissed in January 2007.

The Tribunal held that she had not been discriminated against on the grounds of her sex or as a result of her pregnancy. She was employed as a teacher and could therefore be asked to teach any class within the school. Any strain between relations was attributed to a cause other than pregnancy. However the Tribunal upheld the Claimant's claim for victimisation on the basis that the Head Teacher's assessment of the Claimant's teaching and her feedback constituted less favourable treatment by reason of one or more protected acts. It concluded that the reason for this action was that the Claimant was continuing proceedings against the Respondents. The Tribunal awarded injury to feelings of £22,000.

The Respondents appealed to the EAT. The EAT upheld the award of £5000 aggravated damages, given the underhand way the Respondents had conducted themselves during the course of the remedies hearing in particular. The injury to feelings compensation was reduced from £22,000 to £14,000 because the behaviour the Claimant suffered was not sufficient to merit an award of £22,000 compared to the amount awarded in previous cases. The Claimant was awarded 5 years' future loss of earnings although the EAT noted that the figure had been erroneously

calculated and remitted it to the Tribunal for recalculation. Finally, the Tribunal had ordered that a letter be sent out to the parents of the children at the school apologising for the distress caused to the Claimant. The EAT held that this letter should not contain statements from the Head that the Head did not believe to be true.

*If you would like to discuss any of these topics further please contact **Heather Cowley** (Partner & Head of Employment Law) on 01582 731161. Alternatively she can be contacted via email at [heather.cowley@taylorwalton.co.uk](mailto:heather.cowley@taylorwalton.co.uk)*