

NeTWork

28 July 2010

Contractual Redundancy Scheme

Kraft Food v Hastie

The EAT have held that a contractual redundancy scheme which stopped employees recovering more than they would have earned had they remained in employment did not constitute indirect discrimination on the grounds of age. Read more...

H had been employed by the Respondent company since 1969. In 2008 the Respondent commenced a redundancy programme, including voluntary redundancies on the terms of an established scheme that had been agreed with recognised trade unions. H applied for voluntary redundancy and was dismissed in December 2008 at the age of 61 and with nearly 40 years' service.

The terms of the scheme stated that employees were entitled to redundancy payments at 3 ½ weeks pay for each year of service and using this calculation, H would have been entitled to a redundancy payment of some £90,000. The scheme was subject to a cap defined as what the employee would have earned, at his current rate of pay, had he remained in employment until his normal retirement age of 65. The purpose of the cap was to avoid employees receiving a "windfall" upon redundancy. On his current pay, H would have earned around £76,560 had he remained in employment until the age of 65. There was a difference of around £13,600 between the capped and uncapped redundancy payments.

H brought a claim in the Employment Tribunal for indirect age discrimination, arguing that the cap on the redundancy pay constituted a provision, criterion or practice that put him (and others in his age bracket) at a disadvantage when applied to them. It would therefore be unlawful age discrimination unless it could be justified.

The Tribunal held that whilst there was a legitimate aim for the scheme itself to exist, there was no legitimate aim for the imposition of the cap on redundancy payments. Further, if the aim of the cap was legitimate, it was not a proportionate means of achieving the aim pursued.

The Respondent appealed and the EAT upheld the appeal. They held that the object of the scheme was to compensate those taking voluntary redundancy for the loss of earnings that they would have received had their employment continued. If the cap did not exist, it would lead to payments in excess of what was necessary to achieve that objective where an employee was close to retirement age. It was therefore legitimate for a redundancy scheme to have provisions to limit the "windfall", and the cap was a proportionate means of achieving this.

Stigma Damages following Dismissal

Ms EL Brown v Mr J & Mrs J Baxter T/A Careham Hall

In a recent case, the EAT has held that stigma damages will only be awarded to a Claimant where her difficulty in finding a new job has been attributable to her dismissal from her previous employment. Read more ...

The Claimant was employed as an Assistant Care Manager at the Respondent care home. She had had several allegations made against her since 2007 concerning her attitude towards her handling of the residents of the care home. On one occasion, this had led to a resident's grandson making a Protection of Vulnerable Adults referral to the Department of Health. The Claimant was summarily dismissed for gross misconduct from her employment on 6th June 2008. She brought a claim in the Employment Tribunal for unfair dismissal.

At first instance, the Tribunal held that her dismissal was automatically unfair as the statutory disciplinary procedure had not been complied with. However the Tribunal rejected the Claimant's application for stigma damages on account of the fact that she had been unable to find new employment following an adverse reference from her former employer, rather than her dismissal.

The Claimant appealed on this point, putting forward the argument that there was an actual link between her dismissal and the damage to her reputation and loss of her job. The stigma arose naturally from her dismissal and the communications which followed it (the reference) and the Protection of Vulnerable Adults referral. These events were attributable to the Respondent and she would therefore be eligible for stigma damages.

The EAT held that the Claimant was not entitled to stigma damages. The Tribunal had found that Mr Baxter had originally intended to suspend the Claimant and that he would nevertheless have reported her actions under the Protection of Vulnerable Adults procedure and given her an unfavourable reference, whether he had dismissed her or whether she had resigned.

The Claimant did not obtain alternative employment not because of the dismissal but because of the unfavourable reference and Protection of Vulnerable Adults report.

The EAT held that it was clear that the unfavourable reference did not flow naturally from the dismissal and that it was therefore open to the Tribunal on the evidence in front of them to hold that stigma damages were not relevant.

New take on flexible working

Flexible working takes a new turn as a transport minister, Norman Baker, encourages employers to allow staff to work from home in order to cut down on transport congestion. Read more...

In an article in the Telegraph, Norman Baker said that employees working 1 day in 10 at home could have a huge impact on congestion, pollution and the added stress that commuting to and from work brings. He believes that we need to go against the traditional ways of working, including increasing the use of email and videoconferencing for work purposes, if the government is to fulfil its promise of creating a low-carbon economy.

Other measures include encouraging people to travel outside the peak times and encouraging train companies to review how they sell season tickets, so those who do not work a full week "in the office" are not disadvantaged.

The Government also stated in its final coalition agreement that it would extend the right to request flexible working to all employees following consultation with businesses as to how this would work in practice.

*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*