

Employment Law Update

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Government confirms removal of default retirement age

The Department for Business Innovation and Skills (BIS) have this month confirmed that the default retirement age will be abolished from 1st October 2011, with phasing in commencing in April. The governments 'Response to Consultation Paper' says that it considers that the dismissal of older workers should be managed either by discussion or by formal performance management procedures.

Welcome

Welcome to the first Employment Newsletter of 2011. There have been whisperings this month that the government are seriously considering making it more difficult for Claimants to bring claims in the Employment Tribunal, a claim form issue fee and an increase in the period of qualifying employment needed to lodge a claim for unfair dismissal have been widely rumoured. Through the Newsletter we will of course aim to keep you up to date should any of these proposed changes become law.

National minimum wage name and shame

This month the Department for Business, Innovation and Skills (BIS) released new guidance setting out plans for naming employers who flout the national minimum wage (NMW) law. BIS is responsible for the national minimum wage policy. The BIS guidance also sets out how the government operates the civil; and criminal enforcement of the NMW in the light of the changes introduced by the Employment Act 2008, which came into effect on 6th April 2009.

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Presenter Put Out To Pasture

Ms O'Reilly began working for the BBC in 1982. She was born in 1957. In 2006 she started work on the TV show 'Countryfile'. In 2008 she was told by Andrew Thorman, the BBC's head of Rural Affairs, that she would no longer be the presenter of Countryfile when it moved to its new primetime slot in April 2009. There was press speculation regarding the new line up of the show and allegations of 'ageism' at the BBC following the introduction of younger attractive presenters.

In 2009, contrary to her expectations, she was asked to take part in only one of the eight part series 'Costing the Earth', the episode she was offered was entitled 'The environmental cost of ageing.' She asked if she could present more episodes as she was unhappy about the proposal because of the age related publicity that had followed her removal from 'Countryfile'. The request was refused and she did not receive any further commissions for written work from 'Countryfile Magazine.' She also had two radio programme proposals rejected despite earlier indications of interest.

In January 2010 Mrs O'Reilly brought a claim against the BBC for direct and indirect discrimination on the grounds of sex and age and a claim for victimisation.

The London Central Employment Tribunal held that the BBC had committed age discrimination and victimisation.

The Tribunal saw a number of internal emails mentioning the need to establish a team of presenters that would establish ethnic diversity. They also saw a risk assessment document produced by the BBC indicating that the BBC were aware that the change of presenters could lead to accusations of ageism and sexism because it could be perceived to be "pandering to younger audiences because the two new presenters are young, attractive sorts."

It was also found that following a meeting with Jay Hunt, the then controller of the BBC, Mr Thorman believed he had to look for "ethnically diverse younger talent". This was held to be direct discrimination contrary to Employment Equality Age Regulations 2006 reg.3

Under the Equality Act 2010 direct age discrimination can be justified if it constitutes a proportionate means of achieving a legitimate aim. With regard to this point the Tribunal found as follows:

"The discrimination was not justified. The wish to appeal to a primetime audience, including younger viewers, is a legitimate aim. However, we do not accept that it has been established that choosing younger presenters is required to appeal to such an audience. It is not a means of achieving that aim. Even if it was a means of achieving that aim, it would not be proportionate to do away with older presenters simply to pander the assumed prejudice of some younger viewers."

Press reports suggest that Mrs O'Reilly is likely to receive a six figure sum and continue to work for the BBC.

Teacher sacked for allowing pupils to ride on sledge

Richard Tremelling was the head of technology at a comprehensive school in Swansea. He allowed two 15 year old students to ride on a sledge without carrying out an appropriate risk assessment, failing to provide a written risk assessment and failing to ensure they were wearing protective clothing and headwear. He was allegedly accused at a disciplinary hearing of breaking health and safety rules and he was dismissed as a result. Mr Tremelling said that he had thought about the risks to the pupils before testing the slopes himself and instructing one of the pupils to start from half way down the slope as a matter of precaution.



Third Party Discrimination

In the case of Lisboa and RealPubs Ltd the Claimant was an openly gay Brazilian bar tender. The Respondent owned a chain of Gastro pubs. In September 2008 the Respondent acquired the Coleherne Public House in Earls Court. The Coleherne has a reputation as London's first gay pub and drug dealers and male prostitutes frequented the establishment on a regular basis.

In an effort to re-brand the pub as a gastro pub, the Respondent subjected the pub to a full refurbishment, re-named it the Pembroke Arms and opened it to the public on 5th December 2008. The Claimant was interviewed for a job in November 2008. At the interview the Claimant was told of the pubs intended transition and when he enquired about gay customers he was told that it would be madness to "say no to the pink pound."

The Claimant was employed and soon instructed by the general manager to display a sign outside the pub saying 'this is not a gay pub'. It was also alleged that it was a policy of the Respondent to seat customers who did not appear to be gay in prominent positions within the pub. Allegations were made against the Respondent's Mr Heap that had called a gay couple a couple of "queens" and referred to one individual as "gay but a different type of gay."

The balance of staff also changed with an emphasis seemingly on employing more female staff. One particular staff member called Ricky was discussed during the proceedings. Ricky was not gay but was popular with the gay customers. Mr Heap did not like the way he dressed. The Claimant alleged that Ricky was 'got rid of' because of his attractiveness to the gay clientele. Mr Heap stated that he had left to play Australian Rules Football in his native Australia.

Despite Realpubs efforts the pub's customers remained 90% gay. The Claimant left his employment on 11th January. Mr Heap asked the Claimant not to resign saying that if he was leaving because of the 'gay issue' he was sorry if he had not expressed himself properly on the subject.

The Claimant's claims failed at first instance but he succeed on appeal. The EAT accepted that Realpubs policy of attempting to broaden the pubs clientele was legitimate however the policy was implemented in such a way that the old gay clientele was less favourably treated than the desired straight/ family customer base on the grounds of their sexual orientation. Further, they reinforced the law that "less favourable treatment on grounds of sexual orientation" covers any situation where sexual orientation, whether of the Claimant or a third party, is the cause of the detriment suffered.

CRB Checks

The Court of appeal has held in the case of Desmond v Nottinghamshire Police that a person cannot bring a

claim in negligence against the police in respect of information provided to an employer during an Enhanced Criminal Records Bureau check.

Sacked Dinner Lady Wins Appeal

Dinner lady Carol Hill witnessed schoolgirl Chloe Davis tied to a chain-link fence with rope burns on her wrists, she reported the incident internally. Mrs Hill bumped into the parents of the child on the evening of the incident and discussed what had happened. The parents were surprised to learn of the gravity of the incident as the 'accident notification letter' sent from the school only mentioned Chloe's injuries and not how they had occurred and Chloe had been too upset to discuss the events. Mrs Hill was suspended by the school for a breach of confidentiality as a result of the chat.

Feeling wronged and, as concluded by the EAT, not in 'good faith', Mrs Hill reported the incident to a local newspaper. It was this particular breach of confidence that the School relied on when dismissing Mrs Hill. The EAT concluded that her dismissal was procedurally unfair as the governors had not carried out a reasonable investigation into the allegations and the disciplinary and appeal hearings were not fair. There will now be a remedies hearing to see whether Mrs Hill will be reinstated and compensated.



Band of Reasonable Responses

Mr Gray was employed by the University of Warwick as a lifeguard. He had one written warning on his disciplinary record as a result of a failure to follow the University's absence procedure that was due to expire on 5th August 2008.

On the night of 8th October 2008 the Claimant and some of his friends, some of whom also worked at the leisure centre, were caught by a security guard trying to gain entry to the centre without permission. The Claimant and his friends had been drinking and when they were approached the Claimant, in particular, became aggressive. Disciplinary hearings were instigated against the Claimant and his accomplice colleagues. The Claimant was dismissed and his colleagues were not.

The Claimant brought proceedings for unfair dismissal. The original Employment Tribunal held that his dismissal was unfair as a reasonable employer would not have dismissed the Claimant when it was found that his case was on all fours with the three other colleagues who were given a final written warning for their conduct.

The Respondent appealed to the EAT contending that the existence of the written warning on the Claimant's record meant that dismissal was within the range of reasonable responses open to them and a reasonable employer. The Respondent accepted that what had happened on the night was not gross misconduct but did deserve a final written warning and it maintained that the existence of the warning on the employee's record tipped the sanction over to dismissal.

The EAT agreed finding that the existence of the warning itself and the fact that the Claimant was being aggressive was enough to separate the Claimant from his colleagues and entitle the Respondent to dismiss. The EAT substituted a judgment that it was not unfair dismissal.

And Finally....

We hope that you have enjoyed this month's newsletter. You should now have received a letter regarding the renewal of this service and our Telephone Advice and we look forward to continuing our relationship with you throughout what we hope will be a prosperous 2011 for all.

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Andy Gray seeks legal advice

It has been reported that Andy Gray is going to pursue action against Sky Sports for unfair and wrongful dismissal. Gray was suspended from presenting duties following making sexist remarks about a female assistant referee. However, Sky Sports took the decision to terminate his employment after it confirmed that it had discovered further evidence of unacceptable behaviour. Gray is reported to have earned £1.7 million per year. His co-presenter Richard Keys has now resigned.

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