Employment Newsletter

April 2019

BACKHOUSE JONES

Indirect Discrimination, how is justification assessed…

The Employment Appeal Tribunal (EAT) in *The City of Oxford Bus Services Limited t/a Oxford Bus Company v Harvey* held that when considering if a rule is justified in an indirect discrimination case, a tribunal should not focus on the particular application of the rule on the Claimant, rather than the justification for the rule in general.

The Facts

The Claimant was newly employed by Oxford Bus Company as a bus driver and was a Seventh Day Adventist. In order to observe the Sabbath, he asked not to work between sunset on Friday and sunset on Saturday. After the Claimant received his first roster, he raised issue as he was scheduled to work between sunsets on Friday and Saturday. As the Claimant was contracted to work 5 out of 7 days a week, the Respondent requested that he completed and submitted a flexible working request, albeit, he did not have sufficient service to make such a request.

Although he submitted this form, the Claimant did not sign and complete some of the boxes. Having already made an exception for the Claimant in making this application, the Respondent was not prepared to consider an application which was not properly completed. Thereafter, the Claimant continued to be allocated shifts that conflicted with his beliefs.

The Claimant submitted a further request, again not correctly completed. The Respondent decided to consider the application and made efforts to accommodate his request. A temporary role which did not involve working Friday to Saturday was offered to him, which was accepted. By this time, the Claimant had commenced Tribunal proceedings for indirect discrimination. The Tribunal noted that the Respondent had said his preferred hours could be accommodated, however, issues may arise if more drivers asked for the same facility which would render any such arrangement unsuitable. The Respondent argued that where a person gets preferential treatment without justification there is disharmony. Of course, it was the claimant's case that there would be justification because the treatment sought was on the basis of a protected characteristic, namely religion or belief.

In the first instance, the Tribunal found in favour of the Claimant and ruled that 'the provision, criterion or practice' (PCP) requiring bus drivers to work 5 days out of 7 put the claimant at a particular disadvantage and was not justified. The Tribunal found that there was insufficient evidence to support one of the legitimate aims relied upon by the Respondent of '*maintaining a harmonious workforce*'.

The Respondent appealed and contended that the Tribunal's reasoning demonstrates that it failed to correctly apply the test for justification. It had accepted that the Respondent had demonstrated a legitimate aim, but, when assessing if the PCP was a proportionate means of achieving that aim, the Tribunal had focussed on whether such a request could have been accommodated, rather than whether this was a proportionate means of achieving its aim.

The EAT overturned the decision. It found that the Tribunal had focussed wrongly, on the particular application of the rule on the Claimant rather than the justification for the rule in general. Whilst the Tribunal had

recognised that the Respondent's issues arose not from granting the claimant's request, but from many such requests, it had failed to balance the Respondent's aims with the potentially discriminatory impact of the rule. Given the assessment required on the question of objective justification, the EAT decided that the matter must be remitted to the ET.

Commentary

The outcome of this case is obviously yet to be determined by the Tribunal. However, having recognised that any real issues to the Respondent arose not from granting the request for the Claimant, but from granting many such requests, it will be interesting to see whether the Tribunal will follow this point through second time around. Even if the Tribunal was sceptical about the real extent of this as an issue within the Respondent's operation, it must still carry out the balancing exercise in terms of the rule, not merely its application to the Claimant.

The failure to carry out this exercise and focusing the question on the individual application of the rule essentially took away the Respondent's ability to have a rule or PCP at all. We understand that it can be tricky for employers looking to apply certain procedures, criterions or practices which are both in the interests of the smooth running of their operations as well as being fair to all employees. If you need guidance in relation to the above, please speak with a member of our Employment team to consider all bases before applying the PCP to try and prevent such claims arising.

Communication whilst on Maternity Leave - Can we? Should we?

It is not uncommon that redundancy or restructure within a business will coincide with an employee's maternity leave. In such a situation the Employer has legal obligations to consult with its employees, however how

much contact is required or reasonable when an employee is on maternity leave and how this is done can often be a grey area.

The Employment Appeal Tribunal (EAT) recently considered whether it was unfavourable treatment under the *Equality Act 2010* to send a woman on maternity leave an important email at an email address that she cannot access.

The facts of this case are specific, however, the EAT in *SW Yorkshire Partnership NHS Trust Foundation Trust v Jackson* determined that is was unfavourable treatment, albeit a tribunal needs to consider the reason why the email was sent in that way.

Facts

The Claimant, who was on maternity leave at the time, was one of several staff put at risk of redundancy. However the HR department sent information to her regarding her redundancy to an inaccessible, work email address.

The Claimant received notice of the letters content by other means a week or so later and it was acknowledged that this act caused no substantial harm. However, it was deemed a legitimate concern by the Tribunal due to the content of the emails and as such her claim for unfavourable treatment succeeded.

Law

The question that the tribunal had to consider was whether the Claimant did not receive the email 'because' she was on maternity leave? The answer was yes and as such the claim was upheld at first instance.

The employer appeal and the EAT found that the Tribunal had erred in applying the test quite so strictly. Although the unfavourable treatment would not have happened 'but for' taking maternity leave, the EAT noted that the Tribunal should have considered the reason why the email was sent to the Claimant's work email. There was no finding on this point in the appeal hearing, however you can infer from the comments that provided a reasonable explanation could be offered, an employer may be able to avoid a claim succeeding.

Comment

The reality is, an employer does not want to find themselves having to justify or explain why an email was sent to an inaccessible address, administrative oversights, typos or letters sent to an incorrect address. What can appear as an insignificant mistake can be costly in both the

ordinary sense but also time. Attention to detail, particularly when dealing with an employee on maternity leave is important as they are protected under the Equality Act. This does not mean that employers cannot deal with business matters concurrently. The correct procedures must be followed; however, consultation should apply to all staff, including those on maternity leave. In the event of a redundancy or restructure, ensure the same notification is issued, in the appropriate manner to all affected employees. A preferred method of communication should be agreed in advance of maternity leave commencing.

The redundancy process is applied equally to all staff including those on maternity leave and therefore it is important to include employees on maternity leave in exactly the same way.

The only difference in the procedure is that those on maternity leave are entitled to be offered any suitable alternative vacancies in priority to other employees at risk. There is sometimes a risk of out of sight, out of mind and they are forgotten about but you need to ensure that all correspondence and communication is sent to them and accurate on the subject matter to avoid any uncertainty and risk a claim.

Important pay changes

Increase to statutory sick pay (SSP) - effective 6th April 2019.

- The SSP rate increases to £94.25 per week.

Increases to national minimum wage rates - effective 1st April 2019.

- The national living wage increases to £8.21 per hour.
- The national minimum wage for workers aged 21-24 increases to £7.70.
- For those aged 18-20 the new rate will be £4.35.
- The hourly apprentice rate increases to £3.90.
- For those under 18 but above compulsory school age, the rate is £4.35.

Increase to statutory family leave pay rates - effective from Sunday 7th April 2019.

- The weekly rate for statutory family pay increases to £148.68, applying to maternity, adoption, paternity and shared parental pay and maternity allowance.

Please note: This publication does not constitute legal advice

For further information on anything in this newsletter, contact our Employment Department at Backhouse Jones on 01254 828300.

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