



NOVEMBER 06

Cadman v Health & Safety Executive

In this case Mrs Cadman made a claim to the Employment Tribunal against her employer, the Health and Safety Executive (HSE), after discovering that she was paid less than a man in the same pay grade as her due to differences in the length of service. Mrs Cadman maintained that the HSE's policy of using length of service as a criterion in determining pay amounted to indirect discrimination as on average a female workers length of service is shorter than that of a male worker. The Tribunal upheld her complaint but it was then overruled by the Employment Appeals Tribunal. The case was eventually referred to the European Court of Justice (ECJ) by the Court of Appeal to determine whether using length of service as a factor in a pay system requires objective justification. If the ECJ were to uphold Mrs Cadman's complaint this would have a significant impact on employers as Government statistics show that up to 36% of UK employers use a pay system based on length of service.

Fortunately for employers, the ECJ following existing European case law ruled that no specific objective justification would be needed where unequal pay existed due to length of service criterion in a pay scheme. However, if an employee has evidence raising 'serious doubts' over the appropriateness of using length of service as a criterion for awarding pay increases then using such criteria may require objective justification by the employer. The case will now return to the Court of appeal to assess whether the points raised by Mrs Cadman amount to 'serious doubts'.

Without Prejudice discussions no longer privileged?

The 'without prejudice' rule would normally mean that

discussions between parties aimed at settling a dispute are inadmissible evidence. The aim of the rule is that parties are more likely to reach settlement if they can speak freely without the risk of their discussions later being used as evidence against them.

However, the Employment Appeals Tribunal in the case of Brunel University v Vaseghi & Webster held that in discrimination cases the public policy interests of discovering whether discrimination in fact occurred may outweigh the need to protect the status of 'without prejudice' communications.

In this case the employees made race discrimination claims against the University. The parties failed to reach a settlement before the employment tribunal hearing despite negotiations. The university later publicly accused the employees of making "unwarranted demands for money" during the negotiations. The employees made separate victimisation claims alleging that it was the employer who had instigated financial settlement discussions at a without prejudice meeting and wanted to rely on evidence from a solicitor who was present at the meeting to support this claim. The Tribunal held that the evidence was inadmissible under the 'without prejudice' rule. However,

the EAT allowed the solicitor's evidence and held that the employer had placed the settlement discussions into the public domain by accusing the employees of making "unwarranted demands for money".

It was further held that to deny the employees the

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opportunity of referring to the without prejudice discussions would severely impede their ability to bring a victimisation claim and would be a clear abuse of the without prejudice rule.

Employers should take care in any communications with their employees aimed at settlement, as the content of these discussions may later be used in evidence at a subsequent tribunal hearing.

Flexible working for carers

The statutory right to request to work flexibly was first introduced by the Employment Act 2002. This allowed parents with a child under 6, or parents of disabled children under 18, the right to make one application in any twelve month period to request to work flexibly and to have their request considered seriously by their employer.

The right to request flexible working has been deemed an enormous success by the government with approximately 90% of requests being granted by employers.

The Government's desire to expand family-friendly policies will be further demonstrated from 6 April 2007 when the law will be extended to allow carers of adults the right to request

flexible working. The term "carers" is broadly defined as "someone who cares for an adult who is their spouse or civil partner, a relative or a person living at the same address." This significant extension to current legislation will be a welcome development for many employees and therefore it would seem prudent for employers to prepare themselves for an increase in the number of requests they receive for flexible working. The DTI estimates that given the huge scope of the definition of "carer", between 235,000 and 310,000 people will apply to work flexibly in the first two years of the lifespan of this new provision.

This update is a position of the law as at November 2006. It is not a substitute for legal advice on specific issues. If you require any further information on employment matters please contact:

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