Court of Appeal confirms structured approach to making reasonable adjustment claims

In Newham Sixth Form College v Sanders, Sanders suffers from a depressive illness and because of her disability she was unable to get to work on time with any regularity. Sanders was dismissed on the basis that her continual lateness could not be accommodated any longer and she had constantly failed to comply with reporting procedures. Sanders argued that the employer had failed to make two reasonable adjustments: (i) the requirement to attend work regularly at 8.45 am; and (ii) the requirement to telephone if she was going to be late or absent.

An employment tribunal upheld her claim. But, the Court of Appeal upheld the EAT's ruling that the tribunal had not adopted the structured approach required by EAT rulings in RBS v Ashton and Environment Agency v Rowan when making its judgment and the decision could not stand. The reasoning in both cases was correct and in remitting this case to a different tribunal, the Court set out the approach to be adopted in such cases to be followed by tribunals and which, from a practical point of view, should also be followed by employers.

The central question is the fit between any proposed adjustment and the extent of the disabled person's disadvantage. To determine whether the duty to make a reasonable adjustment under S.20 of the Equality Act 2010 (EA 2010) applies and has, or has not been, met, the following must be identified:

- the relevant provision, criteria or practice, physical feature of the premises or non-provision of an auxiliary aid which puts a disabled person at a substantial disadvantage compared with persons who are not disabled;
- the identity of the non-disabled comparators;
- the nature and extent of the substantial disadvantage suffered by the disabled person; and,
- the reasonableness of the proposed adjustment (see paragraph 6.28 of the EHRC Employment Code), which includes whether taking any particular step would be effective in preventing the substantial disadvantage.

Note that while this case was decided under the Disability Discrimination Act, the principles remain the same, but the 'auxiliary aid' element has been added above to reflect the EA 2010.

Successful appellant reimbursed £1600 for fees paid to lodge and hear appeal in the EAT

With the Unison challenge to the introduction of fees in the employment tribunal and the EAT ongoing, in Horizon Security Services Limited v (1) Ndeze and (2) The PCS Group, the EAT awarded £1,600 in costs to reimburse the fees of the successful appellant, Horizon Security Services, and in doing so revisited and added to the principles established by another division of the EAT in Portnykh v Nomura International Plc, where such a costs order is being considered.

According to the EAT, as the Government apparently recognised in the alteration of its position during the Unison Judicial Review proceedings before the High Court, the introduction of fees changes the landscape. As a statement of general principle in the EAT, it might well seem unjust if a successful Appellant were unable to recover the fees they have had to pay from the party that had resisted the appeal. That statement of general principle might need to be tempered to take account of the particular facts of an appeal.

The issue may not be so clear-cut where, for example, the Appellant has only been partly successful. It might also be considered inappropriate or unjust to make such an award if the Respondent's means are such that they could not pay the sums in question. The EAT retains a broad discretion but, following the introduction of fees, the general expectation must be that a successful Appellant will be entitled to recover the sums paid from a Respondent that had actively sought to resist the appeal.

Draft Equality Act 2010 (Equal Pay Audits) Regulations 2014 published

S.98 of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) inserted a new S.139A into the Equality Act 2010, giving the Government the power to make regulations to require employment tribunals to order any employer that loses an equal pay case to carry out an equal pay audit. Following on from the government's response to consultation setting out proposals for regulations implementing the S.139A provisions, the draft Equality Act 2010 (Equal Pay Audits) Regulations 2014 have now been published. The Regulations set out the circumstances where a tribunal must order that an audit be carried out, how the audit must be conducted, the manner in and time by which the employer must publish the audit and send evidence of publication to the tribunal, and that a tribunal may order the employer to pay a penalty to the Secretary of State of up to £5,000 where the tribunal's order is not complied with. The regulations take effect on 1 October 2014 in respect of equal pay claims presented on or after that date. **Subscribers to our News Update will receive a Legal Development Alert during September 2014 setting out a summary of the new provisions.**

The Small Business, Enterprise and Employment Bill 2014 Published

The government has published The Small Business, Enterprise and Employment Bill. The principal employment measures are set out in Part 11 and a summary is below.

Clause 135 addresses a problem identified in a call for evidence on whistleblowing which indicated a lack of consistency in the approach where disclosures were made to regulators and other bodies, known as 'prescribed persons'. Under this Clause, prescribed persons will be required to report annually on the whistleblowing disclosures they receive.

Currently only around half of claimants receive any form of payment of their Employment Tribunal award prior to enforcement. To help address this problem, Clause 136 of the Bill will allow the imposition of a financial penalty on non-compliant respondents with the aim of encouraging compliance with Employment Tribunal rulings and the prompt payment of awards. The provisions will also cover non-payment of sums owed in settlement agreements reached following ACAS conciliation.

To reduce the time and costs associated with postponements in employment tribunals, Clause 137 of the Bill will allow the Secretary of State, in secondary legislation, to place a limit on the number of successful applications for postponements a party can have in a case, other than in exceptional circumstances; and require the Secretary of State, in secondary legislation, to oblige employment tribunals to consider the use of cost orders where a successful late application for postponement is made at short notice before a hearing.

As part of the government's commitment to clamp down on those who employ people below the minimum wage, Clause 138 of the Bill contains measures requiring that the maximum penalty will be determined by the amount *owed to each worker* meaning that the maximum financial penalty for underpayment of the national minimum wage will change from £20,000 in all, no matter how many workers are involved, to £20,000 per worker.

Following consultation the Government has decided to ban exclusivity clauses in zero hours contracts, via Clause 139 of the Bill. This would allow all workers on these contracts, whose current employers are unable to offer them enough work, to boost their income by working elsewhere. The BIS has also announced that the government will: (i) consult further on how to prevent rogue employers evading the exclusivity ban, for example through offering 1 hour fixed contracts; (ii) work with business representatives and unions to develop a code of practice on the fair use of zero hours contracts by the end of 2014; and (iii) work with stakeholders to review existing guidance and improve information available to employees and employers on using these contracts

Clauses 140 to 142 will give the Treasury a power to require public sector workers to repay exit payments if they are re-employed in the public sector. The clauses will also allow the appropriate Secretary of State to waive this requirement in certain circumstances.

Content

The aim is to provide summary information and comment on the subject areas covered. In particular, where employment tribunal and appellate court cases are reported, the information does not set out all of the facts, the legal arguments presented by the parties and the judgments made in every aspect of the case. Click on the links provided to access full details. Employment law is subject to constant change either by statute or by interpretation by the courts. While every care has been taken in compiling this information, SM&B cannot be held responsible for any errors or omissions. Specialist legal advice must be taken on any legal issues that may arise before embarking upon any formal course of action.