EMPLOYMENT NEWS HEADLINES MAY-JUN 2018 ISSUE 15

NO DISCRIMINATION FOR SHARED PARENTAL LEAVE PAY – CAPITA CUSTOMER MANAGEMENT LIMITED V ALI (EAT)

The case of *Capita Customer Management Limited v Ali* provides employers with clarity, at least for now, on whether they need to align an enhanced maternity leave pay policy by providing the same for shared parental leave. In the present case, the Employment Appeal Tribunal (EAT) has ruled it is not discriminatory to have an enhanced maternity pay policy but not a shared parental leave policy.

Capita had a maternity pay policy providing female employees with 14 weeks basic pay and 25 weeks statutory maternity pay. When Mr Ali's daughter was born in 2016, he took his two weeks statutory paternity leave which he was entitled to do. On returning to work he requested further shared parental leave as his wife was advised to return to work early to combat her post-natal depression. He needed to take on more of the child care responsibilities. Capita advised him he was entitled to take shared parental leave but this would be on the statutory rate. Mr Ali claimed direct sex discrimination.

Mr Ali was successful at first instance and the ET said he could use a hypothetical female on maternity leave as a comparator. Capita appealed and the EAT has ruled in its favour. There is no discrimination. In arriving at this conclusion, the EAT looked at the relevant EU directives and said:

- Maternity leave was for the health and wellbeing during and after pregnancy of the birth mother and served a different purpose to shared parental leave which was about the care of the child. Mr Ali could not, therefore, compare himself to a woman on maternity leave;
- He could compare himself to a woman on shared parental leave, who would also be entitled only to the statutory rate and would be equally treated for shared leave and pay purposes;
- Maternity leave and maternity pay are linked for a different purpose and the comparison was, therefore, not directly discriminatory, employers were entitled to have enhanced rates for one and not the other.

CAN LONG HOURS BE A DISCRIMINATORY PROVISION, CRITERION OR PRACTICE (PCP) – UNITED FIRST RESEARCH PARTNERS V CARRERAS (CA)

This is an interesting case about employer expectation and work culture potentially being indirectly discriminatory against employees with a disability.

Disclaimer: This newsletter is for information purposes only and does not replace professional advice. You must seek specific advice for your particular circumstances in all cases.
Maxlaw Global Limited © 2018

Mr Carreras was an analyst at brokerage firm, United First. He had been involved in a serious cycling accident that has caused him to become disabled under the definition of disability in the Equality Act 2010.

The issue for the Courts to consider in this case was whether an "expectation" that an employee will work consistently late hours was a "requirement" that amounted to a PCP putting employees with a disability at a disadvantage and thereby being indirect discrimination.

Prior to his accident, Mr Carreras had regularly worked long hours as much as 12-hour days. Six months after Mr Carreras returned to work after his accident, he was asked by his employer whether he would work late. Mr Carreras did and, over time, it became an expectation that he would work late on a regular basis. Even though he was not directly required to, he felt pressure to agree to the detriment of his health. The Court found that:

- Although no explicit order to work late was made nor was there any coercion, an expectation that he would work late placed a pressure on Mr Carreras to agree;
- A pattern of repeated "requests" over time would also imply an expectation and place an obligation on the employee to agree;

The Court found, using a broad rather than a technical and narrow definition, that this could amount to a PCP that could place a burden on an employee with a protected characteristic such as Mr Carreras. There is plenty of research on the disadvantages to health of a long hours work culture and employers should consider reasonable adjustments to the way in which they operate to avoid similar claims in the absence of any objective justification of such a PCP, which in general, will be difficult to objectively justify.

NON-RENEWAL OF A FIXED TERM CONTRACT SHOULD BE A FAIR – ROYAL SURREY COUNTY NHS TRUST V DRZYMALA (EAT)

The case of *Royal Surrey County NHS Trust v Drzymala* is an important reminder to employers that correctly complying with the Fixed Term Employees (Prevention from Less Favourable Treatment) Regulations 2002 will not necessarily mean that it does not fall foul of its fair dismissal obligations under the Employment Rights Act 1996. This is particularly true where the fixed term employee has two years or more of continuous service.

An expiry or a non-renewal of a fixed-term contract is technically a dismissal and the relevant rules apply. Ms Drzymala was a locum doctor who had been engaged on several successive fixed term contracts by the Trust over an extended period of time. The Trust decided to make the post permanent and carried out an open recruitment process for the role. Ms Drzymala applied for it but was unsuccessful in securing it. She was subsequently notified that her fixed-term would not be renewed and she was given three months' notice. In confirming this, the Trust:

- Made no mention of possible alternative employment;
- Offered no right of appeal to the termination.

The EAT ruled that the Trust had not acted fairly in that suitable alternative employment was not explored or considered although a lower ranking role was briefly mentioned, no right of appeal was offered (the Trust argued it would have made no difference to the outcome had an earlier right to appeal been offered) and that Ms Drzymala was unfairly dismissed.

Disclaimer: This newsletter is for information purposes only and does not replace professional advice. You must seek specific advice for your particular circumstances in all cases.
Maxlaw Global Limited © 2018

PAYSLIP INFORMATION FROM 6 APRIL 2019

Readers will be aware that the recent Taylor Review looked at a broad range of changes in work practices in the labour market and how legislation needs to be adjusted to reflect these changes. One such change will be the introduction from 6 April 2019 to itemised pay statements for all workers not just employees. The reason for this is not only to ensure consistency but also to ensure:

- workers and employees are treated equally in terms of pay rates;
- there is a distinction between workers and those who are genuinely self-employed contractors;
- employers are complying with the national living wage requirements which applies to workers as well as employees;
- pay statements reflect accurate data on total paid hours and any variable rates for different types of work;
- deductions are clearly itemised.

For many employers this could result in more administration especially where PAYE and other deductions are being made for workers. It would be prudent for employers to carry out a payroll system review prior to the introduction of this change.

For further information and advice please contact Max Woodley at mwoodley@maxlawglobal.com

Maxlaw Global
June, 2018

Disclaimer: This newsletter is for information purposes only and does not replace professional advice. You must seek specific advice for your particular circumstances in all cases.
Maxlaw Global Limited © 2018