RMI Employment Law Bulletin
Winter 2021

As regular readers of this update will be aware, the Covid crisis over the last couple of years has had two major impacts on UK employment law. Firstly, it has created whole new areas of advice, for example in understanding the intricacies of furlough, interpreting the ever-changing guidance for employers during the crisis and in dealing with long Covid. Secondly, however, it has absorbed all the Government's time and has led to the statute books being relatively quiet. There is no change to that this season, so we are looking at some case law updates.

It is expected (but not certain) that 2022 could be a busy year in employment law with many of the Government's planned changes to employment law finally going through Parliament. We will cover the 2022 outlook in the next update.

Case Law Updates

1. Collective Redundancy Consultation
2. Disability, sex discrimination and the menopause
3. Age discrimination justifying a compulsory retirement age

1. Collective Redundancy Consultation

Carillion Services Limited (in compulsory liquidation) & ors v Benson & ors

In collective redundancy situations employers are obliged to follow certain prescribed procedures when proposing to make at least 20 or more employees redundant at one establishment within a period of 90 days.

Employers in these circumstances often query whether there are any exceptions to this rule, particularly if the business is in great difficulty or if there is particular commercial sensitivity about announcing the redundancies.

Under the Act that governs this area (the Trade Union and Labour Relations Consolidation Act 1992) there is potentially an opt out where there are "special circumstances" which render informing and consulting "not reasonably practicable" for the employer to comply with the consultation requirements.

On the facts of this case, Carillion was in severe financial difficulties. Carillion thought that it could secure lending, however in a very short period of time, over a weekend, the company's financial stakeholders did not approve lending arrangements in the absence of Government guarantees. This resulted in Carillion going into liquidation the following day. Carillion argued that given its expectations that it would have

financial support, the failure to get lending was a sudden intervening event and therefore justified special circumstances, which meant it was not reasonably practicable for it to have complied with the consultation periods under the Act.

The Employment Appeal Tribunal (EAT) rejected that argument. Whilst there can be situations in insolvency which could justify the special circumstances defence, this will depend on the individual facts of any case. The Tribunal had to decide whether the circumstances relied upon are uncommon or out of the ordinary. It is not enough that the circumstances are merely "unforeseen". It effectively found that it did not accept the company's argument that the failure to secure lending was unforeseen. On the facts clearly it found the lending problem could have been anticipated, that such a scenario was not out of the ordinary and so the company could have complied with the consultation regulations.

Comment

The case really affirms for employers in the motor industry in dealing with collective redundancy that it is going to be a very rare circumstance indeed in which failure to comply with the collective redundancy regulations (if they apply) will be excused under the "special circumstances" defence.

2. Disability, sex discrimination and the menopause

Rooney v Leicester City Council

The Tribunal recently struck out a claim by Ms Rooney that her treatment when she was menopausal gave rise to claims for disability and sex discrimination. Ms Rooney appealed and the Employment Appeal Tribunal (EAT) upheld the appeal. The EAT ruled that the Tribunal had failed to provide special reasoning to support its decisions on both the sex discrimination and disability point. The Tribunal had not explained why Ms Rooney's condition did not meet the test for disability under the Equality Act, nor looked properly at the evidence submitted regarding whether she had been less favourably treated on the grounds of sex. The EAT sent the matter back to the original Tribunal to reconsider these issues, so that the case at first instance could go either way.

Comment

Readers of this update may have been aware that during October, there was 'World Menopause Day', to highlight the difficulties which can arise for menopausal women. The matter was also discussed in Parliament. The case is a reminder that there is no assumption that less favourable treatment of menopausal women, depending on of course the reasons for that treatment and the severity of the symptoms, might still not give rise to claims for sex discrimination and disability discrimination under the present Equality Act 2010.

There is presently an enquiry by the Women and Equalities Committee into menopause in the workplace and its report is awaited. It is expected to report on

whether further legislation is required to assist menopausal women, or whether the present legislation under the Equality Act is sufficient. We will keep you informed of developments in future updates.

3. Age discrimination justifying a compulsory retirement age

Pitcher v Chancellor Masters and Scholars of the University of Oxford

This case involved a claim for age discrimination. The University of Oxford ran an employer justified retirement age (known as EJRA). As many of you will be aware, since the age discrimination legislation came into effect well over a decade ago, compulsory retirement ages will generally give rise to a claim for discrimination unless in unusual circumstances an employer can justify retiring certain categories of employees at a certain age.

In this case the Employment Appeal Tribunal (EAT) was examining two conflicting decisions of the lower Tribunals, one of which found the retirement age was objectively justified, and the other which found that it was not.

Because there was no error in law, the EAT upheld both decisions. Given the cases will always be case fact specific, the EAT couldn't see an error of law and it saw no reason to interfere with the decisions.

The concept of 'Objective Justification' in discrimination law is a little complicated. Under the Equality Act 2010, some forms of indirect discrimination can still be justified on the basis of Objective Justification. Less favourable treatment on the grounds of prohibited characteristics will only be objectively justified if it can be shown that the treatment (1) has a legitimate aim, (2) it is necessary to achieve that aim, and (3) it is an appropriate way of achieving that aim.

In this case the EAT gives some further guidance. It confirms that aims such as "promoting inter-generational fairness", "facilitating successor planning" and "promoting equality and diversity" can all fall within the category of legitimate aims. The EAT also stressed the importance of statistical evidence to be adduced by the employer to demonstrate the achievement of legitimate aims being identified. Such data could involve historical data but, where that was not available, projections based upon such past data such as workplace surveys could be used. It also said that Tribunals will consider what steps are taken to reasonably mitigate the discriminatory effects of the retirement age and gave examples of potential extension provisions or the availability of post retirement opportunities.

Comment

Enforcing an EJRA is notoriously difficult and risky. The case only goes to show the high burden for employers. Where certain jobs/professions require a high degree of physical or mental ability and there is clear evidence that that ability declines at a certain age, then it may be possible to justify in EJRA, but it is rarely encountered in the motor industry in our experience.

The test for Objective Justification however is also used in other areas of indirect discrimination, so the case provides very useful guidance on the evidence to support any policy, practice or criteria that an employer has that indirectly discriminates, but which the employer still considers is justified and necessary.

In Conclusion

Don't forget, any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.