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November 2016 Employment Newsletter

Welcome to the latest edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do let the employment team know.

Segregation of boys and girls at faith school is not direct discrimination

The High Court has decided that a faith school's segregation of girls and boys when they reach a certain age does not amount to less favourable treatment and therefore no direct discrimination occurred in this case. Given that there was no distinction between the opportunities afforded to the girls and boys to interact with each other, it could not be said that one sex was treated less favourably than the other.

The argument that segregation in a faith school generates a feeling of inferiority as to the status of females in the community is too broad and sweeping an assertion to make in a multi-cultural society, where segregation is not enforced but chosen by parents. (The Interim Executive Board of X School v HM Chief Inspector of Education, Children's Services and Skills [2016] EWHC 2813.)

Background:

X is a voluntary aided faith school for boys and girls aged between four and 16. It has an Islamic ethos and for religious reasons separates boys and girls from Year 5 onwards (when they are aged nine and above) for lessons, trips, breaks and lunchtimes.

In June 2016, Ofsted inspected X and later submitted to X a draft of its report that it proposed to publish. The report rated X as inadequate and cited a number of concerns about its leadership and management, among other things. The report included criticism of X's segregation policy. However, this policy was well known to parents and reflected its Islamic ethos, which in X's view discourages the mixing of genders in this age group.

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Ofsted took the view that it limited pupils' social development, and the extent to which they would be prepared for interaction with the opposite sex on leaving school. The draft report noted this and pointed out that the school had not considered "how to mitigate the potentially negative impact of this practice on pupils' chances to develop into socially confident individuals with peers from the opposite gender". Ofsted took the view that this gender segregation was unlawful under the Equality Act 2010. However, there was no suggestion that either boys or girls received a different or qualitatively poorer level of education than the other.

X brought a judicial review challenge in respect of Ofsted's proposed report. Among other things, it argued that Ofsted was wrong in its view that sex segregation was unlawfully discriminatory under the Equality Act 2010.

Although this case concerns discrimination in the context of a school/education and not employment, the principles involved are useful to note.

Costs awarded against litigant in person for failing to properly particularise claims

The EAT has upheld an employment tribunal's decision that the inability of a litigant in person to properly particularise their claim constituted unreasonable conduct justifying an award of costs in favour of the respondent.

The employment tribunal had recognised that the standard of pleading expected of a lawyer did not apply to a litigant in person, although a litigant in person should still be able to articulate the basis of their complaints in lay person's terms, together with relevant dates. The claimant had been given several opportunities at preliminary hearings and in correspondence to provide the required information but had failed to do so. That lack of preparation amounted to unreasonable conduct, justifying a costs award. (Liddington v 2gether NHS Foundation Trust UKEAT/0002/16.)

Background:

Ms Liddington (the claimant) was a community practitioner working for 2gether NHS Foundation Trust (the respondent). Ms Liddington complained that, after making a safeguarding referral in relation to a patient care issue at a private care home, she was subjected to a number of detriments by the respondent and ultimately dismissed. Ms Liddington had sought to categorise the safeguarding referral as a protected disclosure. She brought various complaints as a litigant in person, including complaints of constructive unfair dismissal, religious discrimination and whistleblowing.

The claims were not regarded by the employment tribunal as adequately particularised and, over the course of a number of preliminary hearings and in correspondence, attempts were made by three employment judges to assist Ms Liddington to do so.
On 12 May 2015, a preliminary hearing was held to consider an application from the respondent to strike out the complaints or alternatively for deposit orders to be made. The tribunal declined to make any orders at this hearing and instead gave Ms Liddington a final opportunity to provide the relevant particulars.

At a further preliminary hearing on 3 June 2015, to again consider the strike-out and deposit order applications, certain claims were dismissed upon withdrawal and the remaining claims were further clarified. There was insufficient time to deal with the strike-out and deposit order applications. Furthermore, the tribunal was unable to deal with one aspect of the application in any event as relevant documents were not available. The tribunal did not assign blame to either party for the hearing being ineffective.

A third preliminary hearing was listed for two days beginning on 17 August 2015 to consider the respondent's applications for strike-out or deposit orders. The tribunal concluded that the remaining complaints had no reasonable prospects of success and made deposit orders in relation to each complaint as a condition of continuing with the claims. Ms Liddington failed to pay the deposit orders and eventually (after a rather convoluted procedural history) the remaining complaints were also dismissed upon withdrawal.

The tribunal ordered Ms Liddington to pay the respondent its costs in respect of the wasted hearing of 12 May 2015. Ms Liddington appealed.

Costs awards in the Employment Tribunal are relatively rare. Nevertheless, this case serves as a useful reminder that litigants in person are not exempt from the requirement to put their case in a form that can be properly responded to. Whilst the tribunal will endeavour to be as helpful as possible, litigants in person must still adequately prepare their complaints.

UK unemployment level falls to its lowest level in 11 years

The unemployment rate fell to its lowest level for 11 years as firms shrugged off the UK's vote to leave the EU.

The country's jobless count fell by 37,000 to 1.6 million in the three months to September, according to the Office for National Statistics.

It reported an unemployment rate of 4.8% between July and September– a level last seen in the third quarter of 2005.

The Bank of England had forecast that unemployment is set to rise amid uncertainty over Brexit.
Average earnings increased by 2.3% in the year to October, unchanged on the previous month.

However, there was some evidence that hiring among firms was easing as the number of people in work rose by 49,000. That was the slowest increase since the first quarter of this year.

GKFX Financial Services chief market analyst James Hughes said: "Initial fear over what Brexit may mean may have caused a brief period of uncertainty in the markets, however today's reading is the more the continued progression of an improving economy in the UK rather than a reaction to the referendum decision.

"We must still take this number for what it is and that is a strong reading in an ever-improving UK economy."

Is an employee required to ask for a rest break before claiming to have been refused a rest break?

Prior to July 2012, the employee had an eight and a half hour working day, paid for eight hours, with the intention that he take a half hour unpaid lunch break (although the nature of his work meant that this could be difficult to fit into the working day). On 16 July 2012, the employer emailed the employee expressing its expectation (at best) or instruction (at worst) that he was to work straight through for eight hours, without the half hour break, but then to leave earlier than he would have done before. In July 2014, the employee lodged a grievance complaining that he had been forced to work without a break, which had contributed to a decline in his health.

The employee made a claim based on section 10 of the Working Time Regulations 1998 that he had been refused a rest break, but the employment tribunal held that he had never asked for a rest break and therefore he had never been refused one. The EAT overturned the decision on the grounds that the instruction to work without a rest break could be construed as a refusal, without an explicit request.

We hope this newsletter has been helpful and gives you peace of mind with practical advice. Please contact Michelle Morgan on m.morgan@gardner-leader.co.uk with any questions or feedback. Click here for information on the employment team.