

Employment Rights Update

April 2010



Just as this Update had been finalised two important decisions were published. So apologies for the slight late arrival but the first two cases warranted inclusion. This month we have cases on:-

- Industrial Action
- Age Discrimination
- Whistle blowing

Milford Haven Port Authority

-v- UNITE

In January this year UNITE gave notice that they intended to ballot, separately, their members performing the following roles – Port Control, Launch Crews and Pilots at Milford Haven Port. As it happened the Port Control Staff voted against any action.

However, in February 2010 the Union sent notice, by way of two letters, to the authority giving notice of industrial action. One letter related to pilots; the other to launch crew.

The Authority sought an injunction claiming that the notices were defective. Both notices informed the authority that the employees in question intended to take both continuous action (overtime ban, work to rule and other action) and discontinuous action (a 48 hour stoppage).

The Authority argued before the High Court that the notices were defective

because there is no scope in the relevant statutory framework for notice to say that action is continuous and discontinuous: it should have been only one or the other.

The High Court Judge agreed and granted the injunction. UNITE appealed to the Court of Appeal who disagreed, and instead held that one notice was sufficient for both continuous and discontinuous action. Serving two separate notices may in fact cause confusion as to which would be acted upon.

Note: However, a second criticism of the notices was also made. The second complaint was that the notices stated that the ban on overtime etc would commence at the same time as the strike; which was plainly impossible. The Authority argued that it meant they could not properly plan ahead as they did not know which type of action would take place. This issue was not dealt with by the Court of Appeal as agreement had been reached between the Parties. However, the Court did comment that notices must be accurate and it should not be necessary to have to draw an inference from them.

Employers will be made well aware of this case and will doubtless use it to their advantage wherever possible. It is therefore essential to ensure strict compliance with not only the legislation but the higher court's interpretation of the same.

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Homer -v- West Yorkshire Police

West Yorkshire Police introduced a grading system where an individual must have a law degree in order to qualify for the highest rate of pay.

Mr Homer argued that because he was 61 he could not obtain a degree (he would have to do it part-time) before retiring and this amounted to age discrimination.

The Employment Tribunal agreed. The Employment Appeal Tribunal allowed the appeal and that EAT decision has been upheld by the Court of Appeal.

The Court of Appeal acknowledged that the position might seem unfair but said that the requirement to have a law degree would be a disadvantage to any employee who stopped work before obtaining the qualification. This was not specific to one age group. The disadvantageous impact of the requirement resulted from Mr Homer's impending retirement and not from his age.

This case makes it clear that indirect age discrimination cases are often very difficult to prove. One always needs to consider whether "age" is, in reality, the reason for the unfavourable treatment complained of. Here, for example, a person 20 years younger than Mr Homer might have been unable to get a degree because, say, of ill health – age

was not the deciding factor; ability to complete the degree was.

Goode -v- Marks & Spencer Plc

Mr Goode was an employee of Marks & Spencer which proposed to make changes to their discretionary enhanced redundancy terms. Mr Goode was unhappy with this and expressed his unhappiness to his line manager. Following further feelings of disillusionment with the Company he sent an anonymous letter to The Times complaining about the proposals.

Mr Goode was summarily dismissed once he was revealed as the author of the letter. He claimed that he had been dismissed for making two protected disclosures – one to his line manager and the other to The Times.

The Employment Appeal Tribunal upheld the Tribunal's finding that the complaint to his line manager was not "disclosure of information" and therefore could not amount to a protected disclosure. Mr Goode had expressed an opinion – that he was "disgusted" with the proposals.

As a result the letter to The Times could not be a protected disclosure either as the legislation requires the information disclosed to another party to be substantially the same as that disclosed to the employer. Logically if the initial act is not a protected disclosure the second could not be either.

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In any event, said the Tribunal, as there was no contractual entitlement to the redundancy payment any “disclosure” did not show that there was likely to be a failure by the Respondent to comply with a legal obligation.

This case suggests that if it looks like a disclosure, smells like a disclosure then it still might not be a disclosure.

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to jayne.phillips@morrishsolicitors.com

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