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Expired Disciplinary Warnings

(Airbus UK Limited v Mr MG Webb)

The Court of Appeal has held that an employer may take expired disciplinary warnings into account when deciding to dismiss an employee. The relevance of Mr Webb's previous misconduct, for which he had received a time-limited final written warning, which had expired by the date of his subsequent dismissal, was disputed. The issue was raised as to whether Airbus UK should have ignored Mr Webb's previous misconduct as a result of the expiration of his final written warning.

Mr Webb, accused of gross misconduct for the misuse of Airbus premises and company time, had been given a final written warning in July 2004, which was stated to last for 12 months. He was caught watching TV during a night-shift along with other colleagues and was dismissed. His colleagues who did not have a previous final warning were not dismissed.

The Court of Appeal, overturning both the Tribunal and the Employment Appeal Tribunal decisions held the dismissal of Mr Webb to be fair. It concluded that the reason for dismissal was clearly illustrated by Airbus to be Mr Webb's later misconduct and not the expired final warning he had received in relation to his previous misconduct. The reliance upon an expired warning was a factor in deciding whether the employer had acted reasonably and could lead, in some circumstances, to the dismissal being unfair, but it does not inevitably mean that it will be considered as unfair. It was made clear that employers cannot now automatically expect to be able to rely on expired warnings. It is an exception, not the rule. We strongly advise that advice is taken in each particular set of circumstances.

Compulsory retirement age for judge is unjustified age discrimination

(Hampton v Lord Chancellor)

A Recorder (the first rung on the judicial ladder), has won his age discrimination claim against the Lord Chancellor. Mr Hampton was forcibly retired from his position in March 2007 because he had attained the age of 65. Unlike employees, no age discrimination retirement exemption applies to office holders, so the compulsory retirement had to be objectively justified.

The argument put forward in order to justify the retirement of Mr Hampton was that it was a proportionate means of achieving a legitimate aim. The Government argued that the 65 retirement age was needed to achieve a reasonable level of new appointments and a new flow of candidates for the judiciary. This was accepted as a legitimate aim. However the Tribunal held that this was not a proportionate means of achieving that aim because there were other less discriminatory methods that could be used instead.

The Tribunal noted that many new vacancies were created every year by Recorders becoming Judges and therefore the "new blood" argument was undermined. Further the need to provide experience to younger Recorders could be remedied by adjusting the listing arrangements for cases, therefore the retirement could not be justified.

We reported in the last edition of Network on *Seldon v Clarkson Wright & Jakes*, another first instance decision in which the tribunal found that that the compulsory retirement of partners in that particular law firm was a legitimate aim. The Tribunal took into account the fact that Mr Seldon had never asked for the policy to be reviewed. Both cases highlight the fact that every case will turn on its own merits.

Discrimination by association

(Coleman v Attridge)

In 2006 the South London Employment Tribunal referred to the European Court of Justice, the question as to whether the EC Equal Treatment Framework Directive protects those employees who are associated with the disabled, such as carers, as well as disabled employees.

This case was brought by Sharon Coleman who worked as a legal secretary from 2001, at Attridge Law, a firm of solicitors in London. In 2002 she gave birth to a son who is disabled, for whom she is the primary carer. She sought voluntary redundancy in March 2005 and in August that year she brought a claim for constructive dismissal and disability discrimination against her former employers, arguing that they treated her less favourably than other employees with non-disabled children and subjected her to hostile behaviour that made for an unbearable working environment.

As a result of the treatment she received she sought to rely upon the Disability Discrimination Act 1995 and the Council Directive 2000/78/EC of 27 November 2000 ("the Directive") which establishes a framework for equal treatment in employment and occupation. The argument she put forward was that the Directive aims to prohibit discrimination not only against disabled people themselves, but also against those people who are victims of discrimination because they are associated with a disabled person. Attridge Law argued that the Act only protects disabled people themselves and that the Directive is not intended to cover discrimination by association.

The Advocate General delivered his opinion on the question in January 2008 (which tends to be followed by the ECJ). He concluded that the Directive protected not only disabled employees from direct discrimination/harassment but also those employees who are associated with the disabled, such as carers.

Although the reference to the ECJ was limited to the disabled, the Advocate General indicated that the same principle will apply to the other prohibited grounds listed in the Directive, namely religion or belief, disability, age or sexual orientation. The Disability Discrimination Act 1995 does not expressly prohibit discrimination by association. The Government may need to change the legislation to bring it in line with the Directive.

If you have any questions about these or other employment issues please call Heather Cowley on 01582 731161.