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Reasonable adjustments: identifying the detriment during case management

In *Tucker v Partnership in Care Ltd* the EAT upheld a tribunal's decision that a "freestanding" claim for detriment arising out of a failure to make reasonable adjustments to the claimant's shift patterns under section 4A of the Disability Discrimination Act 1995 (DDA) had not been properly before it at the hearing. She had raised this issue in her ET1, along with claims that her dismissal was an act of disability-related discrimination.

The tribunal identified the live issues at a pre-hearing review (PHR), which included reasonable adjustments in the context of her claim relating to dismissal, albeit not as a freestanding claim relating to any other detriment.

In considering the claimant's appeal against the dismissal of her DDA claims, the EAT commented that a "freestanding" reasonable adjustments claim requires there to be some detriment, and none had been identified at the PHR other than her dismissal. Since the tribunal found that the dismissal itself had nothing to do with disability or failure to make adjustments, there was no further live issue to consider.

The case illustrates that, regardless of what is put in the ET1, it is essential that the basis of the claim is properly identified at any case management discussion or PHR. If the tribunal issues a list of live issues that is incomplete or ambiguous, the claimant must raise the matter as soon as possible.

Previous incident for which no formal warning given can be taken into account when deciding whether to dismiss

In *London Borough of Brent v Fuller* UKEAT/0453/09 the EAT held that, when deciding whether to dismiss for

gross misconduct, an employer was entitled to take into account a previous similar incident for which no formal warning had been given.

Mrs Fuller was an administrator in a school for children with social and emotional difficulties. In May 2007 she intervened when teaching staff were restraining a difficult child and was told straight away by the Head Teacher not to interfere in matters of discipline or behavioural restraint. No further formal discussion or disciplinary action about the incident took place. In October 2007 a similar but more serious incident occurred. Mrs Fuller again intervened, resulting in her dismissal for gross misconduct, including "repeated and inappropriate intervention into behaviour management issues" and "failure to follow reasonable management instructions". In reaching its decision to dismiss, the school took into account that, because of what had been said to her at the incident in May, Mrs Fuller knew that she was not to interfere when the October incident occurred. An employment tribunal disagreed, holding that the May incident had been "built up to more than it was" and that the "one-off incident" in October did not merit dismissal. It held the dismissal was unfair.

The EAT disagreed, overturning the tribunal's decision. The first incident was part of the relevant background to the later incident for which the employee was dismissed. It referred to the Court of Appeal's decision in *Airbus v Webb* [2008] IRLR 309 that all relevant circumstances to an incident should be taken into account when considering whether to dismiss. The tribunal had incorrectly substituted its own view, rather than deciding what would have been within the band of reasonable responses for an employer to do. The EAT substituted a finding that the dismissal was not unfair.



Employment Law under New Coalition Government

We are in the strange position of having a new government, but not yet being clear what its policies are in a number of areas. While the coalition agreement has now been published, there is still uncertainty in many areas as it does not provide the level of detail likely to be of interest to an employment lawyer.

We have therefore pulled together the information in the coalition agreement, and the key policy statements and pledges that the Conservatives and Liberal Democrats made prior to the election, and added any further information that is available. For further information on all three parties' policies

Work and families

Before the general election, both the Conservatives and Liberal Democrats emphasised the importance of family friendly policies. Indeed, the Conservatives stated that they would make Britain the most family-friendly country in Europe.

Shared leave

The Liberal Democrats stated that they would allow parents to share maternity and paternity leave between them (although mothers would have to take the two weeks following the birth) and seek to extend the period of shared parental leave for up to 18 months "when resources and economic circumstances allow" (pages 49 and 50, Liberal Democrat Manifesto and Lynne Featherstone, ELA Briefing, 1 April 2010).

The Conservatives did not go as far as this, stating that they would introduce a new system of flexible parental leave (page 42, Conservative Manifesto), but that only mothers could take the first 14 weeks after the birth (The Conservative Party, Policy: Women and Fawcett Society, Conservatives on Work and Family). It therefore seems clear that the new government is likely to enable parents to share their rights to leave in the year after the birth, but it is not clear how far this will go.

Flexible working

Prior to the election, both members of the coalition also stated that they planned to extend the right to request flexible working: the Liberal Democrats stated that they would extend it to all employees (page 50, Liberal Democrat Manifesto), while the Conservatives planned to

extend it to only those with children under 18 initially, and then those in the public sector (possibly in stages) and, in the longer term and after full consultation with business, to all employees (page 42, Conservative Manifesto). Again, this indicates that some form of extension of this right is likely to take place.

Ante-natal appointments

In addition, the Liberal Democrats stated in their manifesto that they would give fathers the right to time off for ante-natal appointments (page 49, Liberal Democrat Manifesto).

Equality

Equality Act

The key issue for employment lawyers over the next few months is likely to be implementation of the Equality Act. While the Liberal Democrats broadly welcomed the Act, they would have liked the Government to have done more.

The Conservatives, meanwhile, have previously indicated that they would review the way that the Equality Act 2010 is brought into effect and possibly make some changes to the Act itself. In the course of the Commons' debate on the Lords' amendments to the Bill, which took place on 6 April 2010, Mark Harper MP reiterated the Conservative party's support for the Bill. He stated, however, that if the Conservatives form the next government they will not bring into force the public sector socio-economic duty, the "mistaken" provisions designed to tackle equal pay (presumably the provisions on gender pay reports) and new rules on positive action (HC Hansard debates, 6 April 2010).

In addition, they have suggested that they would introduce a "reasonableness" test for the material factor defence in equal pay claims (WorkingMums.co.uk, Theresa May answers working mums' questions).

Equal pay audits

However, both parties have suggested that they would impose equal pay audits on some employers: the Conservatives would impose them on those found to have discriminated on the basis of gender



(page 16, Conservative Manifesto), while the Liberal Democrats would impose them on all employers with over 100 employees (page 30, Liberal Democrat Manifesto). They would require employers to compare the pay of those doing equal work, identify any pay gaps and establish plans to eliminate any gaps that cannot be satisfactorily explained (Lynne Featherstone, ELA Briefing, 1 April 2010).

Other equality issues

In addition, the Conservatives have stated that they would:

- Require the long list for all executive and non-executive directorship appointments to include 50% female candidates and all non-executive director positions to be advertised (page 4, A contract for equalities).
- Prohibit clauses in employment contracts that prevent employees speaking to colleagues about their salary (page 4, A contract for equalities).

The Liberal Democrats, meanwhile, have stated that they would:

- Introduce "name-blind" application forms, initially for those employers with over 100 employees (page 30, Liberal Democrat Manifesto).
- End "unfair discrimination on grounds of faith" when faith-based schools recruit staff, except for those principally responsible for optional religious instruction (page 37, Liberal Democrat Manifesto).

National minimum wage

Both the Conservatives and Liberal Democrats have stated that they want to retain the national minimum wage, but the Liberal Democrats proposed having a single national minimum wage for all workers over 16 except for those on apprenticeships (Liberal Democrats, Free to be Young and page 16, Conservative Manifesto). It is not yet clear if the new coalition government will go as far as this.

Remuneration in the financial sector

The coalition agreement states that "We agree to bring forward detailed proposals for robust action to tackle unacceptable bonuses in the financial services sector; in developing these proposals, we will ensure they are effective in reducing risk".

The lack of detail in this statement is supplemented by the parties' statements prior to the election:

- The Conservatives stated that they would give the Bank of England the power to crack down on "risky bonus arrangements" (page 29, Conservative Manifesto). They plan to transfer responsibility for bank regulation from the FSA to the Bank of England. It is not clear if the Bank's powers would exceed those of the FSA.
- The Liberal Democrats stated that they would ensure "that the bonus system can never again encourage banks to behave in a way that puts the financial system at risk or offers rewards for failure" (page 22, Liberal Democrat Manifesto). Previously they have suggested that they would limit cash bonuses to £2,500 annually (with any bonuses in excess of this figure to be paid in shares which could not be sold for five years), prohibit board directors from receiving any bonuses, prevent loss-making banks from paying bonuses, require publication of the names of those bank employees earning more than the Prime Minister (currently £197,689 a year) and fine directors of banks if their institution breaks the industry's code of practice (BBC News, Lib Dems urge £2,500 bank bonuses cap).

Public sector

Pay

One of the greatest challenges faced by the new coalition government will be the need to reduce public spending, and both parties in the coalition addressed the issue of public sector pay in their manifestos prior to the election.

The Conservatives stated that they would freeze pay for public sector workers (excluding the million lowest paid workers) for one year in 2011, publish



the salaries and expenses of senior public sector officials, require anyone paid more than the Prime Minister in the public sector to have their salary signed off by the Treasury and cut ministers' pay by 5%, followed by a five year pay freeze (pages 8 and 69, Conservative Manifesto). David Cameron has previously suggested that he would establish a fair pay commission to ensure that senior managers in the public sector do not earn more than 20 times the lowest-paid person in their organisation (The Guardian, David Cameron: public sector chiefs will be forced to take pay cut).

The Liberal Democrats stated that they would cap pay rises in the public sector at £400, initially for two years (page 16, Liberal Democrat Manifesto), scrap civil service bonuses and limit the pay and bonuses of top NHS managers so that none are paid more than the Prime Minister (pages 41 and 102, Liberal Democrat Manifesto).

Whistleblowing

There are indications that the coalition government will address the issue of whistleblowing in the public sector. The Conservatives have stated that they would ensure that NHS staff are protected if they raise concerns about patient safety (page 46, Conservative Manifesto). They have indicated that they would give NHS staff the contractual right to report failings anonymously to the health regulator, which would protect them from bullying and disciplinary action and put the onus on the regulator to investigate (The Independent, NHS targets and secrecy are hurting patients). The Liberal Democrats, meanwhile, have stated that they would restore the public interest defence for civil service whistleblowers (Liberal Democrats, Nick Clegg calls for whistleblower protection to be restored).

Cooperatives

Finally, the Conservatives stated prior to the election that they would give public sector workers the right to form employee-owned cooperatives to take over the services they deliver (page 27, Conservative Manifesto).

Default retirement age

The coalition agreement states that the new government will phase out the default retirement age.

Prior to the election, the Conservatives stated that they would look at how to abolish the default retirement age

(DRA) (page 16, Conservative Manifesto). However, the Liberal Democrats went further, stating that they would scrap the DRA (page 52, Liberal Democrat Manifesto). While there is cross-party agreement that the current DRA should be abandoned, it is not yet clear what approach the new coalition government will adopt.

Europe

The coalition agreement states that the coalition parties agree that there should be no further transfer of sovereignty or powers over the course of the next Parliament and that they will work, in particular, to limit the application of the Working Time Directive in the UK. They also agree that the European Communities Act 1972 will be amended so that any proposed future Treaty that transferred areas of power, or competences, would be subject to a referendum and will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.

Both the parties in the coalition stated, before the election, that they would end the so-called "gold-plating" of European directives. The Conservatives provided more details, specifically identifying the Part-time Work Directive, the Fixed-term Work Directive, the Information on Employment Conditions Directive (to exclude casual workers) and the Agency Workers Directive as possible targets (page 25, Liberal Democrat Manifesto, page 114, Conservative Manifesto and Lord Hunt, ELA Briefing, 1 April 2010). The Conservatives also stated that they would negotiate with the EU with the aim of returning control of employment legislation to the UK, introducing a UK Sovereignty Bill and requiring an act of Parliament or referendum before any expansion of EU powers (page 114, Conservative Manifesto and Lord Hunt, ELA Briefing, 1 April 2010). It has been reported that the new government's programme will include a pledge to have a referendum on any further transfer of powers to the EU (BBC News, David Cameron's coalition government sets to work, 12 May 2010).

Human rights

This is an area where there is a clear divergence in the two parties' views. The Conservatives have stated that they would replace the Human Rights



Act 1998 with a UK Bill of Rights (page 79, Conservative Manifesto), while the Liberal Democrats state that they intend to "protect" the Human Rights Act (page 94, Liberal Democrat Manifesto).

Immigration

The coalition agreement states that "there should be an annual limit on the number of non-EU economic migrants admitted into the UK to live and work. We will consider jointly the mechanism for implementing the limit. We will end the detention of children for immigration purposes". This reflects the Conservatives manifesto, which stated that they would set an annual limit on the number of non-EU economic migrants coming to the UK to work, only allowing entry to those who will bring the most value to the economy and strengthening the student visa system (page 21, Conservative Manifesto). The Liberal Democrats, meanwhile, stated that they would introduce a regional points-based system to ensure that migrants can work only where they are needed, enforcing the immigration system through rigorous checks on businesses and a crackdown on rogue employers who profit from illegal labour and allowing asylum seekers to work (pages 75 and 76, Liberal Democrat Manifesto).

Deregulation and reducing red tape

Prior to the election, the Conservatives stated that they would introduce a "one-in, one-out" rule for new regulations, "regulatory budgets" and sunset clauses to give businesses more freedom and greater flexibility (page 20, Conservative Manifesto). The Liberal Democrats appear to have a similar approach. They have previously stated that they would consult with businesses to identify regulations for repeal, reduction or simplification, reduce the burden of "unnecessary red tape" by assessing the cost and effectiveness of regulations before and after they are introduced, use "sunset clauses" and work towards the principle of "one-in, one out" for new rules (page 25, Liberal Democrat Manifesto).

TUPE

The Conservatives stated prior to the election that they would rein in the effect of the provisions in TUPE relating to service provision changes where they go beyond what is required by the Acquired Rights Directive (Lord Hunt, ELA Briefing, 1 April 2010). The Liberal Democrats have said nothing on this issue.

Employment tribunals

The Conservatives have stated that they will consult on proposed changes to the employment tribunal system to ensure the system offers "fast, cheap and accessible justice" that it is fair to both sides (The Conservative Party, Cutting the burden of red tape on business). They have suggested that this could include raising the limit for deposits and/or cost awards to discourage weak or vexatious claims, reviewing the tribunal rules to ensure a more balanced and consistent approach across tribunals, requiring the president of the employment tribunals to make practice directions on the management of cases to promote greater consistency, harmonising the deadlines and grounds for extending time to bring a claim and requiring mediation in some types of claim (for example, discrimination) (Lord Hunt, ELA Briefing, 1 April 2010).

Agency workers

The Conservatives stated prior to the election that they would review the Agency Workers Regulations, in particular the proposed 12-week qualifying period (The Blue Blog, Another piece of rushed Government legislation and Personnel today, Agency workers regulations could be reviewed if Conservatives win election). On 15 March 2010, David Cameron put forward an Early Day Motion proposing that the Regulations be revoked (UK Parliament, EDM 1087).

Redundancy

Prior to the election, the Conservatives stated that they would give employers incentives to find alternative, suitable employment for potentially redundant workers and imposing a greater obligation on employees at risk of redundancy to seek redeployment within their existing employer (Lord Hunt, ELA Briefing, 1 April 2010).

Industrial relations

The Conservatives stated in their manifesto that they would be "prepared to build" if necessary on the last Conservative government's industrial relations reforms (page 20, Conservative Manifesto).

Remuneration

The Liberal Democrat stated in their manifesto that



they would require public companies to declare any remuneration of £200,000 a year or more (page 30, Liberal Democrat Manifesto).

Criminal records and information

Prior to the election, the Liberal Democrats stated that they would reform the process of criminal record checking so that volunteers need have only one record that is portable, rather than multiple checks for each activity (page 85, Liberal Democrat Manifesto). The Conservatives stated that they would strengthen the powers of the Information Commissioner (page 79), review the criminal records and "vetting and barring" regime and scale it back (page 80, Conservative Manifesto).

Contacts

For further information, please contact your usual Leeds Day contact or

Andrew Roberts
Partner
01480 464600
Andrew.roberts@leedsday.co.uk

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