

The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 9: Next's equal pay case, predictable terms and the right to disconnect

Sally

Hello and welcome! Join us, me, Sally Hulston and my friend and colleague, Lucy, for your coffee break. Each month we talk you through the latest developments and practical takeaways that you need to know for the month ahead. Let's see what we've got in store for you today.

Lucy

Yeah, thanks Sally! We're back after a month's summer break, so I hope everyone's feeling refreshed. Did you manage a good holiday, Sal?

Sally

My goodness, well, once we got through the GCSE palaver, yes, I did manage to have a good break. I know you can relate to that too, Lucy.

Lucy

Absolutely, I had a summer punctuated by GCSE results too. But that summer is well and truly behind us, and we thought we'd start this episode with a quick recap of what's going on and also what we've got coming up before we talk through our case of the month.

Sally

It's going to be a busy time, isn't it, for us employment lawyers? There's lots of change ahead and I think we're all eagerly awaiting the Employment Rights Bill. Hopefully we'll have that in time for the next episode.

Anyway, I'll start us off with the news that Labour won't be implementing the Predictable Terms and Conditions Act after all. If you remember, this was supposed to come into force this month and ACAS had even produced a draft Code of Practice. That Act would give workers the right to request a predictable working pattern if any part of their work pattern lacked predictability. So the emphasis there is on the right to request, so the employer still could have grounds to refuse it.

Lucy

Yeah, that's right. So, any work you've done already isn't going to be wasted because as Sally says, we're likely to learn more about Labour's proposals to enable workers to have a contract that reflects the number of hours they regularly work, possibly even in the Employment Rights Bill. And repeating what we've both been saying, that goes further than the right to request - that is a right to have such a contract.

Sally

But as is always the case, we still need to wait for the details on exactly what that might look like in practice, of course.

Lucy

Yeah, and talking of waiting for details, we do now have a few more hints about what the new right to disconnect might look like. Apparently (as lots of people have suspected) it's likely to be in the form of a code of practice rather than a stand-alone cause of action. So, what does that mean? Essentially, it means that an employee won't be able to bring a claim for breaching their right to disconnect, rather they'd have to bring a connected claim. So, for example, a constructive dismissal claim referencing working exceptionally long

hours and then they'd add on to that the alleged failure to follow the code of practice, meaning that if they win, the tribunal could then uplift an award of compensation.

Sally

And I'm not really sure what's going to constitute a connected claim for that uplift to apply. Well, we'll have to wait for the detail again on that one.

So, I think the only other thing that I wanted to remind people about is the new duty to prevent sexual harassment claims, and that comes into force on the 26th of October, so I hope you've all got your risk assessments and training ready to go. As you would expect, we've got another [podcast on exactly what you need to be doing to prepare](#), which maybe I'll link that in the transcript so you can have a look if you want.

Yes, and also, I nearly forgot the Allocation of Tips Act, that's coming in, isn't it, and the accompanying Code (but I'm not sure how many people that will affect in practice). If it affects you, that comes in on 1 of October.

Lucy

Yeah, thanks, Sally. Let's move on to our case of the month, which is of course, the equal pay case against Next. Like all equal pay cases, it's been going on for a long time, with six years and counting - and it began with mainly female store-based workers arguing that their work as retail consultants was of equal value to warehouse operatives that were mostly male and they were successful in showing those two jobs were of equal value in an earlier ET decision. And so, they've now been successful in arguing that a number of differences in their pay couldn't be justified.

Sally

Yes, Lucy, that's right. But before we get too carried away talking about the possible £30 million in compensation, it is really important to centre on the fact - really the most important fact here maybe - that it's only an employment tribunal decision. And so, this decision won't be binding in other cases which is also important to remember as there are a number of similar equal pay cases being brought against other retailers. Next have also said they're going to appeal this decision of course, so it will be interesting to see what a higher court will find.

Lucy

Yeah, and that is definitely right because there are absolutely some things that would be helpful to have an EAT decision on. But at tribunal level, they held that there was indirect discrimination and there was insufficient justification for it. So Next had argued that the reasons behind the pay differences were largely market forces, you know, the need to recruit, retain people and the tribunal accepted that. But the problem was that retail workers were about 77% female and warehouse workers were about 53% male and from a statistical perspective, the tribunal thought that those percentages were enough to establish a disadvantage to women. And what that meant is that Next then had to go on and get over the additional hurdle of showing that there wasn't indirect discrimination.

Sally

And the tribunal they didn't accept, did they, that Next had a valid justification for paying the retail workers less because if you look at the detail, even if they needed to boost pay in the distribution warehouse in order to get people to do that work, well they could have bumped up pay for the retail workers to match it - given that those retail workers were doing equally valuable work - the reason they didn't do that was essentially based on cost saving and cost saving alone.

Lucy

Yeah, I mean, that's exactly it, Next hadn't been able to answer why, if they were profitable, they just hadn't paid the retail workers more. Although budget considerations, needing to balance the book, all of those

things can be part of a defence for a discrimination claim, if a tribunal characterises that your aim is just about saving money, then that can't be used to justify an equal pay claim because it isn't a legitimate aim.

Sally

Exactly, and the tribunal was so clearly focused on that point that, if you allow employers to rely on market rate as a justification for pay differentials in a market where some roles are dominated by women and others are dominated by men then this may be perpetuating historic pay discrimination and views about the value of men's and women's work.

Lucy

So I guess the question is, what should people be doing about this now? And I think probably the answer is nothing yet. As you said earlier, it's only an ET decision. It's not clear if it's going to be upheld on appeal and I think, importantly, lots of businesses are facing similar challenges but we've seen quite significant increases in national living wage recently and those have been eroding some of the differentials that have been under scrutiny, and I think it's likely that national living wage will increase again in April.

Sally

Yeah, but it's spotlighted the fact, hasn't it, that simply paying the going rates for the work - which quite frankly would be the starting point for most businesses - can that be legally risky? Well, yes, if it's got a disparate impact as between men and women doing work which a tribunal would rule is legally equal or level with each other.

Lucy

Yeah, I mean, that's definitely right. I don't think that the market rate is necessarily completely dead in the water as a potential justification, even if this decision is upheld. I think a lot is going to depend on whether there's that underlying gender impact, so whether you have to go on to justify indirect discrimination. I also think there's always going to be cases where you do need to pay a premium to hire somebody because of "market forces", so, you know, that's the only person that's available in the market at the moment, you've got a targeted approach - that's obviously going to be much more easily defended.

I also think we'll see a movement to a much more focused "costs plus" type argument where employers are really trying to avoid saying it's just about trying to save costs. So, you know, if we stay within the retail sector, I think we'll see this shift in emphasis towards saying, well, we need to ensure that it's sustainable to retain a physical retail presence, the alternative would just be moving everything online. You know, we'll see retailers say this isn't just about cost saving, it's about whether each of our stores or you know possibly even our entire physical retail business, whether that is financially stable - that's more than just about saving costs.

Sally

And just before we finish on this, I did want to touch on the fact that Next, well, they were successful in some parts of the claim. The bits they were successful in was justifying some particular bonus and premium payments that they'd made. And that was where they were able to show that the payments were specifically connected to the very real needs and challenges of warehouse work. So, for instance, productivity bonuses were justified because they were obviously very important for warehouse work, whereas productivity can't easily be measured in the same way for retail work.

Lucy

Yeah, and they were also successful in a case where they paid extra payments for a period of time where they could show there was a very real risk that they were going to lose people, lose workers to a competitor. And so again, that shows if you can show that a pay differential is tied to a clear business objective - one that's not just about costs - probably one that's limited in time - then again, you're going to be

much more likely to be able to justify that. And I wonder if we'll end up in a place where we see sort of equalisation of basic pay, but then specific incentive arrangements for different types of roles in the way that you described about productivity in the warehouse.

Sally

Yeah, that's a good point, I think that maybe is where we will end up.

Well, that's gone too quickly, far too fast but thanks, Lucy, I think that's all we've got time for today. A reminder that our next IHELC meeting is on the 17th of October, so do come along and we'll see you there.

If you're not already part of our In-House Employment Lawyer's Community, but would like to be, well, please get in touch with us. We'd love to know about your thoughts of today's episode too, so please leave us a review whenever you get the chance. Thanks again, have a good day.
