Commercial
Case Law Update
Rosling King LLP

The EAT in Hall v Xerox UK Ltd UKEAT/0061/14/JOJ recently found that an employer had not discriminated against a fixed term employee where the benefit of a PHI Policy was unavailable to him.

The Facts

Xerox UK Ltd ("the Employer") offered its fixed term and permanent employees the benefit of an income replacement policy through its insurer, Unum. The protection was made available to all employees who had been off work for over 26 weeks as a result of a qualifying injury. It was, however, offered by the Employer subject to the terms of the policy between it and Unum.

At the material time, Mr D Hall was employed by the Employer on a fixed term contract which was due to expire on 20 July 2012. With three months left until the expiry of his contract, Mr Hall suffered a hernia which would have put him out of work for the qualifying 26 week period. Notwithstanding that Mr Hall's contract was extended by the Employer for a further year, Unum refused Mr Hall's claim for income protection, relying on a provision of the protection policy which meant only the unexpired period of a fixed term employee's contract as at the time of injury could be taken into account.

Mr Hall claimed that the refusal of his claim for income replacement amounted to discrimination under Regulation 3 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the "2002 Regulations").

Employment Tribunal Decision (the "Tribunal")

The Tribunal dismissed Mr Hall's claim, finding that whilst there was less favourable treatment than would have been the case if Mr Hall had been employed by the Employer on a permanent basis, this did not amount to discrimination under the 2002 Regulations. The Tribunal found that the decision to deny Mr Hall protection was made by Unum, not the Employer and that the Employer was not the agent of Unum but "merely the messenger".

Notably, the above decision was made by the employment Judge using his casting vote. It was the lay member's opinion that the Employer had discriminated against Mr Hall owing to its failure to negotiate non-discriminatory terms with Unum when the policy was effected.

Mr Hall appealed the decision.

The Employment Appeal Decision (the "EAT")

The EAT dismissed the appeal and agreed that Mr Hall had not been discriminated against. The EAT noted that the insurance contract between the Employer and Unum "had nothing to do with agency".

Comment and Advice

Material to the EAT's considerations was that there would have been no suitable alternative policy available to the Employer at the time. The decision might be different if the employer could have obtained a policy which would have covered him.

Also of note is the EAT's rejection of the lay member's opinion that the Employer should have negotiated non-discriminatory terms with Unum at the outset. The EAT found it illogical to run such an argument in circumstances where the Employer had "agreed terms in the form in which they were before the event".

Employers should ensure that any entitlement dependent on a third party, such as an insurer, is stated in employment contracts to be subject to the rules of the third party provider.

The decision of the EAT will be welcomed by employers who offer their employees benefits based on underlying insurance policies. The above suggests that an employer is unlikely to be treated as the agent of the insurer in the event that policy wording has a potentially discriminatory effect, particularly in circumstances where there is no suitable alternative policy available to the employer.

For further information, please contact Jacqueline Kendal or the Partner with whom you usually deal.