solicitors Beers

Employment Law Bulletin

Welcome

July and August may not have delivered the perfect summer. But, by way of silver lining, we have had some significant employment law developments.

One of these is the publication of the Taylor Review of Modern Working Practices, addressing many of the issues that have been bubbling away in workplaces since new models of working emerged and established themselves. The report talks about an overriding ambition: 'All work in the UK economy should be fair and decent with realistic scope for development and fulfillment.'

Among its recommendations is the re-labeling of some workers as 'dependent contractors', with a clearer distinction between that category and the self-employed. The report also talks about gig economy workers and the National Minimum Wage, holiday pay for atypical workers, statutory sick pay, and tax. We shall have to wait and see what comes of the proposals and whether any of our laws and practices will change as a consequence. Meanwhile, the full report is available here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

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Employee jailed for breaching injunction

OCS Group UK Ltd v Dadi and others

Mr Dadi had been accused of breaches of the employment relationship. His employer said that, prior to transferring to a competitor under TUPE he had sent confidential documents and information to his personal email account and had conspired with an employee of the new employer to breach Mr Dadi's duties to OCS.

Under the terms of an injunction that the employer obtained, Mr Dadi was not allowed to disclose or transmit certain confidential information. He was required to provide information about the confidential information he had disclosed to third parties. He had to preserve hard copy and electronic documents. And wasn't to tell anyone, other than his legal advisors, about the injunction Order and the possibilities of proceedings being commenced. The Order warned Mr Dadi that he could be imprisoned if he breached it.

But breach it he did. Describing himself as having panicked, he did various things including deleting a large number of emails, and telling some people about the Order. Although the High Court took account of his subsequent co-operation with his employer, and of his remorse (among other factors), the judge concluded that a prison sentence of six weeks for contempt of court was necessary.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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It would mark the Court's strong disapproval of his conduct and would act as a deterrent both in respect of his further compliance with court orders, and as a warning to others who might be tempted to flout orders as he had done.

Employees are not often imprisoned for matters stemming from their employment. But this case serves as a useful reminder of the seriousness of injunctions, and the advantage an employer can gain from using the injunction process.

Private interests covered by whistleblowing

Chesterton Global Ltd v Nurmohamed

Cast your minds back and you might recall our report of the Employment Appeal Tribunal (EAT) decision in this case.

Mr Nurmohamed had been dismissed from his job at Chestertons after having reported alleged commission-related irregularities in the accounts. Did he qualify for whistleblowing protection (which requires a person to reasonably believe that their disclosure is made in the public interest) when issues he had identified were only really of interest to a group of about 100 managers including himself?

The EAT had said yes, this was whistleblowing, and the Court of Appeal has now agreed. Something that is in an individual's private interests can also be in the public interest. Key to this is the employee's reasonable belief at the time that disclosure is in the public interest, relevant to which could be:

(a) the number of people in the group whose interests were served by the disclosures;

(b) the nature of interests affected and the extent to which they are affected by the wrongdoing disclosed;

(c) the nature of the wrongdoing disclosed (deliberate wrongdoing is more likely to be in the public interest than inadvertent wrongdoing affecting the same number of people); and

(d) the identity of the alleged wrongdoer; the larger and more prominent they are, the more likely their activities are to be in the public interest.

So, where a disclosure relates to a breach of a worker's employment contract, and where the interest in question appears to be personal, it may nevertheless (but won't always) be necessary to treat the disclosure as whistleblowing.

Fees no more

R (on the application of Unison) v Lord Chancellor

A four-year challenge to the introduction of tribunal fees has ended in victory for UNISON and, the union says, for employees everywhere.

As it stands, people will no longer have to pay to bring and pursue cases in the employment tribunal and Employment Appeal Tribunal. Those who have already paid stand to be refunded. This follows the ruling by the Supreme Court that the Government's introduction of fees in 2013 was unlawful.

What does this mean for employers? Quite possibly that you are now more likely to face a tribunal claim than you were when fees were payable (but that's not to say that every claim will be legitimate and will succeed). Something else to be aware of is the possibility that individuals who can show that they didn't bring a claim because of the fee requirement, or that they had a claim rejected because they hadn't paid the fee, may be given a second chance.

It's an evolving picture, and one that will become clearer in the months ahead.

Is voluntary overtime part of 'normal pay'?

Dudley Metropolitan Borough Council v Willetts and others

Holiday pay calculations continue to cause difficulties for employers, with uncertainty still existing over the question of which elements of workers' pay should and should not be taken into account.

In the case of Mr Willetts and some of his colleagues, an employment tribunal decided that overtime that was purely voluntary, as opposed to being a contractual right or duty, should be included in the holiday pay calculation because it formed part of 'normal remuneration'. That was notwithstanding the employer's argument that voluntary overtime lacked the necessary intrinsic link to the performance of the contractual tasks and so should be excluded.

The Employment Appeal Tribunal (EAT) upheld the tribunal's decision. Each case will depend on its facts, but the overriding point is that workers are entitled to be paid at least their 'normal or average remuneration', otherwise they might be deterred from taking leave. Overtime - whether compulsory, non-guaranteed, or voluntary - counts as remuneration. And to qualify as 'normal', the payment must have been paid over a sufficient period of time; items that are usually paid and are regular across time are more likely to count than unusual or exceptional payments.

The EAT went on to consider whether there has to be an intrinsic link between the payment and the performance of tasks required under the contract. It's not essential, the EAT said, but it can be a decisive factor. If such a link were needed, there was one in this case anyway: if there had been no employment contract, there would have been no voluntary overtime. And in working voluntary overtime, the workers were performing tasks required of them under their contracts.

Menopause at work

The Department for Education has published a report that looks at the effects of the menopause on working women.

Hot flushes, insomnia and fatigue are just some of the symptoms. But the report highlights that lower productivity, reduced job satisfaction and problems with time management are all possibly consequences. It says that women sometimes hide or manage their symptoms to avoid letting others at work know that they are having difficulties, and they may not ask for support.

And the work environment can, in some cases, exacerbate problems; heat or poor ventilation, formal meetings, and deadlines are cited as some of the potentially aggravating factors. Women also allude to a lack of sympathy from those around them at work, and even poor treatment because of gendered ageism.

So what can employers do? Recommendations include changing organisational cultures; compulsory equality and diversity training; specialist advice; tailored absence policies; flexible working patterns for mid-life women; and fairly low-cost environmental changes. Particular things that may help include providing:

- fans and good ventilation
- cold drinking water
- lighter, non-synthetic uniforms
- quiet rest areas
- access to natural light.

You'll find the full report here:
https://www.gov.uk/government/publications/menopause-transition-effects-on-womens-economic-participation

When is treatment unfavourable?

Williams v The Trustees of Swansea University Pension & Assurance Scheme

Unfavourable treatment is an essential element of a disability discrimination claim. The Williams case considered what this actually means.

Mr Williams had a number of health problems. After working full-time for the University for 10 years, the University implemented reasonable adjustments to working hours and he moved to part-time. A few years later, at the age of 38, he took ill-health retirement. He was entitled to a pension that was far more advantageous than that available to a non-disabled colleague. However, as part of the pension was based on final salary (and Mr Williams' final salary was a part-time, rather than full-time, one) it was less advantageous to him than a pension that would have been payable to a disabled colleague who had been struck down suddenly and had retired without first working part-time.

The tribunal held that Mr Williams had been subjected to unjustified unfavourable treatment. But the Employment Appeal Tribunal and Court of Appeal disagreed. Unfavourable treatment isn't the same as detriment. A person hasn't been treated unfavourably if the advantage they have received could have been greater.

There might be an appeal, so watch this space.

And Finally...

When is a mistake a minor mistake? Well, it seems that judicial opinion is divided.

In two Employment Appeal Tribunal (EAT) cases, two conflicting decisions were reached on what were very similar facts. In Giny v SNA Transport Ltd and Chard v Trowbridge Office Cleaning Services Ltd both employees sought to bring tribunal claims. They had, while unrepresented, given Acas the name of a director within their employer organisation rather than the company name as the respondent. This led to the Early Conciliation certificates being issued in the wrong names. And when lawyers later sought to bring the claims in the correct (company) names, the tribunals refused because the names didn't match those on the Acas certificates.

In Mr Giny's case, the EAT held that the tribunal was entitled to have rejected his claim. Although there was considerable sympathy for Mr Giny, it wasn't a minor mistake to confuse an individual and a company and his claim could not proceed.

But in Ms Chard's case, the EAT held that the misnaming was a minor error. No prejudice was caused to the other side, and it was in the interests of justice to allow Ms Chard to bring her claim.

So where does this leave arguments about mistakes in the paperwork? A little bit up in the air. Ultimately, it will be for tribunals to decide whether or not a claim should be allowed to proceed where there has been some sort of defect, however minor it might appear to be.

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