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Employment Law Bulletin

Welcome

Worker status and rights are rarely out of the press at the moment. The recent EU holiday pay case of King v Sash Window Workshop adds another dimension and could have massive implications if you hire individuals on a self-employed basis as consultants or contractors.

If the contractor later brings and wins an employment tribunal case which says that they are a 'worker', rather than being genuinely self-employed, they will get all of the rights that go along with being a worker. While these rights are not as extensive as employment rights, they do include the right to 5.6 weeks' paid holiday a year.

Mr King was a self-employed salesman who brought a claim for worker status and was successful. He had never asked to take holidays or been paid for them. However, the Court of Justice of the European Union has held that holiday pay accrued during the whole period that he worked for Sash Window Workshop. He was entitled to be paid for 13 years of holiday back-pay.

There are some questions which still need to be answered by the Court of Appeal, but this case may open up some businesses to the risk of large holiday pay claims from people they thought were self-employed - and going back much further than the two years we previously thought. This case also increases the stakes in the gig economy worker cases going through the courts at the moment.

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White lies – a false reason for dismissal

Many of us have told a white lie or two at some stage – a fib designed to spare someone's feelings. However, in the case of Rawlinson v Brightside Group Ltd the lie tied the employer in knots and eventually led to a successful constructive dismissal claim.

Mr Rawlinson was employed as Group Legal Counsel in an insurance broker business, Brightside. His employer decided to dismiss him because of concerns over poor performance, which it hadn't raised with him. Brightside decided to tell a white lie over the reason for his dismissal. This was partly to soften the blow and partly to encourage Mr Rawlinson to work his notice period so it had time to recruit a replacement and do an orderly handover. Brightside told Mr Rawlinson that a decision had been made to review its approach to its legal service and that it would use external lawyers more in future instead. He was given notice of his dismissal.

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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Mr Rawlinson thought that if there was going to be an outsourcing of legal work there would be a TUPE transfer - meaning that his employment would transfer to the new law firm. He asked his employer for the name of the new firm. This left Brightside in a tricky position as there was no new firm! Mr Rawlinson resigned because of the failure to inform and consult, as he saw it as a breach of contract. He did not work his notice period.

The EAT held that he had been constructively dismissed. An employer is under a duty to act in good faith and not to mislead its employees. It didn't matter that Mr Rawlinson had resigned in relation to something else. Brightside had wanted the relationship to continue during the notice period and so the intention behind the lie was not entirely selfless. While there was no obligation for Brightside to give the reason for dismissal, once it had chosen to do so, it needed to be truthful. The EAT did recognise that there might be less serious white lies which might not amount to a breach of trust and confidence, but this was not one of them. If you find yourself in a similar position, you may have to make a finely balanced judgment. If a handover is crucial then it could be tempting to tell a white lie. Ultimately the real reason for dismissal may come out in a future subject access request or tribunal proceedings anyway. But remember that the lie itself can have consequences that you didn't mean or foresee and like in this case it can make things worse.

Whistleblowing

A worker is protected from detriment or dismissal under UK whistleblowing laws if he or she discloses information in the reasonable belief that it is made in the public interest and that it shows certain types of wrongdoing have taken place, or will take place. In Parson v Airplus International the Employment Appeal Tribunal has held that a disclosure will not be protected if the worker does not believe it is made in the public interest.

Ms Parsons was a legal compliance officer who made various disclosures to her employer. She was later dismissed for being a 'cultural misfit' and argued that her dismissal was automatically unfair for whistleblowing. The employment tribunal and EAT both held that her disclosures were purely out of self-interest, rather than having been made in the public interest. It was Ms Parson's conduct which was the reason for her dismissal. Her employer was not concerned about the substance of her disclosures, but instead what she did afterwards. She didn't give clear rational reasons for her beliefs. She was irrationally fixated on her own personal liability. She was unable to listen or take on board what her colleagues had to say.

It is clear from previous cases however, that a disclosure can still be legally protected if it is partly made in self-interest, as long as the employee also had a reasonable belief that he or she was making it in the public interest as well.

Right to work documents

Employers need to stay on the right side of the immigration rules. A failure to carry out the right to work document checks on employees can result in a penalty of up to £20,000 per employee. There is a defence if you can show that you carried out certain document checks.

In Baker v Abellio London, a Jamaican bus driver with the right to live and work in the UK didn't produce all of the correct documents to his employer to show that he had the right to work. His employer suspended him without pay until he could provide his passport and visa. It lent him the money to get the correct documents and checked the position with the Home Office. In the end, he was dismissed for 'illegality.' Because the bus company didn't have copies of the passport and visa, it couldn't rely on any defence to a £20,000 fine and it didn't want to continue employing him. It mistakenly thought it was illegal to continue to employ him (it wasn't – it just carried a risk of a fine if there were no copies of documents on file).

The Employment Appeal Tribunal confirmed that there is no strict legal requirement on an employer to obtain those documents, although if it has them it has a defence to any later penalty if the employee is illegally working. So the employer had been wrong to believe that it was illegal to continue employing Mr Baker. However, the dismissal could still

be fair in these circumstances because of the risk of a fine, rather than because it was inherently illegal to employ the individual. The EAT sent the case back to the tribunal to consider whether dismissal for that reason was fair or not.

This case does not mean that you shouldn't carry out right to work checks or insist that your employees provide all of the relevant documents. The only way you can rely on the legal defence later, if you need to, is if you have conducted the full right to work document checks.

Investigations

Usually employers are worried about their investigations not being detailed enough. However, in the case of NHS 24 v Pillar the question was whether the investigation was too thorough!

Ms Pillar was a nurse practitioner who worked for the Scottish telephone and online helpline NHS 24. Her work involved taking telephone calls from members of the public and triaging them. She was dismissed following a failure to correctly triage a call – the patient then had a heart attack. Two previous similar incidents were included in the investigation report when they hadn't led to disciplinary action before. The tribunal decided that this made the dismissal unfair as it was an unreasonable investigation - it was too thorough. However, the Employment Appeal Tribunal disagreed.

The EAT held that unless it could be said that the earlier incidents should never have been a factor in the decision to dismiss (which wasn't being argued by Ms Pillar), there was no rational basis to exclude details of them from the investigation report. The dismissal was fair.

We think that as a general rule, it's always best to try and treat conduct consistently to avoid an unfair dismissal. However, an investigation cannot be too thorough. It is for the dismissing officer to decide how to treat the investigation report and to decide whether it would be fair to rely on it at all.

Weekly rest periods

All employers have to allow workers to have a 24-hour rest period every seven days under European Law. But what does that actually mean? Slightly strangely, the European Court has held that it can actually be given at any point in a 14-day period.

Mr Maio Marques da Rosa was a casino worker in Portugal who was made redundant. He worked on a rotating schedule which meant that sometimes he worked for seven days in a row. After he was dismissed, he claimed that his employer had not given him his weekly rest period of 24 hours every seven days. He argued that it should have been given at the latest after six consecutive working days.

The CJEU decided that there was no requirement for weekly rest to be provided after six consecutive days of work. It can be provided within each 7-day period and allows employers some flexibility in how to organise shifts. This means that in the UK, an employer could give a 48-hour rest period at the start of a 14-day period and at the end of the next period. This could involve the employee working for 24 days in a row as long as daily rest breaks, the maximum working week rules and any contractual requirements are met.

Criminal conviction for failure to give pension

All UK employers have to put workers meeting certain criteria into a workplace pension scheme and pay minimum employer pension contributions. This is called 'automatic enrolment' because the employer has to do it without any input from the worker.

If an employer willfully fails to comply with its duty to auto-enrol workers into a pension then it commits a criminal offence under the Pensions Act 2008. Where a director of a company consented or 'connived' to commit the offence, or it was because of the director's neglect, then that director is also personally guilty of the criminal offence.

The Pensions Regulator regulates workplace pension schemes in the UK. The Regulator investigated and found that 36 staff from a bus company, Stotts Tours (Oldham) should have been auto-enrolled into a pension. It found that the company should have been paying contributions since June 2015 into that scheme for them. The Regulator thought that the company deliberately failed to provide the pension and so it deserved to be criminally prosecuted. This has been the first prosecution of its kind since the auto-enrolment legislation was introduced.

The company and its managing director both pled guilty to 16 offences of willfully failing to offer a workplace pension at Brighton Magistrates' Court. The offence can result in an unlimited fine (and up to two years' imprisonment when the prosecution is brought in the Crown Court). Sentencing was deferred. The Regulator is also still chasing the company for civil fines of £14,400 for non-compliance.

The Regulator said "Automatic enrolment is not an option, it is the law. Employers should be in no doubt that if they willfully refuse to become compliant they could end up with a criminal record – and will still have to give their staff the pensions they are due." Employers have been warned!

And Finally...

Two US navy pilots were disciplined because they drew an enormous picture in the sky over Washington State of male genitalia using their aircraft. Their actions were described as "a condensed air trail resembling an obscene image to observers on the ground." It was reported in the Military Times that the US navy had said that their "sophomoric and immature antics of a sexual nature" had "no place in naval aviation today." The pilots were not dismissed by the US navy. However, in the UK sexual harassment and other such misconduct is more likely to result in dismissal, particularly given the press attention it has received lately.

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