Employment Law Bulletin – May 2013

Welcome

Some things in life are almost comforting in their monotony. Poor British weather, the UK's failure in the Eurovision Song Contest…. and the Government passing new employment laws.

Two major pieces of legislation have now been enacted, the *Growth and Infrastructure Act 2013* and the *Enterprise and Regulatory Reform Act 2013*, each of which have considerable impact on employers. The changes they introduce are expected to come into force at various intervals over the next twelve months. They are:-

- introducing compulsory conciliation via ACAS before an employee can start an employment tribunal claim. An employer cannot be forced to participate in the conciliation, but unless the employee has contacted ACAS and asked to conciliate, they won't be allowed to bring a claim;

- introducing fees to start an employment tribunal claim. For all but the smallest claims, it will cost £250 to start the claim, with a further £950 payable by the employee when a hearing date is set. Beware – any employer who loses will probably be ordered to refund those fees as well as pay compensation;

- penalties of up to £5,000 for employers who have breached employment rights, where there are aggravating factors (halved if paid within 21 days);

- creating a new category of worker, known as 'employee shareholders'. In exchange for giving at least £2,000-worth of shares to the employee, a company can require prospective employees to give up some employment rights (including the right to claim most types of unfair dismissal, and the right to a redundancy payment). With various limitations, existing employees can also be asked to become employee shareholders;

- bringing down the cap on the compensatory award for unfair dismissal – either limiting such awards to one year's salary for the employee, or to the national median salary (about £28,000);

- introducing confidential pre-termination discussions, enabling employers and employees to have frank discussions about ending employment without fear of being held to account by a tribunal; and

- various changes to whistleblowing legislation, in general making it harder for employees to claim, but removing the rule that the whistleblower must make their disclosure in good faith.

We'll cover these in more detail in forthcoming bulletins, as and when they come into force.

Now for the monthly round-up:

Nice Work If You Can Get It
Hennigh Berg v Blackburn Rovers Football Club

Football players and company directors are notorious for having long notice periods. When the new manager of Blackburn Rovers accepted his new job, in November 2012, his contract said he would be employed until June 2015 – nearly three years. It also said that if he was dismissed earlier, he would be paid his salary until June 2015.

This being football, less than two months later, he was dismissed. He sued for the rest of his salary, a measly £2.25 million. Blackburn Rovers argued that he was not entitled to the salary as a fixed sum, and he had to give credit for anything else he earned between 2012 and 2015. The High Court said that the contract was plain – the club had agreed to pay any salary which would have fallen due, and Mr Berg was awarded £2.25m for about six weeks work.

The lesson? Even with more modest appointments, make sure your termination clauses are well drafted. It is rarely advantageous (for the employer) to have long fixed term contracts; standard notice periods are almost always better. It is also worth noting that Mr Berg was <u>not</u> under a duty to mitigate his loss (so that for instance income from new work – he is now a pundit on Norwegian TV – is taken into account). Again, careful drafting could have reduced the exposure to the club dramatically.

Inferring Discrimination
Accept v Consiliul Naţional pentru Combaterea Discriminării

Another case, another football club. A prominent figure in Steaua football club in Romania said that he would see the club closed down before it accepted a gay football player on the team.

He didn't have any direct authority over recruitment or other matters relating to the club, but he was closely associated with its management. That, said the Court of Justice of the European Union (previously called the ECJ), was enough to give rise to a presumption that the club's refusal to appoint a gay player was because of his sexual orientation. The player was therefore guaranteed to win a discrimination claim unless

the club could prove a credible (and non-discriminatory) reason for not taking him on.

Remember that public statements made by senior people in your organisation, or those closely associated with it, can have far-reaching consequences. In this case, a throwaway comment by a manager meant that the club became vulnerable to potentially very expensive discrimination claims and, of course, unwanted publicity.

You Say Potato, I Say Discrimination
Durrani v London Borough of Ealing

Discrimination can mean different things. To a HR professional, or a lawyer, it normally means less favourable treatment on grounds of a protected characteristic. To an employee, it can be a catch-all phrase covering any kind of treatment they think is unfair. "You're discriminating against me", from a disaffected employee, might be a formal allegation of discrimination – but it might not be.

So when an employee sent in a grievance complaining of bullying and harassment, and mentioning 'discrimination' (which was later clarified as discrimination in the sense of being used as a scapegoat but not on grounds of race), this was not regarded by the Employment Appeal Tribunal as a proper allegation of discrimination within the equality laws. Therefore it could not form the basis of a victimisation claim when he was dismissed two weeks later.

Post-Employment Victimisation
Onu v Akwiwu

The Employment Appeal Tribunal (EAT) has decided that the Equality Act 2010 covers victimisation that happens after employment has ended. Except it had only just decided that the Equality Act 2010 *doesn't* cover victimisation that happens after employment has ended. Oh.

The EAT had held (in *Rowstock Ltd v Jessemy*), that employees were only protected from victimisation during the course of employment (and not after) on the entirely logical ground that that is exactly what the Equality Act says. Then along came Ms Onu's case, where it decided the opposite. With two conflicting EAT decisions, it looks as though the Court of Appeal will have to decide if this latest decision that post-employment victimisation is covered is the right approach.

Ms Onu was a migrant domestic worker who brought various tribunal claims against her employer. One of these was for race victimisation that she said had taken place a few months after her employment had ended (the employer was alleged to have telephoned

Ms Onu's sister making threats that stemmed from the tribunal claims Ms Onu had brought).

The EAT said it would be wrong if Ms Onu was not protected by the equality laws. But this conflicted with the *Rowstock* decision just two months earlier, where a different judge decided that the equality laws did *not* cover victimisation that took place after employment had ended. While we are waiting for a Court of Appeal decision, the best advice is of course not to victimise former employees!

SOSR and the ACAS Code
Lund v St Edmunds School

The ACAS Code of Practice on Disciplinary and Grievance Procedures applies to certain dismissals. It expressly applies for some (e.g. misconduct) and expressly doesn't apply to some others (e.g. redundancies).

It does not say expressly whether dismissals for "some other substantial reason" (one law of the five "fair" reasons set out in the Employment Rights Act 1996) is covered. This is important, because if an employer fails to comply with the ACAS Code, then compensation can be increased by up to 25%.

Mr Lund was dismissed after the school he worked in lost confidence in him. He'd had problems using computer equipment and was said to have alienated his colleagues and affected morale. A tribunal found that his dismissal was for "some other substantial reason", but it was procedurally unfair because Mr Lund hadn't been warned that he might be dismissed, nor had he had a chance to appeal. It was also substantively unfair because the school hadn't properly addressed the problems Mr Lund was having with the computer system.

Questions for the EAT were: did the ACAS Code apply to a "some other substantial reason" dismissal, and was the tribunal was right not to increase Mr Lund's compensation to reflect the school's breach of it? The answers were: yes, and no respectively.

Even though Mr Lund wasn't dismissed for conduct - which would clearly have required compliance with the Code - it was his conduct which had led to the school contemplating a "some other substantial reason" dismissal, and so the Code should have been followed. Because the school had failed to do this, Mr Lund's compensation should have been increased.

The lesson here is to follow the ACAS Code wherever possible, to be on the safe side.

Dismissal Sprung on Difficult Manager
JJ Food Service v Kefil

Mr Kefil was said to have an "over-authoritarian manner". Members of staff complained about his behaviour and he was eventually called to a disciplinary hearing and dismissed.

Mr Kefil won his unfair dismissal case, primarily because he hadn't been warned that he might be dismissed. He had received an informal warning but, crucially, he had not been told what might happen if things didn't improve. Coupled with the fact that Mr Kefil had not received any management training that, said the Employment Appeal Tribunal, justified the tribunal's finding of unfair dismissal.

The case is a reminder that all employees, whoever they are, have a right to know where they stand when it comes to disciplinary issues. It's no good assuming that a person can read between the lines, or even that they can see their own faults.

Meaning of "Course of Employment"
O'Brien v London Borough of Haringey

Ms O'Brien was a teacher employed by Haringey Council.

She went to Gambia on holiday and, while there, she visited a local school. When she returned, she found out about her own school's intention to connect with others around the world, and she suggested that she revisit the Gambian school during half term. Her headteacher agreed but said that Ms O'Brien would need to fund the trip herself.

During the second visit to Gambia, Ms O'Brien contracted an illness. She needed time off school and claimed that she was entitled to be paid during that sick leave. She relied on a clause in a collective agreement which said that where a teacher has come into contact with a contagious disease in the course of their employment, they are entitled to be paid during their absence.

Haringey argued that Ms O'Brien had not contracted the illness in the course of her employment. The tribunal agreed, dismissing her claim.

The Employment Appeal Tribunal allowed her appeal. It held that it didn't matter that Ms O'Brien had initiated the trip, or that this wasn't part of her normal duties. She was undertaking an activity connected with the school and which the school had approved. What she was doing in Gambia was so closely analogous to extra-curricular or voluntary

activities connected with the school (which counted as being in the course of her employment) that she was entitled to be paid during her absence.

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