HEWITSONS

Hewitsons Employment

LEGAL UPDATE

Absolute Client Focus

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What's new

Discretionary or Contractual Bonus?

The Employment Appeal Tribunal ('EAT') in *Bluestones Medical Recruitment Ltd v Swinnerton* held the terms of a contract claiming that the employee was entitled to a discretionary bonus could be varied by subsequent agreements.

Mr Swinnerton was employed by Bluestones in a number of jobs and was later promoted to General Manager. In his previous roles, his contract stated that any bonus was discretionary. Once he became General Manager, he was to receive a monthly bonus, based on the company's profits and was to become a shareholder. The bonus payments were made as loans which he would later repay from his dividends.

Prior to becoming a shareholder, Mr Swinnerton was suspended and dismissed. During his suspension, Bluestones stopped paying his bonuses, and Mr Swinneton brought a claim for unlawful deduction of wages. Bluestone argued that the bonus remained discretionary until the employee became a shareholding director.

The Employment Tribunal ('ET') held that the failure by the employer to pay Mr Swinnerton's bonus during the suspension was an unlawful deduction of wages because the method by which the sums were paid did not change his entitlement to the bonus. Bluestones appealed on the basis that the ET did not consider the fact that the discretionary nature of the employee's bonus entitlement had not been varied and that the payment would have been made as loan payments (in effect, not wages).

The EAT held that the ET had not adequately considered if any express agreement had varied the previous discretionary quality of the bonus. The ET also did not consider whether the payments should be classified as a loan or a bonus. The EAT concluded that the case should be remitted to a new tribunal.

Reasonable adjustment for each employee

The case of *Linsley v Revenue and Custom* reiterated that the main question in disability

discrimination claims for failure to make reasonable adjustment is whether the employer took all reasonable steps to avoid the particular disadvantage suffered by the employee.

Mrs Linsley had ulcerative colitis. The condition can manifest itself in an unpredictable, sudden and urgent need for a bowel movement and can be aggravated by stress. HMRC had a policy on the use of its car park with priority being given to employees requiring reasonable adjustments.

Mrs Linsley received a dedicated parking space near the toilet for many years of her employment. She was later promoted into a new role in a different site and she requested a dedicated parking space, which the employer did not provide. HMRC attempted to make reasonable adjustments by offering Mrs Linsley an alternative parking arrangement. Mrs Linsley was given a parking space near the toilets if she failed to get a space near the building (and toilets) on a first come first served basis. Alternatively, she could park in an unauthorised zone with a notional sanction which the employer would cover. This new agreement increased Mrs Linsley's stress levels and resulted in her taking sick leave.

Mrs Linsley subsequently brought a claim for disability discrimination alleging that HMRC had failed to make reasonable adjustments. The Employment Tribunal ('ET') held that the alternative arrangements made by HMRC constituted reasonable adjustment and therefore HMRC had not been in breach.

Mrs Linsley appealed to the Employment Appeal Tribunal ('EAT'). The EAT held that the test of reasonableness is an objective one. An employer is not required to select the best or most reasonable selection of adjustments nor is it required to make the adjustment preferred by the disabled person. However, the ET failed to give relevance to the specific disadvantage faced by the employee (i.e. the fact that the alternative arrangement increased Mrs Linsley's stress levels) and did not consider the importance of the employer failing to follow its own policy on parking, which was clearly a relevant factor. The EAT concluded that the ET's approach was an error of law and remitted the case back to the ET.

WHAT TO LOOK OUT FOR

New amendments to employment legislation

The *Employment Rights (Miscellaneous Amendments) Regulations 2019* makes two changes to current employment law:-

1. With effect from 6 April 2019, the maximum penalty for aggravated breaches of employment rights (payable to the government rather than the worker) has increased from £5,000 to £20,000; and
2. With effect from April 2020, the right to a written statement of particulars of employment will be extended to all workers (not just employees).

It is expected that the second amendment will have more significance for all workers.

Increase in injury to feelings awards for discrimination

Increases to the Vento bands for injury to feelings in discrimination and whistleblowing claims have now been announced. Awards for claims presented on or after 5 April 2019 will be as follows:-

- Lower band (for the least serious cases): £900 - £8,800
- Middle band: £8,800 - £26,300
- Upper band: £26,300 - £44,000.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking here.

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