Hewitsons' Employment
LEGAL UPDATE

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What's New

Can 'serious misconduct' without prior written warning be fair?

The Employment Appeal Tribunal (EAT) in *Quintiles Commercial UK Limited v Barango* held that immediate dismissal for "serious misconduct", without prior written warning, may be fair provided that the decision to dismiss falls within the range of reasonable responses.

Mr Barango worked for Quintiles Commercial UK Limited (QCUK) as a pharmaceutical sales representative. Having failed to complete his compulsory training course, Mr Barango was subject to disciplinary proceedings following which he was dismissed without notice for gross misconduct. Mr Barango appealed against this decision following which the appeal officer re-categorised the misconduct as 'serious misconduct' and not "gross misconduct, but upheld the decision to dismiss. Mr Barango made a claim to the Employment Tribunal for unfair dismissal

In the first instance, the Employment Tribunal (ET) found that the dismissal was unfair. The ET's view was that where misconduct was serious, but was not sufficient to amount to gross misconduct, the employer is required to give prior warning and as such a dismissal without warning for such misconduct could not be fair. The ET stated that given that Mr Barango's conduct was unreasonably characterised as gross misconduct in the first instance, once it was recognised by the appeal officer that the conduct was less, a warning was the only reasonable response.

QCUK appealed against the ET's decision and the EAT upheld the appeal. The EAT held that the ET had wrongly presumed that dismissal for any conduct short of gross misconduct, in the absence of prior warning, would be unfair. The EAT held that there was no statutory provision or case law to this effect. The EAT stated that what the ET should have considered was the circumstances of the case, including the ACAS code and the employer's disciplinary procedure, and whether the decision fell in range of reasonable responses. The EAT therefore remitted the case to a new ET for reconsideration.

Promotion does not affect an identified comparator's purpose

In the case of *Reading Borough Council v James*, the Employment Appeal Tribunal (EAT) held that the promotion of a male comparator during or part way through a claim for equal pay did not defeat the claim and the Claimants were not required to find another comparator.

A group of female employees brought proceedings against the Council for equal pay, claiming that the work they performed was of equal value to a male employee (C) who worked as a highways operative. The Claimants claimed that they had been paid unequally since 2002 and so were claiming arrears in pay since that date. However, in 2006, C was promoted and so the Council argued that as a result this individual could no longer be used as a comparator in the proceedings.

The Employment Tribunal (ET) disagreed with the Council and found in favour of the Claimants. The ET found that that C was an appropriate comparator, that any subsequent changes to his role did not affect this, and so the Claimants were entitled to be awarded arrears in pay for the whole period from 2002.

The Council appealed and the EAT dismissed the appeal. The Claimants had chosen an appropriate comparator and the fact that there were other comparators available did not undermine their entitlement to equal pay. The Claimants had been subjected to unequal terms since 2002 and the fact that C's role had changed since then did not effect that.

Employment status

In another ongoing case regarding employment status, the Supreme Court (SC) has held in *Pimlico Plumbers Ltd v Smith* that Mr Smith was not genuinely self employed and was a worker for the purposes of the Employment Rights Act 1996, the Working Time Regulations 1998 and the Equality Act 2010.

Mr Smith was a plumber and had worked for Pimlico as an 'independent contractor' for 6 years prior to the termination of his contract. Mr Smith's contract stated that Pimlico were not obliged to offer Mr Smith work, and that Mr Smith was not obliged to accept work offered. When acting for Pimlico, Mr Smith was required to wear a branded uniform, drive a company van, carry a company ID card, use a company mobile phone and follow the administrative instructions of the control room. There was no express right to substitute in Mr Smith's contract, however, in practice he was allowed to send another Pimlico operative in his place if he could not attend work for any reason.

In May 2011 Pimlico terminated Mr Smith's contract after he had issues with his health. Mr Smith issued proceedings against Pimlico for unlawful deductions from wages, failure to pay holiday and disability discrimination. It was therefore necessary for the Employment Tribunal (ET) to determine whether Mr Smith was genuinely an independent contractor, or whether he was a worker for the purposes of the relevant acts.

In the first instance the ET held that Mr Smith satisfied the statutory definition of

'worker' and that his working situation fell within the definition of 'in employment' for the purposes of the relevant acts.

Pimlico appealed and the EAT and the Court of Appeal both upheld the original ET's decision. Pimlico then appealed to the SC.

The SC dismissed the appeal and agreed with the earlier decisions that Mr Smith was a worker. It held that Mr Smith's right to substitute was insignificant when compared with his obligation to perform the work personally. As a result, the ET was entitled to find that the requirement for personal performance was satisfied in this case. The SC also agreed that Pimlico could not be regarded as Mr Smith's client or customer and the other terms in place did not reflect a genuine self employed arrangement. Mr Smith was a worker for the purposes of the relevant acts and therefore was entitled to pursue his claims for unlawful deductions from wages, holiday pay and disability discrimination.

WHAT TO LOOK OUT FOR

New guidance on Overtime
Acas has published new guidance on overtime working which is intended to support employers and employees. The guidance covers:

- the different types of overtime agreements;
- time limits on how much overtime is worked;
- overtime payments;
- overtime for part-time workers; and
- the impact of overtime on holiday calculations.

For further details the ACAS Guidance can be found here.

Details of the settlement scheme for EU citizens published

On 21 June 2018, the Home Office published further details about how EU citizens and their families will be able apply for the new UK immigration status of "settled status" in accordance with the transitional arrangements following the UK's exit from the EU. The Home Office has confirmed what the eligibility requirements will be for this status and how the application process will work.

Under the new settlement scheme, EU citizens will be required to complete 3 key steps being: (1) provide proof of identity, (2) show residence in the UK; and (3) declare any serious past criminal convictions.

The Home Office will then use this information to check employment and benefit records so that for many EU Citizens, proof of 5 years' residence should be automatic.

The Home Office has confirmed that the application for settled status will cost £65 (£32.50 for children under 16). For those EU Citizens who already have documentation showing the right to permanent residence in the UK, the Home Office has confirmed that these citizens will be able to exchange this documentation for settled status documentation free of charge.

Those EU citizens who have not yet lived in the UK for five years will be able to apply for "pre-settled status" and once they have successfully applied for this status, they will then be eligible to apply for settled status once they have been resident in the UK for 5 years .

The Home Office has stated that there will be a phased roll-out of the scheme from late 2018 and it is expected to be rolled out in full by 30 March 2019. Further details can be found here.

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