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Hewitsons Employment

LEGAL UPDATE

Absolute Client Focus

Vol.20 No.12

What's New

Unfair and Wrongful Dismissal

In Ball v First Essex Buses Limited, a bus driver who was dismissed after testing positive for cocaine has won compensation of almost £40,000 at an employment tribunal.

Mr Ball had worked with First Buses for over 20 years with a glowing record. However, he failed a random drug test after one of his shifts in 2017 and was suspended. He denied taking illegal drugs, arguing that traces of cocaine had got into his saliva from handling bank notes (many of which are contaminated). As a diabetic, Mr Ball had to test his blood sugar every two hours, resulting in sore fingertips which he licked frequently. Mr Ball claimed that the constant handling of bank notes and hand-to-mouth interaction caused the positive result. It was also a busy shift; he had picked up a lot of students and handled a lot of cash.

To prove his innocence, Mr Ball privately arranged and paid for a hair follicle test, which was clear. This test is widely accepted to be more accurate than a saliva test. However, First Buses did not accept this because it was not part of its procedure. Mr Ball was subsequently dismissed for gross misconduct without notice. On internal appeal, Mr Ball obtained another clear hair follicle test and offered to be re-tested. Despite this First Buses rejected the appeal and upheld the decision to dismiss.

Mr Ball issued proceedings in the Employment Tribunal for unfair dismissal and wrongful dismissal, which were successful. The Employment Tribunal held that First Buses had acted unreasonably in reaching the decision to dismiss. First Buses should have considered Mr Ball's good character, clean disciplinary record, his health, the possibility of cross contamination as Mr Ball had contended, the negative hair follicle tests and Mr Ball's offer to be re-tested. The Employment Tribunal also noted that First Buses had failed to follow its policy which said that it would to take all evidence into account. Although failing a drug test may well be gross misconduct, the process followed in dismissing an employee and considering appeals must also be fair and First Buses had not followed a fair process in these circumstances.

Long-term Disability

In the recent case of Awan v ICTS UK Ltd, the Employment Appeal Tribunal ('EAT') held that an employment tribunal was wrong to find that there was no breach of contract where the employer dismissed a disabled employee during a time when he was entitled to long-term disability benefits.

Mr Awan was employed as a security agent for American Airlines. He was entitled to an enhanced sick pay entitlement and, upon expiry of this, long term disability benefit that paid two thirds of his base salary (less any state benefits) until he either returned to work, retired or until his death.

In October 2012 Mr Awan was certified as unfit to work due to ill health. In December 2012 Mr Awan's employment transferred to ICTS as a result of TUPE when American Airways outsourced its security function.

Following the TUPE transfer there were problems in arranging for an insurance provider to continue providing Mr Awan with the long term disability benefit to which he was entitled under his contract with American Airways. However, Legal and General, the provider of this benefit prior to the TUPE transfer, agreed to cover Mr Awan until September 2014 as a good will gesture.

Mr Awan was still certified as unfit to work in September 2014. On 6 October 2014 ICTS advised Mr Awan that they were pursuing the matter with Legal and General further to seek extended cover and that, on a without prejudice basis, it would make equivalent monthly payments to Mr Awan until the situation was clarified.

On 26 November 2014, Mr Awan was still unable to return to work. A capability meeting was held with Mr Awan following which Mr Awan was informed that his employment was being terminated by reason of capability. Mr Awan's employment was terminated on 28 November 2018 and he was paid 12 weeks' salary in lieu of his notice.

Mr Awan brought Employment Tribunal proceedings claiming that dismissal while he was entitled to long-term disability benefit was in breach of contract, unfair and also amounted to discrimination arising from disability.

In the first instance the Employment Tribunal held that whilst it agreed that Mr Awan was contractually entitled to long term disability benefits whilst employed, there was no implied term that would prevent ICTS dismissing despite him still being entitled to receive such benefits. The Tribunal held that ICTS acted reasonably in dismissing Mr Awan for incapacity and his dismissal was fair.

Mr Awan appealed and the EAT upheld the appeal. The EAT held that ICTS had acted in breach of an implied term of the contract. The EAT held that Mr Awan was expressly contractually entitled to disability benefits after 26 weeks sick leave until he returned to work, retired or died. That express contractual entitlement did not provide for dismissal on the grounds of incapacity. The EAT concluded that on a proper construction of the contract, it was contrary to the purpose of the long-term disability plan to permit ICTS to dismiss and deny Mr Awan the benefits the disability benefits clause envisaged would be paid. ICTS had therefore acted in breach of an implied term of Mr Awan's contract by dismissing in these circumstances. The issue of whether the dismissal was fair and/or discriminatory was remitted back to the Tribunal for consideration.

WHAT TO LOOK OUT FOR

The Good Work Plan

Earlier this month the Government published its "Good Work Plan" which sets out a number of proposed changes in respect of improving protection for agency workers, zero-hours workers and other atypical workers.

The proposed changes are the Government's latest response to the recommendations made by the Taylor Review, published in July 2017, and include the following:

1. The repeal of the 'Swedish derogation' exception in the Agency Workers Regulations 2010, which excludes agency workers from the right to the same pay as directly-recruited workers if they have a contract of employment with the agency.
2. Increasing the period required to break continuity of employment for the purpose of accruing employment rights from one week to four weeks.
3. Giving all workers the right to a 'day one' written statement of rights, covering eligibility for sick leave and pay and giving details of other types of paid leave.
4. Improving the enforcement of worker rights, including increasing the fine from £5,000 to £20,000 where employers have shown 'malice, spite or gross oversight' in breaching employment rights, introducing a single enforcement body to ensure vulnerable workers are better protected and creating new powers to impose penalties on employers who breach employment agency legislation.
5. The introduction of legislation to prevent employers making deductions from staff tips.
6. Clarification of the test for employment status by introducing legislation to streamline the tests used for employment and tax purposes and to prevent employers misclassifying employees and workers as self-employed.

The Government has not, however, committed to a timetable for most of these reforms.

Government publishes policy paper on EU Citizens' rights in the UK in the event of a no-deal Brexit

The paper has confirmed that in a no-deal scenario the UK would continue to run the EU Settlement Scheme however only those EU nationals and their family members resident in the UK by 29 March 2019, not 31 December 2020, would be eligible as there would be no agreed implementation period.

In a no deal scenario EU citizens would have until 31 December 2020 to apply for status under the scheme and until then, EU citizens could rely on their passport or national ID card to evidence their right to reside in the UK. For further details the policy paper can be found here.

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