HEWITSONS

Hewitsons Employment

LEGAL UPDATE

Absolute Client Focus

Vol.21 No.3

What's new

Suspension does not breach the employer's duty

In the recent case of *Mayor and Burgesses of the London Borough of Lambeth v Agoreyo*, the Court of Appeal held that the suspension of the employee in anticipation of a misconduct investigation did not constitute a breach of the implied term of trust and confidence.

Ms Agoreyo commenced work as a primary school teacher for London Borough of Lambeth in November 2012. Ms Agoreyo, an experienced teacher, was to teach a class of up to 29 pupils, aged 5 and 6, including two of whom (O and Z) exhibited extremely challenging behaviour.

It was alleged that on three occasions, Ms Agoreyo had used unreasonable force towards O and Z. Ms Agoreyo was suspended pending an investigation into the allegations. Ms Agoreyo submitted her resignation letter on the same day as receiving notice of the suspension.

Ms Agoreyo challenged her suspension on the grounds that the employer breached its implied duty of trust and confidence (a term implied into all employment contracts) because she was suspended before the appropriate investigations were carried out.

The County Court held that the employer was entitled to suspend Ms Agoreyo after receiving reports of the allegations against her because the reports were a reasonable and proper cause for the suspension. Ms Agoreyo appealed and the High Court held that, on the facts, suspension had been adopted as a 'largely knee-jerk reaction' and therefore breached the implied term of trust and confidence. The employer appealed.

The Court of Appeal held that the assessment of whether there was a reasonable and proper cause for a suspension was a question of assessment and evaluation of the facts. An act of suspension can constitute a breach of the implied term of trust and confidence, either by itself or in combination with other acts or omissions, where the employer does not have reasonable and proper cause for its course of action. Here the question of whether or not suspension was described as a neutral act was unlikely to assist in determining whether a breach occurred. The Court of Appeal restored the County Court judgment and found that the employer was entitled to suspend Ms Agoreyo.

Are you a Bad Leaver: what does your contract say?

The case of *Nosworthy v Instinctif Partners Ltd* confirms the importance of obtaining legal advice before entering into an agreement. In this case, the advice required was an explanation of what constituted a good or bad leaver, and the consequences of being a bad leaver.

Ms Nosworthy was given a small shareholding (2%) in her employer's company as a condition of the company's sale to Instinctif Partners Ltd (Instinctif). She sold her shares to Instinctif under a Share Purchase Agreement (SPA), which stated that Ms Nosworthy would receive deferred earn-out shares and loan notes (deferred consideration) in return for her shares. In addition to the SPA, the Articles of Association and the Deed of Adherence stated that the deferred consideration would not apply to a 'Bad Leaver' and the shares of a Bad Leaver would be re-acquired. A Bad Leaver was defined as an employee who voluntarily resigned his or her employment. Ms Nosworthy resigned and was treated as a Bad Leaver.

Ms Nosworthy claimed that the Bad Leaver provisions were unenforceable as they breached a rule against penalties and were an unauthorised deduction from wages. Restating recent case law, the court noted that a penalty is considered to exist when there is a secondary obligation which imposes a detriment on the contract-breaker which is out of all proportion to the legitimate interest of the innocent party in enforcing the primary obligation. The Employment Tribunal (ET) rejected Ms Nosworthy's claim, save in relation to a small amount of deferred cash remuneration that had fallen due and had not been paid. Ms Nosworthy appealed to the Employment Appeal Tribunal (EAT). The EAT held that the deferred consideration was not wages received in connection with her employment but was provided in her capacity as a seller of shares.

Further, the Bad Leaver provisions did not impose a penalty on Ms Nosworthy because the consequences of being a Bad Leaver were not dependent on the employee being in breach of contract. The Bad Leaver provisions were contractually agreed and therefore did not constitute an unlawful restraint of trade.

Religion and Indirect Discrimination

The Employment Appeal Tribunal (EAT) in *The City of Oxford Bus Services Limited v Harvey* held that the court must consider the impact of a policy on all employees before deciding whether the policy was discriminatory.

Mr Harvey was a practicing Seventh Day Adventist. He observed the Sabbath by not working from sunset on a Friday to sunset on a Saturday. He applied for a job as a bus driver with Oxford Bus Company ("the Company"). The Company had a rostering system which required all drivers to work 5 out of 7 days, including either Saturday or Sunday. Mr Harvey did not raise this to be an issue during the application and interview stage.

Mr Harvey was employed by the Company and was given his first rota shifts which required him to work Friday evening and Saturday daytime. At that stage, Mr Harvey explained that he would be unable to work the shifts and asked for arrangements to be made to enable him to observe the Sabbath. The Company provided Mr Harvey with a flexible working arrangement to accommodate his belief, however highlighted that this arrangement would only be temporary. After a while, Mr Harvey was placed back on the usual rota shift and he claimed indirect discrimination on the grounds of religion or belief. The Company argued that its policy was justified to ensure fairness to all staff and a harmonious workforce.

At first instance, the Employment Tribunal (ET) held that the policy of requiring bus drivers to work 5 out of 7 days placed Mr Harvey at a particular disadvantage and was not justified because the

Company had insufficient evidence that the policy maintained a harmonious workforce. The Company appealed the decision.

The EAT held in favour of the Company. The ET had failed to balance the importance of the Company's aims against the discriminatory impact of the policy. It was accepted that, although the policy placed Mr Harvey at a disadvantage, the ET had failed to give appropriate consideration to the Company's aims. The case was remitted back to the ET.

WHAT TO LOOK OUT FOR

Non-EU seasonal workers pilot

Fruit and vegetable farmers are now able to employ up to 2,500 non-EU migrant workers for seasonal work for up to six months via the seasonal workers pilot scheme announced by the Home Secretary in September 2018. The first workers will arrive on UK farms this spring, subject to recruitment and visa application processes. The pilot project will conclude in December 2020 and a review will take place at that stage. Two scheme operators (Concordia and Pro-Force) have been licenced to manage the pilot and will be responsible for identifying suitable workers. The pilot is intended to test the effectiveness of the immigration system at alleviating seasonal labour shortages during peak production period whilst maintaining control of immigration.

Highest employment rate since 1971

Recent statistics by the Office for National Statistics (ONS) highlight a significant drop in the UK's unemployment rate. 76.1% of people eligible to work are in employment as at January 2019. This is the highest recorded rate since 1971. There has also been a noticeable rise of 3.4% in average weekly earnings.

The recent statistics show a drop in the unemployment rate to 3.9%. Employment Minister Alok Sharma stated that the "employment figures are further evidence of the strong economy the Chancellor detailed in the 2019 Spring Statement".

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