Hewitsons' Employment LEGAL UPDATE

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WHAT'S NEW

Employer breached implied term of trust and confidence by giving a false reason for employee's dismissal

In the case of *Rawlinson v Brightside Group* the Employment Appeal Tribunal (EAT) held that the Employment Tribunal (ET) in the first instance was wrong to reject an employee's breach of contract claim, where the employee resigned after having been given a false reason for the termination of his employment.

Mr Rawlinson was employed as an in-house legal counsel by a firm of insurance brokers. The firm had concerns about his performance but these had not been raised with Mr Rawlinson. The firm decided it wanted to dismiss Mr Rawlinson due to these concerns, but to 'soften the blow' they informed him that the firm had decided to outsource its legal services. They asked Mr Rawlinson to work through his three-month notice period to ensure a smooth handover of work. However, Mr Rawlinson believed that the outsourcing constituted a 'relevant transfer' for TUPE purposes and that the firm was breaching its statutory obligations. He resigned with immediate effect on that basis.

Mr Rawlinson subsequently brought various tribunal claims against Brightside Group, including claims for breach of contract based upon his view that Brightside Group had committed a fundamental breach of the implied term of trust and confidence. The ET rejected his claims and held that the employer's failure to raise its performance concerns with Mr Rawlinson did not amount to a breach of the implied term of trust and confidence, and Mr Rawlinson was not entitled to claim wrongful constructive dismissal.

Mr Rawlinson appealed the ET's decision and the EAT held that the ET had been wrong to rule that Brightside Group had not breached the implied term of trust and confidence. The EAT agreed with Mr Rawlinson that the implied term of trust and confidence imposes an obligation on the employer not to deliberately mislead the employee. Whilst this does not mean that an employer is placed under an obligation to volunteer details in these circumstances, where the choice is made to volunteer

information this should be provided in good faith.

The EAT also held that the ET had erred in failing to see that Mr Rawlinson's complaint related to the lie told to him rather than the dismissal itself. Therefore he had a common law cause of action against his employer. The EAT allowed Mr Rawlinson's appeal and substituted a finding that his wrongful dismissal claim should succeed.

Worker entitled to carry over full holiday entitlement each year

In the case of *King v Sash Windows Workshop Limited* the Court of Justice of the European Union (CJEU) held that where an employer does not grant paid annual leave and, as a result, a worker does not take any annual leave, the worker will be able to carry their full holiday entitlement over at the end of each holiday year.

Mr King worked for Sash Windows Workshop Limited (SWW) as a self employed salesman. SWW did not provide Mr King with any paid holiday for approximately 13 years on the basis that he was deemed to be self-employed. Mr King did not therefore take any holiday during this time because it would have been unpaid. When his working arrangement was terminated by SWW, Mr King made a claim for holiday pay for the full 13 years. The ET held that Mr King was a worker, not self-employed, and was therefore entitled to 5.6 weeks' paid annual leave a year. SWW argued however that Mr King had lost his right to paid holiday, as under UK regulations where a worker does not take their paid holiday, they are not entitled to carry the holiday over into subsequent years.

The case went to the CJEU, which held that where an employer does not grant paid holiday and a worker therefore does not take any holiday, the worker is being prevented from exercising their EU rights and cannot be stopped from bringing a claim simply because a new holiday year has begun. The UK regulations which say that the worker will lose their right to bring a claim must be disregarded to the extent that they are incompatible with EU law.

Normally when an employee or worker fails to take holiday there will be limits as to how much holiday can be carried over to the subsequent year. However, the CJEU held that where an employer fails to grant paid holiday the normal limits do not apply, and the worker can claim holiday back pay all the way back to 1996, which is when the relevant EU law came into force.

This decision may impact on several recent decisions where the courts have held that those who were believed to be self-employed are actually workers, such as Uber and Addison Lee drivers. This may result in these workers having holiday back pay claims for up to 20 years. The decision only applies to the 4 weeks' holiday granted under EU law, not the additional 1.6 weeks' additional holiday entitlement under UK law.

WHAT TO LOOK OUT FOR

Acas publishes new advice on sexual harassment at work

Acas has published new advice on sexual harassment at work. The advice provides examples of what will constitute sexual harassment at work, which could include written or verbal comments of a sexual nature, remarks about a colleague's appearance and offensive jokes.

The advice explains that organisations and businesses should be clear to workers about what sorts of behaviours are unacceptable and would be considered sexual harassment. It discusses how to handle complaints of sexual harassment, including historic allegations.

The full advice is available here.

Statutory rates for maternity, paternity, shared parental, adoption and sick pay

The Government has published the proposed weekly statutory rates for maternity, paternity, shared parental, adoption and sick pay from April 2018:

- Maternity pay - £145.18 (or 90% of the employee's average weekly earnings if this figure is less than the statutory rate)
- Paternity pay - £145.18 (or 90% of the employee's average weekly earnings if this figure is less than the statutory rate)
- Shared parental pay - £145.18 (or 90% of the employee's average weekly earnings if this figure is less than the statutory rate)
- Adoption pay - £145.18 (or 90% of the employee's average weekly earnings if this figure is less than the statutory rate)
- Sick pay - £92.05

To be entitled to these statutory payments, the employee's average earnings must be equal to or more than the lower earnings limits, which will increase to £116 in April.

Increase in Employment Tribunal claims following unlawful fees ruling

In July the Supreme Court ruled that the Employment Tribunal fees introduced in 2013 were unlawful. The government committed to repaying the fees paid and the refund scheme has now been launched.

The Ministry of Justice's latest statistics show that there has been a month-on-month rise of 124% in cases filed since the Supreme Court's decision. Before the ruling ACAS was receiving around 350 ET1s per week, but is now receiving up to 700 per week. However, the number of cases filed is still well below those recorded before the fees were introduced.

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