Hewitsons' Employment
LEGAL UPDATE

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Sex Discrimination - Claim succeeds for failure to pay male employee enhanced shared parental pay

In the recent case of *Ali v Capita Customer Management Ltd*, the Employment Tribunal (ET) considered whether an employer's failure to pay a male employee enhanced shared parental pay where a mother taking maternity leave during the same period had received enhanced maternity pay was sex discrimination.

Mr Ali was employed by Capita Customer Management Ltd (Capita) following a TUPE transfer from Telefonica in 2013. Transferring female Telefonica employees were entitled to enhanced maternity pay comprising 14 weeks' basic pay followed by 25 weeks' statutory maternity pay. Transferring male Telefonica employees were entitled to two weeks' paid ordinary paternity leave and up to 26 weeks' additional paternity leave which "may or may not be paid."

Mr Ali took two weeks' paid leave immediately upon the birth of his daughter. His wife was diagnosed with postnatal depression and had been medically advised to return to work. Mr Ali wished to take further leave to look after his daughter. Capita informed him that he was eligible for shared parental leave, but that they only paid statutory shared parental pay. Mr Ali asserted that he should receive the same entitlements as a transferring Telefonica female employee taking maternity leave. When his grievance was rejected, Mr Ali brought various claims in the ET, the main one being for sex discrimination.

The ET upheld the direct sex discrimination claim and rejected the indirect sex discrimination claim. The ET held that Mr Ali could compare himself with a hypothetical female colleague who took leave to care for her child after the two week compulsory maternity leave period. The ET stated that the denial of full pay amounted to less favourable treatment and the reason for this was Mr Ali's sex.

The ET commented that the child caring role that Mr Ali wanted to perform was not a role exclusive to a mother. It noted that men were being encouraged to play a greater role in caring for their babies. The ET decided that the enhanced maternity pay afforded to female Telefonica employees who transferred over to Capita was not special treatment in connection with pregnancy and childbirth; it was about special treatment for caring for a newborn baby.

Whistleblowing - "Public interest" test reviewed

In the recent case of *Chesterton Global Ltd and anor v Nurmohamed (Public Concern at Work intervening)*, the Court of Appeal (CA) has provided guidance on the "public interest" test in whistleblowing cases.

Mr Nurmohamed was employed as director of Chesterton Global Limited (Chesterton), a firm of estate agents. On three occasions between August and October 2013 he complained to senior managers that Chesterton's accounts were being manipulated to the benefit of shareholders. Mr Nurmohamed claimed that costs and liabilities had been deliberately misstated, and that inaccurate figures were used to calculate commission payments for over 100 senior managers (including himself), which resulted in lower commission payments. Mr Nurmohamed was later dismissed and brought various claims including automatic unfair dismissal for having made a "protected disclosure".

In order to be a "protected disclosure" there must be a disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show one or more of six specified types of wrongdoing has taken place, is taking place or is likely to take place.

The original Employment Tribunal (ET) stated that a disclosure does not have to be in the interest of the entirety of the public and upheld Mr Nurmohamed's claim on the basis they found he had a reasonable belief the disclosures were made in the public interest. The Employment Appeal Tribunal (EAT) upheld the ET's decision. Although Mr Nurmohamed had a personal motivation in raising the allegations, the EAT had been satisfied that he had the other 100 senior managers in mind and that this was a sufficient section of the public to amount to being in the public interest. Chesterton appealed, arguing that, to be in the public interest, a disclosure must serve the interests of persons outside the workplace.

Dismissing the appeal, the CA held that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people sharing it. The Court of Appeal went on to hold that where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The CA identified the following features which could be used to weigh up the reasonableness of a worker's belief:

- the numbers in the group whose interests the disclosure served;
- the nature of the interests affected and the extent they are affected by the wrongdoing disclosed;
- the nature of the wrongdoing; and
- the identity of the alleged wrongdoer.

In this case, the CA held that the disclosure was of deliberate wrongdoing and that it allegedly took the form of misstatements in the accounts to the tune of £2-3 million. If the accounts had been statutory, the disclosure of such a misstatement would unquestionably be in the public interest. However, the accounts were only internal

which made the position less clear but, as internal accounts feed into the statutory accounts and Chesterton is a very substantial and prominent business in the London property market, these features rendered Mr Ali's disclosure in the public interest.

WHAT TO LOOK OUT FOR

Employment Tribunal fees held to be unlawful

On 26th July 2017 the Supreme Court ruled that the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (the Fees Order) is unlawful and is therefore quashed on the basis that it prevents access to justice.

The Fees Order introduced fees in the Employment Tribunal and Employment Appeal Tribunal system back on 29th July 2013. Ever since introduction of the Fees Order, Unison has been challenging the lawfulness of the fees regime through judicial review proceedings.

The effect of the Supreme Court's decision will have significant ramifications, including that all fees paid since 29th July 2013 must be reimbursed by the government and fees are no longer payable for future claims.

For further information together with our comments on this important decision please go to https://www.hewitsons.com/latest/news/supreme-court-rules-that-employment-tribunal-fees-are-unlawful.

Government policy paper published on EU nationals living in the UK

The Government has published a paper outlining how it intends to protect the rights of EU citizens living in the UK following Brexit entitled, "The United Kingdom's exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU".

Assuming that reciprocal arrangements will be put in place for UK nationals living in the EU, key proposals include:

- The creation of a new "settled status" for EU citizens who arrive before a specific cut off date. Exactly when the cut off date is will be subject to negotiations with the EU but is unlikely to be no earlier than 29th March 2017 (the date Article 50 was triggered) and no later than the date the UK leaves the EU.
- EU citizens who already have five years' continuous residence in the UK by the specific cut off date will be immediately eligible for settled status. As a result they would be free to live in the UK in any capacity and undertake any lawful activity, to access public funds/services and to apply for British citizenship.
- EU Citizens who arrived in the UK before the specific cut off date but do not have five years' continuous residence at the time of Brexit will be entitled to apply for temporary status to remain in the UK until they reach five years' residence when they will be eligible to apply for settled status.
- A grace period of up to two years will be put in place for EU citizens who arrived in the UK after the specific cut off date so that they can regularise their status to remain in the UK. Some such EU citizens may become eligible to settle

permanently, depending on their circumstances, but settled status is not guaranteed.

The Government's policy paper can be viewed at: https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu/the-united-kingdoms-exit-from-the-european-union-safeguarding-the-position-of-eu-citizens-living-in-the-uk-and-uk-nationals-living-in-the-eu.

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