



Hewitsons' Employment LEGAL UPDATE

November 2017
Vol.19 No.11

Court of Appeal rules no whistleblowing claim where the investigating manager is unaware of the protected disclosure

In the case of *Royal Mail v Jhuti* [2017] EWCA Civ 1632, the Court of Appeal considered whether an employee had been automatically unfairly dismissed as a result of making a protected disclosure, when the dismissing officer was unaware that a protected disclosure had been made.

Ms Jhuti was a Royal Mail employee who made a protected disclosure to her line manager. She was concerned that Royal Mail was failing to comply with its obligations to Ofcom. The line manager then set a performance plan for Ms Jhuti and she was subsequently dismissed for poor performance. The manager that made the decision to dismiss did not know the background of the case, other than that Ms Jhuti had been upset by something. When the dismissing officer questioned Ms Jhuti's line manager about this, the line manager misled the dismissing officer by suggesting that Ms Jhuti had simply misunderstood the situation.

Ms Jhuti brought a claim for unfair dismissal on the basis that her dismissal was as a result of her protected disclosure. The Court of Appeal held that in deciding whether there was an automatically unfair dismissal it was only necessary to consider the reasons and motivations of the decision maker. The investigating manager was unaware of the protected disclosure and made the decision to dismiss in good faith on the basis of what she understood to be poor performance. Therefore, Ms Jhuti's claim for automatic unfair dismissal failed.

Failure to conduct proper risk assessment for a breast feeding mother ruled to be sex discrimination

The Court of Justice of the European Union (CJEU) held in *Oteros Ramos v Servicio Galego de Saude* that a failure to conduct an appropriate risk assessment for a breastfeeding employee was sex discrimination.

Ms Ramos worked as a nurse in a hospital's accident and emergency department. She was a breast feeding mother and the hospital performed a risk assessment. They concluded that her role was risk free, but did not provide any explanation for this conclusion. Ms Ramos had requested an adjustment in her work pattern because she was breast feeding and this request was refused.

Ms Ramos brought a sex discrimination claim against her employer. She argued that the risk assessment was in breach of the European Directive to improve the health of pregnant and breastfeeding workers, and, as a result, breached the Equal Treatment Directive. The CJEU

agreed with Ms Ramos and held that if a risk assessment was flawed or was not carried out at all, that gives rise to a discrimination claim.

Employment Appeal Tribunal upholds the decision that Uber drivers are workers

In the case of *Uber BV v Aslam and Others* the EAT has upheld the Employment Tribunal's (ET) decision that Uber drivers are workers, not self-employed.

The Uber business relies on a smartphone app through which customers order a taxi. Uber treats drivers as self-employed. The contract between Uber and the drivers is such that drivers are not obliged to commit to the work offered. However, when a driver signs into the app this indicates that the driver is able to accept bookings. Upon receipt of a booking, the app then locates a driver and the driver has ten seconds to accept that booking. If the booking is not accepted it is assumed that the driver is unavailable and the booking is passed onto another driver. If a driver fails to accept bookings, warning messages are generated which can lead to the driver's access to the app being suspended or blocked and as such prevents the driver from working.

The EAT held that when the drivers had the Uber app switched on they were workers, as they were obliged to be able and willing to accept assignments, had to accept at least 80% of trip requests and would suffer penalties if they cancelled trips they accepted.

Uber has submitted an application to leapfrog the Court of Appeal and appeal directly to the Supreme Court.

WHAT TO LOOK OUT FOR

National Minimum Wage increases

The Autumn 2017 Budget announced that the National Minimum Wage will increase from April 2018 to the following rates:

Apprentices: £3.70 an hour (currently £3.50);
16-17 years olds: £4.20 an hour (currently £4.05);
18-20 year olds: £5.90 an hour (currently £5.60);
21-24 year olds: £7.38 an hour (currently £7.05);
25 and over: £7.83 an hour (currently £7.50).

Stevenson/Farmer Mental Health at Work Review

An independent review by Stevenson/Farmer 'Thriving at Work' has been published. The review discusses how employers can better support the mental health of employees, including those with mental health problems or poor well-being, to remain in and thrive through work.

The review reports that the UK faces a significant mental health challenge at work, with 300,000 people with long term mental health problems losing their jobs each year and around 15% of people at work having symptoms of an existing mental health conditions. The research undertaken suggests that poor mental health costs employers between £33 billion and £42 billion a year. Over half of that cost comes from presenteeism, which is where individuals come into work while they are ill, resulting in a loss of productivity and sometimes making their condition worse.

The review contains 40 recommendations which it believes could reduce the number of people leaving work with mental health problems by 100,000, which would bring the number in line

with physical health conditions. The full review is available [here](#).



This Employment Update is produced by Hewitsons for existing clients of the firm to provide them with a useful summary of recent casers, journal reports and dates to be aware of. It is not a definitive statement of the law in any area. Advice should be sought from a solicitor in the Employment Team at Hewitsons in respect of any information contained in this update that affects any individual matter with which you may be concerned.

Hewitsons LLP is authorised and regulated by the Solicitors Regulation Authority. While the articles and opinions expressed in this publication are summations of current general legal matters the firm can take no responsibility for their application to specific situations in which specialist advice is required.

Hewitsons LLP is a limited liability partnership. Hewitsons LLP Reg Office: Shakespeare House, 42 Newmarket Rd, Cambridge, CB5 8EP. Reg No: OC334689