Hewitsons' Employment LEGAL UPDATE

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What's New

Constructive Dismissal and the Last Straw Doctrine

The Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* confirmed that the last straw principle can apply in constructive dismissal cases, and that this permits the court to consider a series of acts or incidents which cumulatively may amount to a repudiatory breach. However in this particular case this principle did not apply.

Ms Kaur was employed by Leeds Teaching Hospitals NHS Trust (the Trust) as a nurse. The Trust began disciplinary proceedings against Ms Kaur after she was involved in an altercation with another member of staff. Ms Kaur was found guilty of inappropriate behaviour and was given a final written warning. Ms Kaur appealed against this decision but her appeal was not upheld. The following day Mrs Kaur resigned. Mrs Kaur made an application to the Employment Tribunal (ET) for constructive unfair dismissal, relying on what she alleged was a series of violations of the duty of trust and confidence by the Trust.

In the first instance, the ET struck out Ms Kaur's claim finding that she had no reasonable prospect of success. Ms Kaur appealed.

The Court of Appeal dismissed Ms Kaur's appeal. The Court of Appeal confirmed that the last straw principle can apply to constructive dismissal claims so that, where the employee relies on a series of cumulative repudiatory breaches by the employer, which was previously affirmed but was then continued by further acts, the employee could revive their right to terminate based on the employer's overall conduct. However, the Court of Appeal confirmed that the final breach must contribute, however slightly, to the breach of the implied duty of trust and confidence. In this case, the last straw principle did not apply because the Trust's disciplinary procedure was fair and the decision to reject Ms Kaur's appeal did not amount to a repudiatory breach.

Employment Status

The Employment Appeal Tribunal (EAT) in *Addison Lee Ltd v Gascoigne* upheld the Employment Tribunal's (ET) decision that a cycle courier was a worker and not a self-employed contractor.

Mr Gascoigne worked as a cycle courier for Addison Lee under a contract that stated that Mr Gascoigne was an independent contractor. Mr Gascoigne used his own bike, chose when he worked and was paid weekly for jobs. The company provided Mr Gascoigne with a company ID, allocated call sign, a radio, palmtop computer and GPS tracker. He was contacted on the radio for work and if available, he would log on to the allocation system. Once allocated a job, he was required to complete it unless physically unable to do so. In the company's view, Mr Gascoigne was not a worker due to the fact that he worked under a zero hours contract and was not under an obligation to work when offered.

Mr Gascoigne made a claim to the Employment Tribunal (ET) in respect of his employment status. In the first instance the ET found that Mr Gascoigne was a worker and was therefore entitled to holiday pay under the Working Time Regulations 1998.

Addison Lee appealed and the Employment Appeal Tribunal (EAT) found that there was sufficient factual evidence to support the contention that mutuality of obligation existed in the contractual relationship. Mr Gascoigne had to accept jobs offered once he had logged on the allocation system, and his entitlement to log off at any time did not affect his compulsory obligation to accept logged work. The EAT therefore held that Mr Gascoigne was a worker.

Discrimination arising from disability

In *City of York Council v Grosset*, the Court of Appeal held that the dismissal of an employee for misconduct can amount to discrimination arising from disability even if the employer did not know that the disability was connected to the misconduct.

Mr Grosset was a teacher and Head of English at a school operated by the Council. He suffered from cystic fibrosis which was known to the employer. Following a change of head teacher, Mr Grosset's workload increased, and due to his disability he struggled to cope which resulted in Mr Grosset experiencing high degrees of stress. Mr Grosset was subject to disciplinary proceedings having shown an 18 rated film to a class of 15 year olds without approval or consent. Mr Grosset stated that his actions were a mistake due to the stress he was experiencing, which was connected to his disability. The Council took the decision to dismiss Mr Grosset for gross misconduct.

Mr Grosset made a claim to the Employment Tribunal (ET) for unfair dismissal and discrimination arising from his disability. The ET held in the first instance that the employer's decision to dismiss was within the range of reasonable responses available to them and so dismissed the unfair dismissal claim. However, Mr Grosset presented medical evidence at the ET hearing which established a connection between his disability and his misconduct. The ET therefore found that Mr Grosset had suffered discrimination arising from disability.

The Council appealed, initially to the Employment Appeal Tribunal (EAT), which was dismissed. On appeal to the Court of Appeal, the Court of Appeal rejected the Council's argument that, in order for a claim for disability arising from discrimination to succeed, Mr Grosset had to show that the school knew that his behaviour arose in consequence of his disability. The Court of Appeal did not accept this and stated that in order for a claim of discrimination arising from disability to succeed two issues needed to be considered. Firstly, did the employer treat the employee unfavourably because of 'something'? Secondly, did that 'something' arise in consequence of the employee's disability? In this case it was found that Mr Grosset showed the film as a result of the high stress levels that he was experiencing, which arose in consequence of his disability when his workload increased. He was dismissed because of this and so his claim for discrimination arising from disability was successful.

WHAT TO LOOK OUT FOR

New legislation gives all workers the right to itemised pay statements

With effect from 6 April 2019, the *Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No 2) Order 2018 SI 2018/529* (the "2018 Order") amends the Employment Rights Act 1996, and provides all workers (not just employees) with the right to receive from their employer a written itemised pay statement at or before the time at which any payment of wages or salary is made.

Currently, a worker's written statement includes the gross amount of wages or salary, the amount of any variable sums, any fixed deductions from the gross amount and the net amount of wages or salary payable. The 2018 Order adds that where a worker's wages or salary varies based on time worked, the written statement should include the total number of hours worked in respect of the amount of wages or salary.

If the employer fails to comply, the worker can make an application to the Employment Tribunal to determine what particulars ought to have been included in relation to the worker's statement.

Equal standards in dress code policies

The Government Equalities Offices has published new guidance to employers in relation to workplace dress code policies. The *Dress Codes and Sex Discrimination* guidance explains that dress code policies must impose equivalent standards for men and women. Any gender specific dressing requirements will be unlawful, where an equivalent requirement does not apply to the other sex. The guidance recommends that employers should be flexible in their approach to employees who wear religious clothing, including those who choose to wear head covering and religious symbols.

Employers are advised to consult employees, staff organisations and trade unions over any proposed dress code or changes to an existing code to ensure it is acceptable both to the organisation and its staff.

For more information on any issues discussed in this update please contact Nick Hall on 01604 233233 or click here to email Nick.

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