UK: Employment Update

Welcome to this month's Employment News in Brief, in which we explore the usual melting pot of employment related issues to distract ourselves ahead of the impending Brexit vote. For publicity shy employers, the EAT decision to lift a restricted reporting order at the request of the Press in spite of the case settling will be of interest. Another EAT decision highlights that in today's long hours' culture, employers should be mindful that they may need to make adjustments to working hours if a disabled employee is put at a disadvantage as a result of an expectation that long hours will be worked. We also consider a ruling that injury to feelings compensation is not available for breaches of the Working Time Regulations, the implications for private sector employers of proposed off payroll working tax reforms and what employment rights and liabilities may arise in the forthcoming intern season.

Settlement of proceedings not a sufficient reason to maintain a restricted reporting order

Often one of the biggest factors driving the settlement of an employment tribunal claim is the desire to avoid unwanted publicity, regardless of the merits of the case. Lurid headlines about the claim and/or the witness evidence are rarely followed up when the claim is defeated. A recent decision of the Employment Appeal Tribunal (EAT) highlights that settlement by the parties of their dispute before the substantive hearing does not prevent the 'open justice' principle being applied to allow the press to report on the case.

The essence of the open justice principle is that court proceedings should be held in open court and the public and media have the right to attend. The rationale is that this safeguards against judicial bias, unfairness and incompetence and allows the public to understand and scrutinise the judicial system. In addition, the European Convention on Human Rights provides for the right to freedom of expression, a right frequently expounded by the press.

The Employment Tribunal may, in certain cases, derogate from the principle of open justice and the right to freedom of expression and grant temporary or permanent restricted reporting orders (RRO). These can take a variety of forms including restricting the ability of the press to name parties.

Key issues

- Settlement of proceedings not a sufficient reason to maintain a restricted reporting order
- Expectation of late working placed disabled employee at a disadvantage
- Off payroll working: reform of intermediaries legislation
- Working Time Regulations: no entitlement to injury to feelings compensation
- Interns: are you prepared?

CA was employed by RA and RB to provide hairdressing services to RC. When CA was dismissed, claims for unfair dismissal and sex discrimination were pursued against RA, RB and RC. The claims included allegations of sexual misconduct.

At a preliminary hearing, the Employment Tribunal imposed a temporary RRO preserving the anonymity of the parties. News Group Newspapers (NGN) appealed against the RRO but the claim was then settled before the case was heard. In spite of this, NGN applied for the RRO to be revoked and the Tribunal granted the application. This led the original parties to the claim to appeal to the EAT that the RRO should not be revoked.

The President of the EAT upheld the Tribunal's decision to revoke the RRO. The EAT held that the principle of open justice applied despite the settlement and the fact that there had only been preliminary hearings held in private and none of the documents were publicly available. It considered that open justice was also served by the ability of the press to report on other aspects of litigation including its conduct and the fact of a settlement. It noted that the public interest in settlement of litigation did not outweigh the principle of open justice.

In the past, employment tribunals were often quite amenable to granting RRO's and/or allowing parties to redact documentation containing confidential information. However, increasingly, the emphasis on the need to maintain open justice has become more prevalent as illustrated by this decision of the EAT. The mere fact of embarrassment will not be sufficient grounds for a Tribunal to grant an RRO.

It is understood that this decision is being appealed to the Court of Appeal and so this may not be the last word on the interaction of the principle of open justice and the public interest in parties settling their disputes.

[CA, RA, RB, and RC v News Group Newspapers Ltd]

Expectation of late working placed disabled employee at a disadvantage

The Equality Act 2010 (EQA) imposes an obligation on employers to make reasonable adjustments to any provision criterion or practice (PCP) in the workplace that places a disabled employee at a substantial disadvantage when compared to employees who are not disabled. This duty arises when the employer knows or ought reasonably to have known that the employee is disabled. A failure to make a reasonable adjustment amounts to disability discrimination. In some circumstances a failure to make such an adjustment could also provide a platform for a constructive dismissal claim.

The Employment Appeal Tribunal (EAT) has recently considered whether an expectation or assumption that an employee will work late is a PCP that could trigger a reasonable adjustment obligation.

C worked as an analyst for U. For the first 7 months of his employment he regularly worked 12-15 hour days. Unfortunately he was then seriously injured in a road accident which resulted in a variety of symptoms including difficulty working in the evenings. When C initially returned to work he worked for no more than 8 hours a day for six months. Subsequently, U requested that C worked one or two late nights a week and then assumed that he would do so, asking which nights C would be working rather than asking if he could do so. C felt that his bonus might be at risk or he might be made redundant if he did not work late as requested.

The EAT held that Employment Tribunals should adopt a liberal approach to what is a PCP. It considered that an expectation or assumption of late working (as distinct from an express instruction) could amount to a PCP as there was an element of compulsion involved.

The case was remitted to the Employment Tribunal because although it had concluded that C had suffered a disadvantage as a result of the late working requirement, it had not considered the nature and extent of the disadvantage (i.e. whether it was substantial) and what adjustments it might have been reasonable for U to have made.

This case illustrates that employers can be vulnerable to a disability discrimination claim in relation to late hours working if it puts a disabled employee at a substantial disadvantage. This could arise, for example, in the context of a new late hours working requirement being imposed on employees who have no previous history of late night working, or, in cases such as this where a new disability means that pre-existing late night working arrangements place the employee at a substantial disadvantage. An employee may be placed at a substantial disadvantage if

the nature of their disability is such that extended hours causes the quality of their work to diminish which in turn could impact on performance related pay and/or lead to a capability performance process. Of course what adjustments will be considered reasonable to remove any disadvantage will vary according to the nature of the role, the employer's business needs and its economic resources.

[Carreras v United First Partners Research]

Off payroll working: reform of intermediaries legislation

The Government has published a consultation paper setting out its proposals to reform liability for tax and NICs in cases where an individual's services are supplied to a public sector organisation via the individual's personal service company (PSC). In summary, where an individual provides services to a public sector engager and is doing a similar job in a similar manner to an employee, the engager will be required to decide if the IR35 rules apply and if it determines that they do to pay any associated income tax and NICs (deemed employment payment) as if the individual was their employee. Under the current IR35 arrangements it is the PSC who is responsible for making the deemed employment deduction.

If the rules are not applied properly the following options are being mooted in terms of where liability for failing to make the appropriate tax deductions will fall: (i) joint and several liability on PSC and engager; (ii) on the engager alone; or (iii) where the PSC or worker fraudulently gives the agency or public sector engager incorrect information either on the director of the PSC or on the PSC itself.

This revised IR35 regime will not (for the time being – but it must be a future possibility) apply to private sector engagers of individuals via PSCs. A new online tool is being developed to assist in identifying whether the new IR35 intermediary rules apply. The consultation stresses that the private sector is also at liberty to use the tool. It also seems likely that HMRC will be tempted to use the tool to assess employment status in other cases whether or not a PSC is involved.

The Off Payroll Consultation can be found here.

Working Time Regulations: no entitlement to injury to feelings compensation

The Working Time Regulations (WTR) confer a variety of rights on workers ranging from the right to paid holiday to the right to take rest breaks and daily breaks. A worker can present a complaint before an Employment Tribunal on the grounds that the employer has refused to allow them to exercise any of these rights. If the complaint is upheld, the Tribunal can award such compensation as it considers just and equitable having regard to any financial loss sustained and the employer's default.

To date it has perhaps been unclear whether a Tribunal is permitted to include an element of compensation to reflect any injury to feelings caused by the employer's breach; particularly in a situation where there had been a deliberate and flagrant disregard of the worker's rights.

C's employer breached its WTR obligation to provide a 20 minute rest break and she argued that the Tribunal should award compensation for injury to feelings. The EAT held that any compensation awarded was not intended to be punitive but compensatory to reflect loss on the part of the worker. It acknowledged that if breach of any WTR obligation lead to injury to health, compensation could in principle be awarded; for example, if an employer repeatedly refused rest breaks with the result that the employee becomes exhausted and ill. Compensation for pure injury to feelings could not however be awarded however badly the employer had conducted itself.

[Gomes v Higher Level Care Ltd]

Interns: are you prepared?

As the summer months approach so too does the intern season. Clearly every intern scheme will be tailored to the organisation in question and the arrangements in place will be varied in practice. Organisations that run intern schemes must be alive to the possibility that their interns may be 'workers' for some employment law purposes and possibly even 'employees' for the purposes of the Equality Act on the basis that the intern has contracted

personally to perform the work in question.

Organisations that will run an intern scheme this summer need to be alert to the fact that the intern:

- May be eligible for paid annual leave or a payment in lieu at the end of the internship;
- May be eligible to receive the national minimum wage;
- Could render the organisation vicariously liable for acts of discrimination or harassment against the organisation's own employees;
- Could render the organisation vicariously liable for the intern's negligence where it causes loss to third parties;
- May be covered by the employment provisions of the Equality Act;
- May be privy to and able to disseminate the organisation's confidential information.

Naming and shaming organisations that fail to pay their interns and even reporting them to HMRC has become common practice. Consequently some thought needs to be given to the practical arrangements:

- How will it be documented?
- What will the intern be paid?
- How will holiday be dealt with (if at all)?
- Will a confidentiality agreement be concluded?
- Is any training necessary to reduce the risk of vicarious liability claims?

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