CLIFFORD CHANCE

Briefing Note – November 2019

UK: EMPLOYMENT UPDATE

Welcome to this month's briefing in which we consider an important Supreme Court case on whether the unlawful motives of a manipulating colleague can be attributed to the employer in circumstances where the decision maker had an innocent and valid reason to dismiss.

Also in the spotlight are an Employment Tribunal decision on the application of TUPE to 'gig' economy workers, clarification from the ECJ on whether 'gold plated' holiday must be carried forward if an employee was unable to take it for ill health reasons and new ICO Guidance on special category data.

Key issues

- Whistleblowing dismissal: unlawful hidden reason for dismissal attributable to the employer
- TUPE transfers: gig economy workers are in scope
- Enhanced holiday entitlement: no requirement to carry forward on ill health grounds
- ICO Guidance re Special Category Data

Whistleblowing: unlawful hidden reason for dismissal attributable to the employer

An employee will be regarded as automatically unfairly dismissed if the reason for the dismissal is that the employee 'blew the whistle' (made a protected disclosure) regardless of the employee's length of service. If the individual who took the decision to dismiss did not know of the employee's protected disclosure, but was manipulated by an employee who did, does that render the dismissal automatically unfair?

J reported concerns to her manager (W) about irregularities in the way in which client discount arrangements were being made. He put J under pressure to withdraw the allegations and implied that her job could be at risk if she did not do so. He then embarked on a course of bullying and harassment which included subjecting J to a performance management programme. J eventually went off sick and after a period of absence V was asked to take a decision about J's future employment. V had no previous involvement with J. She asked J's manager for information and W provided her with partial and misleading information that was intended to cause V to conclude that J should be dismissed for poor performance. The Employment Tribunal concluded that W was motivated by J's protected disclosures when he manipulated the information. It concluded that it was not surprising, but in fact inevitable, that V, the decision maker, would choose to dismiss on poor performance grounds; she genuinely believed J was a poor performer on the basis of the partial and misleading information supplied to her by W.

Th Supreme Court considered whether, in a claim for unfair dismissal, the reason for the dismissal can be other than that given to the employee by the decision maker?

The Court's succinct answer was: yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason. So on the facts, W's actions had been motivated by her protected disclosure; he then manipulated V into dismissing J on performance grounds. Even though V had no knowledge of the protected disclosure and was an innocently manipulated decision maker, W's motive was attributable to the employer as the reason for dismissal; rendering it automatically unfair.

The Court did emphasize that in most dismissal scenarios when searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision maker. Most employees will take part in the process leading to the dismissal. In most cases the employer will advance a reason for the potential dismissal (conduct, capability etc). The employee may well dispute it and may also suggest another reason for the employer's stance. The decision maker should usually address all rival versions of what has prompted the employer to seek to dismiss the employee and, if he/she reaches a decision to dismiss, will identify the reason for it. This did not happen in J's case.

The Supreme Court also acknowledged that there could be cases where the motive of other individuals involved in the decision making process could also be attributed to the employer. This would be, for example, where an employer has a disciplinary procedure that places responsibility on an investigating manager to investigate the allegations and produce a report which will form the factual basis for the disciplinary decision of a second manager. In such circumstances the investigating manager's unlawful motive may be attributable to the employer.

The Supreme Court's clarification that an employer can be fixed with the unlawful motive of an employee who has manipulated the decision maker whether in relation to dismissal or other matters (e.g. pay rise, promotion, bonus allocation) makes it important to ensure that an appropriate process is followed that engages the individual in question and any concerns around motive, appropriateness of a proposed course of action etc are tested in order to improve the chances of flushing out any possible manipulation of the decision maker or decision making process.

[Royal Mail Ltd v Jhuti]

TUPE transfers: gig economy workers are in scope

Where the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to the transfer of an undertaking or qualifying service provision change, the employment contracts of the transferor's 'employees' automatically transfer to the transferee (i.e. the entity that acquired the undertaking or the new service provider). The rights and liabilities arising under the contacts (e.g arrears of pay, unpaid holiday) also transfer. In addition TUPE impose information and consultation obligations in relation to the transfer, failure to comply with which can give rise to a protective award of up to 13 weeks' pay; liability, which is joint and several as between the transferor and transferee.

Who is an 'employee' for the purposes of TUPE? Does the TUPE definition of 'employee' also include 'worker' as that term is defined under the Working Time Regulations 1998 . This was the question considered recently by the Employment Tribunal.

A claim was brought by cycle couriers for holiday pay and a failure to inform and consult under TUPE. The couriers worked for X co until X co lost its contract for courier services to Y co. They then immediately started work for Y co.

There has been considerable judicial scrutiny of the 'employment' status of various 'gig' economy arrangements (Uber, Pimlico Plumbers and Deliveroo to name but a few). In many cases the individuals have been judged to be 'workers' (rather than employees) for the purposes of paid holiday entitlement under the Working Time Regulations 1998 (WTR) and the national minimum wage.

The couriers in this case had previously succeeded in a claim against X co that they were 'workers' for the purposes of the WTR. Their holiday pay claims against their new 'employer' (Y co) depended upon them being classified as 'employees' under TUPE so that the holiday pay liability transferred from X co to Y co automatically by operation of law. The TUPE protective award claim also depended on them being employees.

The Employment Tribunal held that the definition of 'worker' under the WTR is the same as 'employee' under the Equality Act 2010. Individuals falling into this 'intermediate class' of worker/employee benefit from EU law derived rights such as paid holiday, right not to be discriminated against and so on. Accordingly the Tribunal considered that such workers should also have the benefit of the rights and protections of TUPE, which is also a piece of EU derived legislation and therefore the definition of 'employee' includes 'worker' as defined under the WTR.

This is a first instance decision that has no binding precedence and it may yet be appealed. Until an appellate decision is handed down on the question of whether workers as defined under the WTR qualify as 'employees' for the purposes of TUPE, anyone involved in a transaction or service provision change to which TUPE applies should be mindful that if there is a gig economy element to the workforce, liabilities could transfer and TUPE information and consultation obligations triggered. Quantification of potential risks may be advisable in order to assess how best to mitigate them.

[Dewhurst v City Sprint (UK) Ltd]

Enhanced holiday entitlement: no requirement to carry forward on ill health grounds

The Working Time Directive (WTD) provides that workers should be afforded a minimum of 4 weeks paid leave a year ('Directive Leave'). Member States and/or employers are of course entitled to give their workers additional paid leave. In the UK workers are entitled to an additional 1.6 weeks' paid holiday under the Working Time Regulations 1998 (WTR).

The question recently considered by the European Court of Justice (ECJ) is whether such gold-plated leave must be treated in the same way as Directive Leave where a worker has been unable to take gold-plated holiday in the relevant holiday year due to absence on sick leave.

The ECJ had previously ruled that a worker who was unable to take the 4 week minimum entitlement provided for in the WTD due to ill health absence is entitled, at the end of his/her sick leave, to enjoy his/her Directive Leave at a

time other than that originally scheduled and should be permitted to carry it forward for up to 18 months.

The WTR do not address the carry forward of untaken holiday regardless of the reason it is not taken. Instead the WTR essentially adopt a 'use it or lose it' approach. In practice however the employment tribunals have adopted a purposive approach to the WTR and applied the ECJ decision on carry forward of Directive Leave. However the tribunals have maintained a 'use it or lose it' approach to gold-plated holiday.

The ECJ has now confirmed that Member States do not need to permit gold-plated holiday to be carried forward to subsequent holiday years if it has not been taken due to ill health.

This is welcome clarification from the ECJ giving employers comfort that they are not going to face claims for pay in lieu of accrued holiday on termination that relates to gold-plated holiday that has been carried forward from previous years.

Employers should be mindful that this ruling only explores the right to carry forward holiday untaken due to ill health absence; it should not be applied to situations where holiday has not been taken due to absence on maternity leave. In such cases employees should be permitted to carry forward all holiday (Directive Leave and gold-plated) to a subsequent holiday year if that is the year in which they return from maternity leave.

Employers may wish to clarify in their holiday policies/staff handbooks when employees will be permitted to carry holiday forward if they have not already done so.

[Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry (C 609/17), other party Fimlab Laboratoriot Oy and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry (C 610/17), other party Kemi Shipping Oy]

ICO Guidance re Special Category Data

The Information Commissioner's Office (ICO) has now produced guidance on the processing of special category personal data (or in old parlance, 'sensitive personal data'). Special category data is information concerning a person's health; sex life or their sexual orientation; racial or ethnic origin; political opinions; religious or philosophical beliefs; or membership of a trade union and genetic and biometric identification data.

Employers would be advised to read this guidance and to keep a watching brief on further guidance on the processing of criminal convictions data and a revised employment practices code which it is understood is being prepared, although no timeframe has been indicated.

The ICO Guidance can be found here: https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/special-category-data/

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