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April 2021 Employment Newsletter

Trade Union activities

An employer should be very careful about the way they deal with a disciplinary action if it potentially involves trade union activities. In a recent case, a University started moderating a departmental mailing list. An employee (a trade union representative) set up a new departmental mailing list so that all staff (both union and non-union members) could receive unmonitored emails, which sometimes included trade union information and workplace issues. The University told him to delete it, but when he refused, he was issued a formal oral warning for wilful disobedience. The Tribunal found the employer's "sole or main motive" for the formal oral warning was penalising the employee from taking part in trade union activities and this amounted to detrimental treatment.

Diversity training

A recent case emphasised the importance of providing good quality, effective and frequent equality and diversity training to staff to prevent discrimination. In this case, an employee racially harassed a colleague, and two managers who knew about it failed to do anything. The employer is potentially liable if an employee performs 'unlawful discriminatory acts' during their employment, unless the employer can show that they have taken ***all reasonable steps*** to prevent the employee from doing so. On the facts, the employer's equality and diversity training was deemed "stale" as the person committing the act thought he was engaging in "banter" and the employer's defence failed.

Uber

Uber

In the recent Uber drivers case, the Supreme Court ruled that drivers who provided their services through the Uber smartphone app attained the employment status of "workers", which would have the effect that they would be entitled to numerous workers' rights.

They concluded that:

1. The fare price was set by Uber, which the drivers were unable to change.
2. The contractual terms were imposed by Uber and the drivers were unable to negotiate.
3. The driver's choice about whether to accept requests for rides was constrained by Uber. For example, if the driver cancelled or declined too many requests, Uber would penalise the driver by logging them off the app for 10 minutes,
4. Uber exercised significant control over the way in which drivers deliver their services. For example, drivers were rated by passengers after every trip and if the driver's average rating fell below a certain level, they would receive several warnings and if this was not rectified, they would no longer be able to work for Uber.
5. Uber restricted communications between the driver and the passenger to the minimum necessary for drivers to perform the ride, effectively preventing any relationship forming between the driver and passenger.

In conclusion, the service provided by the drivers was tightly constrained, defined and controlled by Uber who exercised control over the drivers through rating systems, penalties and the amount they could earn, and therefore, the drivers should be classified as workers.

The Court held that the starting position should not be the contractual terms but rather the purpose of the legislation. The reality of the situation in practice and through conduct needed to be analysed and it recognised the unequal bargaining power in the relationship. Consequently, it was permissible to disregard contractual terms which were drafted to make the individuals appear to be independent contractors.

Where the agreements have been drafted to avoid the impact of the legislation, the employer is likely to lose unless they give up significant control or allow the contractor unfettered discretion to provide a substitute. The Government indicated over 2 years ago its intent to introduce legislation to cover the 'gig' economy but so far nothing has been introduced.

Working Time

The Supreme Court in the "Mencap" case gave an important ruling on working time. The issue was whether sleep-in workers should be regarded as working for purposes of Working Time/National Minimum Wage Regulations for those periods where they were asleep but available 'on call'.

The Court held that the sleep-in worker, who was merely present, was not working and the fact that the sleep-in worker was required to be present during specified hours was insufficient to lead to the conclusion that they are working.

Equal Pay for Asda Store Workers

The Supreme Court ruled that lower paid Asda store staff, who are mostly women, can compare themselves with the higher paid distribution centre workers, who are mostly men. Identifying a comparator is one of the key stages of a successful equal pay claim. It is likely that this ruling will have implications for other supermarkets and retailers. It is recommended that public sector employers regularly review gradings of all their staff.

Increased Statutory Limits

The annual increase for statutory limits came into law in April. Those limits are now as follows:

Basic Award for Unfair Dismissal- £6,634

Compensatory Award for Unfair Dismissal - £89,493

Maximum amount of "a week's pay" for Statutory Redundancy/Basic Award Unfair Dismissal - £544.

Public Sector Exit Payment Cap Revoked

The Restriction on Public Sector Exit Payments Regulations 2020 came into force on 4th November 2020 and set a cap of £95,000 on exit payments in public sector organisations. A review showed that the cap may have had "unintended consequences" which led to the government publishing a Treasury Direction on 12th February 2021 revoking the part of the regulations that implemented the cap with immediate effect.

The Restriction of Public Sector Exit Payments (Revocation) Regulations 2021, which came into force on 19 March 2021, contains a legal obligation for employers to make payments to employees who had an exit date between 4th November 2020 and 12 February 2021. These payments should equate to the additional sums they would have received had the cap not been in place, including interest.

TUPE fragmentation

The Employment Appeal Tribunal (EAT) has provided clarification on how TUPE Regulations apply in service provision changes where those services are fragmented.

The case involved two contractors, McTear and Mitie, who were each awarded a contract by a Local Authority (LA) for the installation of kitchens in its social housing stock. Previously, one contractor, Amey, had undertaken the installation of the kitchens. The LA split the housing stock into two lots based on the geographical areas of "north" and "south", then divided employees into each lot. McTear and Mitie took employees allocated to their lot on new terms and conditions. The roles of two employees, Mr Daly and Mr Lennon, did not fit within the geographical split, therefore Amey allocated one to McTear and one to Mitie. McTear and Mitie took employees each allocated to their lot on new terms and conditions. Amey maintained that the TUPE Regulations applied so that the employees' existing contracts transferred to either McTear or Mitie. Mr Daly and Mr Lennon, along with other employees, issued Employment Tribunal ("ET") proceedings. The ET agreed with Amey's allocation of employees. McTear and Mitie appealed to the EAT.

The EAT held that when services are fragmented, an employee can hold two or more contracts of employment with different employers at the same time so long as the work attributable to each contract is clearly separate from the others and is identifiable as such. The EAT set aside the ET's dismissal of the claims, so that the facts could be reconsidered.

Constructive dismissal – Engaging in an employer's grievance procedure

In constructive dismissal claims, an employee who waits too long after the employer's breach of contract before resigning is regarded as having affirmed the contract (i.e. treat it as continuing notwithstanding the breach), and therefore loses their right to claim constructive dismissal.

However, the Employment Appeal Tribunal held that the fact the employee engaged in his employer's grievance process did not mean that the employee had affirmed the contract. This seems a sensible decision given that this is a form of dispute resolution. To hold otherwise would

mean employees not using grievance procedures and having to accept a reduction in damages of up to 25% for not following the ACAS code

Vento limits increased

The Vento limits which set out the range of compensation for injury to feelings as a result of discrimination have been increased:

For the lower band: £900-9000.
For the middle band: £9,000-27,000
For the highest band: £27,000-45,000

These figures show how an employer can incur a significant liability just for damages for injury to feelings.

Gender Pay Reporting Enforcement Delayed

Equality and Human Rights Commission

The Equality and Human Rights Commission announced that, due to the continued effects of the pandemic, enforcement action against organisations that fail to report their gender pay gap will start again on 5 October 2021, after it was suspended last year.

Whistleblowing (Health and Safety)

The Government has laid an order before Parliament to amend s44 of the Employment Rights Act 1996. This means that workers will be protected from suffering detriment if they raise issues in circumstances of danger which they believe to be serious and imminent. The current position only protects employees. This change is due to become law on 31 May 2021.