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EMPLOYMENT LAW BULLETIN

Case Law Review 2020

Welcome to our Employment Case Law Review of 2020

It is probably an understatement to say that 2020 did not turn out as most of us expected. In employment law we were looking out for some important Supreme Court cases which have either not yet been heard or where judgment is still awaited.

These include the case of ***Royal Mencap Society v Tomlinson-Blake*** on the question of whether carers were actually working throughout their sleep-in shifts or merely available for work, the employment status case of ***Uber BV and others v Aslam and others***, and ***Kostal UK v Dunkley*** on the question of whether an employer's offers made directly to members of a trade union in the context of collective bargaining were unlawful. Watch this space for further information on these and other key judgments in 2021.

Despite the upheaval caused by the pandemic, employment law has continued to develop apace through important and interesting case law decisions in 2020. We collect together in this bulletin our top ten case reports from the last twelve months.

I hope you can join us for our virtual Employment Brunch Briefing on 2 February. We are delighted to be joined for this briefing by data protection expert Ibrahim Hasan. Please sign up through the link below. You can also access below our useful library of free recorded employment and charity law webinars from 2020.

Following the data protection briefing we will be holding an informal discussion about two current government consultations that could significantly change employment contracts in the future. One consultation looks at whether employers should be able to prevent workers from working for another employer whilst they are working under a guaranteed hours contract where earnings are below a certain level (exclusivity clauses). The other looks at whether changes should be made to the restrictions an employer can place on an employee's ability to work for or set up their own competing business in the period after they have left employment (post-termination non-compete clauses). Wrigleys will be seeking the views of employers on these issues before providing a response to these consultations. The relevant consultation documents are available in the following links:

Measures to extend the ban on exclusivity clauses in contracts of employment
Measures to reform post-termination non-compete clauses in contracts of employment

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

We wish all our readers a much happier New Year!

Forthcoming webinars:

- **2 February 2021, Webinar**
  Employment Brunch Briefing
  Data protection update for employers
  Speakers: *Ibrahim Hasan, lawyer and director of Act Now Training Limited & Alacoque Marvin, solicitor at Wrigleys Solicitors*
  Click here for more information or to book

Recorded employment law webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Flexible working: Part II - re-organisation and flexible working**
  7 July 2020, Webinar
  Click here for more information or to view webinar

- **Charities & social economy webinar series: Restructuring your organisation from the inside out**
  22 July 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: What's new in employment law?**
  1 December 2020, Webinar
  Click here for more information or to view webinar

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Was a dismissal for failing to disclose the employee's own safeguarding risk to her child unfair and in breach of human rights?

Article published on 7 February 2020

Dismissal and breach of right to privacy were justified by potential risk to employer's reputation as statutory safeguarding partner.

Employers can be faced with very difficult decisions where internal disciplinary proceedings arise from conduct outside of work. All the more so where that conduct raises a safeguarding risk which could impact on the employer's work and reputation.

Employees who work with children or vulnerable adults clearly have to comply with rigorous safeguarding procedures in the workplace to protect service users. More complex can be the question of whether such an employee has a duty to disclose a safeguarding risk arising from their own private life.

Within the education and child care sector, the rules on reporting a safeguarding risk arising from people the employee lived with (the disqualification by association rules) have been relaxed since 31 August 2018. Further details of these changes are available in a previous article, available on the Wrigleys website. The question of whether a headteacher was required under her contract to report her own relationship with a convicted sex offender was considered in the interesting case of *Reilly v Sandwell Metropolitan Borough Council* (a case which was considered before the disqualification by association rule change but to which the rules did not apply).

Despite the change in these rules, those working with children or vulnerable people are still likely to have a safeguarding duty to disclose to their employee where there is a risk of harm to children or vulnerable people arising from their own personal life. If the failure to disclose comes to light, the employee is likely to face disciplinary allegations including the potential damage to the employer's reputation as well as the breach of the safeguarding duty itself.

In a recent case, the EAT considered whether a probation officer's dismissal for failing to report that she was considered by social services to be a risk to her own daughter was unfair and in breach of her right to respect for private and family life.

Case details: ***Q v Secretary of State for Justice***

The claimant (Q) was employed as a Probation Service Officer, a role which included safeguarding duties although it did not include work with children. Her daughter was placed on the Child Protection Register in 2014 following allegations that Q had been violent towards her. Q did not follow social services' advice to tell her employer about this and so social services disclosed the information directly to the Probation Service. After disciplinary proceedings, Q was given a final written warning for failing to report a potential safeguarding issue and she was demoted. In 2015, a Child Protection Plan was put in place for Q's daughter. Q failed to inform her employer despite having been advised that she should keep them updated. The Probation Service summarily dismissed Q for this failure to disclose and for reputational damage consequent on the way Q had dealt with social services.

Q brought a claim for unfair dismissal which was not upheld by an employment tribunal. It found that the dismissal was fair in the circumstances as a final written warning had previously been given in relation to the same conduct and Q was aware of her obligation to disclose. The tribunal commented that the claimant's actions in not disclosing "showed a lack of professional judgment regarding safeguarding issues which could have impacted on her work". This was the case even though the claimant did not work with children as part of her role.

The tribunal also found that Q's actions were clearly capable of bringing the employer into disrepute and undermining public confidence in the Probation Service. These actions included both the nature of the incident itself, which involved a child, and Q's refusal to engage with social services. As an employee of the Probation Service, with its integral role in the criminal justice system, the claimant was to be held to a higher standard of conduct than employees might be in other sectors. This included personal conduct outside work which was likely to damage the reputation of the Probation Service. The tribunal accepted that the reputational risk was heightened by the fact that the Probation Service was a statutory partner on Local Authority Safeguarding Children Boards.

When considering whether Q's human rights had been infringed, the tribunal determined that the interference with Q's right to respect for a private and family life was proportionate. The Probation Service's requirement to "ensure that its staff behave in a way which is commensurate to their obligations to the public in terms of safeguarding the vulnerable and children" was of particular relevance to this decision.

The EAT agreed. It held that, given the nature and importance to society of the employer's activities and responsibilities, and the importance of its relationship with Local Authorities as statutory partners, the tribunal was right to find the interference with Q's human rights was proportionate and justified, and did not render the dismissal unfair.

Comment

A key question in unfair dismissal claims is whether the employer acted reasonably in treating the reason for dismissal as a sufficient reason to dismiss. This question takes into account all the circumstances of the case. In this case, these circumstances included the employer's activities, policies, duties, standing in society and relationship with statutory partners. The employer was able to show that the importance of these to the organisation had been taken into account in the decision to dismiss.

In this case, the existence of a final written warning about the same issue put the employee on notice that she was obliged to disclose information about the involvement of social services with her family in future and made clear the standards expected of the employee.

When taking the decision to dismiss in gross misconduct cases, it is vital for employers to document clearly the contractual terms, rules, policies, or duties which the employee has been found to have breached. Employers should also explain in the outcome letter the importance of the relevant rules or duties to the organisation and why the breach is therefore a fundamental breach of contract. Where dismissal is because of reputational risk, employers should articulate the nature of that risk and why this risk arose from the employee's conduct itself and/or from the failure to disclose.

It is important to note that not all conduct outside of the workplace will have an impact on the employment relationship and properly lead to a disciplinary process. When deciding whether to take disciplinary action, employers should first consider whether the conduct has any bearing on the employee's ability to perform the role and/or raises reputational risks for the organisation.

Unfair dismissal: whose reason is it anyway?

Article published on 19 February 2020

When the decision-maker's reason for dismissal is not the real reason.

In an unfair dismissal claim, the employer must show that the reason, or if there is more than one reason, the principal reason for the dismissal was one of the five potentially fair reasons (capability, conduct, redundancy, breach of a statutory duty or "some other substantial reason"). The tribunal

will make findings about the facts which were known to the employer and the beliefs held by the employer which caused the employee to be dismissed.
Usually, the tribunal will only examine the knowledge and beliefs (at the time of the decision) of the individuals who make the decision to dismiss, for example the dismissing officer and person hearing an appeal.

How will the tribunal deal with cases where there is evidence to show that someone manipulated evidence before the decision-maker and that the real reason for dismissal was not in fact one of the potentially fair reasons? A recent case has provided clear guidance on when a tribunal can look behind an invented reason for dismissal to the real motivation of someone else in the organisation.

Case details: ***Royal Mail Group Ltd v Jhuti***

Ms Jhuti worked in the Royal Mail Group's media sales team. During her probation period, she reported to her line manager (Mr Widmer) concerns about a colleague's breach of Ofcom compliance rules. Under pressure from Mr Widmer, she retracted the allegations. Mr Widmer then made working life difficult for Ms Jhuti by raising unjustified performance concerns and singling her out by holding intensive weekly performance review and target setting meetings. Ms Jhuti went on sick leave for stress and raised a grievance accusing Mr Widmer of bullying and harassment.

A different manager, Ms Vickers, undertook a paper-based review of Ms Jhuti's performance as her probation was coming to an end. Mr Widmer told Ms Vickers briefly that Ms Jhuti had made allegations about a breach of compliance rules and that these allegations had been retracted. Ms Vickers did not speak to Ms Jhuti during her review (because of Ms Jhuti's sickness absence) and did not have sight of the grievance, although she was aware of it. Ms Vickers dismissed Ms Jhuti on the ground of poor performance, taking into account the paper trail created by Mr Widmer.

Ms Jhuti brought claims for detriment and automatic unfair dismissal on the grounds of whistle-blowing. An employment tribunal upheld her whistle-blowing detriment claim. However, the tribunal dismissed the automatic unfair dismissal claim on the basis that the dismissing officer did not know about the protected disclosures and so could not have been motivated by them.

There followed a series of appeals in which the tribunal's decision was initially overturned by the EAT and then reinstated by the Court of Appeal. The Supreme Court has now clarified matters by agreeing with the EAT that Ms Jhuti's dismissal was automatically unfair on the ground of whistle-blowing.

This decision was on the basis that: "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".

Comment

This is a very important decision which is relevant to all dismissal cases and not only those which involve whistle-blowing. Where an employee can show that the real reason for their dismissal was not a fair reason, even where that real reason was unknown to the dismissing officer, a tribunal can find the dismissal to be unfair. This will only be the case, however, where the person manipulating the dismissing officer or putting forward false evidence to the investigation is someone above the dismissed employee in the hierarchy of the organisation. It would not apply, for example, where a colleague at the same level as the employee gave dishonest evidence to the investigation; although such a case might lead to a finding of an unfair process where the investigation was found to be inadequate in the circumstances.

In practice, it can be difficult for a dismissing manager to know whether the evidence put before them gives a true picture of the employee's performance or conduct. It is important that managers

in this position seek to have as a full a picture of events as possible rather than relying on what they suspect to be partial evidence. Taking steps to hear the employee's version of events is a fundamental part of the investigation process, as is seeking full documentary evidence relating to any grievances or concerns raised by the employee.

Where the employee is not well enough to take part in meetings, adjustments should be made to the process to enable them to participate, such as conducting meetings by telephone, taking written submissions or allowing a representative to attend on their behalf. Where there are compelling reasons to continue a process in the employee's absence, employers can still fairly dismiss. However, this is a risky step to take and we recommend taking legal advice before doing so.

Employer not vicariously liable for the vengeful act of an employee

Article published on 5 May 2020

The Supreme Court has final say on long-running series of cases caused by an intentional data leak.

Cases concerning an employer's liability for the actions of their staff often cause concern, particularly where the law is seen to be 'extended' by the courts to hold an employer liable. In such cases the primary concern is whether the wrongful actions of an employee can be fairly and properly considered as being done in the ordinary course of employment. If so, the employer may be liable.

The problem is that the application of this reasoning is highly fact-specific, meaning that cases which sound very similar to one another can be decided quite differently.

In October 2018 we considered the Court of Appeal's decision in the Morrisons Supermarkets Plc v Various Claimants case. In its decision, the Court of Appeal held that there was sufficient connection between the job and actions of a Morrison's employee to make Morrisons liable for the employee's act of leaking personal data of Morrisons employees on to the internet. Morrisons appealed the decision and we now have a useful Supreme Court decision on this issue making clear that Morrisons was not liable for the employee's deliberate data breach.

Case details: ***WM Morrison Supermarkets plc v Various Claimants***

Mr Skelton, an employee of Morrisons, was tasked with providing personal employee information to an external auditor. He did this, but also secretly made a copy of the data which he later posted to a website. He then also sent copies of the data to newspapers, posing as a concerned member of the public. It appears Mr Skelton had been motivated to do this as an act of vengeance against his employer after he received a verbal warning for a minor disciplinary matter.

When Morrisons was made aware of the breach it acted to protect its employees' identities and information. Not long after, Mr Skelton was arrested and ultimately he received a prison sentence for his actions. Several thousand Morrisons employees whose data had been leaked sued Morrisons for damages on the basis that the supermarket was liable for the actions of Mr Skelton.

The High Court and Court of Appeal found in the employees' favour on the basis that Mr Skelton's actions were within the course of his employment. This in part had been decided on the basis that, in the view of the courts, there was a clear causal link between what he had been asked to do by his employer and the information being leaked. The courts also found that Mr Skelton's motivation to harm his employer was irrelevant, in part because of the decision of the Supreme Court in *Mohamud v Wm Morrison Supermarkets plc* which suggested that the motivation of the employee was irrelevant.

The Supreme Court's decision

In its decision, the Supreme Court outlined that the lower courts had misapplied the tests for vicarious liability through a narrow interpretation of the Supreme Court's decision in the case of *Mohamud*. In particular, the Supreme Court was keen to draw attention to case law that had differentiated between employees who had acted in the course of their duties to their employer, thus making the employer liable, and cases where employees had been found to have gone off 'on a frolic of their own', where the employer was not liable.

One example was the case of *Mohamud* itself, where a petrol station attendant attacked a customer after ordering the customer not to return to the petrol station. In that case, the Supreme Court had found the employer liable because the assault was used to underline to the customer that they should not return to the petrol station. In short, the assault was directly related to the employee's duties and his place of work and the employer was liable for the assault.

As a result, in *Mohamud* the Court had determined that the employee's motivations were irrelevant because the vicarious liability test had already been met. Mistakenly, the lower courts had taken this to be a more general rule, which the Supreme Court found not to be the case.

The Supreme Court also referred to the case of *Bellman v Northampton Recruitment Limited*, a case in which the managing director of a company assaulted a subordinate at a work function after a disagreement arose about the MD's decision to recruit a particular employee. In this case the employer was found to be liable because the MD was making a show of his authority over colleagues, which he then underlined by carrying out the assault.

In contrast, the Supreme Court referred to a British Virgin Islands case in which a police officer left his post and injured a third party after firing his service revolver when he found his partner with another man. In this case, the officer's employer was not found liable for the injury caused because the officer had 'embarked … on a personal vendetta of his own'.

The Supreme Court noted that motivation was an important factor in determining whether an employee was acting to further his employer's business or to his own personal ends. It concluded that it was clear that when Mr Skelton leaked the personal data of employees he was acting on 'a frolic of his own', motivated by vengeance against his employer for having verbally disciplined him previously.

For this reason, Morrisons was not liable for Mr Skelton's actions.

Comment

The decision of the Supreme Court in this case will provide some relief to employers who were concerned by the decisions of the High Court and Court of Appeal.

Had the previous decisions stood, employers would have been left facing a much broader potential liability for employee actions than before. That was, as long as a third party could show that there was a causal link between harm or damage to them and the job the employee was employed to do, employers were at risk of being found liable for the harm or damage caused, no matter what the motive of the employee.
In this case, that causal link was provided by Morrisons asking Mr Skelton to provide the employee data to a third party auditor and then giving him access to that data, which he misused. The Supreme Court has identified that this alone is not enough to make an employer liable for the subsequent actions of the employee.

However, as always with vicarious liability cases, the warning that these cases are highly fact sensitive remains.

When will changes to terms because of a TUPE transfer be void?

Article published on 27 May 2020

The key risks of changing terms on a TUPE transfer – even when they are beneficial to the employee.

The purpose of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and the European Directive which it implements is to protect the terms of employment of employees who transfer from one employer to another when a business or part of a business transfers.

A key provision of TUPE is therefore that any changes to an employee's contract will be void if the sole or principal reason for the change is the TUPE transfer. This means there is a risk that changes to terms which are made before or after a TUPE transfer might be challenged by employees in a court or tribunal and that transferee employers might not be able to enforce the new terms, even if they have been agreed with the transferred employees.

When can changes to terms be made in the context of a TUPE transfer?

There are some circumstances where changes to terms which happen in the context of a TUPE transfer will not be void. These include:

- The reason for the change is an "economic, technical or organisational reason entailing changes in the workforce" (an ETO reason). This only applies when the variation is made because there is a change in the numbers, place of work or functions of the workforce, and when the employer and employee agree to the change. In practice, this exception does not often apply.

- The employment contract permits the employer to make the change. For example, there is a clause in the contract which allows the employer to move the employee to a different workplace.

- The contractual term which is changing is incorporated from a collective agreement and the change takes effect more than one year after the transfer. This will only apply if the terms, when considered together, are no less favourable to the employee than the former terms.

- In some cases where the outgoing employer is insolvent.

A change to terms will also not be void where it is made for a reason other than the transfer. For example, if market conditions lead to a reduction in pay, or if hours are reduced because of a drop in demand from a key client.

Key risks on changing terms following a TUPE transfer

Employers who are planning changes to terms in the context of a TUPE transfer should take legal advice on the risks. Case law suggests that there may be no safe time period after transfer date when a transferee can make changes, if those changes are because of the transfer and an exception does not apply. The question is whether the transfer was the reason for the change, no matter when the change occurred. This is why the harmonisation of employee terms following a TUPE transfer is always risky. The reason for levelling up the terms of existing and transferred employees will usually be the transfer, and there is unlikely to be an ETO reason, so the changes will very likely be void.

Employees whose terms have been changed may bring claims for breach of contract or for unlawful deductions from wages. They can wait to accrue losses (underpaid wages) before doing so, meaning there could be a considerable time of uncertainty for the employer. Breach of contract

claims can be brought within 6 years of the breach. Claims for unlawful deductions from wages can be brought within 3 months of the last of a series of deductions. Where pay has been reduced, the three month window for a claim reopens after each pay date. However, regulations brought into force in 2015 impose a two-year backstop period on unlawful deductions from wages claims relating to contractual pay and benefits.

Case law shows that, where a variation is found to be void and the new employer has entered into a valid contractual agreement for changed terms, employees can cherry pick the most favourable terms from those in place before and after the change.

Can changes be made to terms if they are wholly beneficial?

BEIS Guidance states that changes to terms which are entirely beneficial from the perspective of the employee are not prevented by TUPE. It may be difficult to imagine circumstances where a beneficial change to terms is challenged. However, a recent case has explored just this scenario and clarified that all changes to terms which are by reason of the transfer and do not fall into an exception will be void, whether they are beneficial or otherwise. While the circumstances of this case are quite unusual, it provides a helpful reminder of the risks of changing terms because of a transfer.

Case details: ***Ferguson and others v Astrea***

An estate management company (Lancer) carried out estate management for owners of a considerable property portfolio in London. Lancer had no other clients. The property owners gave 12 months' notice to terminate the contract and appointed a new estate management company (Astrea). It was accepted that this would be a TUPE transfer.

The CEO of Lancer tried unsuccessfully to persuade the property owners to extend the contract or to buy out the business. The CEO then hatched a plan along with other directors/employees of the company to improve their contractual terms, believing that Astrea would be bound by these terms following the transfer. These improvements included a 15% salary increase, guaranteed bonuses of 50% of salary (in the region of £500,000), generous termination payments and extended notice periods. There was also an agreement between the colleagues that their terms would revert to the former terms if their employment did not transfer to Astrea.

The TUPE transfer took place on the change of contractors. Astrea dismissed the CEO and his colleagues shortly after the transfer for gross misconduct relating to the new contractual terms, obstructive behaviour prior to the transfer and contemptuous / racist language towards the owners. They brought claims against Astrea for unfair dismissal and contractual termination payments as well as a claim relating to Astrea's failure to provide information to Lancer about any proposed TUPE measures.

The employment tribunal found that some of the improvements to terms were made by Lancer solely by reason of the transfer (in particular the bonuses and termination payments). It found that these changes had no legitimate commercial purpose but were designed to compensate the claimants as owners of the company for the loss of the contract, trying to gain an undue advantage through TUPE protections. It found that these new terms were void on this basis and stated that the claimant's attempt to vary their own terms before the transfer was an abuse of EU law. The tribunal considered that the 15% increase in salary, on the other hand, was not void as it was in line with market conditions and was not by reason of the transfer.

Although the tribunal found that the CEO had been unfairly dismissed, it reduced compensation by 100% because of contributory fault (including his actions in hatching the change of terms plan and lack of cooperation prior to the transfer) and because the CEO could have been fairly dismissed three weeks after the transfer in any event.
Interestingly, the tribunal awarded the claimants 3 weeks' pay each for the failure of Astrea

to provide information to Lancer as required under Regulation 13(4) of TUPE. As the tribunal considered that there was tactical delay in providing information on both sides, it did not make a higher award (the maximum for a failure to inform and consult is 13 weeks' pay).

On appeal, the EAT agreed with the tribunal's decision that the terms were void and made clear that TUPE makes void all contractual variations made because of a transfer (unless an exception applies) whether or not they are to the employee's benefit. It also agreed with the award of 3 weeks' pay to each claimant. The EAT remitted the question of whether the CEO's conduct had "caused or contributed to" his dismissal to the same tribunal but agreed that his compensation could be reduced on the basis that he would in any event have been dismissed fairly some three weeks after the transfer.

Other considerations for transferor employers considering a change to terms

It is important to note that it is not only the TUPE rules which might limit the changes an outgoing employer can make to its employees' terms.

In the context of a service provision change, where the client has decided to bring in a new contractor, it is common for the existing contract between the client and the outgoing employer to include restrictions on making changes to terms in the notice period, or in the last few months of the contract. In some cases, changes to employment terms may be possible under the contract if the prior consent of the client is obtained. There may also be restrictions on dismissals or recruitment in the period before the transfer.

Similarly, where a business or property sale effects a TUPE transfer, the transfer agreement may include warranties, undertakings or indemnities which limit the seller's ability to change employment terms pre-transfer.

Outgoing employers should take legal advice on any contractual obligations they may be under as the contract comes to an end or the sale takes place. Contractual claims arising from such changes to terms, where they are beneficial to the employees, are much more likely to come from the commissioning client or buyer than from employees.

Breach of confidentiality clause did not entitle an ex-employer to stop making payments under a COT3 agreement

Article published on 8 June 2020

Decision highlights the limits of a generic confidentiality clause in settlement agreements.

When using settlement agreements, employers are primarily concerned to settle any actual (or potential) employment tribunal claims in exchange for payment. Depending on the circumstances, employers may also be keen to keep the existence and details of such settlements confidential, perhaps because of reputational risks and / or because of the risk that other employees will be encouraged to bring claims against the employer.

However, most settlement agreements contain confidentiality clauses as standard, whether or not confidentiality is among the chief concerns of the parties.

It is a common misconception that breach of a confidentiality clause contained in a settlement agreement automatically entitles an employer to recover, or cease paying, sums due under a settlement agreement. As highlighted by a recent decision of the High Court, the options available to an employer in these circumstances will vary depending on the importance placed on confidentiality by the parties.

Case details: ***Duchy Farm Kennels Limited v Steels [2020]***

Mr Steels brought a number of claims in the Employment Tribunal against DFK, including unfair dismissal. A settlement was negotiated with the assistance of ACAS and recorded on a COT3 form (a simple form of settlement agreement ratified by ACAS).

Under the terms of the COT3, DFK agreed to pay Mr Steels £15,500 by way of 47 weekly instalments in full and final settlement of his claims against DFK. It included a standard confidentiality clause stating that both parties would not disclose the fact or terms of the agreement to anyone else, unless required to so by law or a regulatory authority or to a party's professional advisors.

After several weeks the Managing Director of DFK heard that Mr Steels had told a third party about the settlement and the money he was receiving under it. As a result, DFK stopped paying the weekly instalments and Mr Steels issued proceedings in the County Court to enforce payment of the settlement monies.

At first instance, the judge held that Mr Steels had breached the confidentiality clause but that the nature of the clause meant DFK was not entitled to stop paying the settlement monies. DFK appealed the decision.

The High Court concluded that the County Court was correct that the confidentiality clause was not a condition (or fundamental term) of the contract. This was on the basis that the core issue of the COT3 was to settle Mr Steel's Tribunal claims and neither party had placed any importance on the confidentiality clause at the time the COT3 was entered.

The High Court also agreed with the County Court that the breach of confidentiality in this case was not serious enough to entitle DFK to 'repudiate' the contract, in other words to treat the contract as terminated, and to stop paying Mr Steels. It held that the breach of the confidentiality clause was unlikely to result in significant damage to DFK. As the High Court judge noted, the core of the disagreement between the parties, an unfair dismissal claim, was a common issue and the risk of reputational damage was minimal. In addition, evidence suggested that third parties were already aware of the circumstances surrounding Mr Steel's departure from DFK and that the parties had likely settled. In the view of the courts, there was minimal risk that Mr Steel disclosing the existence and terms of the COT3 to a third party would lead to unmeritorious claims by other employees against DFK because the sums involved were relatively small.

Conclusion

This case highlights the importance of parties clearly communicating what elements of a settlement agreement are important to them when negotiating terms. In this case, the COT3 used standard confidentiality wording and neither the surrounding circumstances nor the actions of the parties suggested that confidentiality was a key term of the agreement.

In such cases the innocent party is left to show that the breach is so serious that they are entitled to set aside the contract and no longer be bound by its terms. This is a fairly high bar and whether it is met will depend on the surrounding facts. It is also worth noting that the employer may not want to terminate the agreement entirely if it wants elements of the settlement agreement to remain in place, such as an agreement by the employee not to pursue any claim (which may in any event become time barred) or to make or publish adverse comments about the employer.

The High Court judge noted that it is possible for employers to avoid this type of situation by expressly stating that confidentiality is a condition of the agreement or to making it clear in the agreement that there will be consequences (which may fall short of treating the agreement as terminated) for a party who breaches confidentiality.

However, this decision will no doubt cause some concern for employers that confidentiality terms in a settlement agreement may not be relied upon. There may still be steps employers can take to enforce confidentiality provisions, such as seeking an injunction against further breaches of

confidentiality or to seek compensation for any damage. Such steps can of course be costly and may not be timely enough to limit reputational damage; it is also notoriously difficult to evidence any actual financial loss arising from the breach.

Employers should ideally seek advice on the terms of settlement and remember that ACAS will assist with reaching agreement but cannot provide independent advice.

Whilst bearing all the above in mind, employers also need to be careful how they set out confidentiality clauses, particularly when issues of discrimination, harassment or victimisation are factors in the wider settlement, as failure to do so may also result in the clause being unenforceable. For further information, we considered these issues in an article in November 2019.

ECJ provides directions on determining a 'worker' for the purposes of the Working Time Regulations

Article published on 12 August 2020

Court identifies significant factors for a tribunal to consider when determining employment status.

Determining the precise nature of the relationship between individuals and the organisation they work for is a particularly tricky area of employment law. In part this is because definitions provided in law are open to interpretation and different laws protect different intersecting groups of individuals. This is complicated further where some of the laws describing a worker are based on an underlying European Directive.

For example, a 'worker' is defined in several places in UK legislation, including the Employment Rights Act 1996 (ERA 1996) and Working Time Regulations 1998 (WTR). The ERA1996 is entirely a work of domestic legislation, but the WTR transposes into UK law various protections and rights for workers and employees derived from the EU Working Time Directive (WTD). Because there are differences between the definition of 'worker' in the WTR and the concept of 'worker' status in EU case law, it can be difficult to precisely identify who qualifies for the rights and protections granted under the WTR.

In a recent case, an individual brought tribunal claims under the WTR against a courier business, which led to a referral to the European Court of Justice (ECJ) for clarification on the definition of 'worker' for the purposes of the WTD and WTR.

Case: ***B v Yodel Delivery Network Limited***

B worked as a parcel delivery courier for Yodel under a courier services agreement which stipulated he was a self-employed independent contractor. Under this arrangement, B used his own vehicle to make deliveries and his own mobile phone to communicate with Yodel. B was not required to deliver parcels personally and he was able to substitute someone else to do the work, although Yodel retained the right to veto the substitute if they did not have the adequate level of skill and qualification for the job. B remained personally liable for any acts or omissions of any substitute.

The services agreement allowed B to work for other delivery services (including rivals), stated that Yodel was under no obligation to provide work and that B was not required to accept any parcel for delivery. B was required to deliver the parcels he had accepted to deliver for Yodel between the hours of 7.30 am and 9 pm. B was able to choose the time of delivery of each parcel and their order of delivery to suit him, subject to any fixed time delivery requirements. B received a fixed rate of pay, which varied depending on the place of delivery of each parcel.

B brought claims under the WTR against Yodel and the question arose whether he was a 'worker' for the purposes of the WTR and the WTD. In particular, the tribunal asked several questions of the

ECJ to ascertain whether the interpretation of the WTR by UK courts is compatible with EU law.

The ECJ noted that a 'worker' is not defined in the WTD, but that the ECJ has ruled upon the concept. Referring to EU case law, the ECJ highlighted that the essential feature of an employment relationship for WTD purposes is when a person performs services for and under the direction of another in return for pay. The fact that a person might be classified as an 'independent contractor' under any national law did not prevent that person being classified as an employee under EU law if his or her independence was merely a legal fiction created to disguise the employment relationship. In contrast, an individual who had the ability to choose the type of work and tasks they performed, the way in which work or tasks were performed, the time and place of work, and the freedom to recruit their own staff were features typical of an independent contractor for the purposes of the WTD.

Applying this specifically to the case at hand, the ECJ noted that B had significant freedom in relation to how he worked for Yodel. However, it was for the tribunal to examine the consequences of this freedom and consider whether, despite the discretion afforded to him, B's independence was not merely hypothetical. The ECJ noted that the tribunal would also need to ascertain whether a subordinate relationship existed between B and Yodel.

The ECJ made clear that an individual will not be a worker if they:

- are genuinely independent;
- are not in a subordinate relationship with their client; and
- have discretion to:
  - use subcontractors or substitutes to perform the service;
  - accept or not accept the various tasks offered by the client;
  - provide services to any third party, including direct competitors of the client; and
  - fix their own hours of work within certain parameters.

Having regard for those factors the ECJ indicated that, based on the documentary evidence, B's independence did not appear to be fictitious and that there did not appear to be a relationship of subordination. However, it will be for the employment tribunal to make the final determination on the facts.

Conclusion

Although the Brexit deadline is pending, the guidance from the ECJ in this case on the definition of worker will continue to apply specifically in relation to the protections and rights of workers under the WTR. In particular, this means the case is of most interest to claims relating to rules on working hours and rest periods (including the maximum 48 hour working week) and holiday pay.

As with all cases concerning employment status, caution is advised as these cases are all fact-specific and so it is difficult to apply the decision to wider situations, but the issues highlighted by the ECJ will be familiar to those who have followed employment status case law. In addition, the ECJ mirrored UK courts and tribunals' emphasis on the need to look behind the stated relationship laid out in any contractual documentation and consider the real world effect of those terms and conditions to determine whether the key issues of freedom and flexibility are borne out or if they were merely hypothetical.

Reasonable adjustments: should an employer have guaranteed no contact with alleged bullying managers?

Article published on 25 August 2020

Recent case suggests a reasonable adjustment may take the form of an undertaking.

When an employer is subject to the duty to make reasonable adjustments under the Equality Act 2010 (EqA) it can be tricky to determine precisely whether an adjustment is 'reasonable' to make. The main factors which determine if an adjustment is reasonable are the extent to which it is practicable, the costs of implementation and how it will impact on the employer's activities. These are assessed in the context of the employer's size and financial and other resources. The tribunal will also consider whether adjustment would actually help the employee to overcome the relevant disadvantage and enable them to remain in the role.

Compliance with the duty to make reasonable adjustments often involves the employer and employee working together to make suggestions about how the employee's significant disadvantage due to a disability can be overcome. Typically, adjustments will focus on changes to the tasks undertaken by the employee, the place and times of work, and the provision of special equipment, but a recent case presented an employer with a more unusual proposal from their employee.

Case: ***Mrs S Hill v Lloyds Bank PLC***

Mrs Hill had been employed by the bank for more than thirty years when she had an extended period of sick leave due to stress, which she said was caused by bullying and harassment she received at work from two of her managers.

Mrs Hill and her managers agreed that they did not want to work with each other again and Mrs Hill returned to work. However, on her return Mrs Hill was anxious that at some point in the future she may have to work with the same managers again. This caused her to feel dread and fear such that she felt physically sick. The prospect of working for one of the managers left her in a constant state of fear, which left her feeling exhausted.

As a result, Mrs Hill's union representative requested an undertaking from the bank that Mrs Hill would not at any point in the future be required to work with or under the two managers, and that if she did the bank would pay her the equivalent of a redundancy payment. The bank refused to give this undertaking on the grounds it was not possible to give any guarantees about whether Mrs Hill would work under either manager (both were senior and may one day rise to be regional or division managers, for example) and that no redundancy payment could be made because breach of the undertaking did not create a situation where Mrs Hill's role would be made redundant.

Mrs Hill brought a claim against the bank for failing to make reasonable adjustments on the grounds that it refused to give the undertaking. The tribunal at first instance upheld the claim and awarded a compensation sum to Mrs Hill. The bank appealed.

On appeal a key question before the EAT was whether the undertaking proposed was a 'reasonable' adjustment. The bank argued that it was unreasonable to give the undertaking as it would have been a 'special benefit' given for an indefinite period for an event that had not occurred and may not ever occur. As well as being unreasonable to agree to make a redundancy payment in a non-redundancy scenario, the bank said the arrangement was unreasonable because the arrangement would likely see Mrs Hill leave the bank, which went against the whole point of reasonable adjustments which was to keep individuals in work.

The EAT dismissed the bank's arguments and saw no reason why an undertaking of this type could

not be given. The EAT pointed out that by their very nature reasonable adjustments are often indefinite (e.g. a permanent change to working environment or place of work) and amounted to 'special benefits'. The EAT also held that it could see no reason why a payment mechanism could not be used to reinforce the assurances being sought so that Mrs Hill could work with confidence that the bank was sufficiently motivated to prevent Mrs Hill from working for those managers again.

The EAT noted that many reasonable adjustments had financial implications and that in Mrs Hill's case, the overall purpose of the arrangement was to keep her in work.

Comment

The somewhat attention-grabbing conclusion that an undertaking secured by financial consequences for failure to meet the undertaking has been found to be capable of being a reasonable adjustment in principle may cause employers concern. However, the appropriate circumstances in which such an arrangement may arise appear to be narrow.

There are going to be limited circumstances in which a tribunal is likely to conclude that securing a promise that something will not happen by way of a financial incentive is reasonable. Indeed, the nature of the undertaking in this specific case means it is unlikely to succeed outside of large employers where staff might be managed in such a way as to avoid certain people from working together.

However, as the tribunals in this case have made clear, although the proposal in this case was something of a novel concept, such an arrangement shares many characteristics common to more usual reasonable adjustments in that it is a special arrangement which may last an indeterminate period of time that carries financial implications for the employer.

The takeaway point is that employers need to carefully consider any adjustments proposed by their employees. The simple fact that a proposal is out of the ordinary to what an employer might expect or have seen before will not automatically make it unreasonable.

Teacher was unfairly dismissed after decision not to prosecute for criminal charges

Article published on 10 September 2020

Unfair to dismiss for reputational damage when this was not put to the teacher as a formal allegation.

On the principles of natural justice, an employee facing disciplinary action should be able to understand the precise allegations against them so that they can meaningfully put their case in their own defence. The Acas Code of Practice on Disciplinary and Grievance Procedures (which employers must take into account) also requires that the employee has sufficient information about the alleged misconduct to prepare to answer the case against them. It is therefore vital that all allegations are set out in the letter inviting the employee to the disciplinary hearing.

A recent case in the EAT in Scotland has highlighted the importance of this simple principle even in very difficult cases.

Case: *K v L*

A school teacher was charged by the police with possession of indecent images of children but the Procurator Fiscal (the Scottish equivalent of the Crown Prosecution Service) decided not to prosecute.

After learning of the charge and subsequent decision not to prosecute, the employer began a disciplinary process. The invitation to the disciplinary hearing described the complaint against the teacher as being 'due to you being involved in a police investigation into illegal material of indecent child images on a computer found within your home and the relevance of this to your employment as a teacher.'

The teacher denied responsibility for downloading the images that were found. The teacher lived with their son and explained that their son and many of their son's friends had access to this computer.

The school ultimately decided to dismiss the teacher and gave several grounds for doing so, including:

- The teacher had been charged by the police with an offence of indecent child images being found on a computer in their home;
- Although the decision had been not to prosecute, the prosecutors advised that there was an obligation on them to keep cases under review and they reserved the right to prosecute the case against the teacher at a future date;
- The teacher admitted to the disciplinary panel that a computer located in their household contained indecent images of children;
- The employer was unable to exclude the possibility that the teacher was responsible for the indecent images being downloaded;
- There was a risk to the employer local authority's reputation if it continued to employ the teacher and a future prosecution or similar action were to occur; and
- There had been an irretrievable breakdown of trust and confidence between the teacher and the employer.

The teacher brought a claim for unfair dismissal which was dismissed by an employment tribunal. The teacher appealed to the EAT.

The appeal

The EAT agreed with the teacher that the dismissal was unfair.

Unclear allegations

The EAT commented that it was against natural justice to state a ground of dismissal in the dismissal letter that had not been clearly set out in the invitation to the disciplinary meeting. Although reputational issues had been raised by the school's investigation report and had been touched on briefly during the disciplinary hearing, they were not put formally to the employee and the employee had not commented on them at the hearing. The EAT made clear that any allegations must be clearly expressed so that an employee can adequately prepare themselves to answer the case. The EAT disagreed with the tribunal's view that it was sufficient grounds for dismissal to rely on an issue identified in an investigatory report that was not addressed in the disciplinary allegations.

Finding guilt on the balance of probabilities

The EAT also agreed with the teacher that the dismissal on conduct grounds was unfair as it was not based on a finding of misconduct on the balance of probabilities. The decision maker had dismissed the teacher partly on the basis that, although there was not enough evidence to prove who had downloaded the images, the possibility that the teacher had done so could not be excluded. The EAT made clear that this was the wrong standard of proof. In disciplinary procedures, as in civil proceedings, allegations will be proven if they are more likely than not to be true. In other words, there is more than a 50% chance that the alleged conduct occurred. Here, the school had wrongly decided to dismiss because there remained a possibility (however small) that the teacher had downloaded the images.

Relying on reputational damage

The EAT drew comparison between this case and that of *Leach v Office of Communications [2012]*. In *Leach* the employer had been warned by the police that the employee had engaged in paedophile activity in Cambodia. The employer fairly dismissed the employee because of the risk to its reputation in continuing to employ him. However, in *Leach* the employer had access to information from the police which indicated it was more likely than not that the conduct had taken place and the employee had attempted to conceal the matter from his employer. There was also significant interest from the national press about the case.

In contrast, in this case, the school had not found evidence to establish that the conduct was more likely than not to have occurred and had no evidence to suggest reputational damage was likely. When dropping a prosecution, the Procurator Fiscal commonly reserves the right to prosecute should further information come to light. This was no indication that such a future prosecution would happen and damage the employer's reputation.

Wrigleys' comment

Disciplinary cases involving criminal allegations can be extremely difficult for employers to deal with. Please see further information on handling such cases particularly in a school context in our previous article: "Dealing with school employees who are being investigated by the police" (link here). We have also looked at the interaction between internal and external investigations in a recent case report: "When disciplinary and criminal proceedings interact" (link here).

The employer in this case might have been able fairly to dismiss on the basis of reputational damage to the organisation if it had properly put this point to the employee and considered the likelihood of reputational damage based on the facts of the case. This would depend however on whether there was found to be a real risk of the matter becoming public knowledge and actual harm to the employer's reputation as a consequence.

Use of information from WhatsApp group for a disciplinary process was not a breach of privacy rights

Article published on 29 October 2020

Is there a lower expectation of privacy for those working in certain professions?

Employees have a right to respect for private and family life, home and correspondence under Article 8 of the European Convention on Human Rights (ECHR). This right is not absolute: it can be interfered with where doing so is in accordance with the law, necessary in a democratic society, and in pursuit of a legitimate aim, such as public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others.

Strictly speaking, private employers are not bound by the ECHR like public authority employers are, but all employers should take the right to respect for privacy into account in disciplinary proceedings because a tribunal or court (as a 'public authority') must interpret employment rights in a way which is compatible with the ECHR. This means tribunals must consider whether ECHR rights have been infringed when determining a matter before them. For example, if a dismissal is based on information obtained in breach of Article 8 ECHR it is likely to make it unfair.

There have been several recent cases in the ECJ and EAT which have grappled with the competing rights of individuals to privacy with the rights of employers to use information gathered from social media and other sources for conduct procedures. For example, the case of *Lopez Ribalda and Others v Spain* considered the right of a supermarket to covertly monitor its employees via CCTV when there was a suspicion of criminal activity in the workplace. See our article on this case, **When**

will covert monitoring of employees be lawful? here.

The case earlier this year of *Q v Secretary of State* for Justice considered whether the probation service breached an employee's privacy rights when dismissing her in relation to the alleged safeguarding risk she posed to her own child. See our article, **Was a dismissal for failing to disclose the employee's own safeguarding risk to her child unfair and in breach of human rights?** here.

A recent case from Scotland has considered the privacy rights of several police officers in the context of their employer's use of WhatsApp messages as part of disciplinary proceedings. The high standards expected of police officers in their professional and personal lives were fundamental to the decision of the courts.

Case details: ***BC and Others v Chief Constable of the Police Service of Scotland***

Whilst investigating a crime, police discovered the existence of a WhatsApp group in which several members (and potentially all) were determined to be police officers. The group members shared several questionable posts, including discriminatory and derogatory content and photographs of crime scenes and people who had been detained, in clear violation of police procedure rules.

The police referred the information to the Professional Standards Department within the police service, who subsequently opened disciplinary proceedings against the officers. The officers brought a an application to the Outer House of the Court of Session arguing that the use of the information sent in the WhatsApp group in disciplinary proceedings was a breach of their Article 8 ECHR privacy rights.

The officers' case was dismissed on the basis that they had no reasonable expectation of privacy in respect of the messages exchanged over the WhatsApp group, that the police service had a legitimate purpose to refer the information to Professional Standards, that such action was proportionate, and that it was reasonable for the information to be used in internal disciplinary proceedings against the officers.

The police officers appealed the Outer House's decision.

The appeal

All the grounds of appeal were dismissed.

The Inner House agreed with the Outer House's conclusion that the police officers had no reasonable expectation of privacy in these circumstances and so their privacy rights had not been infringed. If the officers' right to privacy had been infringed, the court determined that such interference would have been lawful.

Considering the key question of the expectation of privacy, the court was not persuaded by the officers' arguments that the WhatsApp groups had been set up strictly in a friendship capacity, noting that the group names ('Quality Polis' and 'PC Piggies') had a clear link to their jobs, as did items of information posted to the groups. The court also noted that the officers bringing the case said that they were not friends with all the group members and indeed were not entirely sure who all the group members were, implying they were professional and not private groups.

Importantly, police officers in Scotland swear an oath to uphold fundamental rights and treat people equally before the law. The oath also requires officers to uphold the honesty, integrity, authority and respect of the service in Scotland and to report discreditable conduct whether on or off duty.

The link between the WhatsApp groups and the officers' roles, the fact that their role was a public

office, and that each knew the groups were comprised of police officers who had sworn a duty to report discreditable conduct, all reduced the expectation of privacy of the WhatsApp group messages in the eyes of the court.

The Inner House agreed with the Outer House's conclusion that a reasonable person would view the messages as 'blatantly sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability[…]' and that the referral of the messages to Professional Standards was made on legitimate grounds of prevention and detection of crime and in order to uphold the reputation of the police service in the eyes of the public.

The court noted that the information had not been obtained by surveillance or deception, but in the course of regular police duties.

Finally, the Inner House concluded that the Outer House judge was correct to determine that the information could be used as part of a disciplinary process because the disciplinary process would allow the officers opportunity to explain their actions and defend themselves against allegations of misconduct.

Comment

Public office and expectation of privacy

This case is one of many which considers the Article 8 ECHR right to privacy in the context of law enforcement but is helpful in that it considers this question in the context of a public official's right to privacy in a conduct investigation by their employer and/or professional regulator. It confirms that the fundamental exercise when determining the expectation of privacy is to weigh up the right to privacy in the full context of the particular circumstances, including the position of the individuals concerned and the content of the information.

In this case, several factors combined to lower the officers' reasonable expectation of privacy in respect of the information they shared. The fact that police are public officials and are under a sworn duty to report conduct that may discredit the police service was also a key factor here, given that the WhatsApp group was clearly linked to their work and several, if not all, members of these groups were serving officers.

Interestingly, the Outer House of the Court of Session commented that an ordinary member of the public would have had a reasonable expectation of privacy in using a WhatsApp group, although this question was not examined on appeal and the Inner House cast some doubt on this conclusion.

Application to other professionals

There are numerous members of professional bodies who are subject to specific standards who are not public officials. For instance, solicitors are subject to an obligation to act in a way that upholds public trust and confidence in their profession and the wider legal system. This includes a broad expectation to act with integrity, honesty and without discrimination, in a private as well as in a professional context.

Teachers are subject to Teachers' Standards, part 2 of which requires that teachers 'uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school'. This includes a requirement that teachers observe proper boundaries with pupils, have regard to their statutory safeguarding duties, and show tolerance of and respect for the rights of others.

By their nature, standards of this kind will draw into question an individual's conduct both inside and outside of the workplace, which may lead to disciplinary proceedings by an employer and in some cases referral to a professional regulator if their actions have breached those standards.

In these circumstances, an employer will therefore need to consider the Article 8 ECHR privacy rights of an individual when deciding to take internal disciplinary action and when disclosing that information to a regulator. Even where an employee may have a reasonable expectation of privacy, there will be cases where the nature of the conduct involved justifies an interference with that right, for example in a teaching context where there is a safeguarding risk.

Are workers protected after refusing to work because of health and safety fears?

Article published on 25 November 2020

High Court: UK has failed to implement EU law protecting workers from detriment on health and safety grounds.

Refusing to work on health and safety grounds

Employees who act in the reasonable belief that they would be in serious and imminent danger at work are protected under UK law from suffering negative consequences or being dismissed because of that act. This applies when someone leaves work early, refuses to attend work, or when they take or propose to take appropriate steps to protect themselves or others.

This protection originally came from the EU Health and Safety Framework Directive (the Framework Directive) in 1992, which applied to "workers". The UK implemented this protection through Sections 44 and 100 of the Employment Rights Act 1996 (ERA 1996). However, the ERA 1996 limited these protections to employees rather than extending them to workers.

What is a worker?

The question of whether someone is an employee or a worker is a complicated one which has been the subject of many court and tribunal cases. In general terms, in UK law employees work under a contract of employment (usually but not always in writing) and a mutual obligation where the employer will provide work which the employee must accept to do. Employees must perform the work personally, and are subject to a high level of control over how and when they perform the work and a high level of integration into the employer organisation.
Workers will usually be distinguished from employees by the fact that they have no guaranteed hours of work and can turn down work when it is offered. They will usually be subject to a lower level of control by and integration into the employer organisation. However, they must still perform the work personally and they are subordinate to their employer, having no bargaining power or client/contractor business relationship with them (as a self-employed person would).

There are a number of definitions of a "worker" under EU law depending on the rights and obligations in question. In general terms, a worker under EU law is someone who performs services for and under the direction of another person in return for wages.

Should workers be protected in the same way as employees if they refuse to work because of fears about their safety?

The High Court has recently determined that the UK failed properly to implement the protection against detriment under the Framework Directive by failing to apply it to workers who do not work under a contract of employment.

The High Court also decided that the UK had failed properly to implement the EU Personal Protective Equipment (PPE) Directive by not extending its protection to workers. The PPE Directive sets out minimum requirements for PPE used by workers at work and requires PPE to be used in certain circumstances when risks cannot be avoided by other means.

Case details: ***R (Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions***

The Independent Worker's Union of Great Britain (IWUGB) union represents gig-economy workers including couriers, private hire and van drivers. During the first wave of the Covid-19 pandemic, many of its members sought advice on concerns about their safety at work, including a lack of PPE and a failure to enforce social distancing at work. Couriers engaged to deliver Covid-19 tests as part of the testing regime expressed concerns about inadequate packaging of contaminated samples.

The IWUGB brought proceedings in the High Court seeking a declaration that the UK had failed to implement the Framework Directive and the PPE Directive because the protections set out in UK law were limited to employees. The High Court agreed and made a declaration to that effect.

Comment

This decision is very important as it extends to workers protection from detriment for refusing to work or taking other steps to protect health and safety. This will apply to those on zero hours contracts, to bank workers and casual workers. This decision may give rise to claims, for example where workers have suffered reduced pay due to a refusal to work because of a reasonable belief that they are in danger when working. Workers (along with employees) will also be entitled to be provided with PPE where this is necessary to mitigate risks.

However, this does not extend protection to those who are genuinely self-employed, that is those who are in business on their own account and who have a client/contractor relationship with the contracting organisation. Of course, the line between worker status and self-employed status will continue to be the subject of legal battles to secure rights for individuals.

Workers' rights include statutory minimum paid holiday, statutory sick pay (if eligible), National Minimum Wage and protection against discrimination. This decision may well increase the number of individuals who bring claims on the basis that they are in fact workers, despite being nominally self-employed.

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