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Employment Law BULLETIN

Welcome to our December employment law bulletin.

Greetings to all our readers for the Holiday Season and we wish you all the very best for 2017.

This month's issue contains topical news items and notable employment law decisions.

The Government has begun a consultation on reform of the employment tribunal system. Case management case workers may take the place of employment judges for the purposes of basic procedural and administrative decisions. And digital correspondence and online decision making may be used for certain simple claims. This is surely a sign of the times.

The Government has also launched a consultation on employment barriers facing disabled people. According to the Office of National Statistics figures, less than half of all disabled people in the UK are in work, compared with 80% of non-disabled people. The consultation seeks to find out why this is the case and what can be done about it.

The long awaited *Code of Practice on English Language Requirements for Public Sector Workers* has now been published. The new rules require public authority employers to ensure that every employee in a customer- facing role speaks fluent English.

It is fitting that our lead employment law case this December is about the high spirited activities of employees following an office Christmas party. In *Bellman v Northampton Recruitment Limited* a High Court decided that an employer was not liable for damage caused by a managing director's assault on a sales manager at an impromptu drinking session following the works Christmas do. Events took place after, and not during, an organised work social event, and at a different location. However, with office festivities taking place this week, employers should be aware that there is a significant risk that an employer will be found to be vicariously liable for unlawful wrongdoing during a works event such as a Christmas party.

In *Tony Pulis v Crystal Palace* the High Court considered Tony Pulis' challenge to a decision made by the Premier League Managers Arbitration Tribunal that he should repay a bonus to Crystal Palace Football Club, as it had been paid early in response to a fraudulent misrepresentation by Pulis. The case raises interesting questions of the law of misrepresentation and breach of contract.

In *Eiger Securities LLP v Korshunova* the EAT held that, in a whistleblowing case, the employment tribunal is bound to identify the alleged breach of any legal obligation before finding a protected disclosure about it has been made. Although a legal obligation need not be identified precisely or in detail, there must, for a successful whistleblowing claim, be some identifiable legal obligation that has been breached. It is not enough for a claimant to believe that someone has simply "done something wrong".

May I also remind you of our forthcoming events:

Click any event title for further details.

Annual TUPE Update

- Breakfast Seminar, 7th February 2017

And in conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- Full day conference, Leeds, 2nd February 2017

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

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1: Consultation on reform of the employment tribunal system

The Government has begun a consultation on reform of the employment tribunal system, as part of its wider plans for transforming the justice system.

The consultation includes a proposal that case management caseworkers should take procedural and administrative decisions currently taken by employment judges. It proposes that electronic-only correspondence and online decision-making be used for certain simple claims. Opinions are sought on whether non-legal panel members should continue to be used in tribunal hearings as a matter of course.

Unlike other parts of Her Majesty's Courts and Tribunal Service which can be changed through secondary legislation, any changes to employment tribunals and the EAT will require amendments to the Employment Tribunals Act 1996. This is likely to mean that reforms to the Employment Tribunal system will be implemented after the changes made in other parts of the Courts and Tribunal service.

The consultation documents are available online. The consultation closes on 21 January 2017.

2: Government launches consultation on employment barriers for disabled people

According to Office of National Statistics figures, less than half of all disabled people in the UK are in work (48%), compared with 80% of non-disabled people. The Government has launched a consultation aimed at understanding the reasons why people with disabilities and long-term health conditions have difficulties in finding work and keeping a job.

Responses are invited from people with health conditions and disabled people themselves as well as from families, friends, teachers and carers. The Government would also like to hear from employers, employability professionals, health and care professionals, local leaders and commissioners in health and social care, local authorities, and voluntary and community organisations. Questions for employers focus on the barriers which may currently stand in the way of employing people with disabilities and how those barriers could be overcome.

The consultation documents are available online. The consultation closes on 17 February 2017.

3: English language requirements for public sector workers

The Code of Practice (English Language Requirements for Public Sector Workers) Regulations 2016 have now been published and will come into force on 22nd December 2016.

As we highlighted in our August issue of this bulletin, the new rules require public authority employers to ensure that every employee in a customer-facing role speaks fluent English. Public authority employers must have regard to the new *Code of Practice* when fulfilling this "fluency duty".

Public authorities in this context include government departments, public bodies, local government, NHS bodies and state-funded schools, including academies. The rules will not apply to people who are employed directly by private sector or voluntary sector employers.

The Code provides guidance to public authorities in deciding which employees are customer-facing, the necessary standard of fluency, establishing a complaints procedure for members of the public, and remedial action where a member of staff falls below the necessary standard.

4: Employer was not vicariously liable for attack on manager at "post-party" drinks

In *Bellman v Northampton Recruitment Limited*, the High Court decided that an employer was not liable for the damage caused by the managing director's assault on a sales manager at an impromptu drinking session following the works Christmas do.

The case concerned Mr Bellman, a sales manager for Northampton Recruitment. He had attended a works Christmas party at a golf club and went on to attend an unplanned "post-party" gathering in a hotel bar which went on into the early hours of the morning. The gathering included a number of colleagues including Mr Major, the managing director of the company. After a period of non-work related chat, the conversation turned to work topics. Mr Bellman and Mr Major, who had been friends since childhood, got into an argument about the recruitment and salary of another colleague. During a "rant" by Mr Major about his ability to do as he wished as owner of the company, Mr Major punched Mr Bellman twice, causing him to fall down and hit his head on the marble floor. Mr Bellman sustained brain damage in the attack. Mr Bellman decided not to pursue a civil action against Mr Major given his lack of funds, but brought a claim against the company arguing that the employer was vicariously liable for Mr Bellman's injury.

In order to find an employer vicariously liable for the wrongdoing of an employee, there must be a "close connection" between what the employee was employed to do and the wrongful conduct. A court will consider the nature of the work which the employee is contracted to do and decide whether the wrongful act comes within the "field of activities" of the employee's role.

In the recent case of *Mohamud v Wm Morrison Supermarkets PLC* [2016] AC 677, the Supreme Court held that the employer was vicariously liable for the damage caused to a customer by a petrol station attendant in an unprovoked attack. In that case, the decision was based on the facts that the attack took place directly following a query by the customer of the attendant, the attendant's role included responding to customers and the attendant instructed the customer during the attack not to return to the petrol station. The Supreme Court held that the attack merged seamlessly with the attendant carrying out his duties.

The High Court found that Mr Major's role as managing director was to control the company and its employees and to motivate staff. However, it did not find that there was sufficient connection between this role, Mr Major's "rant" and the attack, stating that there must be some limit to the concept of vicarious liability and that employees cannot be considered to be "on duty" on any occasion when they are in the company of colleagues and speak about work.

The High Court's decision was based on the facts that the drinking session took place after and not during an organised work social event; there was a gap in time between the Christmas party and the drinking session as well as a difference in location; and there was no compulsion on employees to attend the drinking session (unlike the Christmas do). It distinguished the case of *Mohamud* in which there was no gap between the employee carrying out his role and his attack on the customer.

Organisations should nonetheless be aware that there is a significant risk that an employer will be found to be vicariously liable for unlawful wrongdoing during a works event such as a Christmas party (no matter where or when it takes place).

5: High Court upholds decision that football manager obtained bonus by misrepresentation

In *Tony Pulis v Crystal Palace*, the High Court considered Pulis' challenge to a decision made by the Premier League Managers' Arbitration Tribunal that he should repay a bonus to Crystal Palace Football Club as it had been paid early in response to fraudulent misrepresentation by Pulis.

Under Pulis' contract of employment, he was due to be paid a bonus of £2 million gross if Crystal Palace remained in the Premier League after the 2013/2014 season (which it did) and if Pulis remained in employment with the club until at least 31 August 2014. At the beginning of August 2014, Pulis requested early payment of the bonus. He assured the club chairman that he remained committed to Crystal Palace and that he would remain at the club at least until the end of August. He also stated that the money was urgently needed to allow him to buy some land for his children.

The chairman agreed and the bonus was paid on 12 August 2014. The next day, Pulis stated that he wished to leave Crystal Palace and he resigned on 14 August 2014.

Pulis argued that his resignation was a direct consequence of a "heated players' meeting" which he alleged took place on 12 August. The tribunal preferred the evidence of the club that: this meeting had actually taken place on 8 August; the matters in dispute at this meeting were resolved before the 12 August; and the meeting could not therefore have been the reason for his decision to leave.

In deciding that the bonus should be repaid by Pulis, the tribunal found that Pulis had made two fraudulent misrepresentations. It found that Pulis had deceived the club by saying he was committed to the club when in truth he did not intend to stay until the end of August but rather he planned to seek more lucrative employment with another football club. It also found that there was no imminent land transaction for which Pulis required these funds. Describing Pulis' conduct as "disgraceful" both before and during litigation, the tribunal found that the only logical inference was that Pulis wished to leave the club without forgoing the bonus.

The tribunal also concluded that Pulis had repudiated the employment contract when he refused to take control for the first game of the season against Arsenal on 16 August 2014 thus leaving Crystal Palace with no choice but to appoint another manager. This refusal to perform an obviously fundamental part of his employment contract as manager was a fundamental breach which the club was entitled to accept.

The tribunal ordered that Pulis pay a total of £3,776,000 including payments relating to the bonus, tax and National Insurance paid by the club and £1.5 million in liquidated damages for breach of contract.

The High Court upheld the findings of the tribunal. It dismissed Pulis' argument that the tribunal had ignored the oral evidence of two former Crystal Palace players as to the date of the "heated players' meeting". It also noted that the findings concerning the non-existent land transaction would be sufficient on their own to conclude that Pulis had secured early payment of the bonus by means of fraudulent misrepresentation.

6: Whistle-blowing: tribunal must identify breach of legal obligation before finding a protected disclosure has been made

In *Eiger Securities LLP v Korshunova*, the EAT held that an employment tribunal had failed to identify the source of the legal obligation which the claimant reasonably believed had been breached. The tribunal had therefore erred in finding that the claimant reasonably believed that a legal obligation had been breached and that the claimant had made a qualifying disclosure.

Ms Korshunova worked for Eiger Securities as a broker. It was common practice for employees to use Bloomsberg Chat to communicate with their client bank traders and to share passwords for this service so that it was possible for one employee to complete a trade in the name of another employee. The claimant challenged the managing director of Eiger when she found that he had used her screen to make a trade without identifying himself to the client. Following this, a number of clients were moved away from Ms Korshunova to trainee brokers. Ms Korshunova was invited to a disciplinary hearing to face allegations relating to failure to follow instructions and poor performance. She did not attend and was dismissed for gross misconduct in her absence. Following an internal appeal, she brought claims in the Employment Tribunal of automatic unfair dismissal and being subjected to a detriment due to whistle-blowing.

In order to qualify for employment protections relating to whistle-blowing, the claimant must have a reasonable belief that the disclosure is in the public interest and that the information tends to show one of six types of failure (here that a legal obligation had been breached).

An employment tribunal found that the claimant had reasonably believed that her employer had breached a legal obligation because she had a genuine belief that misleading clients as to the identity of the broker must be wrong. The tribunal also found that the claimant had made a protected disclosure when she challenged her boss about his use of her on-line identity and that she had been subjected to detriments and automatically unfairly dismissed because of the disclosure.

The EAT did not agree. It allowed the appeal of the employer and remitted the case to a fresh tribunal. The EAT held that it was not obvious that the use of another employee's Chat identity was a breach of a legal obligation. It stated that the tribunal should have identified the source of the legal obligation and the way in which the employer had breached it.

The EAT also found that the tribunal had wrongly considered what was in the mind of the dismissing officer when dismissing (as would be asked in discrimination claims), rather than asking whether the disclosure was the reason, or principal reason, for the dismissal (the correct test for whistle-blowing dismissals).

The tribunal's decision that the claimant had been subjected to a detriment was set aside by the EAT as the tribunal had failed to separate out the claimant's alleged protected disclosures and the manner in which she had challenged the managing director (which could have been the sole reason for the dismissal).

This case is useful in clarifying that the breach of a legal obligation must be identified by a tribunal before a qualifying disclosure can be found to have occurred. Although the legal obligation need not be identified precisely or in detail, there must be an identifiable legal obligation. It is not enough for a claimant to believe that someone has simply done something wrong.

If you'd like to contact us please email john.mcmullen@wrigleys.co.uk