Employment law roundup

At our recent seminar, *getting charities in shape for 2016*, Jane Klauber, partner in the charity and social business team, provided a roundup of recent developments in employment law.

Redundancy

One of the most important cases to be decided recently is *USDAW and Another v WW Realisation One Ltd and Others*. This case concerns the meaning of an 'establishment' for collective consultation purposes.

Under the collective redundancy rules, employers must consult with employee representatives where 20 or more redundancies are proposed in an establishment within a 90 day period. When Woolworths went into liquidation in 2008, they consulted with employee representatives only in stores where there were 20 or more redundancies. This led to an Employment Appeal Tribunal (EAT) decision stating that the collective redundancy rules were engaged whenever an employer makes more than 20 employees redundant across its whole business within 90 days even if there are fewer than 20 employees made redundant on any single site.

The Court of Appeal referred the matter to the European Court of Justice (ECJ) which held that the 'establishment' is the local unit to which the redundant employees are assigned to carry out their duties. The ECJ also held that the European Directive in respect of collective redundancies, which domestic rules implement, does not require all 'establishments' to be aggregated for the purpose of the 20 employee threshold. The case has been remitted to the Court of Appeal to determine whether each shop was an establishment.

It is also worth remembering the duty to notify the Secretary of State for Business Innovation and Skills (BIS) whenever an organisation proposes to dismiss 20 or more employees at one establishment within a 90 day period. A failure to comply with this requirement is a criminal offence and since 12 March 2015, the maximum fine has increased from £5,000 to an unlimited fine. Recent case law suggests that BIS is taking a firmer approach in pursuing organisations who fail to file this notification on time.

Working Time Regulations

The calculation of normal remuneration for the calculation of holiday pay under the Working Time Regulations (WTR) has been considered in a number of recent cases. In *British Gas Trading v Lock*, the EAT confirmed the WTR must be interpreted in line with the European Working Time Directive so as to include commission payments in respect of the first four weeks of annual leave entitlement.

A previous case (*Bear Scotland v Fulton*) had already established that non-guaranteed overtime is included in holiday pay calculations. Whether or not voluntary overtime should be included is another issue and in 2015 (in *Patterson v Castlereagh Borough Council*) the Northern Ireland Court of Appeal held that there is no reason why voluntary overtime should not be included as long as it is performed sufficiently regularly for pay for such overtime to form part of the worker's 'normal remuneration'.

The Lock case may still be appealed but until these decisions are reversed, the first four weeks of holiday pay at least should include the whole of a worker's normal remuneration.

In *Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and Another*, the ECJ held that for workers who do not have a fixed or habitual place of work e.g. those who work from home, time spent travelling each day between their homes and the premises of their first and last customers of the day constitutes working time. This has a number of consequences as follows:-

1. the additional working time will affect the calculation of weekly working time. Under the regulations there is a 48 hour cap based on a rolling 17 week period and if employment contracts do not already include opt-outs of the 48 hour limit, this should be looked at again;

2. most contracts specify a fixed number of hours work per week, and unless time at work is to be reduced to compensate for travel time, agreement to an increase will need to be obtained;

3. if overall hours of work are increased as a consequence, this will impact on earnings for statutory holiday. Under the WTR, leave entitlement is based on hours of work and if hours are increased as a result of the ruling, statutory holiday will need to reflect the additional hours;

4. employers need to ensure that entitlements to minimum rest breaks, including a 20 minute break where work exceeds six hours, continue to be met.

There has been much litigation over the years about the ability to carry forward statutory annual leave entitlement where a worker has been unable to take annual leave due to sickness absence. *Plumb v Duncan Print Group Ltd* is authority that the European Working Time Directive does not require workers on sick leave to demonstrate that they are physically unable to take annual leave in order to carry over accrued unused holiday, and as such they may choose to carry forward annual leave. However the EAT held in that case that the right to carry leave forward is not unlimited and that the WTR must be read as permitting a worker to take annual leave within 18 months of the end of the leave year in which it accrued where he or she was unable or unwilling to take it because of absence. There had been previous ECJ authority that suggested that limiting carry-forward leave to 15 months might not be adequate but this provides helpful certainty for employers.

Whistleblowing

In June 2013 the Government introduced a number of changes including the requirement that an employee must have a reasonable belief that a disclosure is made in the public interest in order to attract protection. It was intended that the effect of this change would be to exclude employees from relying on breaches of their own employment contracts as protected disclosures. However in *Chesterton Global Ltd and Another v Nurmohamed*, a manager complained that his employer was manipulating profit and loss figures in order to minimise commission payments to its senior managers.

The EAT concluded that a Tribunal had not erred in finding that the claimant employee had a reasonable belief that his disclosures were made in the public interest, notwithstanding his personal interest. It was considered that as the matter affected 100 other senior managers, the Tribunal had been entitled to find that this was a sufficiently large section of the public to engage the public interest. The decision suggests the whistleblowing legislation sets a fairly low hurdle when it comes to preventing workers making protected disclosures about matters

of self-interest. Organisations should be even more alive to identifying complaints that employees may subsequently rely on as protected disclosures.

TUPE

Many of our clients are involved in tendering for public sector contracts and have to weigh the cost and potential liabilities of inheriting staff under the TUPE regulations. One of the requirements of TUPE is that there must, before transfer, be an 'organised grouping of employees', though it has been long-established that this can include a single employee. The mere fact that an employee works 100% of the time for a client does not automatically bring him within scope. In *Rynda (UK) Ltd v Rhijnsburger*, the Court of Appeal upheld a Tribunal's decision that a single employee who was solely responsible for the management of a client's Dutch properties was an organised grouping for TUPE purposes. In the course of the judgment the court set out a useful four-stage test for determining whether there has been a change in service provision where B takes over services from A:-

1. identify the service which A provided to the client;

2. list the activities which A's staff performed in order to provide that service;

3. identify the employees of A who ordinarily carried out those activities;

4. consider whether A organised the employees into a 'grouping' for the principal purpose of carrying out the listed activities.

Another highly debated question is the degree of responsibility that an incoming organisation has for the employees of sub-contractors of the organisation that delivered the services prior to transfer. In *Jinks v London Borough of Havering*, the Council owned a site comprising an ice rink and a car park. It contracted out the management of the whole site to S. Ltd which in turn sub-contracted the management of the car park to R. Ltd. Around the same time the ice rink closed but the car park remained open for a few weeks. The Council took control of the site and closed the car park.

The claimant was employed by S. Ltd and transferred to R. Ltd. He claimed that he had transferred under TUPE to the Council when it took the management of the car park back in-house. Upholding his claim, the EAT confirmed that the word 'contractor' in the regulations is to be treated as including the word 'sub-contractor' and TUPE could apply where activities cease to be carried out by a sub-contractor on a client's behalf and are carried out instead by the client on its own behalf.

Employment law is a fast moving and complex area. The potential cost of not keeping up to date with the ever changing rules and regulations can be significant, however, disputes can be minimised by seeking advice at the earliest opportunity.

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