Employment Law dispatches

Willans LLP I solicitors

70 YEARS

July 2017

Welcome

Welcome to the July issue of *Employment Law Dispatches*.

In this month's issue we discuss this week's Supreme Court decision to quash employment tribunal fees, along with the latest issues in case law.

Please do not hesitate to call us should you wish to discuss any of these issues in more detail. Feedback is also gratefully received.
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Upcoming seminars

21 September, 9am - 1.30pm

Building flexibility into your workforce

Stonehouse Court Hotel

In this half-day workshop, our employment law team will guide you through the maze of flexible and alternative working arrangements which are increasingly becoming the norm.

7 November, 7:30am - 9am

Managing and incentivising staff in a growing business

National Star College, Cheltenham

Join our employment and corporate lawyers at this breakfast briefing, as they explore alternative ways of incentivising and retaining your key talent as your business grows.

For more information, please visit **www.willans.co.uk/events**.

Matthew Clayton, partner and head of employment – *Chambers UK* rated: *"... he gets right to the point, with meaningful and practical advice."*

Legislation update

with Matthew Clayton

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Official: Judges no longer 'enemies of the people'!

The Supreme Court made history this week by ruling that fees for bringing an employment tribunal case are unlawful. The court found that the fees prevented access to justice for those workers unable to fund their case. It further stated that the fees were contrary to the Equality Act as they disproportionately affected women.

The challenge to the fees system was taken up by UNISON, who argued that the reduction in the number of claims being brought – 79% over three years - clearly went further than the original intention of reducing the number of malicious and weak cases brought. Their legal challenge had failed at both the High Court and Court of Appeal, but was successful at the final stage in the Supreme Court.

The Ministry of Justice (MoJ) has said that the fees will be immediately removed, and that it will refund the fees – estimated at £32m - paid by claimants since July 2013 when the current scheme was introduced.

However a number of issues still remain. The Supreme Court's judgment has been a forceful reminder to the executive about the importance of the rule of law and the rights of citizens to enforce it. However employers can expect to be protected against undeserving employees using a free tribunal system as a means to extort a financial settlement, and so there does still need to be some filter against unmeritorious claims at the earliest possible stage. There is still scope for the government to replace the current fees scheme with a different scheme which doesn't offend against access to justice. The Supreme Court noted a contrast between the level of fees in the tribunal, and the small claims court, where it is very much cheaper to bring a claim.

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However politically it might now be very difficult to introduce a new fees regime.

Also, some claimants might say they agreed to settle their claim for a lower sum than they might otherwise have accepted, because of the prospect of having to pay a hearing fee of up to £950 if they had continued. Unpicking these cases will be nigh on impossible.

Other people would undoubtedly have brought claims if there had been no tribunal fees, but did not do so because of the expense, and cannot now do so because they are out of time. Will the employment tribunals grant them additional time to bring their claims on the ground that it was not 'reasonably practicable' to do so at the time?

Many claimants who have won their cases over the last four years will have had their tribunal fees met by their employer, by order of the tribunal. In those cases, the MoJ would presumably have to refund the employer. It will be a big job to identify which those cases are, and even harder to establish whether the employer has actually paid.

Other cases might have settled prior to hearing. If the settlement has expressly included the payment of tribunal fees then, again, the MoJ should presumably be refunding the employer. But where a global settlement figure has been agreed which reflects, but does not specifically include, the tribunal fees, who should be owed the refund in that case?

We will be in touch in due course with any clients who might be affected by this, once we know more about how the Employment Tribunals Service proposes to deal with refunds.

In the meantime, there are undoubtedly interesting times ahead.

"Good Work" – The Taylor Review of Modern Working Practices

Until the Supreme Court published its judgment on Wednesday morning this week, I had been intending to write about Matthew Taylor's report on Modern Working Practices and his recommendations in relation to 'dependent contractors' and the gig economy. However there will be the opportunity to explore that subject further at our seminar "Building flexibility into your workforce" on 21 September.

Case law watch

with Helen Howes
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Redundancy following sickness absence due to disability was not discriminatory

The Employment Appeal Tribunal (EAT) has held that it was not discriminatory to make a disabled employee redundant following a period of sickness absence (*Charlesworth v Dransfields Engineering Services Ltd).*

Mr Charlesworth had been off work for approximately two months after being diagnosed with cancer. During his absence his employer identified a way of saving costs and realised it could essentially manage without him. Following an individual consultation procedure, Mr Charlesworth was made redundant.

He claimed there was no genuine redundancy situation and he was the victim of a sham arrangement. He argued he had suffered direct discrimination on account of his disability and that he was unfairly dismissed.

The tribunal disagreed and found his dismissal to be fair. It stated that although his absence gave the company the opportunity to manage without someone doing his job, it did not amount to saying that he was dismissed because of his absence.

The EAT upheld this approach stating that such a dismissal will only be discriminatory if the absence itself is the effective cause of the dismissal and not merely a part of the context of the dismissal.

What should I do?

Despite being an 'employer-friendly' decision, this case was very fact-specific and it should not be relied upon by employers considering making a disabled employee redundant.

When considering the future of a disabled employee you should always take legal advice and obtain detailed occupational health and medical reports in order to establish any potential risk or implication for the business' desired outcome.

Whistleblowing and the public interest

"The definition of 'public interest' remains wide and fluid..."

In order to be protected under whistleblowing legislation, a worker must have disclosed information that they reasonably believe is in the public interest. The Court of Appeal has recently considered whether a disclosure relating to a personal employment situation can be in the public interest.

In *Chesterton Global Limited v Nurmohamed*, Mr Nurmohamed claimed he was dismissed because he reported to management his belief that profitability was being artificially suppressed in order to reduce the level of commission payable. Although this affected him, he claimed it potentially affected over 100 senior managers and was therefore in the public interest. The employment tribunal originally hearing the claim held that this was capable of being in the public interest and was therefore a protected disclosure. This decision was upheld by the EAT, which stated that there was no need for the tribunal to decide whether the disclosure was in the public interest; the issue was whether the worker believed that the disclosure was in the public interest and whether that belief was objectively reasonable.

The Court of Appeal also upheld the decision of the employment tribunal, stating it was entitled to find that an employee had a reasonable belief that his disclosures about his employer's manipulation of profit and loss accounts were made in the public interest, despite him having a personal motivation in doing so. It further upheld the tribunal's consideration of factors such as the number of employees affected, the nature of the wrongdoing and the sums of money involved.

What should I do?

This decision might give whistleblowers confidence that all disclosures can be in the public interest, but this is not the case and the decision should be treated with caution. The definition of 'public interest' remains wide and fluid, and each case will be determined by its own facts.

It is therefore important to obtain specific legal advice if you receive a disclosure, as you will need to carry out a fact-specific assessment. In the meantime it is sensible to ensure you have a whistleblowing policy in place which is in plain English and accessible to all workers.

Honesty and resignation

"Judges will want to see at least some evidence that a former employee is actually acting in breach of their obligations, or is likely to, if they are going to grant an injunction."

An employee has an implied duty of good faith to their employer, but does this mean they are under a duty to be truthful about their future plans when they resign?

This was considered by the High Court in the case of *MPT Group Limited v Peel & Others*. Two employees handed in their notices simultaneously, ended their employment on the same day and set up in direct competition with their former employer, following completion of their six month period of restrictions.

During their notice periods they had both denied any intention of going into partnership together; they had stated that they would be working in different fields (one as a freelance designer and one building electrical control panels). MPT Group alleged that during their notice period they had conspired to set up the new business and collected confidential data.

The collecting of confidential data was established, but because the data itself had been disposed of, MPT Group was unable to evidence that it had been misused in order to set up the competing business. It was also unable to claim breach of the covenants, as the new company was set up following the expiry of the six month period of restriction. Instead it claimed breach of contract, arguing the employees had breached their implied duty of good faith whilst still employed.

The judge granted a limited injunction to stop the new company from using any drawings or plans in the course of its business, however the claim for breach of contract failed. The judge expressed a reluctance to set a precedent that employees have a duty to reveal their true intentions to their employer.

What should I do?

This case highlights the importance of evidence when seeking injunctions. Judges will want to see at least some evidence that a former employee is actually acting in breach of their obligations, or is likely to, if they are going to grant an injunction.

If you suspect that such activity is going on, it is important to seek legal advice at the earliest possible stage so that evidence can be collected, if possible without alerting the employee.

Failure to enhance pay for shared parental leave is discriminatory

"... review family friendly policies to ensure they reflect the flexibility required by working families..."

An employment tribunal has recently ruled that an employer's failure to enhance pay for shared parental leave to the same level as enhanced maternity pay was direct sex discrimination (*Ali v Capita Customer Management Limited*).

The father took two weeks' paternity leave following the birth of his daughter. During this time his wife was diagnosed with post-natal depression and was advised to return to work in order to assist with her recovery. Under his employer's maternity policy, female employees (with the requisite service) were entitled to 14 weeks' enhanced maternity pay followed by 25 weeks on statutory maternity pay. New fathers were entitled to two weeks on full pay during their paternity leave.

HR advised him that he was entitled to shared parental leave but this would be on statutory shared parental pay only. He subsequently claimed direct sex discrimination. He argued that this was discriminatory given that a comparable mother would have been allowed 14 weeks' maternity leave on full pay, and that whilst the 2 weeks' compulsory maternity leave is unique to those who have given birth, the other leave entitlements are for bonding and care of the child, which can be carried out by the male or female carer. He argued that the employer's policy assumed that a man caring for his baby was not entitled to the same pay as a woman performing that role.

The employment tribunal upheld his complaint and agreed that, aside from the two week compulsory leave, there was no period of special treatment to be kept exclusively for the mother and that the exclusion of fathers from entitlement to the benefits set out in the maternity policy was therefore unlawful direct discrimination.

It is reported that Capita will appeal the decision.

What should I do?

This case is a good reminder to review family friendly policies to ensure they reflect the flexibility required by working families in the modern workplace. That said, it is questionable whether this decision will apply to all scenarios where the father is taking shared parental leave, as clearly in this instance the father was taking on the role of the primary caregiver. It is uncertain how the courts would approach a situation where both parents are taking shared leave concurrently and as a lifestyle choice, rather than because of a medical reason.

Uncertainty is likely to exist until further cases arise or until the EAT hands down a decision, if Capita does appeal. In the meantime we recommend that your policies aim for equal treatment as far as is reasonable and possible.

Updated subject access guidance

"It is important to show willingness to engage with the data subject..."

The Information Commissioner's Office (ICO) has now updated its Subject Access Code of Practice following two Court of Appeal decisions earlier this year (*Dawson-Damer v Taylor Wessing LLP* and *Deer v University of Oxford*).

Under the Data Protection Act 1988 data subjects have a right of access to their personal data – a 'data subject access request' (DSAR). On receipt of a DSAR a data controller has to provide the individual with a copy of their personal data unless this would involve 'disproportionate effort'. It was this term that was the subject of the two Court of Appeal cases.

The new code has clarified that the disproportionate effort exemption applies only where supplying a copy of the data would result in so much work or expense that it outweighs the individual's right of access. In practice, this is an extremely high hurdle to climb, and the burden of proof remains on the data controller to show that it has taken all reasonable steps to comply with the request and that it would be disproportionate to take any further steps.

What should I do?

If you receive a DSAR you should first determine the scope of what is being asked. The nature of DSARs makes them time-consuming and they can be rather onerous, but it is clear that it is only in exceptional cases that the work or expense involved will be deemed to be disproportionate to the data subject's right of access.

It is important to show willingness to engage with the data subject as this can be beneficial if the data subject later complains to the ICO. You should also bear in mind that, amongst other changes, the time limit for dealing with a DSAR will be reduced following the implementation of the GDPR in May 2018.

If you would like to discuss the impact of GDPR on your organisation please contact Matthew Clayton.

Social media related dismissal

"Ensure you have a clear and transparent social media policy in place..."

A tribunal has held that an employer acted reasonably when it dismissed an employee after she made derogatory comments on social media about her employer, despite her having 17 years' service and a clean disciplinary record.

The employer's decision to dismiss was deemed fair on the basis that the employee was aware of the company's social media policy. She knew that it highlighted that conversations on Facebook were not truly private, that breaches of the policy could result in disciplinary action and that serious breaches may be regarded as gross misconduct and may lead to dismissal.

The employee had posted on her Facebook profile that her job title was 'general dogsbody' and she posted a further negative comment about her employer's announcement about a possible move of premises. She admitted that the comments were aimed at her employer but did not realise her Facebook profile was linked to the employer.

The tribunal deemed the employer had reasonable grounds for dismissal after carrying out investigation and disciplinary hearings.

What should I do?

Ensure you have a clear and transparent social media policy in place which is accessible to all staff. To be effective it must clearly set out the employer's position on the activities of employees on social media, give guidance and clearly state the sanctions if it is breached.

To rely upon it you will need to demonstrate that all employees fully understand the policy. This can be done by offering social media training or by requiring employees to confirm that they have read and understood the policy.

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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