

Employment Case Law Update November 2017

Employment Committee

Whistleblowing

The Court of Appeal has held that the fairness of the dismissal in a whistleblowing case has to be determined by what the employer reasonably believed when dismissing the employee - by reference to what the decision-maker actually knew, not what they ought to have known.

In this case, the appeal was allowed and the dismissal was found to be fair because the person who took the decision to dismiss the employee was not aware of the protected disclosures, even though they had been misled by the employee's line manager, who knew of the disclosures and had engineered a dismissal for poor performance. We understand an appeal against the decision has now been lodged.

(Royal Mail Ltd v Jhuti)

Sex discrimination

The ECJ has held that an employer's failure to carry out a workplace risk assessment to assess the risk posed to a particular breastfeeding worker was less favourable treatment of a woman related to pregnancy or maternity leave and constituted direct sex discrimination.

In this case, the employer had conducted a risk assessment for the role of an A&E nurse but they had not carried out an individual assessment of Ms Ramos's circumstances and the effect of the complex shift system, potential exposure to ionising radiation, healthcare associated infections and stress on her as a breastfeeding worker.

The case is a reminder to employers to assess the risks to particular individuals who are pregnant or breastfeeding and that carrying out a general risk assessment for the role may not be sufficient.

(Ramos v Servicio Galego de Saude)

Pregnancy and maternity discrimination – a potential increase in protection

In the European case of ***Porras Guisado v Bankia SA*** the Advocate General considered a case in which a pregnant employee was selected for redundancy in a collective redundancy situation. She was made redundant and the employer claimed not to have known of the employee's pregnancy. The law states that employers should prevent pregnant workers (and those on maternity leave) from being dismissed, save in exceptional cases.

The employer argued the redundancy situation was an "exceptional case". The Advocate General provided her opinion, summarised here:

- The period of protection starts at the beginning of pregnancy and continues until the end of maternity leave. This is the case even if the employer does not know that the worker is pregnant.
- What amounts to an "exceptional case" will be determined on the facts of the case and construed narrowly. A collective redundancy situation is not automatically an "exceptional".

- An employer must give a dismissed worker an explanation of why the collective redundancy in question is an "exceptional case" if she is pregnant or on maternity leave at the time of the dismissal.
- An employer cannot dismiss a pregnant worker/ worker on maternity leave if she can "plausibly be reassigned" to another suitable work post.

Presently in UK law an employer can select a pregnant employee or a woman on maternity leave for redundancy provided that the selection is non-discriminatory. Employees selected for redundancy while on maternity leave (but not while pregnant) have a priority right to redeployment. In addition the general view is that a woman has no special protection until her employer is made aware of her pregnancy. If the Court of Justice and European Rights follows the AG's opinion, that position may have to be

Addison Lee drivers – workers, not self-employed

A tribunal has ruled that three drivers from minicab firm, Addison Lee, should have been treated as workers and not self-employed – meaning they will be entitled to the national minimum wage, holiday and arrears of pay. Addison Lee claimed that each driver was running a small business in of itself despite significant evidence pointing away from a self-employment arrangement including:

- A dress code and code of conduct
- Each trip requiring the consent of a central control base
- An obligation to accept fares from the company's booking system
- Fixed cost of hiring company levied vehicles

The tribunal did not accept Addison Lee's argument and ruled that the drivers were in a subordinate position to the company, as opposed to contracting with it.

There are a number of cases in which worker rights for those in the so-called 'gig economy' are to be considered including Uber later this month and delivery companies Hermes and DX early next year.

Other Information

Research by various bodies has highlighted the following;

- **Zero-hours contracts:** the Office of National Statistics (ONS) has published data showing that the number of workers on zero hours contracts has fallen by 300,000 over the last year to the lowest level recorded in over three years. 6% of business makes use of zero-hours contracts, with administrative and support services being the most prominent users.
- **National Minimum Wage:** The Low Pay Commission (LPC) believes that as many as 1 in 5 minimum wage workers could be receiving less than they are entitled to. A recent report showed that, at its peak in the year, between 305,000 and 580,000 workers were underpaid. The report estimated that, as the National Living Wage rises, HMRC will be responsible for monitoring 3.3 million workers by 2020, a rise from the 2.3 million currently recorded.

- **Shared Parental Leave:** Research has revealed that only 8,700 new parents made use of the shared parental leave system in the last year, accounting for less than 1% of those that were eligible. Researchers suggest the low uptake may result from a "cultural stigma" attaching to men who decided to take time off work to care for their children and their concern about the impact a lengthy period off work might have on their careers. Other factors may include financial implications of using the scheme and a general lack of awareness or understanding of the entitlement.
- **Bonuses:** The ONS has published data showing that UK bonus payments have risen to the greatest on record. The total number of UK bonuses paid in the latest financial year amounted to £46.4 billion, a 6.5% increase compared to the previous year. The insurance and financial sectors paid the highest bonuses on average. In contrast, the health and social sectors paid the lowest in bonuses to its employees, with average bonuses amounting to almost zero.
- **Apprenticeships:** Apprenticeships are growing at a faster rate than graduate roles a new survey has revealed this week. According to the survey undertaken by the Institute of Student Employers (ISE) there was a 19% increase in the number of apprentices hired in 2016/17 compared to the previous year.