Employment Case Law Update June 2018

Employment Committee

Employee who gave notice anticipating internal transfer had not resigned from employment (EAT)

East Kent Hospitals University NHS Foundation Trust v Levy UKEAT/0232/17 (5 June 2018)

Mrs Levy had been offered a new job within the radiology department, and therefore provided notice in relation to her existing job with the same organisation, a job which she had held since 2006. The Trusts operational manager then treated the letter as a letter of resignation, and the job offer from the radiology department was subsequently withdrawn. Mrs Levy then attempted to retract her notice, but this was blocked by the operational manager. Mrs Levy then brought a claim for unfair dismissal, and she was successful at first instance. The Tribunal held that it was reasonable to conclude from the letter (which said: "Please accept one month's notice from the above date"), that the letter was providing notice of Mrs Levy's intention to accept the internal transfer, as opposed to notice of resignation.

The EAT's ruling that a notice letter does not automatically constitute resignation, means that it is imperative that when an employer receives a letter providing notice, that they seek clarification in relation to any ambiguities within the letter, and double check that it is the employees intention to resign, and the reasons behind their resignation should that be their intention.

Legal privilege

The Director of the SFO v Eurasian Natural Resources Corporation Limited

The Court of Appeal has held that documents, prepared during the course of an internal investigation by lawyers and a firm of forensic accountants, for the purpose of resisting or avoiding contemplated legal proceedings or criminal prosecution, were protected by litigation privilege.

This important decision overturns the previous High Court decision and will be welcome news for any organisation faced with conducting an internal investigation into allegations of wrongdoing but it will be important to note that the application of legal privilege is fact-sensitive and will depend on the circumstances of each case.

Migrant workers

The government has announced a new pilot scheme to allow 2,500 workers from outside the EU to come to the UK to undertake seasonal work for up to 6 months on fruit and vegetable farms in order to alleviate labour shortages during peak production periods.

The pilot scheme will run for 2 years and the results of the pilot will be reviewed by the government to decide how best to support the longer-term needs of the farming industry outside the EU.

Victimisation

Saad v Southampton University Hospitals NHS Trust

The EAT has held that an employee will be protected from victimisation if they wrongly but honestly believed the allegations they made to be true, even if they had an ulterior motive for making those allegations.

The claimant had made an allegation of racial or religious discrimination. The tribunal found that the allegation had been made in order to postpone an assessment of his skills and that the allegation itself was false, but because the claimant subjectively (albeit unreasonably) believed his allegation to be true, the tribunal concluded that it had not been made in bad faith. The claimant was therefore entitled to protection from victimisation.

Holiday pay and voluntary overtime

Flowers and others v East of England Ambulance Trust

Following its earlier decision in *Dudley Metropolitan Borough Council v Willetts*, the EAT has confirmed that voluntary overtime can qualify as “normal remuneration” for the purposes of calculating holiday pay under the Working Time Directive, if it is paid over a sufficient period of time on a regular basis.

In this case, the EAT also held that a clause in the NHS Terms and Conditions of Service, which stipulates that holiday pay is calculated on the basis of what an employee would have received had he/she been at work, gives the employees a contractual entitlement to have non-guaranteed and voluntary overtime included in the calculation of holiday pay.

Minimum wage for on-call carers

MenCap v Tomlinson-Blake

The Court of Appeal has held that carers who are required to sleep-in at work are not entitled to the national minimum wage while they are asleep.

Overturning the previous EAT decision, the Court of Appeal held that only time spent awake and working should be included in the calculation of national minimum wage entitlements, even if facilities for sleeping are provided by the employer.

As set out above, the key question for employers when dealing with workers who may sleep during their shift, is whether the workers are either (a) working or (b) available for work. Key to this assessment is whether the worker is expected or permitted to sleep. Where a worker is expected to sleep, this clearly falls within the sleep-in arrangement in Mencap meaning pay is only due for NMW purposes during periods where the worker is awake in order to work. Where workers have specific tasks to fulfil but are otherwise permitted to sleep, this falls more clearly within the British Nursing Association rule, meaning the workers are working throughout the shift for NMW purposes.

Employers should try to make the position clear in staff contracts of employment, probably by reference to when the work being done on the shift arises.

TUPE transfers

HMRC has changed its enforcement of national minimum wage (NMW) liabilities where there has been a TUPE transfer. With effect from 2 July 2018, all NMW liabilities will be enforced against the transferee employer. Penalties triggered by arrears that accrued before employees transferred under TUPE will also be enforced against the transferee rather than against the transferor (as was previously the case).

Calculating the correct NMW is notoriously difficult and the penalties for getting it wrong can be substantial (currently 200% of the total NMW underpayment, with an overall maximum penalty of £20,000 per underpaid worker), so organisations taking on employees under TUPE should undertake thorough due diligence to determine whether the correct NMW has been paid and, if not, what the likely liability may be.

Brexit Update

The government has published its White Paper "***The Future Relationship between the United Kingdom and the European Union"***, in which it proposes that there be no regression in employment laws.

This would mean that EU based laws (such as TUPE, the Working Time Regulations and collective consultation requirements) would not be repealed. However, the eventual outcome remains subject to the terms of any Brexit deal reached with the EU.