Employment Case Law Update October 2019

Employment Committee

Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad (t/a Clifton House Residential Home) [2018] EWCA Civ 1641

The Court of Appeal held that workers on sleep-in shifts were only entitled to the national minimum wage in respect of hours in which they were required to be awake for the purposes of working, not for the whole shift.

The cases concerned two care workers (Mrs Tomlinson-Blake and Mr Shannon) who were contractually obliged to spend the night at, or near, their workplaces and were expected to sleep for most of the period but could be woken if their assistance was required. The care workers were paid a fixed sum for the sleepover shift; Mrs Tomlinson-Blake was paid additional sums if called on during the night for more than an hour, and Mr Shannon received free accommodation all year round in addition to the fixed sum. The workers argued that they were being underpaid under the NMWR 1999 and NMWR 2015 on the basis that the whole sleep-in shift constituted time work or salaried hours work.

The Court of Appeal has overturned an EAT decision on national minimum wage for sleep-in shifts. Underhill LJ, delivering the judgment of the court, held that care workers who were required to sleep at, or near, their workplace and be available to provide assistance if required, were available for work rather than actually working. Accordingly, they were not entitled to be paid the national minimum wage for the whole of the sleep-in shift, but only for the time when they were required to be awake for the purpose of working. The sleep-in exception in regulation 32 of the National Minimum Wage Regulations 2015 is intended to apply to cases where "the essence of the arrangement is that the worker is expected to sleep".

The judgment brings some clarity by ruling that workers who sleep at a residential care home or similar place of work while "on call" for emergencies are merely available for work (and therefore not entitled to the NMW) until actually called upon

Base Childrenswear Ltd v Otshudi UKEAT/0267/18

The EAT considered whether the tribunal had been correct to make an award in the middle of the middle Vento band in respect of a claimant's injury to feelings caused by a one-off act of racial harassment.

Whether the discrimination was a one-off act or a course of conduct was a relevant factor for the tribunal to take into account, but it was not determinative. The tribunal had correctly focused on the effect the discriminatory act had had on the particular claimant.

The EAT did, however, allow the appeal in part in respect of the aggravated damages award. The tribunal had taken into account the employer's *failure to follow the Acas Code of Practice on Disciplinary and Grievance Procedures (Acas Code)* in respect of the claimant's post-termination grievance when making both the aggravated damages award and an uplift of 25% for failure to follow the Code.

It is notable that the tribunal made an uplift of 25% in respect of the employer's failure to follow the Acas Code in respect of a post-termination grievance. The Acas Code does not expressly state that it applies to grievances received from former employees and there have been no previous appellate decisions confirming the position. Although the employer did not appeal the uplift made in this case, the EAT made no obiter comments disagreeing with the tribunal's approach. *In light of this, it would be advisable for employers to always follow the Acas Code in respect of post-termination grievances*

VENTO BANDS (April 2019)
Lower - £900 to £8,800

Middle - £8,800 to £26,300

Top - £26,300 to £44,000

Coletta v Bath Hill Court (Bournemouth) Property Management Ltd UKEAT/0200/17 (Court of Appeal decision awaited – hearing 25/07/19)

The EAT considered whether the six-year limitation period under section 9 of the Limitation Act 1980 applied to unlawful deduction from wages claims brought before 1 July 2015, when the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) came into effect.

The EAT has held that, for unlawful deduction from wages claims issued before 1 July 2015, there was no six-year "backstop" period limiting the amount that could be claimed in respect of a series of deductions.

Section 9 of the Limitation Act 1980 (LA 1980) prescribes a six-year limitation period for all statutory monetary claims. However, section 39 provides that where a claim is brought

under a statute that already prescribes a period of limitation, the LA 1980 limitation period does not apply.

The claimant had brought his claim within three months of the last deduction in a series, in accordance with section 23 of the ERA 1996, and was therefore entitled to recover all of the sums that were not properly paid over the 15-year period, without the imposition of a backstop of six years.

For most unlawful deduction claims brought since 1 July 2015, the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) imposed a two-year backstop period. *This means that in respect of any claims for underpaid wages, commission, bonuses and holiday pay, tribunals cannot consider deductions where the relevant date of payment was more than two years before the date of presentation of the complaint. This judgment will therefore have no application to most unlawful deduction claims issued on or after 1 July 2015.*

Awan v ICTS UK Ltd UKEAT/0087/18

The EAT has held that an employment tribunal erred in finding that an employer was entitled to dismiss an employee on the ground of capability while he was contractually entitled to long-term disability benefits. The President, Mrs Justice Simler DBE, sitting alone, held that there was an inherent contradiction between the employer's contractual right to terminate on notice and the employee's contractual right to disability benefits. A term must therefore be implied into the contract, either on the officious bystander or business efficacy tests, that the employer could not terminate for incapacity reasons while the employee was entitled to disability benefits.

This case suggests that a termination clause which expressly reserves the right to terminate for incapacity will not entitle an employer to do so where there is also a contractual right for the employee to receive disability or PHI(Permanent Health Insurance) benefits.

Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police [2019] EWCA Civ 900 – Court of Appeal (Judgement - June 2019)

Failure to pay male employee enhanced shared parental pay was not direct or indirect sex discrimination or breach of equal pay sex equality clause

The Court of Appeal has held that it was neither direct or indirect discrimination, nor a breach of the equal pay sex equality clause for two employers in two separate cases not to pay male employees enhanced shared parental pay of an amount equivalent to the enhanced maternity pay available to female employees.

The direct discrimination claim failed because the correct comparator was a female colleague on shared parental leave, not a woman on maternity leave. The purpose of statutory maternity leave related to matters exclusive to the birth mother resulting from pregnancy and childbirth, and that purpose had not been altered by the introduction of shared parental leave. A woman on maternity leave could not therefore be the correct comparator.

The second claimant was also precluded from bringing an indirect sex discrimination claim because of the effect of section 70(2)(a) of the EqA 2010, which provides that the inclusion of a less favourable term in an employee's terms of work could not be regarded as sex discrimination for the purposes of section 39(2) where that term was inserted because of section 66 (the sex equality clause). In any event the indirect sex discrimination claim would have failed because the correct pool for comparison could only consist of employees on shared parental leave and any disadvantage to the claimant would have been justified as being a proportionate means of achieving the legitimate aim of the special treatment of mothers in connection with pregnancy or childbirth.