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Insights

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EMPLOYMENT STATUS AND THE RIGHT TO JOIN A UNION, IS A BONUS CLAWBACK CLAUSE A RESTRAINT OF TRADE, "HEAT OF THE MOMENT" RESIGNATIONS, AND A GENERAL NEWS ROUNDUP

Nov 30, 2023

SUMMARY

Our November update includes a Supreme Court decision on employment status and the right to join a trade union, whether a bonus clawback clause can be an unlawful restraint of trade, and how to deal with a "heat of the moment" resignation. We also feature a news update covering new UK legislation on working time and TUPE, the reform of Fit Notes, and new proposals relating to employers and the menopause.

ONLY EMPLOYEES HAVE THE RIGHT TO FORM/JOIN TRADE UNION

This is a long-running case brought by the Independent Workers Union of Great Britain (the union) against the Central Arbitration Committee (CAC) on the issue of whether delivery riders working for an online food delivery company had the right to form and join a trade union. Although initially based on domestic legislation, the appeal was based on rights under Article 11 of the European Convention for Human Rights (ECHR). In terms of defining worker/employee status for the purposes of Article 11, this is governed by the criteria set out in 2006 by the International Labour Organisation (ILO). The ILO criteria are very similar to the tests for workers/employees in UK employment law.

The CAC rejected the union's claim because riders were not "workers" under domestic legislation. The reason for this was extensive rights of substitution and this is discussed below. The union applied for judicial review of the CAC's decision and, after losing at the High Court and the Court of Appeal, the case ended up at the Supreme Court. A decision was published earlier this month.

The Supreme Court upheld the decision of the lower courts, holding that riders were not workers/employees. Key to the decision were rights of substitution.

The right for riders to appoint a substitute was very wide. A rider could use a substitute without interference and substitutes were not limited to riders working for the same company. Payment of the substitute was a matter for the rider, as were all other arrangements.

A right of substitution as powerful as this is entirely inconsistent with an obligation to provide personal service, and without this there can be no worker/employment relationship. Therefore Article 11 rights could not apply.

The following further points are worth noting:

- The court was satisfied that the CAC had rigorously scrutinised the substance of the relationship and the relevant contractual provisions, which were found to reflect the true nature of the arrangements. The rights of substitution were genuine;
- The right of substitution was wide – it was not monitored or enforced and was left to the riders. There was no objection to substitutes working for a competitor;

The court held that this wide right of substitution (and consequent lack of personal service) was, in itself, enough to decide the issue in favour of the CAC, but went on to identify a number of other factors which were inconsistent with a worker/employment relationship. As this is Supreme Court guidance, it is likely these other factors will be used in the future. They were as follows:

- Riders did not work specific working hours. It was their choice when to work;
- Riders were not required to be available, and did not need to carry out any deliveries at all;
- All equipment was supplied by and at the riders' expense, including equipment and machinery. For example, riders used their own bicycles and mobile phones;
- No payment was made unless work was carried out. Being paid depended entirely on whether riders made deliveries and how many they made;
- Deliveries were not necessarily riders' sole/principal source of income. Of those riders who made their living predominantly from making deliveries, a significant number also worked for direct competitors, and could carry out work for the competitor in preference;
- There was no entitlement to annual holiday or weekly rest; and
- There was no protection for riders against financial risk, including insurance, guaranteed earnings or otherwise.

Although it did not need to, the court also looked at whether Article 11 applied to collective bargaining, as well as the right to form/join a trade union and decided it did not.

WHY THIS MATTERS

In terms of employment status, this case highlights just how important unfettered rights of substitution can be. The Supreme Court was willing to find there was no worker/employment relationship based on unfettered rights of substitution alone, with the other factors being relevant, not determinative. It will probably not escape the attention of large "gig economy" organisations that unfettered rights of substitution will almost be guaranteed to quash any worker/employment relationship, simply because it runs counter to an obligation to provide personal service.

Based on this decision, it may only be where there is no right of substitution, or a heavily qualified one, that a more multi-factoral test will be carried out, based on factors referred to in the judgment and the other well known tests such as control and mutuality of obligation.

It also illustrates the importance of the relationship being "rigorously scrutinised" by the relevant court (in this case the CAC), and the substance of the relationship being reflected in contractual documents.

Independent Workers Union of Great Britain -v- Central Arbitration Committee

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IS A BONUS CLAWBACK CLAUSE AN UNLAWFUL RESTRAINT OF TRADE?

The parties are referred to as "claimant" and "respondent", although this case was heard in the High Court on an appeal from the Insolvency and Companies Court (ICC). So how did this happen?

The claimant was employed by a global executive search company. He received an annual salary of £65,000 and a discretionary bonus. In January 2022 he was paid a bonus of £187,500, but his employment contract contained a bonus clawback clause. If the claimant gave or received notice of termination of employment within three months of the date of being paid the bonus, he had to pay the bonus back as a debt. Unfortunately, the claimant resigned and gave notice of termination in February 2022, within the three-month clawback period.

From February onwards, the respondent made clear its view that the bonus was repayable. The claimant refused to repay it. In August 2022 the respondent served a statutory demand for the bonus. As a statutory demand can only be made for an undisputed debt, the claimant went to court and disputed the debt, claiming at the ICC that:

a. The repayment clause was unenforceable because it was an unlawful restraint of trade; and

b. The repayment clause was void because it was a penalty clause.

The ICC was unsympathetic, mainly because of its view that the clawback clause itself did not restrict the claimant's ability to work elsewhere after termination. It might be a disincentive to leave employment for a short period, but the clawback clause had no bearing on the claimant's post-termination activities. The penalty clause argument was also given short shrift, probably because a

penalty clause requires a breach of contract, and the claimant had not breached his contract, he had lawfully resigned with notice.

The claimant appealed to the High Court, and was again unsuccessful as follows:

- The High Court agreed that existing case law in this area was followed by the ICC. Prior case law has determined that an employee bonus or commission scheme, where payment is conditional on the employee remaining in employment for a specified period, operates as a disincentive to the employee leaving/resigning. However, that does not turn the provision into a restraint of trade;

- There are two tests for restraint of trade – first whether a clause is a restraint of trade and secondly, if it is a restraint of trade, is it reasonable and in the interests of the parties and the public. The claimant argued that the ICC had confused the two tests and, in particular, had considered the reasonableness of the clause by, for example, referring to the three-month period as "modest". This was rejected by the High Court which held that the two tests can at times overlap, although in this case they had not. The nature and effect of the clause was something the ICC had to consider to assess whether the clause was a restraint of trade;

- The claimant said the ICC had failed to consider the effect of the clawback period combined with other contractual restrictions, such as a non-compete. The claimant complained that the cumulative effect was that he was "restricted" for a longer period. The High Court's view was that the clause and question in issue was a bonus clawback, not any other clause – the issue was whether the clawback clause, in itself, was a restraint of trade and it was not;

- The claimant's final ground of appeal was that the law relating to clawback clauses and restraint of trade was "not settled" and subject to conflicting authorities. The High Court again disagreed. The ICC had followed established case law when making its decision, and the case the client relied on was not a bonus clawback case.

This case has attracted a good deal of employment law interest because (a) bonus clawback clauses are rarely the subject matter of legal challenge and (b) they are so common in employment contracts.

The claimant essentially failed because he could not establish the clawback clause had any impact on his post-termination activities. It was also, using the court's words, a "modest" restriction, which only required him not to give notice for three months, which seemed fair when bonuses are paid as a reward for loyalty, and the period involved was not excessive.

However, the court did not state that any and all clawback clauses in any form were OK. The court did highlight that there might be extreme cases where a clawback clause could be a restraint of trade. No examples were given but, for example, a bonus clawback clause that required the employee to remain in employment for a period of twelve months rather than three might have been

viewed differently. The court acknowledged the potential of clawback clauses being used as restraints of trade and was careful to stress that there could be limits on long bonus clawback periods to prevent employees leaving.

WHY THIS MATTERS

It is unlikely this will be the last case on what is a very common type of clause in employment contracts. The court believed this clause to be “moderate” but did not entirely close off the possibility of similar clauses being challenged. In this case the facts that the period was relatively short and that there were no restrictions on the employee after termination were the dominant factors in the decision, but clauses which either (a) impose a longer clawback period or (b) include post-termination restrictions as part of clawback arrangements, which is not unusual, might be more vulnerable to/likely to be challenged following on from this case.

Steel v Spencer Road LLP

RESIGNING IN THE HEAT OF THE MOMENT

The claimant was employed at a law centre from February 2016 to 18 March 2020.

The facts reflect a complex working environment. On 19 February 2020, the claimant, not for the first time, resigned from his employment “in the heat of the moment” during an altercation (again not the first) with his line manager, Ms Skinner. In a subsequent conversation the same day, the respondent’s CEO, Ms Anyanwu, seemed to acknowledge that the claimant, contrary to his earlier resignation, wished to continue his employment and had asked him to consider an alternative role. At a meeting on 21 February, Ms Skinner said she no longer wanted to work with the claimant, and he was asked to confirm his resignation in writing. He said he would do this. Instead, he tried formally to retract his resignation. The respondent refused to accept the claimant’s retraction and treated his employment as terminating on one month’s notice from 19 February, in accordance with the claimant’s “in the heat of the moment” resignation.

It is unusual to find this level of uncertainty in relation to a resignation, and the conduct of both parties seems to have exacerbated the uncertainty rather than resolving it.

The claimant brought claims at the tribunal for unfair dismissal, including constructive unfair dismissal, and wrongful dismissal. The claimant’s case was that, in law, he had not resigned. His situation fell within the alleged "special circumstances” exception recognised in cases such as *Sothern –v- Franks Charlesly & Co* - namely that, although an employer can normally rely on an employee’s words communicating resignation in accordance with their plain and natural meaning, there are “special circumstances” that can prevent the application of the general rule.

The tribunal, using this test, found for the respondent. It described the principal issue of fact as whether the claimant was offered a new role on the day he resigned, 19 February 2020. It found that the claimant declined what he believed to be an offer of alternative employment on 19 February and that he had not, as at 21 February, accepted any other position with the respondent before being informed that the respondent considered he had resigned. The tribunal held that the claimant, by his words and conduct, had brought his employment contract to an end by his resignation on 19 February and there was no constructive dismissal. The claimant appealed to the EAT.

The EAT allowed the claimant's appeal. It held that:

- The tribunal applied the wrong legal test. The correct legal test is an objective one where the situation is viewed from the perspective of a "reasonable employer". That reasonable employer must judge whether the employee, in the heat of the moment, had used words that constituted a genuine or serious wish/intention to resign. The underlying intention of the employee is not relevant, but the exact words used are - the reasonable employer has to ask whether the employer seriously intended to resign based on the words used;

- The tribunal focused, wrongly, on whether there were "special circumstances" that justified departing from the general rule that an employer is entitled to rely on words of resignation in accordance with their plain and natural meaning. The EAT held that there is no such thing as "special circumstances" and the same rules apply in all cases where notice of dismissal or resignation is given;

- Once given, a notice of resignation or dismissal cannot be unilaterally retracted. The giver of the notice cannot change their mind unless the other party agrees;

- Although the underlying intention of the employee is not relevant, the actual words used, and the subsequent conduct of the employer, are. The EAT found the tribunal failed to provide adequate findings of fact relevant to these issues. In particular, it had not made findings about three elements of the case:
  - What specific words the claimant used and how the claimant appeared during the morning of 19 February (on an objective "reasonable employer" test);
  - What had been discussed between Ms Anyanwu and the claimant in the meeting on 19 February, including whether the meeting had ended with it being apparent to Ms Anyanwu that the claimant had not "really intended" to resign; and
  - What Ms Anywanu specifically said at the beginning of the meeting on 21 February. Did she really believe the claimant had resigned?

Finally, the EAT held that the tribunal erred by focusing too much on the question of whether the respondent had offered the claimant an alternative role, an issue which the EAT considered to be a

“side issue” that could not assist much, if at all, with the question of whether the claimant resigned on 19 February.

Bearing in mind the multiple errors of law, the application of the wrong legal test and the tribunal not making adequate findings of fact on the correct legal issues, the EAT ordered that the case be remitted to a different tribunal for a full rehearing.

WHY THIS MATTERS

This judgment reflects the complexity of the tests to be applied when dealing with “in the heat of the moment” resignations/dismissals. In particular, it emphasises the (objective) test and, almost counter-intuitively, that the underlying intention of the employee is not relevant. It is only the words used, and what a “reasonable” employer would understand having heard those words, that is relevant.

This case also reinforces the caution required before accepting/acting on an employee’s resignation made in the heat of the moment. Clear communication and a reasonable cooling off period always helps. Also, employers should be cautious about conduct after the resignation, as this may be taken into account when deciding the outcome.

Omar -v- Epping Forest District Citizens Advice

NEWS ROUNDUP

GOVERNMENT RESPONDS TO CONSULTATION ON WORKING TIME REGULATIONS (WTR) AND TUPE - PUBLISHES AMENDING UK REGULATIONS

The new UK legislation, which will come into effect on 1 January 2024, is probably the most significant change to holiday pay rules since 1998. It is detailed but the main features involve:

- Simplifying the record-keeping requirements under the WTR to maintain the requirement to keep "adequate" records, but not necessarily a full record of all daily working hours;
- Providing a method of holiday accrual for irregular-hours and part-year workers (which may include some agency workers), based on 12.07% of the hours worked in the previous pay period. For workers on sick leave or other family-related leave, accrual will be based on average working hours over a 52-week reference period;
- Permitting rolled-up holiday pay for irregular-hours and part-year workers;
- Repealing the COVID-19 holiday carry-over rules, with a short transitional period to enable any accrued leave to be used;

- Restating the effect of retained EU case law regarding carry-over of holiday in certain situations, including (among other things) inability to take holiday as a result of sickness and family leave;
- Legislating to incorporate the EU-derived concept of "normal remuneration" into holiday pay, to include (among other things) commission and regular overtime; and
- Amending TUPE to allow small businesses (those with fewer than 50 employees), or larger businesses making small transfers of fewer than ten employees, to consult directly with affected employees.

There has been a great deal of discussion around incorporating the EU concept of “normal remuneration” into UK law, and whether this could see periodic remuneration payments such as bonus included in holiday pay.

Watch this space.

CONSULTATION ON FIT NOTE REFORM

The government announced on 16 November a consultation on reforming the fit note system. This is part of the government's “Back to Work” plan to support individuals with long-term health conditions, disabilities or long-term unemployment to look for and stay in work, alongside tougher sanctions for those who do not look for work.

Although there are no specific details of the proposals, it seems that the government is proposing a move away from GP surgeries being the primary source of fit notes, and to provide “easy and rapid access” to work and health support. GP surgeries will apparently continue to play an important role, but pressures on time and expertise mean GPs cannot always deal with matters effectively.

The rollout will begin with trials in a small number of Integrated Care Boards, which will offer support to those have received fit notes for a prolonged period of time. Bearing in mind the rationale behind the consultation, the move might be away from GP fit notes and towards a system that might make fit notes declaring individuals as unable to work harder to obtain, particularly if there is no evidence of effort to treat/manage long term health conditions.

ALL-PARTY PARLIAMENTARY GROUP PUBLISHES MANIFESTO FOR MENOPAUSE

On World Menopause Day (18 October) an all-party group published a “Manifesto for Menopause”, calling on all political parties to commit to seven reforms ahead of the next General Election. The employment aspects of those reforms include:

- Requiring employers with over 250 employees to introduce menopause action plans to support employees experiencing the menopause;

- Providing specific guidance to SMEs to support employees going through the menopause; and
- Introducing tax incentives to encourage employers to integrate menopause into occupational health

This was supported by new findings from a survey carried out by Menopause Mandate of over 2,000 women. 96% of menopausal women surveyed said their quality of life had suffered and it took over a year for nearly 50% of respondents to realise that they might be perimenopausal or menopausal. Among working women, 64% said that they were negatively impacted by the menopause, but only 29% said their employers had any kind of menopause policy.

This article was written with Trainee Solicitor Rhea Ava Patel.

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