BCLP. Client Intelligent

Insights

UK HR TWO MINUTE MONTHLY: DISABILITY DISCRIMINATION; TUPE; EMPLOYMENT STATUS

Aug 11, 2020

SUMMARY

As we move towards a 'new normal', our August 2020 update outlines some of the key non-COVID related employment law developments in the UK over the last month. It includes a TUPE-related ECJ judgment which takes a different approach to our usual domestic position, as well as cases on disability discrimination and agency workers. We also provide an update of other recent points of interest. You can find our latest UK COVID-19 employment law updates for the UK here.

Unfair dismissal of long-term sick employee does not automatically mean dismissal is disability discrimination

The Employment Appeal Tribunal ('EAT') has held that an employment tribunal erred in focusing on an employer's decision-making process when considering whether a dismissal arising from disability was proportionate.

The employee was dismissed for disability-related sickness absence. The employment tribunal found that she had been unfairly dismissed. It also upheld the employee's claim that her dismissal constituted discrimination arising from disability, rejecting the employer's objective justification defence to the disability discrimination claim. It held that the employer's aims of protecting scarce public resources and reducing the impact of the employee's absence on her colleagues were legitimate but that it was not justified because it was not a proportionate means of achieving either aim.

The EAT upheld the employer's appeal against the finding of discrimination. Having accepted that the employer had legitimate aims for the dismissal, a balancing exercise between the employer's needs and the discriminatory effect of the dismissal should have been carried out. The fact that the dismissal was unfair did not necessarily mean that it was disproportionate, thereby amounting to discrimination arising from disability. This element of the case was remitted to the tribunal for redetermination.

WHY THIS MATTERS

The question of proportionality will often be key when defending claims for discrimination arising from disability. This case serves as a reminder that employers should consider whether there might be other ways of achieving their aims, which might have a less detrimental effect on the employee.

Department of Work and Pensions v Boyers and others

Employee can TUPE transfer to multiple employers, each on a part-time basis

The ECJ has followed the Opinion of its Advocate General, and held that where a TUPE transfer involves multiple transferees, an employee's contract of employment can be split into part-time contracts so that the employee has multiple employers following the transfer. The employee will work for each transferee in proportion to the extent to which they were 'assigned' to the respective parts of the business. This sort of arrangement can happen provided such a division is possible and doesn't otherwise worsen the working conditions or rights of the transferring employee.

The case involved a cleaning contract for the city of Ghent. The contract was divided into three lots on re-tender. The employee was the project manager for all three lots. The contracts were awarded to two new contractors, one of whom took two of the lots, to which the employee was 85% assigned.

Under the approach usually taken by UK tribunals, it is likely that the employee would simply have transferred to the contractor to which she was 85% assigned. However the ECJ found that she could have two employers following the transfer, and could work part-time for each in the proportion to which the contractors had taken on the transferring business.

WHY THIS MATTERS

This is a very different approach to that adopted in the UK, where an employee is either sufficiently connected to one part of the business to transfer with that part, or remains employed by the transferor. The current UK case law does not favour splitting one person's employment to multiple transferees. This is an area where, following Brexit, we may start to see a divergence in approach between our domestic courts and the ECJ.

ISS Facility Services NV v Sonia Govaerts and Atalian NV

Agency worker working for one client was engaged on a temporary basis

The EAT has held that a worker who had a permanent contract of employment with an agency that only supplied workers to one end-user was nonetheless supplied to work "temporarily" for that end-user, and could therefore be an "agency worker" for the purposes of the Agency Workers Regulations 2010 ('AWR'). Whilst the individual had worked solely for the agency's sole client since

the outset of his employment, this was under a series of assignments, each with a specified end date following a particular shift or shifts. The individual did not know whether he would be required following that date, and there had been periods of up to two or three weeks during which no work was assigned to him.

WHY THIS MATTERS

A previous decision in Moran and others v Ideal Cleaning Services Ltd and another had introduced uncertainty as to whether workers who were assigned to one hirer for an extended period would be covered by the AWR. Those workers were found to be permanently (rather than temporarily) assigned to the hirer and therefore outside the scope of the AWR. Here the EAT reiterated that the focus should be on the basis on which the worker is supplied to work for the hirer on each occasion, rather than on the nature of the worker's contract with the agency.

Angard Staffing Solutions Ltd and another v Kocur and others

Holiday pay did not have to include profitability bonus

In this case the employees were eligible to receive a monthly profitability bonus. The bonus was calculated as a variable uplift on their hourly rate over the previous month and was payable only if individual and company performance targets were met. The employees argued that their holiday pay should be calculated to include this profitability bonus. The employer conceded this only in relation to the first four weeks' holiday underpinned by EU law, not the additional 1.6 statutory weeks provided under UK law.

The EAT agreed that the calculation of holiday pay for the additional 1.6 weeks of statutory holiday was purely a matter of UK law. The profitability bonus was not part of the sums legally payable for employees who, like these claimants, worked normal hours – it was also dependent on targets being met. It therefore did not count towards holiday pay for the additional 1.6 weeks.

WHY THIS MATTERS

This case follows a long line of decisions regarding the calculation of holiday pay. Many of those cases focus on pay during the 4 weeks' holiday under EU law, and this case is a reminder that UK law continues to apply to holiday in excess of that entitlement.

Econ Engineering Ltd v Dixon and others

EAT finds that professional cyclist was not an employee or worker

Jess Varnish is a professional cyclist who was selected for a series of elite training programmes operated by British Cycling. Multiple athlete agreements were entered into between British Cycling and Ms Varnish. The agreements included a variety of provisions and obligations including a

performance plan and a package of benefits, but expressly stated that Ms Varnish's participation in the programmes did not create an employment relationship. The EAT held that the employment tribunal had been entitled to conclude on the facts before it that Ms Varnish was not an employee or worker of British Cycling. Whilst Ms Varnish was subject to the control of British Cycling under the terms of the agreements, she was not personally providing her work or services, but rather her commitment to train. Nor were the benefits provided to her remuneration or wages, but were instead support to enable her to train to the highest levels.

WHY THIS MATTERS

The EAT emphasised that the tribunal's conclusions on employment status were based on the facts before it, and demonstrates yet again the fact-specific nature of cases involving the determination of employee or worker status.

Varnish v British Cycling Federation (t/a British Cycling

Other developments in brief

Protect whistleblowing report: The FCA has agreed to consider recommendations from the Complaints Commissioner on how the FCA handles whistleblowing cases. The recommendations focused on the FCA's interactions with the whistleblower and the information provided when the matter was concluded.

Certification and conduct rules implementation deadline extended: The FCA has published a consultation paper which considers extending the implementation deadlines for the certification and conduct rules regime for FCA solo-regulated firms. This paper was published after the Treasury agreed to delay the deadline by which FCA solo-regulated firms must assess the fitness and propriety of certified staff until 31st March 2021.

Privacy Shield invalidated: The ECJ has ruled that the EU-US Privacy Shield under which many businesses transfer personal data from the EU to the US is invalid. You can listen to BCLP's podcast discussing how to adapt to the death of the Privacy Shield here.

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

Katherine Pope

London

katherine.pope@bclplaw.com
+44 (0) 20 3400 3533
