BCLP. Client Intelligent

Insights

UK HR TWO MINUTE MONTHLY: FEBRUARY 2022

Feb 02, 2022

SUMMARY

Our February update covers key employment law developments from January 2022. It also includes recent cases on gross misconduct/lodging multiple and vexatious grievances, if a "franchisee" delivery driver with rights of substitution is a worker, and whether an employee can impliedly agree to extend flexible working decision periods.

IN A FAIR GROSS MISCONDUCT DISMISSAL, IS MERE MISCONDUCT (LODGING VEXATIOUS GRIEVANCES) ENOUGH, OR DOES THERE HAVE TO BE A BREACH OF CONTRACT?

In cases of potential gross misconduct, the question of whether the conduct amounts to a repudiatory breach of contract is one of the considerations for deciding whether a dismissal is fair under section 98(4) of the Employment Rights Act 1996 (ERA 1996). However, not all cases require a purely contractual analysis.

In a recent decision of the Employment Appeal Tribunal (EAT), the employee brought numerous grievances against senior managers which concerned, among other matters, the failure of those managers to include him in meetings he thought he should attend.

The employee was only willing to meet with his own line manager to discuss the grievance(s) but as the grievance itself concerned senior managers, his line manager was not able to resolve the issues informally. A formal grievance meeting was scheduled and the employee refused to attend, despite being told the request was considered a reasonable instruction. The meeting was held in the employee's absence - the grievances were not upheld.

Subsequently, the employer commenced disciplinary action against the employee based on bringing numerous vexatious and frivolous grievances and refusing to comply with a reasonable management instruction to attend a grievance meeting. The employee was dismissed for gross misconduct, although a payment in lieu of his contractual notice period was made.

The Tribunal found the dismissal was fair. The employee appealed, arguing that the Tribunal had failed to consider whether his conduct amounted to a repudiatory breach of his employment contract.

The EAT dismissed the appeal. There was no contractual element in this decision as the employer, when considering the issue of gross misconduct, did not rely on any breach of contract. As such, a contractual analysis was not required and the employee's conduct was a sufficient reason to dismiss fairly.

WHY THIS MATTERS

An analysis of whether there is conduct amounting to gross misconduct/a repudiatory breach in the contractual sense may be relevant when an employer relies on a breach of a specific contractual term (for example a term in a contract of employment) but not in all cases when considering the fairness of a gross misconduct dismissal.

This case is also an interesting example of a situation where an employee's vexatious grievances and an unwillingness co-operate and engage with a grievance/disciplinary process amounted to conduct sufficiently serious for dismissal to be within the band of reasonable responses.

Hope v British Medical Association

CAN A DELIVERY DRIVER WITH UNFETTERED RIGHTS OF SUBSTITUTION BE A "WORKER"?

The distinction between the three "employment status" categories of employee, worker and self-employed independent contractor is significant for a number of reasons, and case law has demonstrated that the right to provide a substitute is a critical factor in determining employment status.

The EAT recently upheld a decision that individual owner-driver franchisees (ODFs) who provided parcel delivery and collection services to DPD were independent contractors, not employees or workers.

The decision turned on whether the ODFs had an unfettered right of substitution i.e. whether they were genuinely free to provide a replacement to undertake work on their behalf. The franchise agreements between the drivers and DPD required the ODFs to supply a driver who could be the ODF or another person to perform the services. The fact that in practice, the ODFs had used cover drivers who were also ODFs or drivers of other ODFs did not undermine the broad contractual right to use a substitute of their choice. The EAT found that it was reasonable for DPD to check a substitute driver's qualifications and complete an application form and this did not detract from the

broad contractual right of substitution to use any substitute of their choice at any time. In fact, an individual could be an ODF with DPD and not drive at all.

The EAT held that the Tribunal had had correctly found that ODFs had a genuine and unfettered right of substitution and this was inconsistent with employee and worker status.

WHY THIS MATTERS

The issue of whether the drivers had a genuine unfettered right of substitution was critical to the EAT's reasoning. This case serves as an important reminder that where a substitution right is limited only by the need to show that the substitute is as qualified as the contractor, this will generally still be inconsistent with personal performance and therefore probably fatal to a claim based either on or for employee or worker status.

Stojsavljevic and Anor v DPD Group Limited

CAN A STATUTORY FLEXIBLE WORKING DECISION PERIOD BE IMPLIEDLY EXTENDED BY CONDUCT?

Under the statutory scheme, if an employer receives a flexible working request, the employee must be notified of the outcome within the "decision period", which is three months beginning with the date of the employee's request, or such longer period as is agreed by the parties. An employee is only able to bring a claim at the employment tribunal in relation to breaches of the statutory scheme after the decision period has expired.

In a recent decision of the EAT, the employee in question submitted a flexible working application. The application was rejected by the employer and there was then correspondence between the employer and employee. The employee attended an appeal meeting in relation to his application and, although the appeal meeting took place after the decision period had expired, the employer argued that the very fact of agreeing (prior to the end of the decision period) to an appeal meeting after the end of the decision period, amounted to an implied agreement by the employee to extend. The employee submitted his employment tribunal claim after the decision period had ended but before the appeal was heard.

The EAT had to consider the employer's case that the employee had impliedly agreed to an extension of the decision period when he agreed to attend the appeal hearing scheduled to take place after the end of the decision period. If he had, his claim was premature and the Tribunal would not have jurisdiction to hear it.

The EAT found that the employee's agreement to attend the appeal hearing after the decision period was not an implied agreement to extend the decision period itself. For an extension to the decision period to be valid, the employee would have to agree expressly and specifically to both the

extension and the length of any extension. Accordingly, the Tribunal had jurisdiction to hear the employee's claims.

WHY THIS MATTERS

This case brings into focus the timeframe in which flexible working requests must be dealt with and highlights the fact that, where it becomes clear that the process will not be completed by the deadline, it is important to ensure that express agreement is reached with the employee to extend the decision period. In the absence of an express agreement, an employer cannot rely on some form of implied extension to the decision period caused by an employee's continued participation in a flexible working process, even if that continued participation goes beyond the end of the decision period.

Walsh v Network Rail Infrastructure

ROUND UP OF OTHER DEVELOPMENTS

Work-related stress and depression: The Health and Safety Executive (HSE) published a report in December 2021, which stated that 822,000 workers were suffering from work-related stress, depression or anxiety (new or longstanding) in 2020 and 2021. Even prior to the coronavirus pandemic, the rate of self-reported work-related stress, depression or anxiety had been trending upwards but it has continued to rise in 2021 and 2021. Prior to the pandemic, the main causes were workload, too much work or too much pressure or responsibility as well as other factors such as changes at work and violence. Of the 822,000 workers suffering from work-related stress, depression or anxiety in 2020 and 2021, approximately just under half of these workers reported that this was caused or made worse by the impact of the pandemic. The report further states that stress, depression or anxiety is most prevalent in the education, health and social care sectors.

Gender recognition: The Women and Equalities Committee (WEC) has published a report on the reform of the Gender Recognition Act (GRA 2004) where it heavily criticises the government's response to its own 2018 consultation on reforming the GRA 2004, which was published two years later in 2020. The WEC report states that the response was 'minimal and ignored areas where there was a majority in support for change' which leaves a gender recognition process that is no longer fit for purpose and is in urgent need of reform. One of the suggested changes is for the government to develop a specific healthcare strategy for transgender and non-binary people within the next year, which should include improved and mandatory training for GPs around treating trans and non-binary patients as well as guidance for healthcare professionals including how to communicate appropriately with patients who are trans and non-binary.

Employers should be aware that one of the recommendations made by WEC is for a review to be conducted into the use and application of the occupational requirement exception in the Equality Act 2010 (EA 2010), which allows employers to impose a requirement that certain jobs can only be

open to people who are not transgender, having regard to the nature and context of the work. The recommendation is that this review should consider the role of the GRA 2004 and how it interacts with the EA 2010 and employment laws, and make recommendations to strengthen protections for trans and gender non-confirming people at work.

RELATED CAPABILITIES

- Employment & Labor

MEET THE TEAM

David von Hagen

London

david.vonhagen@bclplaw.com
+44 (0) 20 3400 3576
