SUMMARY

Our April 2018 blog outlines recent key employment law developments. These include cases on the test for fair misconduct dismissals, an employer’s obligation to make reasonable adjustments to its long hours working culture, and the correct approach to use when comparing employment terms under the Agency Workers Regulations.

SUPREME COURT CASTS DOUBT OVER THE LONGSTANDING TEST FOR FAIR MISCONDUCT DISMISSALS

The Supreme Court has held that it was within the band of reasonable responses for a school to dismiss a head teacher who had failed to disclose her relationship with a convicted sex offender.

The employee was a head teacher at a school in Sandwell. She became close friends with a man who was convicted of downloading indecent images of children, but she failed to disclose this to the school’s governing body. On becoming aware of the relationship, the local authority said that her failure to disclose was a serious breach of her employment contract, given the nature of her role, and dismissed her for gross misconduct. The Supreme Court, agreeing with the tribunals and Court of Appeal below, held that the dismissal was fair as it fell within the range of reasonable responses open to the employer.

However, in giving its judgment the Supreme Court also questioned the validity of the longstanding ‘Burchell’ test that applies when deciding whether misconduct dismissals are fair. The Burchell test says that a dismissal for misconduct will be fair if the employer had a genuine belief that the employee had committed the misconduct, that belief was reasonable, and the employer had undertaken a reasonable investigation. The Supreme Court suggested that the Burchell test may not fit well with the statutory test for deciding on the fairness of a dismissal, but the Supreme Court didn’t have to decide the point for this case and so its comments are obiter.
WHY THIS CASE MATTERS?

The Supreme Court has effectively invited litigants to challenge the Burchell test in future cases. It remains to be seen whether the principles laid down in Burchell, used by employment tribunals for over 40 years, will remain good law.

Reilly v Sandwell MBC

PREGNANT WORKERS CAN BE DISMISSED IN A COLLECTIVE REDUNDANCY EXERCISE

The ECJ has held that pregnant workers can be dismissed in a collective redundancy situation. Under the Pregnant Workers Directive (PWD), workers cannot be dismissed during the period between the beginning of their pregnancy and the end of their maternity leave, apart from in exceptional cases. Those exceptional cases must not be connected with the worker's pregnancy and must be permitted under national law. In this case, the pregnant employee was dismissed by her employer as part of a collective redundancy exercise because she achieved a low score in the agreed selection process. The employee challenged her dismissal in the Spanish courts, which referred a number of questions to the ECJ.

In giving its ruling, the ECJ held that dismissing a pregnant worker as part of a collective redundancy exercise counted as an 'exceptional case' under the PWD. The ECJ also held that there is no need under EU law for pregnant workers (and those who have recently given birth or are breastfeeding) to be given any special treatment in terms of being retained or redeployed. Neither is there a need to state any exceptional grounds in the dismissal notice, beyond the grounds for the collective redundancy.

WHY THIS CASE MATTERS?

This case gives comfort to UK employers as it maintains the current position under UK law that it is possible to dismiss pregnant employees as part of a collective redundancy exercise. However, the ruling should not be confused with the right under regulation 10 of the Maternity and Parental Leave etc Regulations 1999 for women on maternity leave to be given first refusal on suitable alternative roles, without being required to go through a competitive recruitment process.

The Advocate General in this case had suggested that protection under the PWD should take effect from the beginning of pregnancy, even if the employer does not know that the employee is pregnant. However, the ECJ did not consider it necessary to consider this point and accordingly, as discussed in the final case report in this blog, it remains the case that pregnancy protection arises under UK law only once the employer knows about the pregnancy.

Porras Guisado v Bankia SA and Others
EXPECTATION TO WORK LONG HOURS CAN BE SUBJECT TO REASONABLE ADJUSTMENTS

The Court of Appeal has ruled that an employer's repeated requests for an employee to work long hours can be a provision, criterion or practice (PCP) under the Equality Act 2010. Identifying a PCP is a necessary step when claiming reasonable adjustments under disability discrimination law.

Prior to being injured as a result of a cycling accident, the employee in this case regularly worked late into the evening. His cycling accident caused injuries that amounted to a disability. When he returned to work, the employee initially worked shorter days until his employer asked that he work longer hours. The employee objected to working late and was told that he could resign if he did not want to work the hours. He resigned and brought claims for constructive unfair dismissal and disability discrimination, including a failure to make reasonable adjustments on the basis that the requirement to work unreasonable hours was a PCP.

Although initially unsuccessful in claiming that there was a PCP to work long hours, this point was overturned by the EAT. The employer appealed to the Court of Appeal, arguing that it had not imposed the PCP complained of because working long hours was, at most, an expectation it had of its employees, rather than a requirement. The Court of Appeal rejected the employer's appeal. It said that it was not necessary for the employee to show that he was coerced by his employer into working long hours - the expectation that he would work late was sufficient to amount to a PCP. As the other aspects of the reasonable adjustments test were satisfied, the employer was under a duty to make reasonable adjustments in relation to working long hours, which it had failed to do.

WHY THIS CASE MATTERS?

This case demonstrates that the courts can give a broad interpretation to the concept of a PCP. A long hours working culture can therefore, in facts such those in this case, give rise to disability discrimination issues.

United First Partners Research v Carreras

AGENCY WORKERS REGULATIONS: COMPARISON NECESSITATES ‘TERM-BY-TERM APPROACH’

In the first appeal decision on this issue, the EAT has clarified that parity of employment terms under the Agency Workers Regulations must be looked at using a term-by-term approach, not as an overall package.

The claimant was an agency worker who was supplied temporarily to the Royal Mail. He alleged that both the agency and Royal Mail had failed to ensure that he received the same terms as direct
workers. He was entitled to 28 days’ annual holiday but direct workers received 30.5 days, and he was only paid for 30 minutes of his rest break whilst they were paid for the whole hour.

The Employment Tribunal dismissed the claims on the grounds that the claimant was paid a higher hourly rate to compensate for the disparity in terms. However, on appeal, the EAT has disagreed. It ruled that a higher hourly rate does not compensate for shortfalls in other terms and each employment term must be assessed individually, rather than looking at them as an overall package. Notwithstanding this analysis, the EAT acknowledged that the disparity in rest breaks and annual leave could be rolled-up into an agency worker’s hourly pay provided that that was done in a transparent way. In this particular case, however, it was not transparent.

WHY THIS CASE MATTERS?

This case makes it clear that providing an agency worker with an enhanced hourly rate of pay does not compensate for less favourable working time rights, rest breaks and annual leave entitlement. Rather, staffing companies must ensure that they adopt a term-by-term approach when comparing the terms of agency workers with direct recruits of the end user.

Kocur v Angard Staffing Solutions Ltd and another

NO PREGNANCY DISCRIMINATION WHERE DECISION TO DISMISS IS MADE BEFORE KNOWLEDGE OF PREGNANCY

The EAT has confirmed that an employer is only liable for a pregnancy-related dismissal if they know or believe that the claimant is pregnant at the time the employer takes the decision to dismiss.

The employee in this case was dismissed during her probationary period because of her “emotional volatility” and “failure to fit in” with the employer’s work ethic. The employer made this decision on 3 August 2016, but didn’t inform the employee until 5 August 2016, when it presented her with a dismissal letter dated 3 August. Meanwhile, on 4 August 2016, the employee told her employer that she was pregnant. Following receipt of her dismissal letter, the employee brought claims for automatic unfair dismissal and pregnancy discrimination, arguing that the decision to dismiss her had been taken after her employer was aware of the pregnancy and that the employer had dismissed her for that reason.

The Employment Tribunal ruled in the employee’s favour, saying that once employer learned of the employee’s pregnancy, it should have been obvious that her conduct was pregnancy-related. However, on appeal, the EAT overturned the Employment Tribunal’s decision, saying that for the decision to be because of the pregnancy, the employer must know of it. The decision to dismiss was made before the employer found out about the employee’s pregnancy, so the employer’s decision could not have been motivated by the pregnancy. Nevertheless, the EAT remitted the case.
to a new Employment Tribunal to consider whether, after 3rd August, there was evidence that the employer had made a further decision to dismiss after learning of the pregnancy.

WHY THIS CASE MATTERS?

This case is helpful to employers as it confirms that for an employer to be liable for pregnancy dismissal/discrimination, they must know, or believe, that the employee is pregnant. Importantly, where the date of the decision is in issue, employers should ensure that they can paper trail their decision to dismiss.

Really Easy Car Credit Ltd v Thompson

RELATED PRACTICE AREAS

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