Employment Law Round-up August 2017

Calculation of a week's pay should include employer pension contributions

University of Sunderland v Dross (EAT)

The EAT has held that a week's pay under the Employment Rights Act 1996 must be calculated taking into account employer pension contributions.

Whilst this decision goes against long-established practice, the EAT was satisfied that the wording of the Employment Rights Act (under which a week's pay is calculated) was wide enough to include payments made by the employer into an employee's pension fund. Pension contributions are no less a reward for service than basic pay and can therefore properly be said to be 'remuneration' that should be taken into account when calculating a week's pay.

The judgment pushes up the value of potential unfair dismissal awards for employees earning less than the statutory cap on a week's pay (currently £489 pw), as well as the amount of the protective award on collective redundancy and compensation for failing to inform and consult under TUPE, both of which are calculated based on actual weekly earnings (now including employer pension contributions). Employees who are offered 'buy-outs' for protective awards claims under a settlement agreement may wish to ensure that buy-out payments reflect the higher amount that a tribunal can award.

A link to the case can be found below.

http://www.bailii.org/uk/cases/UKEAT/2017/0341_16_1306.html

Cycle currier had worker status

Gascoigne v Addison Lee Ltd (Employment Tribunal)

In the latest 'gig economy' case, an employment tribunal has found that a cycle courier working for Addison Lee was a worker rather than a genuinely self-employed independent contractor.

The tribunal disregarded the contractual documentation which it said did not correctly reflect the reality of the relationship. Key in this case was the fact that the courier was required to provide personal service under the company's direction and control. The fact he could turn down a job on occasions (for example, if he had a puncture) did not negate the existence of a contract, as the company claimed.
Notably, the tribunal was highly critical of the inclusion in the contractual documentation of an obligation on the courier to indemnify the company against any liability, including costs, resulting from any claim made by him based on employee or worker status.

This case reinforces the general direction of travel that dependant individuals working in gig economy businesses may well be workers rather than genuinely self-employed.

https://assets.publishing.service.gov.uk/media/598c5d7ce5274a75134a9924/Mr_C_Gascoigne_v_Addison_Lee_Ltd_2200436-2016_-_Final_and_Reasons.pdf

Teacher's suspension amounted to a repudiatory breach of contract

Agoreyo v London Borough of Lambeth (High Court)

The High Court has held that a teacher was entitled to treat herself as constructively dismissed when she was suspended pending an investigation into her conduct and the alleged use of unreasonable force on a child.

The High Court rejected the school's argument that the suspension was in support of the school's overriding duty to protect the children, noting that it had failed to consider any alternatives to suspension before deciding to suspend. The school has also failed to establish why the investigation would be prejudiced had the teacher remained at work. In these circumstances, the act of suspension constituted a repudiatory breach of trust and confidence and the teacher could treat herself as constructively dismissed.

Suspension pending a disciplinary investigation is not a neutral act and should not be an automatic or knee-jerk reaction. Employers should be able to show that they have considered alternatives and, having done so, suspension remains the only appropriate way of proceeding in the particular circumstances of the case.

http://www.bailii.org/ew/cases/EWHC/QB/2017/2019.html

New approach to burden of proof in discrimination cases

Efobi v Royal Mail Group Ltd (EAT)

The EAT has held in a direct discrimination claim there is no initial burden of proof on the claimant. This runs contrary to what had been the generally accepted approach in discrimination cases for several years. The historic approach required the claimant to prove facts from which you could infer that discrimination had taken place, at which point the burden shifted to the employer to prove that there had been no discrimination.

Instead, this new EAT decision says that the tribunal is required to consider all of the evidence, from all available sources, to determine whether or not there are facts from which it is possible to conclude that discrimination has occurred. If such facts exits, and the employer has put forward no reasonable explanation, then the tribunal must find that discrimination has occurred.

Although the case concerned direct discrimination, the principle will apply to all types of discrimination claim. There will be no initial burden on the claimant to prove anything in evidence and the tribunal will need to consider all of the facts as a whole. In defending discrimination claims, an employer must ensure it places sufficient evidence before the tribunal to be sure to robustly defend the claimant's allegations.

http://www.bailii.org/uk/cases/UKEAT/2017/0203_16_1008.html

Union recognition and the test for the appropriate bargaining unit

Lidl Ltd v Central Arbitration Committee and anor (Court of Appeal)

The Court of Appeal has upheld the CAC's decision that a group of warehouse operatives at a distribution centre, constituting only 1.2% of a supermarket chain's national workforce, was an appropriate bargaining unit for the purposes of statutory trade union recognition

The Court's judgment confirms that para 19B(3)(c) of Schedule A1 to TULR(C)A is directed at fragmentation between bargaining units or fragmented collective bargaining. It is not concerned with a situation where there is a single bargaining unit and no risk of proliferation.

In other words the provision is not designed to address the difficulties created by a small island of recognition in a sea of non-recognition. Nonetheless, this should be taken into account when considering the appropriateness of the bargaining unit and/or its compatibility with effective management.

The potential problems caused by the creation of a small, localised bargaining unit within a non-unionised national workforce include the unit not being clearly defined or self-contained, or excluding employees at other locations who do the same work.

In this case the CAC identified a number of factors to support its conclusion that the proposed bargaining unit was appropriate. These included the existence of a regional management structure, regional variations in terms and conditions, and the fact that warehouse operatives were a distinct group with separate contracts to store workers.

http://www.bailii.org/ew/cases/EWCA/Civ/2017/328.html

Sleep Shifts and National Minimum Wage

Focus Care Agency Ltd v Roberts and ors (EAT)

The EAT considered that a multifactorial approach was appropriate when considering whether a worker is working merely by being present at the workplace (even if asleep) and therefore doing 'time work', such as to entitle them to be paid NMW for the duration of the shift. The four potential relevant factors are:

(a) The employer's purpose for engaging the worker – e.g. is the employer subject to regulatory or contractual requirements to have someone present

(b) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer, including whether the worker was required to remain on the premises throughout the shift

(c) The degree of responsibility undertaken by the worker

(d) The immediacy of the requirement to provide services if something untoward occurs.

None of those factors is determinative of the issue by itself.

http://www.bailii.org/uk/cases/UKEAT/2017/0143_16_2104.html

Pension losses

Presidential Guidance has been issued together with together with the 4th Edition of Principles to be taken into account by employment tribunals when assessing and compensating pension losses. This took effect from 10 August 2017.

A revision to the guidance to calculating pension losses for final salary and CARE schemes was long overdue. The new guidance is more favourable to claimants than the 3rd edition.

https://www.judiciary.gov.uk/wp-content/uploads/2015/03/principles-for-compensating-pension-loss-20170810.pdf

Compensation for Injury to Feelings

The Presidents of the Employment Tribunals have confirmed an increase in the bands for injury to feelings compensation in discrimination claims. The new bands are £800 to £8,400 (less serious cases); a middle band of £8,400 to £25,200 (cases that did not merit an award in the upper band); and an upper band of £25,200 to £42,000 (the most serious cases). These will be reviewed in March 2018 and annually thereafter.

https://www.judiciary.gov.uk/wp-content/uploads/2017/07/vento-consultation-response-20170904.pdf