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Employment Law Bulletin

Welcome to our March Newsletter.

If you came to our very successful update at Trinity Park a fortnight ago you'll know that we covered a lot of ground; but such is the pace of employment law that we already have several more cases to tell you about. As always, if any of this prompts a question in your mind, you know how to contact us.

Liability for employee's assault of customer

As a general rule, employers are responsible for their employees' actions in the course of their employment. It's called vicarious liability. But it has limits.

This case concerned a petrol kiosk attendant at a supermarket. A customer, Mr Mohamud, went in and asked if some documents could be printed off a USB stick he was carrying. The employee reacted angrily and abusively, using racist language. He followed Mr Mohamud to his car and punched and kicked him while the customer lay on the floor.

Mr Mohamud brought a claim against Morrisons. But the Court of Appeal held that the supermarket was not liable. The employee's actions were outside the scope of his employment; he wasn't employed to keep order over customers (as in cases involving night club doormen who overstep the mark). The employee's supervisor had told him not to follow Mr Mohamud out of the shop but he hadn't listened, instead carrying out the attack for no good or apparent reason.

So Morrisons was not vicariously liable, which will provide some comfort to employers. After all, there is no accounting for spontaneous and unexpected actions by employees. Things might have been different, however, if the employer had been aware of the possibility of something like this happening.

Mohamud v Morrison Supermarkets

Tribunal fees are here to stay (for now)

A High Court action which could have led to the abolition of employment tribunal fees has been thrown out. The Administrative Court has dismissed Unison's application for judicial review of the decision to introduce fees.

Unison had argued that people who had been badly treated by their employers were denied access to justice by having to pay to bring and pursue their employment law claims. Certainly the latest statistics confirm a significant fall in the number of claims, particularly those for smaller amounts. The High Court concluded that Unison's challenge had been brought prematurely. It said that robust evidence would be needed before the decision to bring in fees could be reversed. It did comment that the Government would be legally obliged to review the level of fees if experience demonstrated that it was preventing significant numbers from accessing the Tribunal system. This would apply particularly in the sphere of discrimination law.

Unison has said that it wants to take the case to the Court of Appeal.

Who to contact?

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Sexual harassment whilst working illegally

The Employment Appeal Tribunal (EAT) has decided that an individual who was working illegally in the UK still had the right to bring a claim for sexual harassment, but not unfair dismissal.

Ms Wijesundera is a Sri Lankan national. She agreed to work for Heathrow Logistics, knowing that she needed a UK work permit first. She worked there for two years unlawfully. During that time she was sexually assaulted by a colleague.

The EAT held that Ms Wijesundera could bring a sexual harassment claim even though she was working illegally. She could not, however, claim unfair or discriminatory dismissal because she could not base a claim on the termination of an employment contract which was void in the first place.

Wijesundera v Heathrow Logistics

Intermediaries and false self-employment

When it comes to employment law, one thing's for certain. If you create a false picture to avoid duties and liabilities, you'll be found out.

But even the innocent could get penalised by the Government's clamp down on employment status. Consultation has just finished, and a report is expected soon on proposals to catch organisations which are engaging employees or workers, and claiming that they're self-employed.

While on a practical level it can sometimes be difficult to differentiate an employee from a self-employed contractor, the distinction is very important from a tax and employment law perspective. Unlike the self-employed, employees attract employer NICs at 13.8% and PAYE obligations. They're also entitled to employment rights including holiday pay, sick pay, redundancy pay and pension contributions.

The Government wants to stop the exploitation of a loophole in legislation which is enabling employers to move workers into ostensible self-employed arrangements with third party intermediaries. The intermediary either simply labels the worker 'self-employed', or they set up a contract which allows the worker to provide someone else to do the work in their place (which in reality would never happen). That substitution element is an important difference between a worker and a self-employed contractor.

The proposal is that agency legislation will apply where the worker is:

1. subject to control, supervision or direction in the way they carry out their duties
2. providing their services personally
3. paid for providing their services
4. paid remuneration not already taxed as employment income.

Where these four criteria are met and the worker is engaged by or through an intermediary, they will be deemed to be employed by the intermediary for tax and employment rights purposes - unless they are already employed elsewhere.

There are a few problems with this which could affect legitimate business arrangements. It's not uncommon for there to be a long contractual chain involved in the supply of services, and various employers and intermediaries could exercise supervision and control over an individual. Who bears the tax burden? It could be any of them, and could end up being an organisation which in actual fact has less contact with the individual than others.

While this remains uncertain for now, there are concerns that this spells the beginning of a risky time for businesses which use self-employed people. Recruitment agencies could be hit hard - many could end up footing the tax and NIC bill for the people it places, unless they can show that the worker really is self-employed. These agencies will probably want to steer clear of placing workers who are paid as self-employed, for fear of being held liable for employment-related payments.

It looks as though the new legislation could come into force as soon as 6 April 2014. In the meantime, speak to us if you have questions about your existing arrangements for using self-employed contractors.

Dismissals without notice

Most employment contracts contain a summary dismissal clause. This entitles employers to end the employment straight away (summarily) if the employee commits an act of gross misconduct or gross negligence.

The Employment Appeal Tribunal (EAT) has issued a reminder that not every breach justifies summary dismissal. Gross misconduct is an accepted basis for immediate termination, but employers need to be careful to ensure that that threshold has been reached before invoking a summary dismissal clause.

Mr Knight was a gardener. His contract listed a number of circumstances in which his contract could be terminated without notice. These included "breach of the employer's or customer's security rules", and "theft of the employer's or customer's property".

Mr Knight was working on a Ministry of Defence site. The rule book stated that removal of any property required a "property pass" and that vehicles would be security searched.

Mr Knight was suspended after a bag of bolts from the MoD site was found in his van. During the investigation, he said that he had forgotten to hand the bolts in but had intended to do so the next day. He was summarily dismissed for breaching protocol by taking goods from the site.

At the EAT the crucial question was whether the employer was entitled to summarily dismiss for any breach of protocol (including those which were minor or inadvertent). The EAT said not. The usual rules of contract should play a part; a repudiatory breach - one which entitles the employer to dismiss without notice - must involve gross negligence or a deliberate breach of contract. Mr Knight's conduct was not serious enough to justify summary dismissal.

The main point to take from this case is: just because a contract gives examples of gross misconduct, that doesn't mean that the right to summarily dismiss kicks in when one of those events happens. Consider the context and the severity of the breach before taking the serious step of summary dismissal.

Robert Bates Wrekin Landscapes v Knight

Post-employment victimisation

There's been some discussion about a legal loophole in the Equality Act 2010. While the legislation prohibits post-employment harassment and discrimination, it doesn't actually expressly protect against post-employment victimisation too.

The Court of Appeal has now decided that the omission must have been an unintentional drafting mistake. The Court upheld Mr Jessemey's claim for victimisation stemming from an unfavourable reference written about him by his employer. Mr Jessemey said that the employer's action was in response to a discrimination claim he had brought.

The Court of Appeal has brought certainty to the law in this area by holding that victimisation which happens after employment has ended is covered by the Equality Act.

Jessemey v Rowstock

Employer's decision to dismiss

It is sometimes advisable for employers to engage an independent consultant in some parts of a disciplinary process, for example when an employer does not have enough in-house managers at the senior level to deal with an investigation, a disciplinary decision or an appeal. It can also happen where an employer wants to ensure, and be seen to ensure, impartiality and fairness.

In the Kisoka case, the employer had investigated the alleged gross misconduct and decided to dismiss the employee. It brought in an independent panel to hear Ms Kisoka's appeal, andhat panel recommended that the decision to dismiss be overturned. But the employer chose not to implement the panel's decision and so the dismissal stood.

Was this an unfair dismissal? Perhaps surprisingly, the Employment Appeal Tribunal held not. The employer was not bound to follow the panel's decision. There was nothing in the terms of the panel's engagement to say that its decision would be final, or that the employer would implement it.

Here it was relevant that the employer's investigation (and decision) was found to have been reasonable. Although the employer had asked for an independent panel to reconsider the matter, it was ultimately a decision for the employer to make.

Kisoka v Ratnpinyotip

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