On the Case CRONER

October 2007 THE PROFESSIONAL'S FIRST CHOICE

Holiday entitlement increases

On 1 October 2007, minimum statutory holiday entitlement increased to 4.8 weeks per year.

The Working Time (Amendment) Regulations 2997 create a new minimum holiday entitlement that amounts to 24 days annually for employees who work a five-day week. There will be a further increase (to 5.6 weeks per year, which is 28 days for those working a five-day week) from 1 April 2009. Increases are *pro rata* for those working part time.

The changes are designed to ensure that all workers are paid for bank holidays in addition to the four weeks' minimum leave granted by the Working Time Regulations 1998. The new regulations do not entitle an employee to take the extra holiday on the actual public holidays. As was recently confirmed in *Sumsion v British Broadcasting Corporation (Scotland)* [2007] IRLR 678, EAT, the Working Time Regulations 1998 do not restrict which days of an employee's annual entitlement an employer can nominate as leave days.

The proposals relate to England, Wales and Scotland. The Department for Employment and Learning in Northern Ireland is bringing forward proposals for Northern Ireland.

After the change to 28 days per year from 1 April 2009, the UK will nonetheless remain joint bottom (with the Netherlands) of the EU league table for holiday entitlement. Germany tops the league at 39 days a year, including public holidays.

The Department for Business, Enterprise and Regulatory Reform (BERR), formerly the DTI, has produced a holiday entitlement ready reckoner which can be found at: *www.berr.gov.uk/employment/holidays/page40455.html*.

Case reports featured

Paterson v the Commissioner of Police of the Metropolis (EAT) — a dyslexic senior employee was disabled within the meaning of the Disability Discrimination Act.

Penwell Publishing (UK) Ltd v Isles — a contacts list maintained on an employer's computer system belonged to the employer.

B v A — in sex discrimination proceedings, it is not enough to establish that but for the fact she is a woman an employee would not have been dismissed; a comparator is needed.

Amicus v MacMillan Publishers Ltd (EAT) — a large penalty was imposed on an employer for breach of the Information and Consultation of Employees Regulations 2004.

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News cont'd...

Commission for Equality and Human Rights

The Commission for Equality and Human Rights (CEHR), a new single equality body, came into existence in October with the stated purpose of reducing inequality, eliminating discrimination, strengthening good relations between people and protecting human rights.

The Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission are incorporated into this single body, which also has new powers in the areas of age and religion or belief discrimination and greater ability to enforce legislation more effectively.

Compensation for unfairly dismissed video joker

A supermarket employee has been awarded more than £2000 for unfair dismissal after being sacked for posting a video of his colleagues on YouTube.

Craig Taylor, 24, was dismissed after his bosses at the Somerfield store in Aberdeen saw the video clip and claimed that it brought the company into disrepute. The 20-second clip showed workers playing around, with one hitting another on the head with a plastic bag filled with other plastic bags. Mr Taylor was not present when the incident took place.

The tribunal ruled that the video had not damaged Somerfield's reputation. The tribunal chairman stated that the video footage "could not, in the eyes of a reasonable viewer, have indicated a lack of concern for matters such as health and safety, as was claimed by the respondents".

Equal pay ruling

In *Redcar v Cleveland Borough Council*, the Court of Appeal has confirmed the equal pay legislation applies where the woman is doing higher-rated work than a man, as well as when she is doing work that is rated as the same.

No new discrimination regulations yet

Changes to UK discrimination law were expected this October following the Equal Opportunities Commission's successful challenge to the Employment Equality (Sex Discrimination) Regulations 2005. However, no new legislation has yet arrived.

When compromise agreements unravel

Charles Wynn-Evans of Dechert LLP reports on two recent cases where compromise agreements were disputed.

Introduction

Compromise agreements recording the terms of an agreed (or at least negotiated) departure from employment or the resolution of associated disputes seek a clean break and waive statutory as well as contractual claims. This article highlights two recent decisions on situations where a clean break did not result.

Warranty about misconduct

In *Collidge v Freeport plc* [2007] EWHC 1216, a compromise agreement was negotiated to record the departure of the employer's chief executive, who agreed to depart rather than be suspended and subjected to an investigation into alleged impropriety. He was to receive a termination payment of £445,680 and other benefits.

The compromise agreement contained a warranty to the following effect: there were no circumstances of which the former chief executive was aware, or of which he ought reasonably to be aware, that would constitute a repudiatory breach on his part of his contract of employment which would entitle (or would have entitled) the employer to terminate his employment without notice.

After the agreement was signed, the employer concluded that there were circumstances that would have justified summary dismissal of the former chief executive for gross misconduct. The employer declined to make the relevant payments, on the basis that the former chief executive's warranty was false. The former chief executive sought payment.

Interpreting the warranty

The employee's argument was that, as a matter of construction of the agreement, the employer's obligations were not subject to and conditional on the warranty being accurate and that the warranty was not a precondition of payment. Accordingly, he claimed to be entitled to the relevant payments.

These arguments failed. The employer's obligations were explicitly stated to be "subject to and conditional upon" the terms and conditions of the compromise agreement, including the warranty in question. Consequently, the giving of the warranty and its being true were indispensable conditions of the former chief executive's entitlements. This point is now being appealed to the Court of Appeal.

Was the warranty false?

The issue then arose as to whether the warranty was false, such that the employer could legitimately avoid payment. Under his service agreement, the former chief executive could have been summarily dismissed without notice if guilty of gross misconduct. He had misused company credit cards and expense processes, removed company property and used a company chauffeur for personal work which, despite his denials and explanations, were established to the satisfaction of the judge. Accordingly, the judge concluded that the warranty that the former chief executive had given in the compromise agreement was not accurate and therefore he was not entitled to its payments.

Tactical considerations for employers

Warranties are increasingly used by employers, especially in high-value compromise agreements, to protect and even improve their position in the course of negotiations by flushing out an employee's position — resistance to a particular warranty may indicate that the employee has concerns about the point in question.

The types of warranties sought are not only ones that vouch that no gross misconduct has been committed. Other warranties include that the employee has not already instituted legal proceedings or has not made defamatory or other

comments about the employer. Another significant warranty, given the importance of compensation of the duty to mitigate loss, can be the confirmation (often sought) from the employee to the effect that he or she has not obtained alternative employment and does not have any offer of such employment or any expectation of an offer. The employer may wish to seek to avoid agreeing a termination package based on inaccurate assumptions about the employee's likely losses.

Misrepresentation

Well-drafted compromise agreements, especially in high-value cases, will often contain express entire agreement clauses and provisions seeking to exclude claims based on misrepresentation (to the effect that the parties agree that they have not entered into the agreement on the basis of any representations not recorded in the agreement). Such provisions seek to ensure clarity and certainty and to avoid disputes about representations made as part of, or associated with, the negotiation of the agreement in question.

Crystal Palace FC (2000) Ltd v Dowie [2007] EWHC 1392 (QB) illustrates that, whatever express terms may be agreed by the parties in a compromise agreement, general principles of misrepresentation may still apply.

Mr Dowie's contract with Crystal Palace contained a provision that required his employer to receive a £1 million compensation payment should he leave prematurely and join a Premiership football club. After a season at the end of which Crystal Palace did not achieve promotion from the Championship to the Premiership, a compromise agreement was negotiated releasing Mr Dowie from his employment.

A matter of only days later Mr Dowie became manager of Charlton Athletic, then a Premiership club, prompting Crystal Palace to seek rescission of the compromise agreement. The basis for Crystal Palace's claim was its contention that, prior to signing the agreement, Mr Dowie had falsely represented to Crystal Palace's majority shareholder that he wanted to leave Crystal Palace because he wished to move to the North of England for family reasons and, further, that he had had no contact with Charlton.

Crystal Palace succeeded in establishing that Mr Dowie had represented (before the compromise agreement was signed) both that he had had no contact with Charlton (when this was not the case) and also that he had, by implication, no intention of joining Charlton (when he had just such an intention if the terms were suitable). Mr Dowie made these representations, which he knew to be false, with the purpose and effect of inducing Crystal Palace to agree to the compromise arrangements. Crystal Palace had relied on the representations in concluding the compromise agreement. The agreement had been based, therefore, on fraudulent misrepresentation.

The question then arose about the effect on the compromise agreement of the finding that it had been reached on the basis of fraudulent misrepresentation. Was Crystal Palace entitled to the rescission of the agreement, ie was it entitled to an order that Mr Dowie was still employed by Crystal Palace under his original employment agreement? By now, Mr Dowie had become manager of another club, Coventry City.

The judge concluded that it would not be just to make an order that Mr Dowie remain bound by the contract of employment which he had with Crystal Palace but from which he had been released pursuant to the compromise agreement: Mr Dowie could hardly work for two clubs at one time. An order of rescission was also inappropriate as it was likely that Crystal Palace would only seek to rely on Mr Dowie's employment contract with it to enforce a clause that required payment of compensation if he joined a Premiership Club.

Conclusions

Whilst these two cases are perhaps unusual, the conclusions to be drawn are clear. Compromise agreements are as susceptible to challenge on the basis of fraudulent misrepresentation as any other form of contract. Whilst employers will wish to include suitable and carefully drafted warranties in compromise agreements to protect their positions whenever possible, employees may be concerned at the consequent lack of a guarantee of a clean break if a dispute about warranties can lead to a reopening of the issues surrounding the termination. ❑

Paterson v the Commissioner of Police of the Metropolis

EAT/0635/06

Summary

A dyslexic senior employee was disabled within the meaning of the Disability Discrimination Act (DDA). His condition had a substantial adverse impact on his normal day-to-day activities, which were held to include assessments and examinations even though these were not normal everyday occurrences.

The facts

Mr Paterson started working for the police in 1983, reaching the position of chief inspector. The next stage was superintendent, which involved completing a promotion assessment.

Mr Paterson had taken exams throughout his career and his work involved a significant amount of paperwork of varying complexity. In 2004, he discovered he was dyslexic. He brought a claim for disability discrimination on the basis that his employer had failed to make reasonable adjustments, in particular in the process for determining his promotion to superintendent.

The employment tribunal

The tribunal accepted that Mr Paterson was dyslexic. Therefore the relevant issue was whether his dyslexia had a substantial adverse impact on his normal day-to-day activities.

An expert found that Mr Paterson had mild dyslexia and recommended that he be given an extra 25% time at each stage of the selection process (which had been done). The tribunal noted that Mr Paterson's dyslexia disadvantaged him in comparison with colleagues competing for senior positions, and that the degree of difficulty he experienced had increased as he became more senior.

However, in considering the issue of normal day-to-day activities, the tribunal compared him with the average person, rather than with his colleagues, and decided that his dyslexia only had a minor impact on his day-to-day activities. Also it did not consider that assessments or examinations were day-to-day activities. Therefore, he was not "disabled" within the DDA.

The EAT

The EAT upheld Mr Paterson's appeal. Where an employee, because of the effects of a disability, is suffering a substantial disadvantage in procedures adopted for deciding who an employer will promote, there must be a more than trivial effect on ability to undertake normal day-to-day activities.

The tribunal's role is to compare what the individual can do and what he or she could do without the impairment, rather than compare him or her to an average person. Once it was accepted that Mr Paterson was disadvantaged to the extent of needing 25% extra time, it must follow that there was a substantial adverse effect on day-to-day activities.

The EAT considered that high pressure assessments or examinations were day-to-day activities, in accordance with the ECJ's decision in *Chacón Navas v Eurest Colectividades SA* [2006] IRLR 706 that the governing directive envisaged "situations in which professional life is hindered over a long period of time".

Comment

This decision is important as it involved an individual whose dyslexia only had a significant impact on his abilities once he had progressed to a senior position. Employers cannot rely on the fact that someone has been able to manage up to a certain point in his or her career when determining whether he or she is disabled for the purposes of the DDA. The case also confirms that assessments and examinations are considered to be normal day-to-day activities for the purposes of the DDA. ❑

Penwell Publishing (UK) Ltd v Isles

[2007] EWHC 1570 (QB)

Summary

A list of contacts maintained on an employer's computer system belonged to the employer even though the list included personal contacts made by the employee prior to joining the employer.

The facts

Mr Junior Isles was employed as a publisher and conference chairman in the power industry. With colleagues, Mr Isles became involved in setting up a rival business and he left the company seven days after the rival business had been launched.

Mr Isles had brought with him a list of personal and business contacts when he joined Penwell. He had transferred these details onto the Outlook e-mail system at Penwell. After that, he maintained a single list of contacts — those he needed for his work at Penwell together with his own previous business and personal contacts — on the same Outlook address list. Before leaving, Mr Isles downloaded the entire address list for his future use.

The High Court

In his contract, Mr Isles had not been subject to a restrictive covenant, but there were the usual confidentiality and company property clauses. The principal issue between the parties related to the rights over the information in the contacts list. As most of the contact details were in the public domain, the use of individual contact names by Mr Isles was not a breach of the confidentiality clause. The more difficult issue was whether the contacts list fell within the definition of company property.

Had the database list been provided to Mr Isles, copying it and then using it would potentially have amounted to a breach of the employee's duty of fidelity. However, the court ruled that the contact list was the property of the company.

In the absence of an adequately communicated company e-mail policy, the court had to consider the status of contact details put on an employer's system by an employee for his or her own use, not knowing that doing that made them part of the employer's property. It was reasonable that an employee would be entitled to take copies of his or her own personal information and, where the information was confidential to him or her, remove these details from the employer's system. However, Mr Isles had removed the entire contents of the contacts list not for his own personal purposes, but to have the widest possible list of contacts for the rival business.

It followed that Mr Isles was in breach of the express terms of his employment contract and that the company was entitled to retain the contacts list, subject to the limited relief identified by the court, which was that, as a result of the company not having had an effective e-mail policy, Mr Isles should be permitted to retain details of those individuals who amounted to contacts from outside work or prior to his employment with the company.

Comment

Had the employee maintained a list of personal contacts, from outside his employment, separately, rather than adding these details to his employer's list, it is unlikely that this particular issue would have been litigated.

The court suggested that employers would be well advised to make sure that they had an e-mail policy that was effectively communicated to employees, making it clear that the e-mail system was to be used for business purposes only and that, in adding to or maintaining contact details on that system, the employee was doing so exclusively for the employer's benefit, and not for his or her own benefit. ❑

B v A

[2007] IRLR 576

Summary

In a sex discrimination case, a finding that a dismissal would not have occurred but for the fact that the dismissed employee was a woman was insufficient. There needed to be an appropriate comparator.

The facts

B is a solicitor in a small practice. A was employed by him, initially as a secretary/receptionist, until she was promoted to become his personal assistant. B and A became involved in a consensual relationship and became regarded as a couple. However, A developed a regular association with another man. When B saw A with the other man, he reacted by dismissing her that day. She brought a claim of unfair dismissal and sex discrimination.

The employment tribunal

The tribunal found as a fact that the reason for the dismissal was driven by jealousy or the discovery of the claimant's relationship with the other man. As the claimant had been dismissed without notice and without any reason that could be recognised as potentially fair, the dismissal was unfair. Moreover, the dismissal amounted to sex discrimination as the dismissal would not have occurred but for the fact that A was a woman.

The EAT

The question of the reason for the less favourable treatment received by an employee was an issue which was not to be approached as a question of causation, and certainly not decided by the question whether, "but for" the fact that the dismissed employee was a woman, the dismissal would have occurred. It was vital that a proper comparison was made, given that the advancement of a non-discriminatory reason will almost inevitably involve the assertion that others without the characteristic in question would have been treated the same way. There may be no need for an actual or hypothetical comparator but there must be an appropriate comparison.

The tribunal had provided a reason for the claimant's dismissal, namely the jealousy of B or the discovery of A's relationship with the other man. This was inconsistent with the reason being the claimant's sex. It could not be said that the reason operating in B's mind was that A was a woman. The dismissal occurred because of relationship breakdown, nothing more and nothing less than that. It was simply not open to the tribunal to find, as it had done, that the claimant suffered discrimination on the grounds of sex simply because the dismissal would not have occurred but for the fact that she was a woman.

The tribunal's error was compounded by the fact that it had failed to carry out an exercise in comparison. In the circumstances of the case, it was incumbent on the tribunal to construct a hypothetical comparator. The appropriate comparator would have been a homosexual male employee with a homosexual male employer. On the tribunal's findings, such an employee would have received exactly the same treatment. Specifically, he would also have suffered dismissal that was driven by feelings of jealousy when his apparent infidelity was discovered.

Comment

A contrary view might be that jealousy in respect of a female employee is not inconsistent with the reason for treatment being the employee's gender, particularly if comparison is made with the way in which the claimant would have been treated by a heterosexual manager if she were a man. ❑

Amicus v MacMillan Publishers Ltd

EAT/0185/07

Summary

A penalty of £55,000 was imposed following a Central Arbitration Committee (CAC) declaration that the employer had not arranged a ballot of its employees to elect the relevant number of information and consultation representatives. The level of the fine reflected the fact that the breach of the Information and Consultation of Employees Regulations 2004 had been serious.

The facts

Amicus complained to the CAC that, in the absence of a negotiated agreement, the standard provisions under the Information and Consultation of Employees Regulations 2004 should have applied. The regulations require an employer to hold a ballot of relevant employees to elect the relevant number of information and consultation representatives. This had not happened.

The Central Arbitration Committee

None of the requisite criteria in respect of pre-existing arrangements had been met. Further, there had been no attempt to initiate negotiations following the employees' request. It followed that the standard provisions applied. These had not been implemented.

The CAC made a declaration to this effect and ordered the relevant ballot to be held.

The EAT

Following the CAC declaration, Amicus applied to the EAT for a penalty notice to be issued. Although not represented at the hearing, the employer put forward that it had believed that it was enough to adapt its existing mechanisms to the new legislation, but that it had now taken appropriate advice and was actively seeking to carry out its obligations.

In setting the amount of the penalty, the EAT was required to take account, amongst other things, of the gravity of the failure, the period of time over which the failure occurred, the reason for the failure, and the number of employees affected.

The EAT also noted that there was an EU requirement for there to be social dialogue between management and labour, and for any sanction in respect of a breach of this obligation to be effective, proportionate and dissuasive.

The EAT stated that this was a significant failure, compounded by the fact of earlier upheld complaints against the employer and affecting a large number of employees (somewhere in excess of 1350). It was also appropriate to stipulate a sum that would deter others from adopting such a "wholly cavalier attitude" to their obligations. In the circumstances, the penalty was fixed at £55,000.

Comment

This is the first case in which the EAT has fixed a penalty under regulation 22 of the Information and Consultation of Employees Regulations 2004. ❑

Published by Wolters Kluwer (UK) Limited,
145 London Road, Kingston upon Thames, Surrey KT2 6SR.
Tel: 020 8247 1175. Fax: 020 8547 2637.
Web: www.croner.co.uk, e-mail info@croner.co.uk
 ISSN 1746-8930
Content Director: Michèle Wheaton