



EMPLOYMENT LAW UPDATE – JULY 2010

FAILURE TO OBEY INSTRUCTIONS

The Court of Appeal in the recent case of **Dunn v AAH Limited** ruled that where an employee failed to follow instructions to report a health and safety issue within the company to group headquarters the employer was allowed to fairly dismiss the employee for gross misconduct. It should be noted that in this case it was a high level employee with management responsibilities who was dismissed and employers should take advice before acting in similar circumstances.

RACE DISCRIMINATION

The Court of Appeal in the case of **Aziz v FDA** held that when considering whether separate incidents constitute an act of discrimination extending over a period of time, one relevant but not conclusive factor is whether the same individual or different individuals were involved in the incidents. In this particular case the employee had made allegations about three different individuals. The Court found that there was no continuing act of discrimination.

WHISTLE BLOWING

The Employment Appeal Tribunal in the case of **BP Plc v Eiston** has held that a worker or employee can claim to have been subjected to a detriment by his current employer on the grounds of making a protected disclosure whilst employed by a previous employer. However, the employee/worker must be employed at the time of making the disclosure.

Employers need to tread carefully with employees who make protected disclosures in relation to their previous employer.

WHISTLE BLOWING

The Employment Appeal Tribunal in the case of **Goode v Marks and Spencer** has held that the expression of an opinion about an employer's proposal to change a discretionary enhanced redundancy scheme cannot be a qualifying disclosure under the Employment Rights Act 1996.

The employee had taken a number of steps including complaining to his line manager, contacting the Times Newspaper and completing a survey all of which he sought to argue were protected disclosures. The Employment Appeal Tribunal held that such information was insufficient to amount to a reasonable belief by the employee/worker that the employer was likely to fail to comply with a legal obligation to which it was subject.

Employers should take advice if unsure as to whether disclosures made by an employee or worker are protected under the law.

EQUAL PAY

The Court of Appeal in **Potter v North Cumbria Acute Hospital NHS Trust (2) 2009** has confirmed that the introduction of Agenda for Change merely amounted to a variation of employees contracts of employment rather than the rescission and issuing of new contracts of employment. Therefore the six months limitation period for bringing an equal pay claim under Section 2ZA of the Equal Pay Act 1970 had not been triggered.

SIMULTANEOUS EMPLOYMENT IS PERMISSABLE

The Employment Appeal Tribunal in the case of **Prison Officers Association v Gough** has confirmed that an individual can at the same time have two jobs with different employers provided that the jobs are compatible with each other. In this case the individual concerned could be an employee of both the Prison Service and the Prison Officers Association.

TERRITORIAL JURISDICTION

The Employment Appeal Tribunal in the case of **BA v MAK** considered the issue as to the amount of work that an employee has to carry out in Great Britain in order to successfully argue that the Employment Tribunal is entitled to hear his/her claim. Here the employees were cabin crew of Chinese Nationality ordinarily resident in Hong Kong. They completed 28 flight cycles between Hong Kong and London each year. They took part in de-briefing sessions on landing in Great Britain, had duties upon arrival and prior to departure from Great Britain and underwent training in Great Britain.

The EAT found in this case that they had Jurisdiction to hear the claims.

ILLEGALITY

The Employment Appeal Tribunal in the case of **San Ling Chinese Medical Centre v Lianweiji** has held that the employee's contract of employment was not tainted with illegality merely by circumstances that could lead to a work permit being revoked. Actual revocation of a work permit is required.

In this case the employee was pressured into reducing her actual salary by her employer without any variation to her work permit. The employer issued two sets of pay slips showing the actual and ostensible pay. The employee had not colluded in the illegality and there was no tax evasion. Therefore, the Employment Tribunal was entitled to hear the employee's claim.

DRESS CODES AND RELIGIOUS DISCRIMINATION

The Court of Appeal has ruled in **Eweida v British Airways** that by adopting a staff dress code which does not allow the wearing of a visible neck adornment in this case, a small visible crucifix with the employee's uniform, the employer was not indirectly discriminating on the grounds of religion. The Court found that a ban on such a neck adornment was a proportionate means of achieving a legitimate aim.

Employers should take advice before acting in similar circumstances.

CONSTRUCTIVE DISMISSAL

The Court of Appeal has handed down its decision in **Buckland v Bournemouth University** where it held that an employer who has committed a fundamental breach of an employee's contract of employment cannot cure this whilst the employee is considering whether to treat themselves as having been dismissed. Put simply, once the breach has occurred it cannot be undone.

COLLECTIVE CONSULTATION & REDUNDANCY

The Employment Appeal Tribunal in **Shanahan Engineering v Unite** has held that where there are special circumstances which mean that it is not reasonably practicable for the normal 30 or 90 day collective consultation period to be complied with this will not relieve the employer of its actual consultation obligations if they can still be carried out in a shorter period of time. In this case it was held that there could have been a shorter period of consultation over a two to three day period. Employers should be careful in cutting short or failing to carry out consultation. In particular, where they have more than 20 employees who may be affected as this can lead to a 90 day protective award being made which put simply, amounts to three months pay for each relevant employee.

COLLECTIVE AGREEMENTS AND INCORPORATION

The High Court in **Malone and others v British Airways** has held that a clause allowing the airline to unilaterally vary contracts of employment was enforceable.

In upholding British Airways express right to unilaterally alter the individuals contracts of employment, the court placed a great deal of emphasis on the financial situation facing British Airways. The Judgment set out detailed financial information relating to British Airways, in particular highlighting the Company's very difficult financial circumstances which appears to have been instrumental in the court reaching its conclusion.

Irrespective of this case employers should not take for granted that they can unilaterally alter employees contracts of employment and should seek advice when considering taking such a step.

MINIMUM WAGE

Since April 2009 employer's not paying at least the minimum wage now face an automatic penalty of up to £5,000. As at the end of January 2010 more than 316 penalties have been issued and nearly £4.5m of minimum wage arrears have been recovered for workers.

CHANGES TO TERMS AND CONTITIONS

Bateman and others v Asda Stores Limited . In this case the Employment Appeal Tribunal held that an employer can enforce a variation clause contained within a contract of employment or employee handbook provided that (a) the clause is clear and unambiguous (b) the employer complies with its terms (c) the employer does not act arbitrarily or capriciously in making the change and (d) the employer complies with the implied term of trust and confidence in relation to the manner in which the change is made.

Here the variation clause was contained within the staff handbook and stated that the company reserved the right to review, revise, amend or replace the contents of the handbook and introduce new policies from time to time as required by changes in the needs of the business or legislation.

It should be noted that this case does not give an employer an unlimited licence to vary employment contracts at will. Employment Tribunals are still likely to be reluctant to allow unilateral changes, particularly to significant terms. Even where such a clause allowing change exists the employer will still have to show a genuine business need for the change.

WHISTLE BLOWING – DETAILS FOR REGULATORS

Since 6th April 2010 a whistle blowing complainant can ask for the information on their Tribunal application form to be passed to the appropriate regulator. All they have to do is tick the box on the newly

amended version of the Employment Tribunal application forms. Complainants may also use this as a negotiating tactic to persuade employers to proceed with quick settlements before the Tribunal claim is issued.

If you require further information or general employment advice in relation to any of the above or you have an employment law or HR query please contact Marlene Hession at marlene.hession@fdl-law.co.uk or 0161 828 1560.

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