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Brief Update

August 2007

from the Employment Law Division

Recent Case Law and Developments

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The first half of 2007 has proven to be a busy 6 months in terms of thought provoking decisions. Whilst cases concerning the new Age Discrimination regulations (in force October 2006) have been slow to trickle through, there have been interesting decisions in the areas of disability discrimination, dismissing employees whilst off work with stress related illness, agency workers and disciplinary procedures. This update aims to give you a comprehensive round-up of those decisions and also an overview of recent amendments to the Working Time Regulations (WTR).

Disability Discrimination Act 1995

Paying salary – a reasonable adjustment that should be made? There was much speculation as to whether the Court of Appeal would uphold the EAT's decision that an employer is not obliged to pay salary to disabled employees pursuant to its duty to make reasonable adjustments. The Court stated that it was not incumbent on an employer to indefinitely fund sick pay to those on long-term sickness absence who are also 'disabled' within the meaning of the 1995 Act. ***O'Hanlon v HM Revenue & Customs*** concerned an employee who had had considerable ill health absence caused predominantly by clinical depression. After she had exhausted her contractual entitlement to full sick pay (for 6 months), she argued that she should have been maintained at a full rate of sick pay albeit this was beyond the terms of her employer's sick pay policy by reason of its duty to make a reasonable adjustment in light of her disability. Her claim failed. The decision will be gratefully received by employers who were often unsure as to whether the duty to make reasonable adjustments which requires them to remove the disadvantage to the disabled person in any 'work arrangements' could potentially include extending or increasing their contractual sick pay policies to those who are or might be absent due to their having a disability. The Court has clarified that the duty to make reasonable adjustments does not extend this far.

Disciplinary Procedure

Expired disciplinary warnings – can they ever be relied upon? The EAT has ruled that an expired warning cannot be relied upon for any purpose by an employer. In ***Airbus UK v Webb***, Mr Webb was dismissed for not working when he ought to have been in circumstances where others were not dismissed for the same act of misconduct. The reason for Mr Webb's dismissal was that he had received a final written warning 13 months earlier whereas the others involved had clean disciplinary records. Mr Webb's final written warning had expired after 12 months and had therefore lapsed. The EAT stated that 'a tribunal is obliged, and not merely entitled, to ignore expired warnings'. The ACAS Code of Practice on disciplinary and grievance procedures states that a final written warning 'should normally be disregarded for disciplinary purposes after a specified period (for example 12 months)'. This case serves as a word of warning to employers that there are no circumstances therefore where it will be justifiable to rely on an expired warning.

Agency workers

New guidance on 'implied contracts'. The President of the EAT acknowledged that the recent rulings concerning whether the possibility of an implied contract of employment could exist between the agency worker and the end user, had not given Tribunals guidance on how to approach such cases. The Court of Appeal decisions of ***Dacas*** and ***Muscat*** have caused much unrest for businesses that regularly use the services of employment agencies to supply them temporary workers, since these earlier decisions had left open a can of worms that these temporary workers, for which they pay a marked up rate, could in fact claim unfair dismissal against the end user after their assignments ended. In ***James v Greenwich Council***, Mrs James, an agency worker had signed a contract with her agency in which she acknowledged that she was self employed and that she had no contract of employment with the agency or the Council. Mrs J accepted that initially she there was a genuine agency relationship between her and the Council, however she claimed that after a period of time (i.e. one year) a contract of employment should be implied by custom and practice and that over that time she effectively became a Council employee. The EAT disagreed with her noting that whilst she had been

off sick she had been replaced during her absence (and notably during her absence she did not have to notify the Council). This was important as it showed that there was no mutual obligation between Mrs J and the Council. Indeed, it was noted that she had received no benefits or remuneration from the Council. Also, Mrs J had at one time switched employment agencies in order to benefit from its higher rates of pay and therefore she was well aware of Council terms and conditions for its employees, however chose to avoid them in preference for the better rates with the agency. The guidance given by the EAT to Tribunals in considering whether there is a question of implying a contract with the end user includes the following: a key feature is not whether the end user pays the worker's wages but whether the end user can insist on that particular worker being provided. The mere passage of time does not justify implying a contract as a matter of necessity. It will be easier for a tribunal to find a contract of employment when an ***existing*** employee is asked to ***move*** to providing his/her services through an agency either as a PAYE employee or limited company contractor. The Tribunal in those circumstances is likely to find that the agency arrangements were superimposed to create a sham and that the original contract of employment did not actually come to an end.

The decision in the ***James*** case does not sit easily in many respects with the Court of Appeal decisions in ***Dacas*** and ***Muscat***. In particular, one of the judges in ***Dacas*** stated clearly that the passage of time under the agency relationship could give rise to an implied contract of employment which the EAT judge in ***James*** disagreed with. Since ***James*** there have been a number of further cases again from the EAT (including a very recent case from the EAT in Scotland being ***Wood Group Engineering v Robertson***) in terms of which end users have successfully appealed decision from the Employment Tribunal, in terms of which they found that the end user was the employer of the agency worker. These cases have followed the reasoning in ***James*** which is to the effect that implication of a contract of employment in these circumstances will be exceptional. This is all obviously encouraging news for employers but these cases need to be treated with some caution. It is highly unusual for the Employment Appeal Tribunal to disagree with a superior Court but that is in effect what has happened in these cases. We are aware that some of these cases at the EAT level are again going to the Court of Appeal and it is hoped that the inconsistencies between these decisions are properly dealt with in the course of this year. It would be of undoubted help to all employers if Parliament would intervene and provide clear legislation. Watch this space!

Dismissing Employees Absent from Work on Account of Stress-Related Illness

An issue which has been left unresolved for a period of time is the question of whether an employer can fairly dismiss an employee on grounds of medical incapacity, when there is evidence that the employer's conduct has either caused or at least contributed to the employee's ill health. This matter has now very recently been considered by the Court of Appeal in the case of ***McAdie v The Royal Bank of Scotland***. The case considers the situation where an employee was on long term stress related sick absence, which the Tribunal found had been caused at least in part by mismanagement at work and not dealing with her grievance correctly. However, the medical evidence was clear that Mrs McAdie was unfit for work and that there was no prospect of recovery. Even if the bank had been able to offer some solution to the situation for example by re-opening her grievance or a full apology, this was not going to be acceptable to her. The bank, on the basis of that evidence, took the decision to dismiss. The question was whether such a dismissal was fair when there was evidence that the employer had contributed to the situation. The Tribunal found the dismissal to be unfair. The Court of Appeal upheld the EAT and reversed its decision, finding the dismissal to be fair. Key elements from the Court of Appeal's decision are:-

1. the fact that the employer contributed to the incapacity and was therefore culpable, did not prevent the employer from dismissing fairly.
2. the question in every unfair dismissal case is whether it was reasonable to dismiss in the particular circumstances.
3. importantly, where there is evidence that the employer is partially or fully responsible for an employee's incapacity, it would normally be expected "to go the extra mile in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable".

This case is clearly useful where an employee is absent from work eg due to personal injury or other circumstances which may be attributable to employer fault. In essence, the same basic rules apply in determining fairness but perhaps with a further obligation on the employer to do their best to try to find alternative employment or allow rehabilitation.

Age Discrimination

Questions not to ask during recruitment.
Whilst the new Age Regulations have yet to show their mark on the incoming case law, the Director of the Equality Tribunal in the Republic of Ireland published an interesting decision on age discrimination which is likely to be relevant to the UK.
In ***Cunningham v BMS Sales,*** Mr. C was asked questions about his age at an early stage of the recruitment process, including questions on the application form such as are you "living with parents/ renting/ mortgaged accommodation", "number of children", "age" and "date of birth".

Mr. C provided incorrect information stating that he was 37 years old and refused to divulge his date of birth (he was in fact 47 years old). He objected to the questions stating them to be "irrelevant and invasive". He was not given the job, despite matching the required skill set for job. The respondent was recruiting for a professional sales person who would be selling server and storage solutions directly to the prospective customers. Mr. C had previously sold servers and storage solutions and had been one of the highest achievers in his section and he had the customer experience required for this particular post when he had previously worked in a face to face sales environment. The Equality Officer held that he had been discriminated against on grounds of his age, and awarded him 5,000 Euro. The case is a useful reminder to employers to audit their recruitment procedures and practices to ensure that age related criteria have been completely removed.

Amendments to WTR

After much consultation, in June, Jim Fitzpatrick, the Minister for Employment Relations, presented to Parliament the draft Working Time (Amendment) Regulations 2007. The purpose of these Regulations is to increase workers' entitlement to paid leave so as to include, normal and recognised public holidays. This is done by increasing the total entitlement under WTR from 4 weeks to 5.6 weeks. The increase to the entitlement is done in two tranches. There is an additional 0.8 weeks provided from 1 October 2007 and then a further 0.8 weeks from 1 April 2009. Other key features of the proposed amendments are:-

- the new provisions will come into force on 1 October 2007.
- there is a cap on the total aggregate entitlement of 28 days.

- the right cannot be replaced by a payment in lieu except where employment is terminated or during an initial transitional phase. This will allow employers to effectively buy out the first tranche of additional leave (0.8 weeks) until 1 April 2009. Thereafter, the additional leave entitlement cannot be bought out during the employment relationship.
- there is the possibility of limited carry over of the additional annual leave of 1.6 weeks into the immediately following leave year, so long as this is contained in a "relevant agreement" on which see further below.
- payment during the additional leave period must comply with the "weeks pay" definition as is the case for existing annual leave entitlement.

As readers of these updates will appreciate, the original WTR have created much uncertainty and numerous unresolved questions due to the vagueness of its wording, particularly in respect of offshore workers. Unfortunately, the amendment to WTR has just added a further layer of complexity. It is important to note that the new Regulations do not simply increase the workers' entitlement to annual leave under WTR. Instead they create an entirely new right to what is called "additional annual leave" being the 1.6 weeks. One of the reasons for this is because the Government has stated that it wishes to encourage employers to implement the new entitlement to additional annual leave on a voluntary basis. The amendment to WTR provides that if certain conditions are met by employers, that the new right to additional annual leave will not apply. There is however an important distinction in terms of contractual arrangements as between the right to four weeks annual leave and the additional leave. In relation to the four weeks annual leave right, WTR has a "set off" provision. Essentially, annual leave under the Regulations is separate from but not in addition to leave already provided to the worker. Under Regulation 17 of WTR, if there is "any provision" which can include the contract of employment, in terms of which the worker receives leave equivalent to the annual leave right under WTR, the worker can only insist on the statutory right if it is more favourable. In relation to additional annual leave, there is no such set off provision. The amending Regulations provide that the right to additional annual leave does not apply if certain conditions are satisfied. One of these conditions is that the employer provides either in a collective agreement or contract of employment a provision in terms of which the worker is given an annual leave entitlement of 1.6 weeks which is additional to the four weeks existing annual leave entitlement under WTR. It is important to note that in this regard, in order for the new additional annual leave right not to apply, the leave must appear in a ***written*** contract of employment. Any informal, implied or custom and practice provision to additional leave would not count. Also, the contractual provision must be in place before 1 October 2007. This could have a significant effect for those employers who do not have written contracts of employment or alternatively, whose written contracts do not provide for eg public holidays but which are clearly established as a contractual right by custom and practice. Unless employers in these circumstances amend their written contracts before 1 October 2007, so as to include such leave provisions that exist in practice, in writing, they may face a claim on two fronts. The first would be that the existing contractual arrangements continue. Secondly, the worker could further insist upon the 1.6 weeks additional annual leave under the amended WTR, as there is no set off provision. The clear message therefore is for all employers to carefully review their written contracts to ensure that the 1.6 weeks additional leave is included as a contractual provision.

If you would like to discuss any aspect of this Update further, please contact one of our Team members being:-

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