EMPLOYMENT NEWS HEADLINES JULY- AUG 2016 ISSUE 4

ACAS DISCIPLINARY AND GRIEVANCE CODE DOES NOT APPLY TO ILL-HEALTH DISMISSALS – HOLMES V QINETIQ LIMITED

The Employment Appeal Tribunal (EAT) has confirmed in the case of *Holmes v Qinetiq Limited* that the Employment Tribunal (ET) was correct in refusing to uplift the compensatory award to Mr Holmes due to a disciplinary procedure not being followed. It has clearly stated that the ACAS Code on Disciplinary and Grievance procedures does not apply for ill-health dismissals.

Mr Holmes was a security guard for Qinetiq between 1996 until he was dismissed in 2014 on the grounds of his ill-health. Mr Holmes argued that his award should be uplifted as Qinetiq failed to follow any disciplinary procedure prior to his dismissal. The EAT concurred with the ET that an uplift was not due, it said apart from Mr Holmes' ill-health he was able to perform the job of a security guard. There was no suggestion that it was a dismissal for misconduct or poor performance and, therefore, the ACAS Code did not apply. It went on to say that the ACAS Code will not apply to internal company procedures on sickness capability but will apply to culpable misconduct or culpable poor performance. In Mr Holmes' case there was no issue of culpability and his appeal was dismissed.

It is important for employers to be very clear on the *reason* for a termination and should review company policy on terminations before determining which procedures, if any, apply.

DOES TUPE APPLY TO THE LONG-TERM SICK? – BT MANAGED SERVICES LIMITED V EDWARDS

In the case of *BT Managed Services Limited v Edwards* an interesting question arose which will be an important consideration to outsourcing companies. In particular, where there is a long-term sick employee who is retained on payroll.

Mr Edwards was an engineer in the service maintenance team on an outsourced contract at BT Managed Services Limited (BTMS). A serious medical condition resulted in Mr Edwards being unable to perform his role as a service maintenance engineer and was on extended sick leave. As no suitable alternative roles could be found, Mr Edwards was first paid under BTMS' Permanent Health Insurance scheme and when this ended, BTMS continued to pay him. Mr Edwards was on sick leave for a period of 5 years before BTMS lost the outsourcing contract which as a Service Provision Change (SPC) transferred to Ericsson with the Transfer of Undertaking regulations (TUPE) applying.

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Ericsson argued that as Mr Edwards was on sick leave, he was not assigned to the "organised grouping of employees" and, therefore, did not transfer under TUPE as a part of the SPC. BTMS disagreed and argued Mr Edwards did transfer despite being on long-term sick leave. At Employment Tribunal and Employment Appeal Tribunal both courts agreed with Ericsson and said that Mr Edwards did not transfer as he was not "economically active" in the grouping nor was there any likely prospect that he would be in the future. BTMS appealed again and has been granted leave to appeal to the Court of Appeal. It has argued that the question should not be whether the employee was economically active at the time of the transfer but rather the test should be if Mr Edwards was fit would he be carrying out work as a part of that organised grouping?

The outcome will be watched with great interest by employment specialists. If the Court of Appeal agrees with previous courts then a long term sick employee is very unlikely to transfer in this sort of outsourcing situation. Employers should aim to agree terms of responsibility/liability as a part of the transfer negotiations before this sort of situation arises.

COURT OF APPEAL RULES THAT THE EMPLOYMENT TRIBUNAL IS THE APPROPRIATE FORUM FOR EQUAL PAY CLAIMS – ASDA STORES LIMITED V BRIERLEY & OTHERS

The *Asda Stores Limited v Brierley & Others* case concerns a class action brought by around 7000 current and past store workers of whom approximately a third were male. The issue related to the store workers claiming that although the work carried out by the predominately male workers at the distribution depots was of equal value to the store workers, the depot workers were paid a substantially higher hourly rate.

The question for the Court of Appeal to consider was whether this action should be forced into the High Court by the Employment Tribunal (ET) granting an indefinite stay to proceedings or whether the ET was an appropriate forum. Asda argued for a stay citing the following as reasons for the High Court being more appropriate:

- It was a complex case for the ET and it's experience of mass public sector claims was of little relevance in this private sector claim;
- It would have a significant financial impact for the retail sector;
- It was an important case for the private sector.

The Court of Appeal rejected this reasoning for imposing an indefinite stay to force a claim into the High Court, it took account of the following issues in reaching its decision:

- Although High Courts can sometimes transfer a claim to the ET, there is no such power in reverse. Parliament had not legislated for the ET to have this power;
- There was also the practical consequences for the Claimants in having to restart their claim in the High Court and the issue of fees, time limitations etc.,
- The Claimants would also need to bear the winners legal costs if they lost in the High Court;
- It also noted that few High Court judges were experienced in hearing equal pay claims whereas the ET had outstanding judges who were highly able and experienced in this area and capable of applying their specialist knowledge to complex legal points.

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It ruled that the ET was the appropriate forum for the action and refused Asda's appeal. The claim is now being progressed in the ET.

HEADSCARVES IN THE WORKPLACE - UPDATE ON BOUGNAOUI V MICROPOLE UNIVERS

In the last issue of Maxlaw Global news (see Issue 3) we reported on the outcome of one of the two cases being heard at the European Courts relating to whether or not there was discrimination when two Muslim women were prohibited from wearing the Islamic headscarf in the workplace. In Issue 3 we reported that there had been a finding in the case of *Achbita v G4S*, the Belgian case, that there was no direct discrimination due to the employer's neutrality policy and even where there may have been indirect discrimination, this was objectively justified. In the second case of *Bougnaoui v Micropole Univers,* the French case, the finding has gone the other way resulting in contradictory decisions on essentially the same issues.

In *Bougnaoui v Micropole Univers* the Courts have found that there was both direct and indirect discrimination. It stated that although Ms Bougnaoui had not been dismissed because of her religion per se, she had been dismissed due to a manifestation of it, namely the Islamic headscarf, and this was directly discriminatory.

In terms of indirect discrimination, as this dismissal was in response to a customer complaint, in this case, the Courts found there was no objective justification for the indirect discrimination. It was for purely commercial reasons to accommodate the customer's prejudice and, therefore, was found to be indirectly discriminatory.

Although neither case directly impacts the UK position, it will be interesting to see how this saga eventually concludes.

HOLIDAY PAY AND COMMISSION – UPDATE ON LOCK V BRITISH GAS

In the January-February issue of Maxlaw Global news (see Issue 1), we reported on the case of *Lock v British Gas* which concerned the issue of whether commission payments should be included in the calculation of holiday pay. This case has travelled through the ET, the EAT and the European Court of Justice (ECJ). We reported in February that British Gas was granted leave to appeal to the Court of Appeal.

The case has now been heard by the Court of Appeal in July this year and it is hoped that its ruling will be issued in a few months. Key considerations for the Court of Appeal were:

- Could the Working Time Regulations 1998 be interpreted to include commission pay in Mr Lock's holiday pay calculations;
- Would the inclusion of such calculations have far reaching and unintended consequences – i.e., this could not translate to broader discretionary bonus schemes based on organisational or team performances.

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The parties agreed that if the Court of Appeal found that commission pay should be included in holiday calculations then it should be limited to individual performance-based commission for workers with normal hours.

British Gas have estimated that there are around 1,000 cases pending awaiting the outcome of this Court of Appeal hearing. We will keep you posted.

CONSULTATIONS OPEN ON TAXATION OF TERMINATION PAYMENTS

In the March-April issue we reported on Government plans to introduce changes to taxation on termination payments (see Maxlaw Global Employment News – Issue 2 for details). Her Majesty's Revenue and Customs (HMRC) has now opened consultations on taxation on termination payments draft provisions which are scheduled to be introduced in April 2018. The consultations are open for comment until 5 October 2016. See link here:
https://www.gov.uk/government/consultations/simplification-of-the-tax-and-national-insurance-treatment-of-termination-payments-consultation-on-draft-legislation

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