EMPLOYMENT NEWS HEADLINES JULY-AUG 2017 ISSUE 10

EMPLOYMENT TRIBUNAL FEES – SUPREME COURT DECISION

The life an employment lawyer may be about to get a whole lot busier. In a landmark and unanimous decision, the Supreme Court ruled in July that the introduction in 2013 of the filing fee of up to £1,200 in order for an employee to bring a claim in the Employment Tribunal was unlawful and unconstitutional.

The successful challenge for judicial review brought by the public sector union, Unison, means the decision to introduce the fees in 2013[1] will now be reversed with immediate effect. The important changes are as follows:

- Anyone who paid the fee between the period of 2013 – 2017 will receive a refund from the Government of that cost;
- It will also be possible for employees who had not brought a claim against their employer due to the fee being prohibitive to now apply for an out of time application in certain circumstances;
- The situation prior to 2013 when access to the Employment Tribunal system was free of charge to the employee will be resumed, at least, for the time being.

Although, the Supreme Court did not say that a fee structure was never possible in access to justice, it found that in this particular instance:

- There was an effective prevention of access to justice by the introduction of the fee regime. Since the introduction, ACAS statistics have shown a drop of 70% in claims being brought in the Employment Tribunal/ Employment Appeal Tribunal primarily due to the fee regime.
- Given the higher fee for a Type B claim, which includes discrimination claims, Unison succeeded in its argument that the fee regime was indirectly discriminatory as it affected women or other protected groups - putting those wishing to bring this type of claim at a particular disadvantage that could not be justified as a proportionate means of achieving a legitimate aim.
- More widely, the Supreme Court found that the fees resulted in a limitation on the ability of workers to enforce EU law and assert employment rights emanating from the EU.

Contact Maxlaw Global to find out what this could mean for you or if you have any questions or concerns about potential claims.

[1] The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893

BREXIT AND WHAT THIS MAY MEAN FOR EU WORKERS IN THE UK

Earlier in the summer, the Government published its eagerly anticipated policy paper[2] on starting Brexit negotiations and what is proposes for EU citizens working in the UK and its expectation of how UK citizens living in the EU will be treated.

In short, as the media continues to report, there is much to negotiate with Brussels and nothing is certain yet. The Government paper, at least, provides a starting point and a general picture of how it anticipates the future for EU national in the UK. Broadly, the paper identifies the following:

- First, a "cut off" date will need to be agreed as to when new rules will apply to EU nationals. The "cut off" date will be a date between when the two year period of negotiation began, 29 March 2017, to when the UK will eventually exit the bloc on 29 March 2019;
- The immigration status of the EU national will depend on when he or she entered the UK in relation to the agreed "cut off" date and whether they have continuously lived and worked here for a given period, currently 5 years. The status will fall into three categories – "settled" status, temporary residence or temporary residence pending settled status or new the immigration rules will apply post-Brexit;
- Those with settled status and 6+ years continuous residence will have the option to apply for British citizenship;
- Family dependents of EU nationals who live with or join them before Brexit will be able to apply for settled status or leave to remain depending on the duration of their continuous residency;
- The Government has made clear that, as the UK will remain an EU member until 29 March 2019, there will be no change to rights and status before then for EU nationals living in the UK and, therefore, no action needs to be taken at present;
- Those EU nationals who have already applied for and hold a Certificate of Permanent Residence will still be required to make a new application for one of the above immigration categories although the process will be more streamlined;
- The new application process and fees are yet to be finalised but the Government intends for it to be a user-friendly and efficient process. It is expected that the on-line process will go live sometime next year;
- It is expected that a grace period of 2 years will be implemented, primarily, for a post-Brexit smooth process for those wishing to apply for the relevant category of residence. Those not granted relevant permission to remain will be required to leave the UK after this time;
- An important point to note is that granted "settled" status will lapse if the EU national remains outside the UK for a period of 2 years unless he or she can show strong links to the UK.

The debate and uncertainty will continue for some time while the details of how this will actually work is thrashed out between the UK Government and the EU. In the meantime, it is important for employers to be abreast of changes as they happen, have mechanisms in place for reassuring and informing their EU employees of changes that will impact them, and most importantly, have a long-term plan to ensure they remain competitive with the best talent even after Brexit.

[2] Safeguarding the position of EU citizens living in the UK and UK nationals living in the EU available on gov.uk

WHISTLEBLOWING – IN THE PUBLIC INTEREST? – CHESTERTON GLOBAL LTD V NURMOHAMED (CA)

The Court of Appeal in *Chesterton v Nurmohamed* has provided some guidance as to what may be considered "in the public interest".

For a disclosure to be a "qualifying disclosure" under the Employment Rights Act 1996, the whistle-blower must have "a reasonable belief….that the disclosure is made in the public interest". What falls in the "public interest" is not formally defined in the Act, however, it cannot be merely a private interest of the individual concerned. This use to be case before changes made to the law in 2013. Prior to this, employees often made a disclosure for a breach of their own contract terms.

The question for the Courts to consider is when can an ostensibly private interest cross over to being in the public interest and, therefore, become a qualifying disclosure? This issue will always be heavily fact specific as was the case in *Chesterton v Nurmohamed*. This case related to Mr Nurmohamed making a disclosure which, although affecting him personally, also affected around another 100 members of staff. He claimed that Chesterton was inflating expenses in order to present reduced profits thereby depriving sales managers of the real commission payments they were due under their employment terms.

The Court found this was in the public interest even though it only affected a relatively small number of people. Factors considered in reaching this decision included:

- The size of the group affected - the greater the numbers the more likely it will qualify;
- The nature of the interests affected – in this case, Chesterton was deceitfully depriving the employees of earned commission. In the public sector, this could be a more serious interest that could be affected, for example, public safety;
- The extent of the wrong doing – the more serious and deliberate the wrong doing, as was the case here, the more likely it will be in the public interest than any inadvertent wrongdoing;
- The identity of the wrong doer – the greater the organisation and the more prominent and influential, the more likely this will fall in the interest of the public.

The Court also accepted that, as is often the case, a whistle-blower will justify the disclosure after the fact. It stated that provided the employee had an objectively reasonable albeit subjective belief that the disclosure is in the public interest *at the time* the disclosure is made, this was permissible.

If you have concerns that you may be subject to a disclosure or need guidance on how to avoid this risk, please contact Maxlaw Global.

REDUNDANCY FOLLOWING SICKNESS ABSENCE – CHARLESWORTH V DRANSFIELDS ENGINEERING SERVICES LTD (EAT)

The case of *Charlesworth v Dransfields* is a very interesting and fact specific case but can be useful for employers in very specific circumstances.

Mr Charlesworth was a manager employed with Dransfields, a financially struggling company for some years. In 2014 Mr Charlesworth was diagnosed with cancer and was absence due to this for a few months. During this time, Dransfields realized that Mr Charlesworth's position was not really necessary and could be eliminated.

On Mr Charlesworth's return in he was engaged in a full redundancy consultation procedure and was subsequently made redundant. Mr Charlesworth brought claims for unfair dismissal and discrimination.

Both the ET and the EAT dismissed Mr Charlesworth claims of unfair dismissal and discrimination on the grounds of disability as it found that although the context of Mr Charlesworth absence highlighted Dransfields ability to cost cut and, therefore, make his position redundant, the absence was not the *"effective cause"* of the termination. The Courts found that the absence was the mere context but was not the operative cause of the dismissal. Although the absence enabled Dransfields to see that the position was unnecessary for the business to function, it was not the reason for the dismissal.

Although a helpful case, employers will need to be very cautious when dismissing a sick employee who is absent. If the "something" (i.e., the absence) is the effective cause, even if it not the main or sole cause, then it will be discriminatory. If it is merely the context then it will not be. This is a very subtle and fact specific line and it is important for employers to seek proper advice before carrying out such a dismissal.

DRESS CODES IN THE WORKPLACE

Regular subscribers to Maxlaw Global employment news will recall the story in June 2016 (Issue 3) of Nicola Thorp, the receptionist who was sent home from work by her employer for refusing to wear high heels. This triggered an on-line outcry and a petition signed by over 100,000 people resulted in a debate in Parliament earlier this year.

Although, the parliamentary debate did not result in a change in the law, the Government had said it will provide further guidance on dress codes in the workplace. So what are the key things for employers to consider in order to avoid any damage to their reputation or, more critically, avoid a discrimination or health & safety claim?

- Employers should consider having a written dress code policy in the workplace;
- The policy should be sensitive to issues of direct or indirect discrimination based on gender or for a protected group when having a specific requirement which may be a blanket requirement across the organisation for all employees;
- The law does allow for a different dress code for male and female employees, however, see the next bullet point below;
- Thought should be given to why a specific requirement is necessary – is it for image or for the function of the role? Are there health & safety consideration for certain dress requirements?
- Consider whether there is a degree of flexibility that can be applied. For example, in a corporate environment where men may be required to wear a tie, consider whether this requirement be lifted on a sweltering hot day in the interest of health & safety and plain common sense.

The *reason* for the dress code requirement and a justification of *why* it is a requirement will be fundamental to its enforceability. For further guidance and review of your existing policy or to discuss a new policy please contact Maxlaw Global.

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Maxlaw Global
August, 2017