EMPLOYMENT NEWS HEADLINES SEPT-OCT 2017 ISSUE 11

SUSPENSION IS NOT NECESSARILY A NEUTRAL ACT - AGOREYO V LONDON BOROUGH OF LAMBETH (HC)

The case of *Agoreyo v London Borough of Lambeth* is an important reminder that employers must consider the circumstances very carefully before making a decision to suspend an employee. More so if the employee is a senior member of staff where the reputational damage of a suspension could be significant.

Ms Agoreyo was a primary school teacher who was suspended over allegations of using unreasonable force on unruly children in her care. There had been a number of issues at the school and Ms Agoreyo had requested assistance in managing the children. New measures had been introduced shortly before the suspension but had not been fully implemented.

The suspension letter indicated the reason as "allowing the investigation to be conducted fairly". Ms Agoreyo tendered her resignation the same day on the basis that the suspension was unnecessary and unreasonable.

As she did not have the qualifying period to bring a constructive dismissal claim in the Employment Tribunal she brought a breach of contact claim in the County Court which then went up to the High Court.

The High Court ruled the school had breached Ms Agoreyo's contract of employment and the implied duty of mutual trust and confidence. There had been a repudiatory breach. It found that the suspension had been a "knee jerk" reaction to the allegations and proper consideration had not been given in the following areas before the decision was taken:

- There was no question there were behavioural issues with the children and new measure had just been implemented days before the suspension;
- Ms Agoreyo had previously requested assistance for support with the children. The Head Teacher had investigated the issues previously and had not found unreasonable force or any cause for disciplinary action;
- The school had failed to explore alternative measures to suspension and had used this as a default position. Nor had it taken account of Ms Agoreyo's viewpoint or that of other witnesses before deciding to suspend her;
- The school had stated in the letter of suspension that the purpose was to investigate the allegations fairly but later tried to argue that it was in order to protect the children which was inconsistent with the reason given to Ms Agoreyo;

- The reputational damage and the "inevitable shadow cast over the employee's competence" by such an act had not been given any consideration. The Court stated that the suspension was not, therefore, a 'neutral' act.

Ms Agoreyo succeeded in her claim for breach of contract against the school. It is clear from this case that suspension should not be a first port of call. All angles should be carefully considered and the reasoning fully documented before any such decision is taken.

VENTO INJURY TO FEELINGS BANDS REVIEWED

Following a period of consultation, the Employment Tribunal presidents of England and Wales and Scotland have published new figures for injury to feeling awards in discrimination claims.

The table below sets out the original bands and the new revised bands.

Band	Old figures	New Figures
Lower	£660 - £6,600	£800 - £8,400
Middle	£6,600 - £19,800	£8,400 - £25,200
Upper	£19,800 - £33,000	£25,200 - £42,000
Exceptional Cases	£33,000+	£42,000+

These award bands are known as Vento bands based on a case that defined them and have been revised to apply for any claims on or after 11 September 2017 and will be reviewed each year.

HOLIDAY PAY CALCULATION SHOULD INCLUDE VOLUNTARY OVERTIME – DUDLEY MBC V WILLETTS & ORS (EAT)

In Issue 5 of Maxlaw Global employment news readers will remember the first instance ruling in the case of *Brettle & Ors v Dudley Metropolitan Borough Council*. The case was appealed and the EAT has upheld the decision and ruled that voluntary overtime should be included for the purpose of holiday pay calculations for the first four statutory leave weeks set out under the EU working time directive. The issue of what is "regular" and what is "normal" was also explored further at appeal.

Although there should be an "intrinsic link" between the pay and the tasks the worker is required to perform under the contract, the EAT found Dudley MBC had focussed too much on the contract and has stated that once a worker agrees to perform the overtime and is on a rota, they are required to work under the contract, as needed, albeit by a separate agreement. The absence of an overtime requirement in the contract of employment itself does not mean there is no intrinsic link.

As for whether a payment is 'normal' or 'regular', the EAT stated this will be a question of fact in each case but held consistently with previous case law in that it must be paid over a sufficient and settled period of time for it to be 'normal remuneration' even if this is over a less frequent number of weeks in an overall year.

As previously mentioned in Issue 5, this applies to the first four weeks under Regulation 13 of the UK Working Time Regulations and not the additional 1.6 weeks under Regulation 13A. Calculations should include call out allowance, out of hours standby pay, mileage or travel allowance for voluntary

overtime duties. Employers should review their overtime arrangements and how holiday pay is currently calculated to ensure compliance with this ruling.

DETRIMENT IN WHISTLEBLOWING CASES CAN EXTEND TO CO-WORKERS – INTERNATIONAL PETROLEUM LTD V OSIPOV (EAT)

The case of *International Petroleum v Osipov* is a helpful case for whistle-blowers as it confirms that individual officers of a company can be jointly and severally liable, together with the employer, for their actions which results in a detriment to the whistle-blower.

Mr Osipov was the CEO for International Petroleum for a brief period and made a number of protected disclosures relating to compliance with laws in Niger pertaining to oil and gas exploration. As a result of this, he was subjected to a series of detriments by two non-executive directors of International Petroleum and was later dismissed by one on the advice of the other.

Mr Osipov was successful in his automatic unfair dismissal and detriment claims at the ET and was awarded over £1.5m for losses flowing from his treatment by the company. The company and individuals appealed to the EAT. Their claim was rejected on appeal. The EAT found that the individuals were responsible for the way Mr Osipov was treated and they were individually liable for the detriment as well as the company for the unfair dismissal.

The case highlights the value of bringing a separate whistleblowing detriment claim against individuals of the employer as well as the unfair dismissal claim against the employer as, unlike an unfair dismissal claim, the detriment claim can bring with it an award for injury to feelings (see Vento award headline in this Issue 11). The detriment claim also has a lower standard of causation which is potentially easier to prove.

The lesson for employers is that they should be aware that individual dismissing managers can also be personally liable in cases of whistleblowing. Training and policies should reflect this.

TRIBUNAL FEE REIMBURSMENT SCHEME LAUNCHED

In the last edition of Maxlaw Global employment news (Issue 10) readers will recall the reversal of the fee regime for filing Employment Tribunal claims following a landmark ruling by the Supreme Court in July.

The Government announced an initial phase of reimbursement of fees. This commenced in October 2017 for an initial 1,000 claims where parties would be contacted regarding reimbursement. Successful refunds will include the initial fee and interest of 0.5% calculated from the date of the original payment to the date of the refund.

Following this, there will be a wider launch of the scheme expected in November 2017. Those not contacted in the initial phase should register by email or post at the following contact address for proceedings brought in England and Wales.

- ethelpwithfees@hmcts.gsi.gov.uk
- Employment Tribunal Central Office (England and Wales)/Employment Appeal Tribunal (EAT) Fees PO Box 10218 Leicester LE1 8EG

Parties who did not proceed with a claim due to non-payment of fees will also be contacted by HMCTS with respect to any reinstatement of the proceedings.

For further information and assistance please contact Minaxi Woodley at mwoodley@maxlawglobal.com

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