EMPLOYMENT NEWS HEADLINES NOV-DEC 2017 ISSUE 12

DETAILED INVESTIGATIONS DO NOT MAKE A TERMINATION UNFAIR - NHS V PILLAR (EAT)

The case of *NHS v Pillar* is helpful for employers in that it provides some clarity around when past misconduct that had not necessarily resulted in disciplinary action or sanctions can be considered in any future disciplinary action.

Ms Pillar was a nurse employed by NHS 24. Her work involved co-ordinating a triage system of dealing with calls from members of the public and referral to other NHS bodies including the emergency services. In 2013, Ms Pillar's actions resulted in a Patient Safety Incident (PSI) which had put a cardiac patient at risk. Ms Pillar was subsequently dismissed as a result of this incident. As a part of the investigation, the dismissing officer was told about two previous PSI incidents where disciplinary action was not taken against Ms Pillar and instead development plans and training had been put in place.

At first instance the ET found that although Ms Pillar's dismissal was in a range of reasonable responses, the dismissal had been procedurally unfair due to the inclusion of previously expired or non-disciplinary incidents in the investigation report and the fact that Ms Pillar had not been told the consequence of any further PSIs.

The EAT has overturned this decision on appeal by NHS 24 as inconsistent and perverse, the EAT has said:

- The issue of fairness when taking account of past misconduct in a decision to dismiss is a difficult area for employers to deal with;
- An investigation containing too much information is not necessarily unfair although the judge did concede that there will be situations when an over-zealous investigation may indeed be deemed to be unfair;
- Including information about previous PSIs was a factor that should have been included in this particular investigation and there was no rational basis to exclude these details in making the final decision as Ms Pillar had been given no expectation as to whether past misconduct would be relevant or not in any future investigations. This is particularly true in situations that do not warrant a lesser sanction;
- Although failure to communicate any future consequences to Ms Pillar of further PSIs was a procedural irregularity, it was not sufficiently serious to necessarily mean the dismissal was procedurally unfair as the ET had concluded.

DECISION TO DISMISS MUST BE ATTRIBUTABLE TO THE EMPLOYER – ROYAL MAIL V JHUTI (CA)

The case of *Royal Mail v Jhuti* is an interesting one as although the Court of Appeal sets some parameters for employers' liability in whistle blowing and automatic unfair dismissal claims, this also comes with a word of caution about financial liabilities which the employer may nonetheless face.

Ms Jhuti was a media specialist in Sales for Royal Mail and had raised concerns with her immediate line manager about breaches of OFCOM guidelines. Her line manager took exception to Ms Jhuti raising these concerns and subjected to her to a series of detriments including bullying, harassment and asking her to withdraw her concerns which she did.

Sometime after this Ms Jhuti raised a grievance against her line manager and was later signed off sick. She was subsequently dismissed for poor performance by a second manager based on a performance plan that Ms Jhuti had been place on. During the investigation, Ms Jhuti's line manager deliberately mislead and withheld critical information from the dismissing officer with respect to the whistleblowing. The dismissing officer had been unaware of the protected disclosure at the time of the decision to dismiss.

Ms Jhuti claimed for automatic unfair dismissal and unlawful detriment due to a protected disclosure. Her claim was rejected at first instance and overturned at the EAT as the EAT found "that a decision could be attributed to the employer where the decision-maker, in ignorance of the true facts, had been manipulated by someone in possession of the true facts and who was in a managerial position responsible for the employee".

Royal Mail appealed and the Court of Appeal has reversed the EAT's decision holding that in "deciding the reason for the dismissal in a claim of automatic unfair dismissal on grounds of whistleblowing, only the mental processes of the person(s) who was authorised to, and took the decision to dismiss are relevant".

This is good news for employers as it narrows liability for employers where the dismissing officer is ignorant to critical information relating to protected disclosures. This ruling places all the focus on the knowledge of the dismissing officer at the time of the dismissal decision. That said, it is a very fact specific case where the Court of Appeal is very clear that in other instances where managers do have input in any investigation process or influence in the decision to dismiss or where it is a very senior dismissing manager such as a CEO, it was probable that this could be attributable to the employer and the employer would be held liable.

The Court of Appeal despite its ruling did go onto say Ms Jhuti would be entitled to compensation for the detriment she suffered at the hands of her line manager even though it could not make a finding of automatic unfair dismissal on the facts. In short, the employer despite this outcome may still not escape some kind of financial liability.

UBER DECISION UPHELD– DRIVERS ARE WORKERS – UBER V ASLAM & ORS (EAT)

Readers of Maxlaw Global Employment News will recall the ongoing saga of worker status in the gig economy and the numerous cases where "freelancers" were in fact found to be workers on closer examination of the actual work arrangements.

Issue 6 set out the case brought by Uber drivers and the finding of the Employment Tribunal. The Employment Appeal Tribunal has now upheld the ET ruling that Uber drivers are workers and not independent contractors. Meaning they do qualify for the rights workers are entitled to such as

minimum wage, working time limits and statutory holiday pay. In reaching its decision the EAT focussed on:

- The fact that when the app for Uber requests was switched on the drivers were expected to be ready for work;
- They were obliged to accept at least 80% of requests;
- There were penalties if the drivers refused/cancelled too many requests;
- Uber had the power to control fares and rebates without reference to the drivers.

The EAT found this did not point to the drivers "being in business on their own account" as when the app was switch on there was sufficient control by Uber to suggest the drivers were in fact workers. Uber's attempt to escalate the appeal process directly to the Supreme Court was rejected late last year. It will now have to appeal to the Court of Appeal. Maxlaw Global will keep readers update as this case progresses.

HOWEVER….DELIVEROO RIDERS ARE SELF-EMPLOYED! – IWGB & ROOFOODS LIMITED t/a DELIVEROO (CAC)

Hot on the heels of the Uber case above, there was an interesting decision taken by the Central Arbitration Committee (CAC) which is not a tribunal but a body which deals with trade union matters. The application was made by the Independent Workers' Union (IWGB) for union collective bargaining recognition rights for Deliveroo riders.

In considering whether this should be granted the CAC examined key elements of the Deliveroo riders work and obligations. The CAC found that Deliveroo riders were not workers but genuinely self-employed. The key issues that lead to this decision were fact specific but important for employers operating in the 'gig' economy to be aware of. The CAC concluded:

- The riders did work independently and could take on multiple jobs for different companies at the same time;
- They had a right of substitution where they could ask someone else to replace them i.e., they did not have to perform the work personally;
- This right was exercised often and in practice – evidentially it was easy to prove this actually happened and was a genuine right;
- There was no policing by the companies as to whether the rider personally carried out the work or not and there was no control over them by the employer.

All this pointed to the riders having real and actual control of their work and how they worked and were found not to be workers but genuinely self-employed. The CAC rejected the IWGB's application. A number of Deliveroo riders have brought a claim for worker status, much will depend on further guidance from the Supreme Court later this year when the Pimlico Plumbers case (outlined in Issue 8) is heard.

PRIVATE MEMBERS BILL ON BEREAVEMENT LEAVE AND PAY RIGHTS

A private members bill introduced by a Conservative MP is making its way through parliament with the Government's support for the introduction of formal parental bereavement leave and pay rights for employees following the death of a dependent child, i.e., a child under 18 years of age.

It is anticipated that this will be:

- An immediate right from day one of employment;
- leave that can be taken up to 8 weeks following the bereavement;
- leave for up to two weeks;
- bereavement leave with parental bereavement pay depending on eligibility;
- a statutory right probably from 2020.

The details of this private members bill does need to be fleshed out and debated. However, this is formalising a right that many employers already informally observe to a less or greater degree.

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