EMPLOYMENT NEWS HEADLINES NOV-DEC 2018 ISSUE 18

EMPLOYER FOUND TO BE VICARIOUSLY LIABLE – BELLMAN V NORTHAMPTON RECRUITMENT LIMITED (COURT OF APPEAL)

Regular readers of Maxlaw Global employment news will recall we reported the case of ***Bellman*** in (issue 6) where the High Court had found that the employer was not vicariously liable for the acts of its employee which lead to the wrong doing.

Briefly, this is the case where a Managing Director punched an employee at an afterparty drinks event which resulted in serious brain injury to the employee. The Court of Appeal has now overturned the findings of the High Court stating that the High Court judge had been wrong to rely on the gap between the actual company sponsored party and the drinks event in the hotel lobby bar where the assault and injury had occurred. In finding the employer vicariously liable it focussed on:

- The "field of activities" that the manager was responsible for which were wide and autonomous. He was also "lecturing" the employees who were subordinates who were still at the bar about his "authority" which had been challenged by Mr Bellman and had motivated the assault;
- The drinks were not an "impromptu" event held on any night, it was an unofficial continuation of the company Christmas party where the manager continued to pay for the drinks and had provided taxis back to the hotel from the party venue. The roles had not, therefore, changed of those in attendance at the hotel bar.

Given the context, authority and conduct of the manager, the Court of Appeal found that there was a "*sufficiently close connection*" between the position in which the manager was employed and the wrongful act carried out by him. The company was, therefore, vicariously liable for the manager's act.

The Court did stress the unusual facts of this case and emphasised that this did not mean open floodgates for employers, in general, to be liable for acts of its employees outside the normal course of employment, but it is important for employers to be mindful that sometimes liability will arise even where the wrongful act may appear remote from the normal course of the employee's employment, particularly, where the employee is in a senior position.

WHERE IS THE LINE BETWEEN DISCRIMINATION AND OFFICE BANTER? – EVANS V XACTLY CORPORATION LIMITED (EAT)

The case of *Evans v Xactly Corporation Limited* is an interesting one as, on the face of it, the comments made to Mr Evans by his work colleagues could clearly be discriminatory, offensive and linked to protected characteristics under the Equality Act 2010. However, a closer look at the facts and context lead the ET to dismiss Mr Evans' claim for harassment on the grounds of disability and race and for the EAT to uphold the ET's findings on appeal.

The brief facts on this case, Mr Evans was employed for a little under one year as a sales representative for Xactly Corporation. His sales figures were very low and Mr Evans, amongst other employees dismissed earlier, was dismissed for poor performance. In bringing his claim, Mr Evans alleged:

- He had been called a "fat ginger pikey", as he had type 1 diabetes he was sensitive about his weight;
- He also had links with the traveller community and he found the reference 'pikey' offensive;
- Amongst other things, he had also been called a "salad dodger" and "fat yoda".

In dismissing Mr Evans' claims the EAT closely examined the way the office operated, the work environment and culture, the specific context and the timing of the allegations. It found:

- Although Mr Evans was diabetic there was no medical link between this and his weight as he was not overweight, the term "fat", the tribunal found, was a general derogatory term used regardless of the reality of the persons weight to whom it was directed;
- Mr Evans did have links with the traveller community, but at the time of the alleged insult all but one colleague was unaware of his links to the community and although potentially offensive and distressing was not found to be in this case. It also found Mr Evans had actively participated in similar "teasing and jibing" calling a colleague "fat paddy" which was indicative of the general toxic culture of this particular sales work environment.
- Mr Evans had not raised a complaint of offence or distress at any point until he was dismissed for poor performance and was a willing participant in the "banter" of the office;
- The Tribunal focussed on the context of these allegations as particularly significant in its findings and said the work environment was "indiscriminatingly inappropriate" and no one either respected or focussed on protected characteristics.

As with most cases, the outcome of this case is highly specific to the facts and employers should not assume that this will always be the outcome from the courts. In general, any sort of banter that is potentially unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment will amount to harassment and will be discriminatory.

Employers should always follow their internal investigation process when such allegations are made or a grievance is raised. Policies should be in place and managers should be trained to ensure employees are clear and aware of the boundaries of what is and is not acceptable in the workplace.

EUROPEAN COURT RULES EMPLOYEES CANNOT BE DEPRIVED TO RIGHT TO HOLIDAY - KREUZIGER V LAND BERLIN AND MAX-PLANCK-GESELLSCHAFT ZUR FÖRDERUNG DER WISSENSCHAFTEN EV V SHIMIZU (ECJ)

In the above two cases, one in the public sector and one in the private sector, both relate to whether the 4 weeks statutory holiday granted under the EU Working Time Directive can be forfeited in respect of it being not taken or paid out in lieu on termination of employment or whether it must be carried over.

The ECJ has ruled that it cannot be forfeited nor paid in lieu where:

- The employer cannot show that there is a transparent process to encourage employees to take their leave within the relevant leave period; and
- They have given the employee a genuine opportunity to actually take the leave within the relevant period.
- The ECJ stressed that the only time where forfeiture of statutory leave is possible is where the employee has been given clear notice that if the employee does not use it, they will lose it and the employee understands this and still deliberately declines to take the leave entitlement knowing it will be lost. The burden of proving this will be on the employer.

Given the Working Time Regulations 1998 in the UK automatically prohibits carry over of statutory holiday, employers will now be required to apply this only where they can show that the above steps have been taken and the employee was encouraged to take the leave, given real opportunity to take the leave and knew the consequences of losing it if they did not take it. In the absence of this, the ruling means that untaken statutory leave entitlement will carry over or will need to be paid out in lieu on termination. It is important for employers to review their processes and consider mechanisms to ensure employees take their entitlement in good time. This ruling does not apply to the additional 1.6 weeks statutory entitlement under UK law or any contractual entitlements.

COURT CONFIRMS THAT UBER DRIVERS ARE 'WORKERS' – UBER V ASLAM & ORS (COURT OF APPEAL)

Regular readers will be aware of the ongoing debate and the case of whether Uber taxi drivers are workers or independent self-employed contractors. The Court of Appeal with a 2 to 1 majority has found that Uber drivers are 'workers' and that the ET was right to draw the conclusions that it did.

- The Court rejected Uber's argument that the contract was between the driver and the passenger and Uber itself was an intermediary agent supporting the transaction through booking and payment services as this did not reflect the practical reality;
- The Court disagreed with Uber and found that a driver was working for Uber if he or she were within their licenced territory with the Uber app switched on. It concluded that the latest the driver could be said to be working for Uber was when a trip was accepted via the app which is relevant for the assessment of working time and minimum wage.

This being the case, the Court upheld the ET and EAT findings. With LJ Underhill dissenting, Uber has been granted leave to appeal the finding to the Supreme Court so, unfortunately, the story in not over just yet.

EMPLOYER NATIONAL INSURANCE CONTRIBUTIONS ON TERMINATION PAYMENTS DELAYED

In Maxlaw Global employment news (issue 14) we reported that income tax is now chargeable on notice payments above the £30,000 threshold regardless of whether or not a payment in lieu of notice provision existed in the contract of employment. In addition, the Government had planned to charge employers' national insurance contributions (NICs) on any payments above this threshold from April 2019 as this does not happen at present. This change has been delayed for a further year and is not now expected to be introduced until April 2020. It should be noted that employee NICs will continue to be exempt even when this change does eventually come into force.

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