EMPLOYMENT NEWS HEADLINES MAR-APR 2019 ISSUE 20

ADVOCATE GENERAL'S OPINION ON THE WORKING TIME DIRECTIVE - FEDERACIÓN DE SERVICIOS DE COMISIONES OBRERAS V DEUTSCHE BANK SAE.

This is an interesting and potentially important case brought in the Spanish High Courts by the trade union (TU), *federación de servicios de comisiones obreras* against Deutsche Bank (DB). The TU claimed that DB were obliged to set up a system of time recording that measured the *actual daily hours worked* by its full-time employees in order to comply with the requirements of the Working Time Directive. Whilst DB kept an 'absences calendar' recording full working days when an employee was absent, it did not have a system in place for recording actual hours worked daily by its staff. DB argued there was no such obligation under Spanish law and the obligation was only to record overtime hours worked.

The Advocate General has agreed with the TU stating that national law must require a system of recording actual hours worked if it is not to "*significantly reduce the effectiveness of the rights that the Directive confers on workers, who will essentially be dependent on their employer's discretion".*

As an opinion of the Advocate General it is not legally binding on the European Court of Justice (CJEU) although the CJEU will generally follow the Advocate General's opinion.

In the UK, the Working Time Regulations 1998 (the Regs) require employers to keep records that (i) *adequately* show workers who have not 'opted-out' of the Regs do not exceed a maximum of 48 hours per week averaged over the relevant reference period and (ii) they are compliant with the obligations and limits the Regs place on them with respect to night working.

There is no specific required format for keeping such records nor is there a requirement to set up a specific system exclusively for this purpose. The Health & Safety Executive has said where an existing employee record keeping system for other purposes exists, this may be an adequate record keeping system for working time. Any such records must be retained by the employer for two years.

If the Advocate General's opinion is adopted by the CJEU it could mean more robust and clear working time recording systems may need to be introduced to record *actual* time worked by employees who have not opted out of the Regs.

NON-DISCLOSURE/CONFIDENTIALITY AGREEMENTS AND HARASSMENT IN THE WORKPLACE

The use of non-disclosure and confidentiality agreements in the workplace continue to come under scrutiny following the report last year by the Women and Equalities Committee in the shadow of the #MeToo movement and the misuse of such agreements by some employers following an employment

dispute. Non-disclosure Agreements (NDAs) and Confidentiality Agreements are used in two ways in the employment context:

1. At the beginning of the employment relationship they normally appear in the contract of employment itself and are often used to protect the trade secrets and confidential business information of the employer such as client lists, business plans, pricing data etc., A perfectly reasonable and legitimate use of such provisions;

2. The other context is at the end of the employment relationship, often in settlement of a dispute that has arisen between the parties which can only be settled by entering into a formal settlement agreement.

The Solicitors Regulation Authority has published some guidance for employers on the use of NDAs in settlement agreements and the Government consultation on the same topic closed on 29th April 2019. The context of the consultation was the misuse of NDAs in cases of discrimination and harassment in the workplace.

Key highlights for employers to consider are:

- Ensuring there are *exceptions* to the general NDA, for example, for statutory protected disclosures under the Whistleblowing legislation, reporting a serious misconduct or breach or when disclosure is required by law or regulatory requirements;
- Employers will already be familiar with disclosure exceptions in settlement agreements so that employees can share information with their spouses, close family and accountants or HMRC;
- The drafting should be in simple, clear plain English that is easy for the employee to understand. He or she should also be given time to consider the terms and the implications including taking independent legal advice.

In addition, the consultation document provides for:

- Legislating for a total ban on NDAs that place restrictions on victims making any kind of disclosure to the Police;
- Ensuring that confidentiality provisions also expressly set out the limitations of them in employment contracts;
- In the context of settlement agreements, it is proposed that the independent legal advisor will be required to cover the nature of the limitations of confidentiality clauses and what disclosures under any NDAs are still permitted as a part of the advice;
- Any confidentiality clauses that do not comply with the proposed new requirements will be entirely invalid and void.

We will report back on the outcome of the consultations which closed at the end of April. In the meantime, it is advisable for employers to start reviewing their current documents in anticipation of the changes.

ENTITLEMENT TO STATEMENT OF TERMS AND LENGTH OF SERVICE - STEFANKO V MARITIME HOTEL LTD (IN VOLUNTARY LIQUIDATION) (EAT)

The case of *Stefanko v Maritime Hotel Limited* is a timely case and reminds employers of their obligations to provide employees with a written statement of terms of employment.

The case involved a number of wait staff at the Maritime Hotel, most were employed for a few months but one employee had only six weeks of service. When she challenged her employer for late payment, a shortfall in her wages and falsification of her payslips, she was dismissed. She was successful in her claim for automatic unfair dismissal as she was asserting a statutory right, however, the Employment Tribunal at first instance rejected her claim for a written statement of terms stating that she did not have two months qualifying service. The employee appealed.

Upholding her appeal, the EAT, said the ET's decision was wrong, as although employers have *up to two months* to provide a written statement of terms to its employees, the employee is entitled to written terms after one month of *continuous* service. It is important for employers to remember this especially if they take on employees on shorter term contracts. However, regular readers of Maxlaw Global employment news will be aware that this is a moot point - as of 6 April 2020 *all* workers will be entitled to a written statement of terms from day one of employment.

LONDON BOROUGH OF LAMBETH V AGOREYO – UPDATE (COURT OF APPEAL)

Regular readers will recall we reported the case of Ms Agoreyo, a primary school teacher who was suspended pending an investigation into her handling and treatment of unruly children in her class. She lost her case in County Court, a decision later overturned by the High Court in favour of Ms Agoreyo (see Issue 11 for full details). The Court of Appeal has now overturned the High Court's findings concluding that the suspension was *not* a breach of the employer's implied duty of trust and confidence provided that the employer had "reasonable and proper cause" to suspend the employee in order to carry out the investigation.

The Court of Appeal found that whether a suspension was "reasonable" was a question of fact and not a matter of law. It stated the High Court had made errors in law by substituting its own judgement for that of the County Court. The Court of Appeal did not comment on whether suspension as a "neutral" act noting it was irrelevant in considering the appeal. The case is a reminder that employers should always consider certain factors before moving to suspension such as:

- The type and seriousness of the alleged misconduct or act;
- The justification of a suspension, for example, would having the employee at work be prejudicial to its investigations; and
- Alternatives to full suspension, for example, working from home where this is feasible.

OLDEST PERSON WINS AGE DISCRIMINATION CLAIM - EILEEN JOLLY V ROYAL BERKSHIRE NHS FOUNDATION TRUST (ET)

The case of Eileen Jolly, a medical secretary in her late 80's, is an interesting case of how an employer should *not* behave. There were a series of failures by the NHS trust which resulted in Ms Jolly bringing a successful claim for age discrimination, disability discrimination (due to her heart condition and arthritis), unfair dismissal and breach of contract. A remedies hearing is scheduled for October 2019 where Ms Jolly's is likely to be awarded substantial compensation not only for injury to feeling due to the manner of her dismissal, but also loss of earnings since her dismissal.

Ms Jolly joined the now Royal Berkshire NHS Trust in 1991 as a medical secretary taking care of patient lists for non-urgent surgery and keeping patient details up-to-date. In 2015 the system was automated, Ms Jolly received no training on this, which the ET found was largely due to her age. Her

role title was changed to 'patient pathway coordinator' but no explanation was provided on what this change would mean for her. In September 2016, she was invited to a meeting stating she was being investigated for capability issues and was placed on "special leave" i.e., the ET treated this as a suspension. She was told to collect her belongs and was escorted from the building. Ms Jolly subsequently raised a formal grievance about her treatment, which included hurtful comments by her colleagues related to her age, medical condition and mobility, this was ignored by the Trust.

Later that month Ms Jolly received a letter detailing capability concerns in her role related to "a third serious incident in two years regarding 52-week breaches of the referral to treatment standard in the waiting list". This was actually the duties of another employee where they were required to monitor and ensure patients should not wait more than 52 weeks for surgery from the original GP referral. Ms Jolly had no idea what these breaches were nor were her colleagues able to identify any incident related to her duties.

Due to a number of scheduling issues where Ms Jolly had valid reasons for not being able to attend the investigation meeting, the manager decided to proceed without her, no investigation took place to get Ms Jolly's version of events nor was any evidence brought to light that would indicate any shortcomings in Ms Jolly's capability.

Ms Jolly was dismissed for "catastrophic failures in performance". She appealed this decision. Initially this was ignored and later she was incorrectly informed that she was out of time to bring the appeal. When she raised this error with the Trust she was ignored. No appeal took place.

Ms Jolly was successful in all her claims, in reaching its conclusion the ET found:

- The Trust had failed to properly investigate the allegations against Ms Jolly and the discriminatory comments made by her colleagues related to her age and disabilities;
- There was no evidence to suggest there were any capability issues with Ms Jolly's performance which the consultant surgeon she worked for confirmed as "meticulous and reliable";
- Ms Jolly received no adequate training on the automated systems or her new role in 2015 largely due to her age;
- The Trust had failed to properly follow its own capability procedures in terms of the investigation itself, the meetings, the grievance and the appeal.

ACAS has produced some detailed guidance for employers on how to deal with age discrimination in the workplace, in particular, in relation to stereotypical assumptions, inconsistent treatment for different age groups and unconscious bias. Employers should review these carefully to ensure any discriminatory behaviours and practices by its staff are removed.

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Maxlaw Global
April, 2019