EMPLOYMENT NEWS HEADLINES NOV-DEC 2019 ISSUE 24

CONSTRUCTIVE DISMISSAL, GETTING IT RIGHT – UPTON HANSEN ARCHITECTS LIMITED V GYFTAKI (EAT)

The case of *Upton Hansen v Gyftaki* is an important reminder to employers not only to take a considered and balanced approach on the *reason* before deciding to suspend an employee but more importantly to ensure it pleads in the alternative if a particular claim is being denied in defence pleadings.

Ms Gyftaki worked as an architect at Upton Hansen and had requested additional annual leave to travel for a family emergency to Greece having exhausted her annual entitlement. Due to miscommunication about whether the leave request had been granted or not, Ms Gyftaki did not learn that it was refused until the evening before she was due to travel. She travelled anyway and was suspended pending an investigation on her return.

Ms Gyftaki resigned claiming constructive unfair dismissal due to a breach of the implied duty of trust and confidence. Upton Hansen denied constructive dismissal in its grounds for resistance but failed to plead in the alternative that the dismissal was fair, for example, for misconduct, in the event that a breach was found. The ET and the EAT both found that she had been unfairly dismissed but not for the fact that Ms Gyftaki had travelled despite the refusal to grant leave but for the suspension, its reason and how it was handled following her return. As no alternative had been pleaded by Upton Hansen, Ms Gyftaki succeeded in her claim.

WORKPLACE SEXUAL HARASSMENT – RAJ V CAPITA BUSINESS SERVICES & WARD (EAT)

The case of *Raj v Capita Business Services* is an important reminder that there will be instances in the workplace where behaviour, although not sexual harassment for the purposes of the Equality Act 2010, may nonetheless be uncomfortable and unwanted and employers must be vigilant about what is and is not permitted in the workplace.

Mr Raj was hired as a Customer Service Agent at Capita. His employment was terminated following an unsuccessful probationary period. He brought a claim for sexual harassment under the Equality Act claiming that his team leader, a female, had on a number of occasions stood behind his seat and massaged his neck, back and shoulders lasting for two to three minutes in duration each time which was conduct that was sexual in nature and unwanted.

The ET found and the EAT upheld that Mr Raj did *not* satisfy the two-stage test for sexual harassment and rejected his claim. Sexual harassment occurs where:

- *The conduct of A has the purpose or effect of* *either violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.* The tribunal found that Mr Raj did satisfy this strand of the test as the conduct was unwanted and lasted long enough for him to feel uncomfortable;

- *A's conduct is sexual in nature and related to B's gender.* The tribunal found that the massage whilst inadvisable and unwanted was on a gender-neutral part of the body, in an open plan office and was not, therefore, sexual in nature or related to B's gender. Mr Raj did not satisfy the second strand of the test.

While specific to the wider facts of this case and a good outcome for Capita, this ruling is a reminder that employers should not become complacent about unacceptable behaviour in the workplace and should keep conduct and harassment policies and employee and manager training up-to-date.

FLEXIBLE WORKING AND THE RIGHT TO REQUEST

The debate on the rights to flexible working is open again following the Trade Union Congress (TUC) joining the campaign for flexible workings rights to become a day one right for all employees. The current position on flexible working is:

- There is no automatic legal right to be granted flexible working;
- There is a legal right to make a flexible working request once an employee becomes eligible i.e., has 26 weeks of continuous service with the employer;
- Only one request can be made in any 12-month period;
- The employer must consider the request seriously and must provide a decision, preferably in writing, within 3 months of the request being made (including any appeal of the decision).

If a request is refused a justifiable business reason or reasons must be given. With flexible and non-traditional ways of working on the rise, it is advisable for employers to maintain an open and transparent dialogue to get the most out of its workforce. The TUC claims flexible working increases productivity, boosts worker morale and improves rates of employee retention. These are elements employers cannot afford to ignore in a fluid and fast changing world of work. This topic will, no doubt, remain on the agenda as a result.

HOLIDAY PAY FOR PART YEAR WORKERS – THE HARPUR TRUST V BRAZEL (COURT OF APPEAL)

The Court of Appeal's ruling in *Harpur Trust v Brazel* clarifies the distinction between the common practice of pro-rating holiday pay for a part-time employee and the different application that is required following this ruling for what is a part-year employee. i.e., permanent contract employees that do not work the whole year.

Ms Brazel was a permanent employee but worked on a zero-hours contract as a music teacher. She worked on an "as required" basis during term time only. She did not work in between terms and was paid holiday at the end of each term pro-rated based on the hours she worked in the preceding term.

ACAS guidance provides that casual workers on a zero-hours contract have holiday pay applied as follows:

- 12.07% of hours worked during the year i.e., 5.6 weeks divided by 46.4 weeks (52 weeks minus 5.6 weeks).

The Trust, therefore, applied one-third of 12.07% to calculate Ms Brazel's holiday pay based on her previous term's earnings as she was paid holiday in April, August and December. She brought a claim for unlawful deduction of wages. She argued that she was underpaid and this calculation was incorrect. As a permanent employee she argued there was no provision under the Working Time Regulations 1998 (WTR) to pro-rata her holiday and the calculation should be:

- Average weekly earnings in the 12 weeks prior to her taking holiday multiplied by 5.6 weeks to which she was entitled under her contract.

The Employment Tribunal rejected Ms Brazel's claim at first instance agreeing with the Trust and the ACAS recommended calculation method of pro-rating.

However, the Employment Appeal Tribunal rejected this finding and the Court of Appeal has now upheld the EAT's ruling. Agreeing with Ms Brazel, it confirmed that the WTR states that to calculate a week's pay for someone who works irregular hours it must conform to s224 of the Employment Rights Act 1996 which is to take an average of the hours worked over the 12 proceeding weeks. This excludes any time where no payment is made. There is no provision for pro-rating in the WTR.

The practical outcome of this ruling is that it does mean part-year employees receive a higher percentage of their annual salary as holiday pay than a full-time, full year employee, however, this is an anomaly of the EU working time directive and its adoption at the national level through the WTR and was not, therefore, obviously unfair or unlawful. Employers applying the ACAS holiday pay calculation method should revisit this for their *permanent* zero-hour contract employees.

AGENCY WORKERS AND CONTRACTUAL HOURS – KOCUR V ANGARD STAFF SOLUTIONS LIMITED (COURT OF APPEAL)

The Agency Workers Regulations 2010 (AWR) provides, under Regulation 5, that agency workers supplied via an agency to an end user are entitled to the same basic employment rights and working conditions as a permanent comparator employee or worker after being engaged for 12 continuous weeks by the same hirer in the same job. Specifically, in relation to:

- Pay;
- Duration of working time;
- Night work;
- Rest breaks and rest periods;
- Annual leave.

In *Kocur v Angard*, the agency worker claimed he was being unfavourably treated on a number of the above basic rights and conditions. Whilst the EAT agreed that each right needs to be reviewed separately and not as an overall less favourable package, the worker appealed to the Court of Appeal specifically claiming that he was entitled to the same working hours as the permanent employee under Regulation 5 a right to the same "duration of working time".

The Court of Appeal has clarified this in its ruling stating that "duration of working time" means protection in equality for issues in relation to the work *at the time* of working in a continuous period, not the *amount* of work given. This ruling clarifies that employers are ***not*** required to provide the same number of hours of work to agency workers under Regulation 5 as directly recruited employees. The Court stressed that this would rather defeat the objective of using agency workers who are generally engaged when employers have fluctuations in volume and frequency of work.

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