EMPLOYMENT NEWS HEADLINES JUL-SEPT 2021 ISSUE 34

APPEALING A REDUNDANCY - GWYNEDD COUNCIL V BARRATT & OTHS (CA)

Whilst the ACAS code on disciplinary and grievance procedures provides that terminations on the grounds of capability or conduct must offer an appeal process in order to be fair, it is not a required step in terminations by reason of redundancy.

The case of *Gwynedd Council v Barratt* reminds employers that despite the above general position, it must always look at the full context of the specific situation in determining whether a right to appeal in a redundancy situation is necessary or appropriate.

The case relates to two physical education teachers at a community school who were made redundant following the closure of their school and a reorganisation and establishment of a new school at the same location. Teachers from the old community school were encouraged to interview for positions at the newly established school. The two teachers did interview, they were unsuccessful and were made redundant without the right to appeal. They both claimed unfair dismissal.

Their dismissals were found to be unfair at first instance and by the Employment Appeal Tribunal. The Council appealed up to the Court of Appeal. Upholding the previous findings of the lower courts, the Appeal Court stated that whilst an absence of an offer to appeal is not always fatal to whether a termination is fair or not, this is dependent on the consideration of other factors as well. In this instance the Court ruled the terminations to be unfair as:

- No consultation procedure had been applied in respect of the redundancies at the specific location, especially as a new school was established at the same geographic location;
- The teachers were asked to apply for the own positions at the new school and were unsuccessful in securing them;
- No right of appeal was offered to the teachers by the Council in applying a fair procedure before confirming the redundancies.

The context was critical to the Council's failure. Although the ACAS code does not require an appeal to be applied to redundancies, this case demonstrates that it should generally be offered other than in clear circumstances where it would make no difference.

WORKING TIME AND REST BREAKS FOR PART-TIME WORKERS – FORTH VALLEY HEALTH BOARD V CAMPBELL (EAT)

The case of *Forth Valley Health Board v Campbell* is an important reminder of not only the limitation of regulations such as the *Part-time Workers (Prevention from Less Favourable Treatment) Regulations 2000* ("PTW Regs") but also the need for the correct application of them as was the issue at hand in this case.

Mr Campbell was a part-time phlebotomist working under a 16 hour contract each week for the health board. His work was structured in 4 hour shifts during the week days and 6 hour shifts at the weekends depending on the six-week roster. The health board's policy was that any worker working 6 or more consecutive hours was entitled to a 15-minute paid rest break, a requirement under the *Working Time Regulations 1998*. Mr Campbell did not receive a paid break during a 4-hour shift but did during a weekend 6-hour shift. His full-time colleagues received a paid break during each shift. Mr Campbell brought a claim arguing that he was being treated detrimentally because he was a part-time worker under the PTW Regs.

At first instance, the Employment Tribunal applying the test of "but for" his part-time status, he would receive the paid break, agreed with Mr Campbell's argument as part-time workers tended to work shorter shifts. The Employment Appeal Tribunal overturning this finding clarified that Mr Campbell did not suffer a detriment due to him being part-time but because he worked shorter shifts. This was clear from the fact that when Mr Campbell did work 6-hour shifts, he did receive his 15-minute paid break. Had the *sole* reason been he did not receive the breaks because he was part-time then this would certainly have been a breach of the PTW Regs, this was not the case here according to the facts and the reason was he did not qualify for the paid breaks only on the days of his shorter shifts.

COVID-19 VACCINATION PROGRAMME AND RETURN TO WORK

Covid-19 updates from the UK Government and governments around the globe continue to be under review and are evolving and changing daily. The latest daily statistics for vaccinations, hospitalisations and new cases is available on the government website at www.gov.uk/coronavirus along with guidance and latest updates on travel restrictions, red lists and recommendations when interacting with others. The Autumn-Winter plan 'Plan B' published by the UK Government in September 2021 is, no doubt, constantly under review but, as yet, aside from care home workers being required to be vaccinated to enter the workplace with effect from 11 November 2021[1] unless exempt and the commencement of the Covid-19 booster programme for over 50s, there are no further mandatory restrictive measures or initiatives as the number of infections in the UK continue to rise. Although there are gathering calls to implement Plan B from the medical profession as winter approaches and the National Health Service braces itself for the strain, there has been no further announcements from the UK Government as yet.

As employers continue to see employees slowly return to the workplace, the hybrid working model is an obvious and popular approach to stagger commuter numbers, providing employees with the flexibility they require to balance family commitments and routines of the past 18 months and permit

[1] Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021

sensible health & safety measures to be applied in the workspace. Questions around vaccines are also a big part of the consideration for employers and some typical issues are highlighted below:

- Whilst it is no longer mandatory to wear facemasks in most environments, employers should consider the continued requirement for them in crowded or public work spaces as a part of its duty of care to employees and its health & safety obligations to provide a safe work environment. Only last week, the week of 18 October 2021 some schools have made masks wearing mandatory again as infection rates continue to rise;
- Aside from the care home worker sector there is no mandatory requirement for employees to be vaccinated against Covid-19 risks. Readers will be aware of the swathe of news articles and public debate on the suitability of vaccines and it may not be suitable for all. Employers should, therefore, direct employees to reliable and most up-to-date information sources so that employees can make their own informed choice about whether or not to be vaccinated. Where the employee chooses not to be vaccinated, they must not suffer a detriment due to this choice. Employers will need to balance the needs of all its workforce and carry out appropriate risk assessments depending on the industry sector when opening up the workplace to ensure it is as safe for all as possible and what may or may not be permitted as reasonable and justifiable;
- From a data protection perspective, it will be rare instances where employers will be able to ask for vaccine information from the employee and to retain this data. This must be justified in the context of the business and the work environment and guidance on this is available from the Information Commissioner's Office;
- Employers should also be mindful as they introduce new practices and processes in the workplace that policies and measures are not in any way directly or indirectly discriminatory on any of the protected grounds such as gender, age, religion or belief or disability.

GOVERNMENT LAUNCHES CONSULTATION ON FLEXIBLE WORKING

In the last edition of Maxlaw Global Employment News (Issue 33) we highlighted arrangements and issues employers needed to consider in assisting the workforce back into the workplace following a slow lifting of the Covid-19 pandemic lockdown.

In September 2021, the UK Government launched a consultation to look into these issues further. Specifically, to consider whether the;

- existing right to request flexible working should be a 'day one' right for the majority of employees not after the qualifying 26-week period which is currently the position;
- grounds for refusing a request by employers needs to be revisited in light of the homeworking that employers were forced to grant due to the global pandemic and lockdown that ensued over the past 18 plus months;
- procedural requirements for making the request and receiving a response from the employer needs to be reviewed including the frequency of requests and the response timeframe;
- employer should be required to provided alternative options if the original request cannot be accommodated; and
- option of temporary flexible working arrangements is integrated and should be discussed by both parties as a part of the overall process.

Consultation closes on *1 December 2021*. In the meantime, the current provisions of the right to request flexible working remain in place.

For further information please contact Max Woodley at mwoodley@maxlawglobal.com

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