EMPLOYMENT NEWS HEADLINES JUL-SEPT 2022 ISSUE 37

UPLIFT OF 25% IN COMPENSATION UPHELD FOR ACAS CODE FAILURE – RENTPLUS UK LTD v COULSON (EAT)

The case of *Rentplus UK Ltd v Coulson* is an important reminder for employers to not automatically bypass the ACAS disciplinary and grievance code of practice (the "Code") because they assume another reason applies to a termination. The Code should be applied to any disciplinary or grievance matters relating to capability or conduct issues. However, the Code does not apply in redundancy situations.

Ms Coulson was in a senior director role at Rentplus since 2015. In 2017 a new male CEO was appointed. After his appointment Ms Coulson increasingly felt she was excluded and marginalised from the leadership group often excluded from important decision making. In the spring of 2018 Ms Coulson was told her role was to be made redundant and was taken through a redundancy consultation process. Ms Coulson raised a grievance claiming that her role was not redundant and any reorganisation had, in fact, resulted in an increase in headcount. Her grievance and subsequent appeal were not upheld by her employer and she was later dismissed by reason of redundancy. Ms Coulson brought claims for unfair dismissal and direct sex discrimination. The Employment Tribunal (ET) found Ms Coulson's dismissal had been unfair as redundancy was not the real reason for the termination and she had been discriminated against due to her gender. It further ruled that a 25% uplift to the compensation should be awarded for Rentplus' failure to follow the Code. The ET found that both the redundancy process and the grievance process were a total "sham" and the decision to remove Ms Coulson was taken as far back as 2017 when the new CEO had joined.

Rentplus appealed claiming that as the termination was for redundancy and there was a finding of discrimination, this meant the Code did not apply. Furthermore, even if it did apply, the ET did not explain the reason for a 25% uplift in compensation. The Appeal Tribunal upholding the ET's decision highlighted the following:

- A finding of discrimination does not preclude the application of the Code (where disciplinary issues may still be applicable). In this case, the issue was concerning Ms Coulson's capability or conduct albeit this was based on the CEO's discriminatory assumptions. The Code should have been followed.
- In this case the employer had not even attempted to consider the Code instead dressing up the reason for the termination as something entirely predetermined and different i.e.,

redundancy. The EAT found the employer's actions to be 'egregious' and in bad faith justifying the percentage uplift as 'just and equitable' on the facts.

PART YEAR WORKERS AND HOLIDAY PAY - UPDATE – HARPER TRUST V BRAZEL (SUPREME COURT)

Regular readers of Maxlaw Global employment news will be aware we reported on the above case (Maxlaw Global news, Issue 24) at which time the Court of Appeal had upheld the application of Ms Brazel's, a music teacher and part year worker[1], method of calculating holiday pay. The method being not to use a percentage of 12.07% (5.6 weeks divided by 46.4 weeks) as Harper Trust were doing but rather to calculate the average weekly earnings in the relevant weeks (i.e., weeks worked in the reference period) preceding the annual leave which resulted in a greater amount of holiday pay payable to Ms Brazel. The Trust appealed this finding by the Court of Appeal. Rejecting the appeal, the Supreme Court has now confirmed that this calculation method is correct for *permanent* part year workers contracts. The calculation should be based on the average earnings of weeks worked in the preceding 52 weeks (the new reference period since April 2020) prior to the start of the holiday, ignoring any weeks not worked and multiply this by 5.6 weeks under the Working Time Regulations 1998 (WTR).

Whilst the Supreme Court acknowledged that this was more generous for part year workers than full-time workers, it found that it was not inconsistent with the WTR or the EU directive or EU law that protects less favourable treatment for part-time workers. Employers should review how holiday leave is taken, holiday pay is calculated and working time recorded for this category of worker in their organisation.

CHANGES TO WHO CAN PROVIDE 'FIT NOTES'

Employers will be well aware that with the outbreak of the Covid-19 pandemic in 2020, a number of urgent and temporary legislative changes resulted to sickness absence notification and sick pay procedures. The knock-on effect in 2022 has seen permanent reforms to the old regime with the introduction of issuing digital "statements of fitness for work" ('Fit Notes') in April 2022.

Further reforms were introduced by the Government with effect from 1 July 2022 which widens the scope of health care professionals who now have authority to issue Fit Notes. Traditionally, only medical licenced doctors were able to issue Fit Notes, the new laws now additionally permit registered pharmacists, nurses, occupational health therapists and physiotherapists to also issue Fit Notes. The motivation for the change is to not only remove this administrative burden from already over stretched General Practitioners but also to allow the actual medical professional treating the employee to provide the necessary assessment of his or her fitness to work. The NHS will no doubt issue further guidance on this in due course.

The accuracy of Fit Notes is important for employers as it impacts the employee's entitlement to statutory sick pay (SSP) following the initial seven-day self-certification period. Widening the scope of health care professional who may now issue Fit Notes means employers should review sick pay policies, notification processes and contractual provisions relating to employee consent for the release

[1] Workers on a permanent contract but who only work varying hours and weeks over the course of the year.

of more specialist or detailed medical assessments where this might be linked for more generous company sick pay schemes and to satisfy employer obligations to make reasonable adjustments required under the Equality Act 2010.

GOVERNMENT ANNOUNCES WITHDRAWAL OF IR35 REGIME

Many readers will be aware of the "Growth Plan" announced by the new Conservative Government incumbents on 23 September 2022. One aspect of this Plan was a clear indication by the new Chancellor, Kwasi Kwarteng, that the IR35 tax regime introduced for public sector contracting in 2017 and thereafter for private sector contracting in 2021 will be repealed in April 2023. The reason for this move, he said, was to simplify a complex tax system and remove time and cost burdens on UK businesses to support this planned growth in the economy.

In summary, the IR35 regime is designed to ensure that correct income tax and national insurance contributions are paid by individuals personally providing services via an intermediary such as a Personal Services Company (PSC). What this meant, in practice, was if the working relationship was an employee/employer relationship in the absence of the PSC then the contractor was *inside* IR35 and liable to income tax and NI. Prior to previous governments closing this potential tax loophole by placing the burden of whether a contractor was inside or outside IR35 on the end-user, this responsibility lay with the PSC who was accountable to HMRC for assessment and payment of the relevant tax and NI.

Employers who were impacted by the changes will be well aware of the time and energy invested in putting appropriate assessment, status determination testing and other measures in place. Some larger employers went so far as to introduce a blanket ban on any contractors working through a PSC to prevent this headache for the business. HMRC also successfully brought a number of cases against high profile contractors for back taxes. The current Government wish to return to this old regime from next April.

Whether or not it will actually happen remains to be seen. Employers may, however, wish to start thinking about whether they would like to return to their old practices or whether it would be impossible for them to now ignore the tax obligations of their contractors when they know the contractors fall inside IR35.

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