UK Employment Law Round-up

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In this issue we look at recent case law decisions which have provided a useful reminder of the position when dealing with contracts tainted by illegality and taking prior disciplinary warnings into account. We also bring you up to date with the latest thoughts on calculating holiday pay, and the scope of ACAS Early Conciliation certificates. We review the new judicial assessment procedure in the employment tribunal, along with proposals to inspect corporate governance and to ask employers to disclose employed foreign nationals.

An agreement tainted by illegality

Hughes v. The Coupers Partnership Ltd (CPL) UKEAT 0078_16 has provided a reminder of the concept of illegality.

The facts

Mr Hughes was a commercial director of CPL from February 1999. He had a written contract of employment that set out his entitlement to a fully-expensed private car. As a result of government announcements changing car taxation, CPL withdrew the benefit of a company car.

CPL dismissed Mr Hughes after it considered that he had fraudulently claimed for business mileage. They found he had not in fact made the journeys in question. The parties gave different accounts to the Tribunal of what was agreed on withdrawing the car benefit. Mr Hughes' case was that he was entitled to make the expenses claims based on an agreement reached in 2002. He argued the company agreed he could claim

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£480 per calendar month (£5,760 a year), to compensate for the loss of the company car and fuel card. He agreed at a disciplinary hearing that he had not undertaken the journeys he claimed for and said they were to substitute for the loss of the company car.

The decision

The ET held the company fairly dismissed Mr Hughes. It found Mr Hughes' evidence to be inconsistent and unreliable compared to that of the company. Mr Hughes appealed to the EAT. The EAT dismissed the appeal, rejecting Mr Hughes' evidence that a variation to his contract had been agreed. Further, it found the ET was right to decide that if Mr Hughes' case was as he explained it, then the contract was tainted by illegality. The company was not accounting to HMRC for the expenses payments.

Comment

The courts will not allow an illegal contract to be enforced. An employee who knowingly collaborates with an employer in performing a contract illegally will be unable to bring an employment tribunal claim that relies on that contract. The courts have a duty to uphold the law and therefore even if neither party has raised the issue, because illegality is an issue of public policy, it will take precedence. This principle goes back as far as 1775. Lord Mansfield put it as follows: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." This case is a more recent reminder of the Tribunal's approach to dealing with contracts tainted by illegality.

Taking prior disciplinary warnings into account

The extent to which an employer can take prior warnings issued to employees into account can be confusing. The recent case of ***Trye v. UKME (UK Mission Enterprise Ltd) UKEAT 0066_16*** is a helpful reminder of the Tribunal's approach.

The facts

In this case, UKME gave Ms Trye a final written warning after a series of misconduct allegations of failing to follow reasonable instructions and bringing the company into disrepute were upheld.

Twelve months on, Ms Trye faced allegations of failing to comply with the company's absence procedures. The allegations were upheld and the company dismissed her. The ET held her dismissal to be fair.

The decision

Ms Trye appealed to the EAT. The EAT had to decide whether it was reasonable for the company to treat the misconduct, taken with the previous warning (assuming there were grounds for imposing it), as sufficient to dismiss. Could the company rely on the earlier warning? The EAT did not need to be concerned with whether the company issued the warning for different conduct.

The EAT held that if a final written warning is on file, only in exceptional circumstances will further misconduct not result in dismissal. This is the case regardless of whether the further misconduct was serious enough in itself to warrant dismissal, or whether the warning is current or has expired.

Comment

This is welcoming reassurance for employers. With regard to previous warnings, employers can take into account any live warning on the employee's personnel file. They may only take into account any expired warning where that warning is not the principal reason for any resulting dismissal. In other words, the circumstances would have justified dismissal anyway. There is some risk in moving to dismissal where there is only a first written warning on file, as opposed to a *final* written warning. Indeed the ACAS code does not give any certainty for an employer on the approach which it may be fair to take. Previous case law has given some general guidance about the factors that a tribunal may consider when deciding the effect of valid warnings on the fairness of a conduct dismissal:

- The tribunal should take into account any proceedings that may affect the validity of that warning, such as an internal appeal.
- It will be going behind a warning (which is not permissible) to hold that an employer should not have issued a warning or to hold that an employer should have applied some lesser category of warning.
- It is not going behind a warning to take into account the factual circumstances resulting in the warning. Just as a degree of similarity may sometimes favour a more severe subsequent penalty, so a degree of dissimilarity may tend the other way.
- It is not wrong for a tribunal to consider an employer's treatment of similar matters relating to other employees.
- A final written warning always implies that further misconduct of whatever nature will be met with dismissal, unless the terms of the contract provide otherwise or the circumstances are exceptional.

Guidance on new judicial assessment procedure in employment tribunals published

Judge Brian Doyle, the President of the Employment Tribunals (England and Wales), has issued Presidential Guidance on the protocol for "judicial assessment" in the Employment Tribunal which allows judges to provisionally assess the case before them. The guidance came into force on 3 October 2016. Employment Tribunals must consider the guidance, but the ET is not bound by it.

Judicial assessment is an unbiased review of the relative strengths, weaknesses and risks of the parties' respective claims by an employment judge, who will also give a view on the potential remedy. This assessment takes place at an early stage of the proceedings, typically at a preliminary hearing. It can only take place subject to concluding certain formalities, including clarifying the issues, the judge giving case management orders and the parties presenting a mutual request to have judicial assessment.

This procedure is a confidential assessment with the aim of encouraging settlement between the parties. Rule 3 of the Employment Tribunal Rules requires judges to encourage parties to "resolv[e] their dispute by agreement" before proceeding to the employment tribunal. The early conciliation process through ACAS typically satisfies this. However, the new rules allow judges to refer parties to other forms of dispute resolution where it is "practicable and appropriate" – judicial assessment being one of these alternative forms.

The protocol makes it clear that the parties cannot refer to the assessment in the later stages of the litigation. Therefore, if they do not succeed in settling the claim, the independent judge conducting the final hearing will not be aware of the outcome of the judicial assessment. Further, the procedure takes place without a full view of the evidence in the case, and therefore the preliminary view on the matter may not accurately reflect the merits

of the case once another judge undertakes a more detailed analysis. As such, the judge who carries out the assessment will make it clear that this assessment is provisional and the result of a final hearing may well differ. This judge will then normally cease having any involvement in the case (except for day-to-day case management of the proceedings).

While judicial assessment is by no means a substitute for legal advice, it appears that this procedure will be helpful for litigants in person (a party to a claim without professional representation). It will give an indicative view of the strengths and weaknesses of their case that they may not otherwise be able to identify. It might also help those who are represented to have an early steer of how a litigant in person might run their case before the final hearing. This is because, usually, the detail of a case would not develop until the parties are subject to the careful questioning experienced at a substantive hearing. In any event, following the introduction of judicial mediation 10 years ago, this development marks another interesting progression toward a purely adversarial system in the Employment Tribunal.

Holiday pay update

In February this year, we reported to you via our ***Hub***, that in Lock v. British Gas the EAT had held that holiday pay must include commission payments. The EAT applied the European Court of Justice's (ECJ) ruling on this issue and interpreted domestic UK law in a way that conforms with EU law.

The position under EU law is that workers must have the right to at least four weeks' paid annual leave. However, it does not specify how holiday pay should be calculated. In the UK, the Working Time Regulations 1998 (WTR) implement the European Working Time Directive (the Directive) and provide that holiday pay, for a worker who works "normal working hours", is calculated on basic salary only.

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Despite the wording of the WTR, the EAT has held that the WTR can and should be interpreted to conform with the Directive, and that holiday pay must reflect a worker's "normal remuneration", which includes non-guaranteed overtime (***Bear Scotland***). Also, on referral, the ECJ ruled that holiday pay under the Directive includes commission, to ensure workers are not discouraged from taking annual leave (***Lock v. British Gas***).

British Gas appealed the ET's decision. It argued that adding or implying words into UK legislation to conform with EU law amounted to "judicial vandalism". Further, it argued the Bear Scotland case, which was to do with non-guaranteed overtime, should not have been applied to a dispute about commission. The EAT dismissed British Gas's appeal, disagreeing with both of its arguments.

British Gas lodged a further appeal to the Court of Appeal. It was hoped that some further guidance would be given around how to factor commission or non-guaranteed overtime into the calculation of holiday pay. The Employment Rights Act 1996 uses a reference period of the last 12 weeks to calculate pay where pay varies according to the amount of work done or the time of work. The Advocate General suggested a reference period of 12 months. The ECJ held that national courts must decide a reference period that they "consider to be representative". The ET suggested the reference period for calculating holiday pay should be the period of 12 weeks immediately before the holiday (excluding any weeks where no remuneration was paid for any reason).

The Court of Appeal decision has now been handed down. While this is an important decision, it does not in fact say anything new. The Court of Appeal took a malleable interpretation to the WTR to find that, when calculating holiday pay, workers are entitled to be paid an amount which reflects the commission they would have earned if not on holiday. We knew this already!

As for the issue of how to calculate holiday pay, the court stated that "nothing in this judgment is intended to answer [that]"!

Given that British Gas has suggested that it has around 1,000 potential claims that have been awaiting this decision, there is a strong likelihood that British Gas will appeal this decision to the Supreme Court. However, now the Court of Appeal has ruled on this issue, employers should, where relevant, ensure that commission is included in holiday pay. This could have huge financial implications for employers with high numbers of staff working on commission. As to what reference period to use for calculating the commission to be paid, employers should, with reference to general practice in the industry within which they operate, look at their commission scheme and make a sensible decision. Commentators have suggested that 12 weeks could be an appropriate reference period, which we agree is a helpful starting point for employers.

Despite Brexit, employers will still have to comply with this decision as, until the UK leaves the EU, UK legislation has to be interpreted in line with both EU directives and decisions of the ECJ.

It is worth noting, however, that the application of this decision is limited. It applies to workers (1) with normal working hours; (2) whose pay does not vary with the amount of work completed; and (3) whose results-based commission is part of their normal remuneration.

Can an ACAS Early Conciliation certificate cover a claim which has not arisen before the date of the certificate?

In the recent case of ***Compass Group UK & Ireland Ltd v. Morgan UKEAT 0060_16***, the EAT clarified the scope of matters that can be covered by a single early conciliation period when an employee's resignation, and later claim for constructive unfair dismissal, post-dated the early conciliation certificate.

The facts

The Claimant was employed by Compass Group UK & Ireland Ltd (Compass). She suffered from an anxiety disorder and, when she was asked to transfer to a different location to work in a less senior capacity, she felt aggrieved and brought a complaint.

The Claimant registered a potential claim with ACAS through its early conciliation (EC) procedure and ACAS then issued an EC certificate. Two months following receipt of the EC certificate, and after no action was taken to resolve her grievance, the Claimant resigned and filed an ET1 citing various claims. This included claims for failure to make reasonable adjustments in relation to a disability and for constructive unfair dismissal.

The issue

Compass argued the Tribunal did not have jurisdiction to hear the claim. It stated that, under section 18A(1) of the Employment Tribunals Act 1996, the Claimant had failed to follow the EC process for the claim for constructive unfair dismissal. It stated the EC certificate only covered disputes in existence at the time of the EC procedure. It argued that, as the Claimant resigned from Compass after the EC certificate had already been issued, the EC procedure the parties had already completed did not relate to this limb of her claim. Compass argued that prospective Claimants should not be able to raise any new claims in their ET1 if this cause of action has not accrued at the date that ACAS is notified. It called for a chronological approach to the matters that Claimants must notify ACAS of before issuing a claim. Compass argued that, without this approach, Claimants can bring claims which are not in existence at the time of EC.

The court's decision

The Tribunal found in the Claimant's favour and, when Compass appealed, the EAT agreed with the Tribunal. The EAT took a robust view and reiterated that the EC procedure is voluntary and there is no need for the prospective respondent to engage in the process if it does not wish to. Further, the prospective claimant is free to provide as much or as little information as it wishes, as long as it provides the names and addresses of the parties to the dispute. Therefore, the Claimant did not need to offer the factual details of the issues or any prospective dispute.

The basis of the EAT's decision was that the Claimant's claim for constructive unfair dismissal related to the facts in dispute at EC. It held that if a subsequent claim relates to the facts and matters in existence at the time of the EC certificate, then it would naturally come within the Tribunal's jurisdiction. The EAT took particular note of the scope of Parliament's language under section 18A(1) of the Employment Tribunals Act 1996 where it connects the EC procedure to a "matter" rather than a specific "claim". Therefore the process does not work in a way to limit the reach of an EC certificate to events pre-dating the commencement of the EC process.

The EAT decided there was no "chronological" test required, as submitted by Compass, but instead, whether the Tribunal had jurisdiction to hear the claim was a question of fact and degree. Essentially, it turned on whether the later claim related to events or disputes in existence or contemplation at the time of EC. In this case, it was clear that it did.

Comment

The employment tribunal has historically been less tolerant with issues about the scope of the EC procedure. However, it now appears that it is adopting a more flexible approach as, more often, claims will not be as readily dismissed for issues with the EC process. This is an interesting decision for claimants as sometimes it is necessary to register a claim when still in employment to avoid missing a limitation period. However, claimants should still err on the side of caution as the EAT made it clear that its decision did not give a claimant a "free pass" to bring proceedings about issues that do not relate to the dispute.

It is clear from this decision that the EAT is trying to create a precedent whereby parties are not duty bound to repeatedly refer disputes to ACAS where they are connected. Instead it is trying to adopt a practical approach, by taking a broad view of which issues will come within the "matter" before it, rather than unnecessarily encouraging satellite litigation.

Corporate governance inquiry

The Business, Innovation and Skills (BIS) Committee has launched an inquiry into corporate governance, focusing on executive pay, directors' duties, and the composition of boardrooms, including worker representation and gender balance in executive positions.

One trigger for this has been the failings highlighted by the BIS Committee's inquiries into BHS and the Prime Minister's commitments to overhaul corporate governance.

The inquiry, among other issues, will focus on:

Directors' duties:

- Is company law sufficiently clear on the roles of directors and non-executive directors, and are those duties the right ones? If not, how should it be amended?
- Is the duty to promote the long-term success of the company clear and enforceable?

Executive pay:

- How should executive pay take account of companies' long-term performance?

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- Should executive pay reflect the value added by executives to companies relative to more junior employees? If so, how?

Composition of boards:

- What evidence is there that more diverse company boards perform better?
- Should there be worker representation on boards and/or remuneration committees? If so, what form should this take?

Any written submissions were to be lodged by Wednesday 26 October 2016.

Listing foreign workers

Government proposals for business owners to disclose what percentage of their workforce is non-British received short shrift!

There was an initial mixed reaction from business owners from the announcement from Amber Rudd, Home Secretary. Some business owners spoke out saying they would refuse to do such a thing believing that their workers would feel insecure, unwelcome and scared. However, Will Beckett, Hawksmoor co-founder, reacted by releasing details of the make-up of his workforce. He commented that he was proud of his diverse workforce made up of 40% British employees and 60% overseas employees.

Following Amber Rudd's announcement, Sir Michael Fallon followed a matter of days later with his own announcement stating UK companies will not be told to list or name foreign workers they employ. He did, however, say that an obligation may remain to report their numbers. This would be to identify skills gaps or to factor in deciding whether to grant firms more visas for overseas workers. This would be to complement the existing "resident labour market test" that employers need to meet if they wish to employ non-EU workers.

The government addressed the matter as a "misunderstanding" rather than a "U-turn", and that the consultation on the proposal would take place. Feedback from businesses would be considered in forming the government's decisions on how best to collect evidence to respond to skills shortages.

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