CLIFFORD CHANCE

Newsletter

November 2015

UK: Employment Update

In this month's Employment Update we review the latest developments in relation to the new requirement to publish slavery and human trafficking statements. We also examine recent case law that provides further guidance on: (i) when it will be fair to dismiss on capability grounds due to long term ill health absence; (ii) whether disclosures in relation to a dispute between an employer and employees can be in the public interest with the result that the employee will enjoy 'whistleblowing' protection against detrimental treatment or dismissal; and (iii) whether an employer's apparently inconsistent approach to disciplining employees for gross misconduct renders a dismissal unfair.

Slavery and human trafficking statements: update

In our October Employment Update we highlighted the new Slavery Act 2015 ("**the Act**") requirement that organisations which supply goods or services and have a total turnover of not less than £36 million must produce a slavery and human trafficking statement ("**SHT Statement**") each financial year.

Commencement regulations have now been made and the SHT Statement provisions of the Act came into force on 29 October 2015. Under transitional arrangements the SHT Statement obligation will not apply to companies who have a financial year ending between 29 October and 30 March 2016. Businesses with a year end on 31 March 2016 will be the first required to publish a SHT Statement for the 2015-16 financial year.

The Government have now published Guidance on the SHT Statement obligation; this can be found here.

The Guidance states that the Government expects organisations to publish their SHT statements as soon as practicable after the year end and in practice would encourage publication within six months.

Organisations should consider what steps should be taken in order to meet any SHT Statement obligations. In particular consideration should be given top the following:

- Is the organisation caught by the SHT Statement requirement?
- Having regard to the Guidance what form will the SHT Statement take?
- Is training currently made available to staff in relation to slavery and human trafficking? If not, which populations of staff should be targeted.
- Do new policies and procedures need to be implemented or existing ones amended to address the obligations under the Act?

[*The Modern Slavery Act 2015 (Commencement No 3 and Transitional Provision) Regulations 2015 and Transparency in Supply Chains etc. A Practical Guide*]

Key issues

- Slavery and human trafficking statements: update
- Ill health absence: is it fair to dismiss?
- Whistleblowing: disclosure about an employment dispute can be in the 'public interest'
- Inconsistent approach to disciplinary sanctions: when is this problematic?
- Zero Hours contracts: Government issues guidance

Ill health absence: is it fair to dismiss?

When an employee has been absent due to ill-health for an extended period is an employer able to dismiss fairly on capability grounds? Does the fact that the employee is disabled and/or that their incapacity was caused, or exacerbated, by the employer's behaviour make any difference? The Employment Appeal Tribunal ("**EAT**") has recently provided some guidance on these issues.

In the case in question, H had a number of disabilities and did some home working to accommodate them. She complained that her new line manager was not supporting her home working arrangements and then went off sick for some five months until she was dismissed on ill health capability grounds.

H brought claims of unfair dismissal and discrimination arising from disability. These were upheld by the Employment Tribunal. On appeal, however, the EAT considered that the Tribunal had adopted the wrong approach and provided a useful summary of the law in relation to ill health capability dismissals.

- When assessing the fairness of the dismissal a Tribunal must examine whether the employer could be expected to wait any longer before dismissing.

  Clearly this will be fact specific and the size and nature of the employer's organisation, the individual's role, the availability of cover and funding issues will all be relevant.

- Before dismissal the employee should be consulted about the prognosis for return and the possibility of dismissal and consideration should be given to any views expressed.

  If the employee refuses to engage in any discussions the employer should make it clear that consideration is being given to their long term prospects and that it will be forced to take a decision in the absence of any input from the employee.

- An employer must take steps to discover the employee's medical condition and the likely prognosis by obtaining proper medical advice but the employer is not required to pursue a detailed medical examination.
- Where the employee's incapacity was caused or exacerbated by the employer's conduct that does not mean that the employee's dismissal is automatically rendered unfair. However, this may be taken into account as background when a Tribunal considers whether the dismissal was within a reasonable range of responses open to the employer in the circumstances.
- The fact that an employee's incapacity arises from a disability does not mean that a dismissal related to it must be unfair.

An employer has a defence to a claim of discrimination arising from disability if it can demonstrate that the dismissal was a proportionate means of achieving a legitimate aim. The employer will have to adduce evidence of its business considerations and working practices and why its business needs were such that dismissal on capability grounds was necessary to achieve those needs.

In this case the legitimate aim of the employer in dismissing H was the safeguarding of public funds and the need to consider the stress on H's colleagues given the employer's inability to fund a replacement for H during her absence. The issue that the Tribunal should have addressed was whether H's dismissal was a proportionate means of achieving that aim.

[*Monmouthshire County Council v Harris*]

Whistleblowing: disclosure about an employment dispute can be in the 'public interest'

In order for an employee to be protected against dismissal or detrimental treatment for blowing the whistle the disclosure in question has to be a 'protected disclosure'. To qualify as a protected disclosure the whistleblowing employee must reasonably believe: (i) that the disclosure is in the public interest; and (ii) tends to show one of a number of matters listed in the legislation, one of which is that a person has failed to comply with a legal obligation.

Before the 'whistleblowing' legislation was amended in 2013 a qualifying disclosure could include an employee's complaint about a breach of their own contract of employment without the additional requirement that the employee believed that the disclosure was in the public interest.

The courts are now starting to grapple with the issue of when a disclosure is in the public interest. In this case, C claimed that his dismissal was automatically unfair because it was in response to a protected disclosure. The disclosure he was relying on was a complaint to his employer that overtime was not being allocated fairly so that some drivers were suffering reduced income and this was in breach of the term implied into their employment contracts that the employer would not act arbitrarily, capriciously or inequitably.

The Employment Tribunal struck out C's claim on the grounds that the disclosure was not in the "public interest"; it was a dispute between C and his employer about the terms of employment and that this could not be in the public interest as it was not something which the public was affected by directly or indirectly and neither could C reasonably hold the belief that such a disclosure was in the public interest.

The EAT overturned this decision. It held that the Tribunal had construed too narrowly the concept of "public"; it was clear that "public" could be a subset of the public even if that subset comprised only persons employed by the same employer on the same terms. Therefore it must be possible that an employee could reasonably hold the belief that such a disclosure was in the public interest.

Although the case upon which the EAT based its own decision is on appeal, for the time being it is clear that in order for a disclosure to be in the public interest it need only be in the interest of a subset of the public at large and that can comprise the individual employee and a group of fellow employees.

[Underwood v Wincanton plc]

Inconsistent approach to disciplinary sanctions: when is this problematic?

Christmas party season is almost upon us with the attendant risks of employee misbehaviour and the appropriate disciplinary sanctions to impose. A recent case before the EAT arose out of employee misbehaviour at a work function. It had to consider whether the disparity in disciplinary sanction rendered the dismissal of one of the two employees in question unfair.

J was involved in an incident with X at a work function. J punched X in the face after being kneed by him. The 'kneeing' seems to have been provoked by J licking X's face upon arrival at the party. Later, after the end of the work function, X waited around at a second venue for J to arrive and then sent a number of texts to him of a very serious and threatening nature.

Both J and X were subject to disciplinary proceedings that were conducted by the same manager. Both were considered to be guilty of gross misconduct, however J was dismissed and X was issued with a final written warning.

An Employment Tribunal held that J's dismissal was unfair because the circumstances of X and J's misconduct was indistinguishable but X had not been dismissed. The EAT held that the Tribunal had to assess whether the employer had reached a reasonable conclusion about J's misconduct and then applied a reasonable sanction, not whether it had been unreasonably lenient in X's case. The conduct of J and X was not truly parallel; J had been found to deliberately punch someone at the workplace event but X had issued a threat after the event.

The EAT considered the case law on disparity of treatment by an employer and how it was relevant in the context of unfair dismissal claims. In short an employer's inconsistency in relation to disciplinary action can be relevant in the following circumstances:

- It may suggest that employees have been led to believe that certain categories of conduct will either be overlooked or at least not subject to the sanction of dismissal.

  For example if an employer has a zero tolerance policy to drinking alcohol during office hours but at Christmas it is common practice for teams to be taken to lunch by their managers drinking the odd glass or two then dismissing a long serving employee because they appear to be under the influence upon their return to the office could expose the employer to an unfair dismissal claim depending on the precise circumstances.
- It may support an inference that the reason stated for an employee's dismissal is not the genuine reason.
- In truly parallel circumstances evidence of inconsistent disciplinary decisions in relation to other employees may be enough to support an argument that the dismissal of an employee was not reasonable and that a lesser sanction would have been appropriate.

This case illustrates the need for employers to consider whether they have been consistent in relation to the disciplinary sanctions imposed after disciplinary proceedings; where there is disparity in the sanctions imposed can this be justified or will it render the employer vulnerable to a potential unfair dismissal or even discrimination claim as a consequence?

[*MBNA Ltd v Jones*]

Zero Hours contracts: Government issues guidance

BIS has published guidance for employers on zero hours contracts. This covers what they are, employment rights, appropriate and inappropriate use, alternative arrangements, best practice and exclusivity clauses.

This can be found here: https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers

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