UK: Employment Update

Welcome to the Summer Employment Update. Although it is holiday season, the courts and tribunals are still handing down judgments of significance. In this Update we consider cases that variously address: when the doctrine of illegality can be used to defeat a claim; the extent to which HR may become involved in producing a disciplinary investigation report and when an agency worker will be protected from detrimental treatment as a consequence of blowing the whistle.

Whistleblowing: clarification on the extended definition of 'workers' who are entitled to protection

The Employment Appeal Tribunal (EAT) has recently provided guidance on the approach that should be adopted to assess whether an individual who is supplied to an end user can be regarded as a 'worker' and therefore be entitled to protection from detrimental treatment in the hands of the end user as a consequence of having blown the whistle.

The legislation contains an extended definition of 'worker' which is aimed at protecting individuals who are supplied via an employment agency or other tri-partite contractual arrangement where the individual does not have a direct contractual relationship with the end user only with the entity supplying their services. In most cases the supplier and end user, will have a contractual relationship with each other. This lack of direct contractual relationship with the end user means that the individual does not come within the standard statutory definition of worker, which requires the individual to have entered into a contract to perform work personally.

An individual will come within the extended definition of worker if the end user and/or the agency supplying him, substantially determines the terms on which the work is done.

Key issues

- Whistleblowing: clarification on the extended definition of 'workers' who are entitled to protection
- Disciplinary investigations: how much input can HR have into the investigation report?
- After centuries of case law the Supreme Court provides clarification on when the doctrine of illegality can defeat a claim
- Anti oral variation clauses: Court of Appeal confirms they are not worth the paper they are written on
- Gender Pay Gap Reporting: implementation timetable may have slipped

C was an agency nurse employed by T but supplied to work at R. The EAT has clarified that C could bring a whistleblowing claim against both her employer T in her capacity as its employee and against R the end user who received the benefit of her services, in her capacity as a worker under the extended definition. C did not determine the terms on which she performed the work, T and R did, she was therefore R's worker.

The EAT clarified that it is not necessary to demonstrate that the employer could dictate the terms on which C performed the work to a greater or lesser extent than the end user; the fact that the end user and not the

individual dictated the terms was the determining factor.

Where individuals supply their services via third party arrangements the end user will potentially be vulnerable to whistleblowing claims from such individuals if they subject them to detrimental treatment based on protected disclosures, for example, by terminating their contract prematurely.

[McTigue v University Hospital Bristol NHS Foundation Trust]

Disciplinary investigations: how much input can HR have into the investigation report?

A recent decision of the EAT highlights once again the perils of third party input into disciplinary investigations if handled inappropriately.

The ACAS Code of Practice on Disciplinary Procedures provides that employers should establish the facts of each case before proceeding to a disciplinary hearing. In cases of suspected misconduct the Code suggests that where practicable, different people should carry out the investigation and disciplinary hearing. In order to avoid a misconduct dismissal being deemed unfair a reasonable investigation must be carried out; it must be reasonable to conclude that the individual is guilty of the misconduct based on that investigation and finally, dismissal must be within the reasonable range of sanctions.

The ACAS Guide to handling disciplinary procedures emphasises that when conducting an investigation an employer should keep an open mind and look for evidence that supports the employee's case as well as evidence against.

In some cases it may be that more than one individual is tasked with producing the investigation report upon which the decision maker will rely. The investigator, particularly if inexperienced, may seek guidance on their approach from in house lawyers and/or HR; however as the EAT made clear last year (see our October 2015 Update) any advice must be limited to addressing questions of law, procedure and process and the appropriate level of sanction to achieve consistency and should not stray into the territory of offering opinions on culpability.

X was the subject of a disciplinary investigation by his employer, R, to determine whether X's relationship with a student was conduct in breach of R's statute ("conduct of an immoral, scandalous or disgraceful nature") and grounds for dismissal. The investigation was carried out by P. His investigation report went through a number of drafts before the final version was provided to the disciplinary decision maker. In a number of those drafts P concluded that there was no evidence that X's conduct was of an "immoral, scandalous or disgraceful nature". A number of paragraphs with findings favourable to X had disappeared in the final investigation report after discussions with HR and R's in house legal advisers.

The EAT reiterated its view that an investigation report was the responsibility of the investigating officer and that HR only provides a supporting role. Its view was that it was far from normal practice for HR to assume joint responsibility for the investigation report.

The case was remitted for reconsideration by the Employment Tribunal to assess whether P had fully expressed his conclusions in the final investigation report and if not, why not, and whether in light of this it was reasonable to dismiss.

[Dronsfield v University of Reading]

After centuries of case law the Supreme Court provides clarification on when the doctrine of illegality can defeat a claim

The doctrine of illegality (or the ex turpi causa rule if you wish to insist on using Latin) in essence means that a cause of action cannot arise from an illegal arrangement. In the employment context the doctrine of illegality is sometimes deployed to defeat an unfair dismissal claim on the basis that both parties knowingly

entered into an arrangement with the intention of defrauding HMRC of the tax and NIC's that should have been paid. In the context of discrimination claims the illegality doctrine defence has in recent times been deployed in circumstances where the claimant knew that she was working in breach of the immigration rules.

The case law on when a defence of illegality can be successfully deployed spans centuries and sadly has given rise to much uncertainty and unpredictability in relation to both employment and other claims.

The Supreme Court has reviewed the principles emerging from the case law and has provided new guidance on when the doctrine can be invoked. The claim in question did not concern an employment law issue; rather it was a claim for unjust enrichment. The claimant, P transferred £620,000 to M for the purposes of betting on some RBS shares using advance insider information. In the end the inside information did not materialise and the shares were not bet on; but M did not return the money. P claimed unjust enrichment; M invoked the illegality defence. The issue was whether P should be denied the claim because he paid the money to M for an unlawful purpose?

The majority of the Supreme Court concluded that the rationale for the doctrine of illegality is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In assessing whether the public interest would be harmed it is necessary to: (a) consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim; (b) to consider any other relevant policy on which the denial of the claim may have an impact; and (c) to consider whether denial of the claim would be a proportionate response to the illegality bearing in mind that punishment is a matter for the criminal courts.

Applying this analysis it held that P satisfied the ordinary requirements for a claim of unjust enrichment and should not be debarred from enforcing his claim only by reason of the fact that the money he was seeking to recover was paid for an unlawful purpose; enforcing P's claim would not undermine the integrity of the justice system.

It remains to be seen whether this decision will alter the way in which the Tribunals approach the issue of illegality; for example whether unfair dismissal claims will be permitted to proceed in cases where both parties were aware that the contract was being illegally performed; for example there is some sort of tax evasion in the pay arrangements.

[Patel v Mirza]

Anti-oral variation clauses: Court of Appeal confirms they are not worth the paper they are written on

In our May Update we considered comments by the Court of Appeal that in its view contractual clauses that stipulate that a variation to the contract will only be valid if effected in writing ('an anti-oral variation clause') cannot prevent a subsequent contractual variation by oral agreement or conduct. The observations were obiter and as such not binding on lower courts but were indicative of judicial thinking.

In a subsequent case the Court of Appeal has now formally ruled on this issue; it confirmed that an anti oral variation clause cannot prevent a subsequent variation to the contract by a senior employee who has ostensible authority to conclude a contract.

This decision does not mean that such clauses are not worth the paper they are written entirely. There is some merit in retaining anti-oral variation clauses as there may be a difficult evidential burden on a party to persuade a court that the contract has been varied by an informal communication when it was contractually envisaged that a change could only be achieved in writing by an authorised representative.

[MWB Business Exchange Centres Ltd v Rock Advertising]

Gender Pay Gap Reporting: implementation timetable may have slipped

In February, the Government published a consultation on the draft regulations under which the new 'Gender Pay Gap Reporting Regime' will be implemented (See our Briefing Note). At that time, the Government intended that the regulations would come into force in October 2016 giving employers a lead time of 18 months before they had to produce their first gender pay gap report before 30 April 2018 (using a snapshot of pay data on 30 April 2017).

Indications are that the Government may not publish its response to the consultation this summer as intended. In part this is due to other parliamentary priorities but also, it is suspected, because the response to the consultation exercise highlighted that a number of key issues needed to be reconsidered, including the definition of employer within the scope of the regulations.

The Government Equalities Office has also confirmed that the regulations will now come into effect in April 2017 rather than this October; whether this delayed implementation will have knock on consequences for the 30 April pay snapshot date is at this stage unclear.

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com