Despite the ambiguity surrounding Brexit, employment law has continued to evolve.

While Brexit generally remains in limbo, post-Brexit immigration enjoys a degree of certainty and clarity. For example:

» The post-Brexit EU Settlement Scheme is already operating, with over 50,000 applications received in the first weekend.
» £65 administration fee for settled-status applications has been waived.
» EU citizens with 5 years continuous residence in the UK can apply for settled-status.

The “gap” continues: Due to the impasse at Stormont, gender pay gap (‘GPG’) reporting remains outstanding in NI. However, recent reporting carried out by GB businesses has highlighted a widening gender pay gap.

GB businesses have also been encouraged to report ethnicity pay gaps (‘EPG’) following a consultation which closed in January 2019. Although it is anticipated that EPG reporting will be required alongside GPG in NI, it may be some time before we will see any movement on this.

This briefing covers a selection of key cases of interest.

1. CLAIMS FOR EQUAL PAY AREN’T GOING AWAY: COURT OF APPEAL RULES IN FAVOUR OF ASDA EMPLOYEES IN BRIERLEY AND ORS V ASDA STORES LTD [2019] EWCA CIV 44

Over 7,000 predominantly female retail employees brought equal pay claims against ASDA in the Employment Tribunal.

The first hurdle to overcome in an equal pay claim is establishing an appropriate comparator. The female employees in this case relied upon male employees in the distribution line. The female employees argued that the work carried out by men in the distribution operation is of equal value to the work that they carry out but the male employees receive superior terms and conditions.

However, Asda argued that its distribution and retail sectors are fundamentally different, because they:
   » Operate in different industries;
   » Have different objectives;
   » Require employees with different skill sets;
   » Have vastly different physical environments; and
   » Have distinctly different functions.

Therefore, the female employees were not entitled to compare themselves to male employees in a different sector.

The Employment Tribunal found in favour of the female employees and held
that they could compare themselves to male employees in distribution. This was upheld by the Employment Appeal Tribunal and Court of Appeal.

Although the female employees cleared this hurdle, they still have a long road to go. The Tribunal will have to now determine whether the work of the female employees is actually of equal value to that of their male comparators. Nevertheless, employers in the retail sector could see an increase in equal pay claims being brought after this decision, as it highlights to employees that an appropriate comparator can be someone in an entirely different role and/or area of the business.

2. BREXIT: WHAT’S THE DEAL WITH DATA PROTECTION?

Although the particular form Brexit will take is currently shrouded in ambiguity, in all likelihood the UK will become a ‘third country’ for the purposes of the General Data Protection Regulation ("GDPR"). Consequently, the UK would be subject to additional requirements when making cross-border data transfers. This is expected to be the case despite the incorporation of GDPR into UK domestic law by the Data Protection Act 2018.

Therefore, in the event of a no-deal Brexit, businesses who transfer data from the EU to UK (for example from ROI to NI) could face difficulties. Although we are awaiting guidance from the European Data Protection Board in this area, it would nevertheless be prudent to keep a record of data that you receive from EU countries (e.g. ROI) and consider an appropriate legal basis for the transfer of this data. (However, the most applicable will likely be implementing the Standard Contractual Clauses approved by EU Commission).

The UK government’s ‘Guidance on data protection if there’s no Brexit deal’ issued in September 2018 recommends that the EU makes an adequacy decision on the UK. This would confirm that the UK has a data protection regime equivalent to that under GDPR and it would make data transfers between the UK and EU more straightforward because additional safeguards would not be required.

3. SPOTLIGHT ON SUSPENSION

Employers should pause and ensure there is a reasonable and proper cause: London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322

Agoreyo, a teacher, was suspended pending investigation for using unreasonable force against children in her class with behavioural difficulties. The letter detailing her suspension stated that it was not a disciplinary sanction and was a ‘neutral act’. Agoreyo resigned following notification of her suspension and subsequently brought a claim for breach of contract, arguing that she had been entitled to resign in response to Lambeth’s repudatory breach of her contract.

The County Court ruled that the suspension was not a repudatory breach of contract, but this decision was overturned by the High Court who reasoned that suspension was not a ‘neutral act’. However, the Court of Appeal disagreed with the High Court and the following useful guidance can be deduced for employers when suspending employees:

» Suspension is not a disciplinary action and this should be made clear to the employee;
» There should be reasonable and proper cause for the suspension; and
» Ensure that the way suspension is carried out will not damage the relationship of trust and confidence with the employee.

Suspension pending investigation – the safest way is to pay: North West Anglia NHS Foundation Trust v Dr Andrew Gregg (2019) EWCA Civ 387

The Court of Appeal held that the NHS Trust was not entitled to withhold Dr Gregg’s pay during a period of interim suspension by a professional disciplinary body pending police investigation, during which Dr Gregg was ready and willing to work.

The Court of Appeal recognised that the period of suspension in this case was not a disciplinary sanction (which is usually unpaid). It also considered that there was no contractual term dealing with pay during suspension. The Court of Appeal held that in such instances, where suspension is involuntary and allegations are disputed, pay should not be withheld.

This case highlights that employers need to tread carefully when suspending an employee as part of an investigation and should have a clear process for suspension set out in employment contracts and/or disciplinary and grievance policy.

4. WHISTLEBLOWING: INDIVIDUALS CAN BE LIABLE FOR DETERIMENT AND POST-DISMISSAL LOSSES

A worker has the right not to be subject to detriment by their employer on the ground that they made a protected disclosure under section 47B of the Employment Rights Act 1996 ("ERA") (article 70B of the Employment Rights (Northern Ireland) Order 1996). This protection also extends to detriment by a worker’s colleagues or an agent of the employer.

In accordance with the new whistleblowing legislation discussed in our last Employment Alert, in the case of detriment by a colleague, an employer will be vicariously liable unless it can show that it took all reasonable steps to prevent the detriment.

However, in a recent case Timis and Sage v Osipov [2018] EWCA Civ 2321, the Court of Appeal held that co-workers can also be personally liable for losses flowing from detrimental acts, including dismissal, which occurred because a protected disclosure was made. The facts are as follows:

» Mr. Osipov was CEO of International Petroleum Limited ("IPL"). Osipov quickly made protected disclosures relating to corporate governance and foreign law relevant to IPL.
» This resulted in Osipov suffering alleged detriments from two non-executive directors, Mr. Sage and Mr.
Timis. Osipov was subsequently dismissed by Timis.

Osipov brought claims against IPL alleging detriments and unfair dismissal for making protected disclosures. Osipov’s detriment claims were also brought against Sage and Timis in their individual capacities.

The Employment Tribunal (“ET”) found that Osipov had been unfairly dismissed due to his protected disclosures being the main reason for dismissal. The ET also held that Sage and Timis subjected Osipov to detriments contrary to section 47B of the ERA, which prohibits ‘whistle-blower detriment’ by other employees as well as by the employer.

Therefore, Sage and Timis were held jointly and severally liable with IPL to compensate Osipov approximately £1,745,000 for the losses he had suffered as a result of his dismissal.

Following an unsuccessful appeal to the Employment Appeal Tribunal, Sage and Timis appealed to the Court of Appeal on the following grounds:

(a) Where detriment amounts to a dismissal, they could not be liable for any detriment suffered under section 47B; and

(b) Sage could not be liable for instruction to dismiss Osipov when it was Timis who gave the instruction.

The Court of Appeal held that preventing an employee from bringing a claim against a co-worker based on detriment of dismissal would produce an “incoherent and unsatisfactory” result. For example, co-workers whose conduct or acts caused the employee to be dismissed would be liable for those acts but a co-worker who actually decided to dismiss the employee would get off.

Although unfair dismissal claims can only be brought against an employer, the Court of Appeal held that individual employees can nevertheless be liable for losses flowing from dismissal which was caused by a prior act of whistleblowing detriment. The Court of Appeal also held that Sage and Timis were liable because they were both involved in discussions to dismiss Osipov.

Key points to note

- Individuals can be personally, and therefore financially, liable for their actions towards whistle-blower colleagues.
- This case may encourage claimants to join individuals (e.g. colleagues) as well as their employer to a claim for detriment as a result of making a protected disclosure.
- In instances where the employer is insolvent or a new start up with minimal funds, co-workers can be liable to pay any compensation awarded.
- Employers should act pre-emptively to ensure that all reasonable steps have been taken to prevent workers from subjecting co-workers to detriment following a protected disclosure. For example, training should be provided to managers, employees and other workers in order to highlight the potential risks and liability they could face.

5. EMPLOYERS CAN BREATHE A SIGH OF RELIEF - UNFAVOURABLE TREATMENT WILL NOT ARISE IN CONSEQUENCE OF A MISTAKEN BELIEF: IFORCE LTD V WOOD [2019] UKEAT 0167/18/0301

The Claimant, Ms. Wood, was a packer working at a fixed workstation at the Respondent, IForce Ltd. The Claimant suffered from osteoarthritis which was exacerbated by cold and damp. Therefore, when the Respondent introduced a policy requiring employees to move between benches, the Claimant would not comply due to her belief that sitting by the door would exacerbate her disability. However, the Respondent’s investigations showed that there was no material difference in temperature and humidity levels throughout the warehouse.

The Respondent issued the Claimant with a written warning on the basis that her refusal to obey the instruction was unreasonable. The Claimant successfully brought a claim in the Employment Tribunal (“ET”) for unfavourable treatment in consequence of a disability. The ET found that although the Claimant had a mistaken belief that the warehouse temperature was different near the doors, her refusal to accept the Respondent’s instruction was because she believed that doing so would adversely affect her health.

However, the Employment Appeal Tribunal (“EAT”) disagreed and set aside the decision of the ET. The EAT held that whilst a broad approach should be adopted when determining whether the ‘something’ i.e. the Claimant’s refusal to work near the warehouse doors led to ‘unfavourable treatment’ i.e. the warning, there still as to be a connection between the ‘something’ and the Claimant’s disability.

In this instance, the Claimant’s refusal to move between work benches did not arise from her osteoarthritis but rather from the Claimant’s mistaken belief that moving benches would worsen her condition. Essentially, there could be no unfavourable treatment arising from a misplaced perception that was not established on the facts.

6. WAGE UPLIFTS

The biggest ever increases to the National Minimum Wage and National Living Wage came into effect on 1 April 2019:

- 25 and over: £8.21 per hour;
- 21 to 24: £7.70 per hour;
- 18 to 20: £6.15 per hour;
- Under 18: £4.35 per hour.
For further information on employment sector legal issues, please don’t hesitate to contact one of our sector specialists.

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