CIPD Employment Law Update

May 2009
West London Branch

Overview

• Grievance, dismissal and discipline
• Agency work
• Equality Bill
• Discrimination case law
• Collective redundancies
• TUPE
• Holidays and sick pay

Changes to grievance & discipline

• Statutory Grievance and Disciplinary procedures to be abolished from 6 April 2009
• No decision yet on position in Northern Ireland
• Return to Polkey and the ‘no difference’ rule
• New Acas code of practice on discipline and grievance
• 25 per cent adjustment in compensation for unreasonable breach of code (probably)
New Acas Code

- General tenor
- Investigations
- Information provided to employees
- Witnesses
- Hearings and appeals
- Interplay of grievances and discipline
- Exclusion of redundancy dismissal

Agency Workers

- Normally not employees – fall between two stools
- Court of Appeal pushes ‘implied contract of employment’ – Dacas v Brook Street Bureau, Cable & Wireless v Muscat
- Court of Appeal emphasises ‘necessity’ in James v LB Greenwich
- Now appears that agency workers are only employees if the agency arrangement is a sham
- Mere passage of time will not make an agency worker an employee
Implementing the agency workers directive

- Proposal in May 2009
- Equality between agency worker and permanent
- 12 week qualifying period
- Anti-avoidance measures
- Information duties
- Liability passing

Equality Bill

- Direct discrimination
- Indirect discrimination
- Harassment
- Equal pay
  - Hypothetical comparators
  - Gender pay gap
- Disability discrimination
- Equality duties
- Enforcement

Key discrimination decisions

- Age discrimination
  - Heyday – retirement ages
  - Rolls Royce – last in, first out
- HM Prison Service and ors v Ibimudun: not victimisation to dismiss for harassing employer with discrimination claims
- English v Thomas Sanderson Blinds: Court of Appeal say homophobic abuse of heterosexual man could amount to harassment
Religion and Belief

- **Eweida v British Airways**: No indirect discrimination for subjective religious belief held by a single person
- **Ladele v London Borough of Islington**: Registrar disciplined for refusing to carry out civil partnership ceremonies was not discriminated against
- **Noah v Desrosiers (trading as Wedge)**: No justification for turning down hairdressers assistant who wore a headscarf

Coleman v Attridge Law

- Mother claims flexible working to care for disabled son
- Alleges hostility and abuse based on his disability
- Claims under the DDA – but that only covers disabled claimants
- ECJ says must have disability discrimination ‘by association’
- Tribunal interprets DDA to include those ‘associated’ with a disabled person
- That issue now to be appealed

Stringer v HMRC

- Sickness lasting more than a holiday year
- ECJ say leave accumulates during sickness
- Employee entitled to take leave on return
- Or be paid in lieu on termination
- What about temporarily ‘returning’ to work to take holiday?
- Wider implications?
TUPE — Amicus v UCATT & ors EAT (0014/08)

- The duty to inform must be complied with pre-transfer
- The Transferor must consult its affected employees pre-transfer about measures it envisages
- The Transferee must consult its affected employees pre-transfer on measures it envisages
- There is no duty to consult post transfer:
  - "There is no point in providing for the transferring employees to be entitled to consultation regarding measures envisaged by the transferee employer because their contracts of employment cannot be changed even by agreement, if the reason for the change is the transfer."

Amicus v UCATT & ors

No right to be consulted at all?

Employees staying with transferor

Employees already with transferee

Right to be consulted by transferee

Alemo-Herron v Parkwood Leisure

EAT (0456/08ZT)

- Transfer of contract linking pay to future NJC negotiations
- Whent & Others v T Cartledge Limited [1997] IRLR 153 EAT had held that transferee is bound by future agreements
- However ECJ in Werhof v Freeway Traffic Systems GmbH & Co KG [2006] IRLR 400 suggested otherwise
- EAT have just ruled that Whent still applies and Werhof does not apply in the UK context
- Expect an Appeal!
Pre-pack administrations

- What is a pre-pack?
- Effect of selling assets
- The bankruptcy exemption in TUPE
- Oakland v Wellswood (Yorkshire) Ltd
- Importance of administrators statements

Other law reform / issues

- Working time opt out
- Blacklisting union members
- Licensing for construction sector
- General election
- Clampdown on expenses
- Redundancies

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