CIPD Seminar Employment Law Update

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Topics covered:

- The case of *R (on the Application of Unison) –v- The Lord Chancellor*.
- Employment law developments & interesting cases from 2017.
- Anticipated changes to employment law in 2018.

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R (on the Application of Unison) v The Lord Chancellor (2017) UKSC 51

In July 2013 the Government introduced Tribunal fees of up to £1200 for ET claims and £1600 for appeals in the EAT (the Employment Tribunals Fee Order).

On 26 July 2017, in a landmark ruling, the Supreme Court held that fees for bringing a claim in the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) were unlawful.

R (on the Application of Unison) v The Lord Chancellor (2017) UKSC 51

Why introduce fees?

- transfer tax burden;
- incentivise early settlement;
- discourage unreasonable behaviour and vexatious claims.

How much were the ET fees?

- Type A claims (unpaid wages, redundancy pay, breach of contract) - £160 issue fee and £230 hearing fee;
- Type B claims (unfair dismissal, discrimination and whistleblowing) - £250 issue fee and £950 hearing fee;
- Fee remission.

Unison argued that the fees denied access to justice as there had been a significant decrease in the number of claims brought in the ET since the introduction of fees, particularly "low value" claims which were often brought by the most vulnerable workers;

ET statistics showed that there had been a "*sharp, substantial and sustained fall in the volume of case receipts*" (HMCTS & MOJ Review Report January 2017).

- 2013/2014: total claims accepted 105,803
- 2014/2015: total claims accepted 61,308
- 2015/2016: total claims accepted 83,031

Judgment

The Supreme Court held that the Government was acting unconstitutionally and unlawfully when it introduced the fees.

- There was a real risk that Claimants would be denied access to justice;
- The fees were obstructing access to justice & were unlawful under UK and EU law;
- The fees did not bear any relation to the potential value of a claim;
- Claimants claiming non-monetary remedies or a small amount would be deterred from pursuing a claim.

What now?

- Claimants no longer need to pay a fee;
- The Government will also have to repay more than £27 million to Claimants who have paid fees since July 2013;
- The ET has started to re-instate claims that were rejected for non-payment of Tribunal fees;
- Claimants can make an application for reimbursement of fees.

Implication and tips for employers

- It may be more difficult to settle a claim during the early conciliation stage as employees will have less of a deterrent to start employment tribunal proceedings;
- ET rules provide power to weed out weak claims – apply for a preliminary hearing and threaten costs;
- Robustly check systems and procedures to ensure compliance and train managers to avoid and/or minimise the risk of claims;
- Seek to recover any fees paid as part of a settlement?

Other interesting cases

Whistleblowing

Chesterton Global Ltd (t/as Chestertons) v Nurmohamed (2017 IRLR 837 CA)

Mr Nurmohamed and around 100 of his colleagues had profit based commission arrangements in place. He alleged that the company was deliberately manipulating its accounts by overstating its actual costs and liabilities in order to reduce commission payments.

Shortly after his disclosure, Mr N was dismissed. He brought a number of claims, including a claim of automatic unfair dismissal.

Was the ‘disclosure’ in the public interest?

The Court of Appeal dismissed the employer’s appeal and held that Mr N’s disclosure related to deliberate wrongdoing and therefore, he had a reasonable belief that the disclosure was in the public interest.

The Court cited four factors to assess reasonableness/public interest:

- number of employees involved;
- nature of the interests affected;
- nature of the wrongdoing (deliberate vs accidental);
- identity of the wrongdoer.

Discrimination & equal pay (Equality Act 2010)

Asda Stores Ltd v Mrs S Brierly & Others (EAT/0011017)

EAT held that the Claimants, who were mostly women, who worked in retail stores, could compare themselves with higher paid men who worked in the distribution centres for equal pay purposes.

Asda has been granted permission to appeal. 10,000 Claimants. Value of claims circ. £100m. To win, the women will need to demonstrate that their work is of equal value to their male colleagues.

<u>Various Claimants v Barclays Bank ((2017) EWHC 1929 (QB))</u>

High Court ruled that Barclays was vicariously liable for sexual assaults committed by a doctor engaged to medically examine prospective applicants.

2 stage test applied: (i) whether the relationship was one of employment or "akin to employment"; (ii) whether the assaults had a sufficiently close connection to the employment or quasi employment.

The doctor was under the control of the bank; the assessments were performed for the benefit of the bank and the assaults were carried out during the course of his duties.

Agoreyo v London Borough of Lambeth ((2017) EWHC 2019 (QB))

The High Court held that the suspension of an employee, a teacher, accused of using unreasonable force against children, in order to allow an investigation to be conducted fairly, constituted a repudiatory breach of contract which entitled the teacher to resign and treat herself as constructively dismissed.

The Claimant was not asked for her response to the allegations and there was no evidence of consideration given to alternative options. The reason of the suspension was not to protect the children but to “allow the investigation to be conducted fairly”.

Barbulescu v Romania (2017 ECHR 754)

There had been a violation of Article 8, ECHR (right to respect for private & family life) when a Romanian employer monitored an employee's personal email account on his work computer because the employer had failed to provide prior notice of monitoring communications at work.

Workers have a right to privacy in the workplace and if employers want to monitor email accounts, then they must notify employees in advance of the extent and nature of the monitoring activities.

UBER

Employment status

Aslam & Others v Uber BV & Others (2017 IRLR 4 ET)

- In October 2016 the ET held that Uber's drivers are workers and therefore entitled to benefits and paid rest breaks. The drivers had argued that they had no control over the fare, the route, the bookings etc. Uber argued that the drivers are independent contractors and that they would rather be self- employed due to flexibility.

- The appeal by Uber was heard in the EAT on 27 and 28 September 2017. The decision is awaited.

Developments in employment law 2017

New guidance has been issued for injury to feelings compensation (claims issued on or after 11 September 2017). The *Vento* bands have been updated as follows:

- lower band £800 - £8,400
- middle band £8,400 - £25,200
- upper band £25,200 and £42,000
- exceptional cases over £42,000;

Developments to Employment Law 2017

From April there were various changes including:

- SSP increased to £89.35 per week;
- Statutory compensation limits – one weeks' pay for redundancy pay/unfair dismissal basic award increased to £489;
- Unfair dismissal maximum compensatory award increased to £80,541;
- Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 public and voluntary sector employers with more than 250 employees must publish their reports by 4 April 2018 (with a snapshot date of 5 April 2017) and 30 March 2018 for larger public sector employers.

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Anticipated changes to Employment Law legislation 2018

- March and April – Gender Pay Gap reporting, as above;
- April – taxation of termination payments. All PILON payments to be taxable and subject to NICs. Proposal to remove distinction between contractual and non contractual PILON (Finance Bill, yet to be finalised and subject to consultation);
- May – General Data Protection Regulations: new requirements on processing 'personal data' and detailed definition to include genetic, mental, economic and social information and IP addresses.

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