EMPLOYMENT NEWSLETTER SEPTEMBER 2018

1. Victimisation and bad faith

The Employment Appeal Tribunal (EAT) has held that the primary question to be asked when considering bad faith for the purposes of a victimisation claim is the employee's honesty.

Background

In this case, Mr Saad brought a grievance and alleged racial or religious discrimination. The Tribunal found that the allegation was false but that Mr Saad believed in what he had said. However, he also had an ulterior motive of delaying and avoiding performance management processes and the Tribunal therefore held that he had acted in bad faith.

What does this mean?

The EAT allowed Mr Saad's appeal. The bad faith test for victimisation purposes is different to the good faith test that used to apply in whistleblowing claims. The primary question for victimisation purposes is whether the worker has acted honestly in giving the evidence or information, or in making the allegation, that is relied on as a protected act. The existence of an ulterior motive, while potentially relevant, does not necessary mean that the employee has acted in bad faith.

What should employers do?

This is an important case that makes it clear that any ulterior motive should not be the focus in victimisation cases. Employers should be aware that if the employee can prove that they acted honestly in making the allegation then there is a significant chance that they will defeat any argument that they have acted in bad faith.

Case reference: Saad v Southampton University Hospitals NHS Trust

2. Employers urged to encourage their staff to cycle to work

The Institution of Occupational Safety and Health (IOSH) has urged employers to encourage their staff to cycle to work on a regular basis. IOSH is encouraging employers to promote cycling to work as a healthy lifestyle choice and a boost to wellbeing and productivity.

According to a survey by insurer VitalityHealth, the University of Cambridge and RAND Europe, workers who did not cycle regularly lost, on average, six additional days per year of productive working time due to ill-health related absence and presenteeism. However, the study revealed that 30% of employers did not provide bicycle storage facilities and 32% did not have access to lockers or showers.

3. Five-month cessation of activities did not preclude existence of transfer

The European Court of Justice (ECJ) has held that a five-month cessation of activities did not preclude the existence of a transfer of an undertaking

Background

In this case, a contract to operate a Spanish music school was terminated and all the staff were dismissed.

The service was resumed by another contractor after a gap of five months. This new contractor used the same premises, instruments and resources as the previous contractor. The ECJ held that a transfer of an undertaking under the Acquired Rights Directive had potentially occurred in these circumstances. The final decision on this point lay with the Spanish courts. However, the ECJ also held that the employees' dismissals were probably for an economic, technical or organisational reason entailing changes in the workforce given that their dismissals took place well before the transfer due to the fact that it was impossible for their employer to pay them.

What does this mean?

The fact that the music school in this case shut for five months before being taken over by the new contractor did not mean that there could be no transfer. The economic activity in question was the management of the music school. It was the material resources, such as musical instruments, facilities and premises, which were essential to the conduct of the economic activity and the new contractor took these over when it started to run the school.

This was an 'asset reliant' business so the fact that the new contractor did not take on the workers did not preclude the existence of a transfer.

The ECJ held that the fact that an undertaking is temporarily closed at the time of the putative transfer and has no employees is a relevant factor, but not determinative. It was particularly relevant that three of the five months of closure in this case were school holidays in any event.

What should employers do?

This case is interesting but it would be analysed differently under the UK's TUPE Regulations. These go beyond the requirements of the European Acquired Rights Directive and provide for the concept of a "service provision change".

There is no requirement for there to be a transfer of significant assets or a major part of the workforce in order for a service provision change to occur and for TUPE to apply. The TUPE Regulations do not suggest that a temporary cessation of activities would preclude a TUPE transfer but the purpose, nature and length of the cessation would be relevant in determining whether or not the organised grouping of employees required for a service provision change continued in existence.

Case reference: Colino Sigüenza v Ayuntamiento de Valladolid and others

4. Workers 'undertaking controlling the employer' means for collective redundancies

The European Directive on collective redundancies provides that obligations as to information, consultation and notification will apply irrespective of whether the decision to make collective redundancies is taken by the employer or by an "undertaking controlling the employer".

The European Court of Justice (ECJ) has ruled that the concept of an "undertaking controlling the employer" extends to situations where:

- By virtue of belonging to the same group or having a shareholding which gives it the majority of votes in the general meeting, the undertaking is able to require the employer to adopt a decision contemplating or planning for collective redundancies.
- The undertaking is able to exercise decisive influence in terms of voting, despite not having a majority of the votes, by virtue (for example) of a low level of participation by members in general meetings, or the existence of pacts between members within that employer.

The concept does not cover situations where there is a 'purely factual criteria' connecting the entities, such as the existence of a common interest between the employer and the other undertaking. This would undermine legal certainty. A simple contractual relationship, in so far as such a relationship does not allow an undertaking to exercise a decisive influence on dismissal decisions taken by the employer, would not suffice.

Case reference: Bichat v Aviation Passage Service Berlin GmbH & Co KG

5. Service company arrangement was really employer / employee relationship

The High Court has held that, despite a contract for services arrangement between a services company and the client, the true relationship between the parties in this case was one of employer and employee.

What does this mean?

The individual in this case was recruited because of his particular expertise and he was effectively the company's sole computer programmer. He was required to work for the company through a service company as a consultant for tax avoidance reasons, which he did and he entered into a contract for services. However, the Court held that the true relationship was one of employer and employee as the individual was obliged to personally perform technical services for the company.

What should employers do?

The Court in this case examined the practice of using service companies in an employment context and expressed concern about the level of artificiality involved in such arrangements. It stated that there is a clear public interest in everyone paying taxes properly and not escaping tax liability by devices falsely describing their contractual relationships.

This case illustrates that the use of a personal services company where it (rather than the individual) contracts with the client is vulnerable to challenge not just under IR 35 tax legislation but also in relation to employment status.

Case reference: Sprint Electric Limited v Buyer's Dream Limited and another

6. Gender pay gap fuelled by asking applicants their current salaries

The Women's Trust charity, which supports women on low pay, has said that the practice of asking job applicants for their current salaries fuels the gender pay gap.

The charity has suggested that featuring salaries in job adverts could help close the gender pay gap, after a YouGov survey revealed that nearly half of advertisements did not include wage information. The charity says that the change could prevent firms from unintentionally paying men and women differently for the same positions. Publishing salary details may also create a transparency that attracts more applicants.

7. Service company arrangement was really employer / employee relationship

Background

This case involved a work seeker's appeal against the inclusion on an enhanced criminal records certificate of the fact that he had been acquitted of raping a 17 year old woman while he was working as a taxi driver. This subsequently prevented him from getting a job as a teacher and as a minicab driver.

What does this mean?

The Court held that there was no breach of the worker's right to a private life under Article 8 of the European Convention on Human Rights. Reference to the rape acquittal was reasonable, proportionate and no more than necessary to secure the objective of protecting young and vulnerable people.

The Chief Constable's view was that the information included in the enhanced certificate was "not lacking substance" and the allegations "might be true". Acquittal was not proof of innocence, it merely confirmed that guilt had not been proved beyond all reasonable doubt. The incident was recent and of a very serious nature. It was relevant that the information about the charge and acquittal was a matter of public record and might have come to the potential employer's knowledge from other sources.

The Judge pointed out in this case that there is no clear guidance as to how much weight should be given to an acquittal in these circumstances and no evidence on how an enhanced certificate is likely to be used by employers. It remains to be seen what action, if any, the Government takes in response to these issues considering the number of enhanced

8. Compensation awarded after woman declined to shake hands at job interview

A Swedish Muslim woman has been awarded compensation after her job interview with a company was swiftly

ended when she declined to shake hands with a male interviewer.

The candidate declined to shake his hand but instead smiled and put her hand on her heart as a greeting, while explaining that her religion stipulated she should avoid physical contact. She was subsequently shown out of the building, leaving her in tears. She brought a discrimination claim as a result. She stated that she adhered to an interpretation of Islam that prohibits handshaking with the opposite sex unless it is a close family member.

The Swedish Labour Court concluded that the woman's refusal to shake hands with people of the opposite sex was a religious manifestation of Islam that was protected under Article 9 of the European Convention on Human Rights. It accepted that the company was right to require that employees treated men and women equally, including greetings, but said that it could not specify that the greeting should involve shaking hands.

Case reference: Alhajeh v Semantix

Find out more

Please contact us to discuss your requirements or to find out more.

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