rollits

www.rollits.com
May 2013

Employment Newsletter

Employment Tribunal reform – Summer 2013

Summer 2013 will see a continuation of the Government's commitment to the review and reform of Employment Legislation and the Employment Tribunal system.

The "Red Tape Challenge" is a response to feedback from employers who constantly refer to the complexity of employment legislation which together with the rate of change presents an enormous challenge to all businesses large and small.

The Government has committed to a policy of wide ranging de-regulation to boost economic recovery. A report published on 14 March 2013 – Employment Law 2013 sets out the proposed timetable. Of particular interest to employers:

Fees will be introduced in the Employment Tribunal. The target date is 12 July 2013. A claimant will be required to pay two fees, one on issue and a hearing fee. The two tier system will involve a distinction between the type of claim and costs applicable. Level one claims will include breach of contract, wages claims, holiday pay and redundancy pay. The issue fee will be £160 and a hearing fee of £230. Level two claims will be for unfair dismissal, detriment and discrimination claims and will attract an issue fee of £250 and a hearing fee of £950. Payments will be made on line but otherwise the detail is sparse. It is clearly hoped that the requirement to pay a fee will deter claims especially from vexatious litigants.

Continuity of employment

In the Employment Appeal Tribunal ("EAT") decision in *Koenig v Mind Gym Limited* the Employment Appeal Tribunal considered whether an employee's continuous employment ran from the date when they undertook activities at the request of but not the strict requirement of the employer or the later date stated in the contract of employment.

In this particular case the employee had attended a meeting before the date of the employment contract. The date upon which employment began was significant in determining whether or not the employee had sufficient continuity of employment in order to bring a claim for unfair dismissal.

Here the Employment Appeal Tribunal upheld an Employment Judge's decision that an employee's continuous employment did not begin until the date on which their contract provided they should start work. The fact of the earlier meeting did not bring the start date forward.

The EAT further held however that the date upon which an employee starts work for the purpose of determining their continuous employment is a question of fact and degree. Where significant activity is performed for the employer's benefit in anticipation of an individual commencing employment it will be easy to infer that the parties had agreed that the activity would be performed under a contract.

Also in this issue

Meet the Employment Team

Donna Ingleby
Partner
Employment
Direct dial +44 (0)1482 337314
Email donna.ingleby@rollits.com

Ed Jenneson
Partner
Employment
Direct dial +44 (0)482 337341
Email ed.jenneson@rollits.com

Lottie Pigg
Senior Solicitor
Employment
Direct dial +44 (0)1482 337242
Email lottie.pigg@rollits.com

Ed Heppel
Senior Solicitor
Employment
Direct dial +44 (0)1482 337313
Email ed.heppel@rollits.com

Ruth Everitt
Paralegal
Employment
Direct dial +44 (0)1482 337283
Email ruth.everitt@rollits.com

Employment Tribunal reform

Settlement Agreements and Pre-Termination Negotiations and other changes

As a result of new legislation due to be introduced in summer 2013, Compromise Agreements will be renamed Settlement Agreements. In an attempt to offer employers greater protection when offering Settlement Agreements evidence of pre-termination negotiations will be inadmissible unless in the opinion of the Employment Tribunal, the Employer has used improper behaviour in seeking to reach settlement.

Inevitably case law will establish what amounts to improper behaviour. The provision will only prevent discussions in relation to a Settlement Agreement or the offer itself from being inadmissible in unfair dismissal proceedings which means that such discussions and any offer will be admissible in any other case including Discrimination Act claims, Automatically Unfair Dismissal claims and Breach of Contract matters. It may be difficult to isolate what is intended to be inadmissible.

In the meantime, in February 2013 ACAS produced a Code of Practice on Settlement Agreements. The Code gives examples of improper behaviour to include, all forms of harassment including offensive words or aggressive behaviour, physical assault or undue pressure.

Any offer must be in writing and an employee should have seven working days to consider any offer to terminate their employment. Finally, the employee is entitled to be accompanied at meetings as per the entitlement to be accompanied at disciplinary hearings. The aim of this approach is to provide a mechanism for dismissing staff safely and avoiding time consuming and difficult Employment Tribunal proceedings. Whether the proposals enable employers to avoid uncertainty and the Employment Tribunal remains to be seen.

The Twelve Month Cap on the Compensatory Award Settlement may help promote settlement by the proposal that the compensatory award for unfair dismissal be the lower of either one year's pay (paid gross) or the existing statutory cap (£74,200). The definition of a week's pay will not include pension contributions, benefits in kind and discretionary bonuses. This statutory cap will hopefully impact on the employee's expectations in relation to compensation and encourage the early resolution of disputes.

The above are just some of the forthcoming changes all intended to enable employers to manage staff more effectively but at the same time promoting fairness and retaining core employment protection for employees.

Covert recordings

In a recent case of *Vaughan v London Borough of Lewisham* the Employment Appeal Tribunal reviewed the decision of an Employment Judge who had refused an application to adduce evidence comprising of 39 hours of covert tape recordings of discussions between the Claimant and her managers and colleagues.

In this case the Employment Appeal Tribunal considered the correct approach for a Tribunal to adopt when invited to introduce covertly recorded evidence.

An Employment Tribunal has a wide discretion to admit evidence which it considers to be relevant to a claim. Here, however, the application to adduce covert tape recordings was refused. The Claimant sought to justify the reasons why the covert tape recordings should be admissible but did not include a transcript or copy of those recordings. Indeed in correspondence with the Employment Tribunal the Claimant made it clear that she was unwilling to provide further details at the early stage of the proceedings.

At a Pre-Hearing Review the Employment Judge refused the application.
The reasons given were:

- Concern as the clandestine method by which the tape recordings had been obtained and the fact that they could have been tampered with. The Judge considered that in those circumstances it was reasonable for the recordings to be independently transcribed.
- That the information about the recordings disclosed to the Tribunal was insufficient for the Judge to form a view as to whether or not they were relevant to the issues of the claim.
- Finally the Judge considered that the time and cost to the Respondent and to the Tribunal in reviewing the 39 hours of recordings was disproportionate. The Claimant appealed.

The Employment Appeal Tribunal upheld the decision of the Tribunal. Much emphasis was placed upon the fact that in the absence of transcripts of the recordings it was not possible for the Judge to form a view about their relevance.

The EAT did have some misgivings in relation to the Judge's reasoning particularly the requirement that the Claimant should have had the recordings independently transcribed. Instead the Tribunal concluded that the first step would have been for the Claimant to serve her own transcript of the recordings on the Council. At that stage the Council could have taken a view, whether to challenge the accuracy of the transcript in whole or in part. The Employment Appeal Tribunal were mindful of the possibility that recordings could have been tampered with, however, in this particular case there was no evidence to suggest that to be the case.

In relation to the proportionality question the Employment Appeal Tribunal stressed that an Employment Judge would have been better able to consider proportionality had transcripts been disclosed.

This is an interesting case as the use of tape recording generally presents many problems to employers as does the potential for covert tape recording in the context of disciplinary and grievance meetings.

There is no requirement for an employer to allow tape recording in the disciplinary context. The quality of tape recordings can be poor particularly when done covertly and of course the risk that recordings could be tampered with is paramount. Employer's should however be on their guard given the ready availability of tape recording devices including of course mobile telephones.

Volunteers not covered by discrimination law

In a Supreme Court decision it was held that a volunteer legal advisor in the claim of *X v Mid Sussex Citizens Advice Bureau* could not bring a claim for disability discrimination as the Employment Tribunal did not have jurisdiction to hear the case.

In this matter the volunteer had signed a written volunteer's agreement which stated that it was "binding in honour only and not a contract of employment or legally binding".

X sometimes failed to turn up on days when she was scheduled to work because of health problems. No objection was ever raised, either to her nonattendance or to her changing working days. When the Citizens Advice Bureau asked X to stop volunteering she alleged this was because of her disability and brought Tribunal proceedings. The claim that the Citizens Advice Bureau had discriminated against her by terminating her employment was dependant on her being able to show that she was in employment within the meaning of the relevant legislation.

X had signed a volunteer agreement which was not a contract of employment and was not legally binding and in those circumstances she did not satisfy the definition of employment and her claim was dismissed. The Supreme Court eventually agreed with this decision.

Whilst the case was pursued under the Disability Discrimination Act 1995 now repealed and replaced by the Equality Act 2010, the decision will have equal application.

In circumstances where the case had been decided differently this would have placed a further significant burden upon charities. This would have been to the detriment of charitable organisations in that it would have created obstacles to using volunteers and inevitably additional costs.

The case also emphasises the importance of a volunteer agreement as in this case X had been a regular volunteer and had performed a similar role to paid staff.

Case Law update

Eweida v British Airways

The case concerned a Christian employee who was sent home from her job as a check-in assistant with British Airways (BA) for visibly wearing a crucifix which was in breach of BA's uniform policy. The uniform policy adopted by BA at the time, did not allow for any visible item to be worn except 'mandatory' religious items. Examples given were things like a turban or the Jewish skull cap, neither of which could not be concealed.

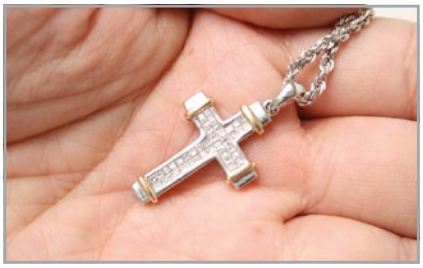
Ms Eweida brought a claim at the Employment Tribunal, The Employment Appeal Tribunal and the Court of Appeal for indirect discrimination. All of the claims failed. The basis for the rejection of her claim was that an indirect discrimination claim cannot be based on disadvantage to one individual – it had to be a group of individuals and that BA's approach was "a proportionate means of achieving a legitimate aim".

Another argument rejected by the UK courts was that Ms Eweida had a right to manifest her religious belief under Article 9 of the European Convention of Human Rights (ECHR), which provides for freedom of thought, conscience and religion.

The case was then brought before the European Court of Justice (ECJ). The question put to the ECJ was "whether restrictions on visibly wearing a cross or crucifix at work amounted to interference with employees' rights to manifest their religion or belief, as protected by Article 9 of the ECHR and if so, whether the UK had breached its obligation to protect those rights".

The ECJ, took a different view to the UK courts and concluded that there was no evidence that the wearing of turbans or hijabs negatively impacted on BA's brand (which was what BA had argued throughout) and given that Ms Eweida's cross was discreet, there was no evidence that this would have any negative impact either.

What does this mean for Employers?
My view is that Employers need to take a common sense approach. Clearly a discreet cross is unlikely to cause offence



or damage a "corporate brand" which was something strenuously argued throughout by BA. Therefore an Employer needs to think very carefully before preventing an employee from wearing any form of religious garment or jewellery if they cannot justify why they are preventing the employee from wearing it. It should be noted that it is possible to prevent an employee from wearing a cross as one of the cases which went to the ECJ with Ms Eweida was very similar in terms of the facts. However, this employee (Ms Chaplin) who also wore a cross was a practising mental health nurse. It was determined by the employer that it was too dangerous for an employee who dealt with mentally ill patients to wear something around their neck as it could cause harm. This approach from the employer was justified on the grounds of health and safety as the ECJ would not interfere with health and safety. As stated, a common sense approach is required from Employers.

Simmonds v Milford Club

Mr Simmonds worked as a club steward for Milford Club ("the Club"). He received a final written warning after it was discovered that he had given the Club's takings to his wife, who was not an employee, to deposit at the bank. The Club's disciplinary rules and procedures said that any recurrence would lead to dismissal.

Mr Simmonds was later found to have given employees their Christmas bonus in cash instead of, as instructed, in the form of bottles of alcohol and he was dismissed.

He claimed unfair dismissal at the Employment Tribunal. The ET agreed that without the previous written warning, the dismissal on the bonus issue alone would have been unfair. The Tribunal then proceeded to consider the previous warning, and found that it was appropriate to take into account the previous warning because they considered it was reasonable that Mr Simmonds must have known, whether he had been specifically told so or not, that it was wrong to ask his wife to bank the money especially in the light of his background as a publican. The Employment Tribunal therefore found that the claimant had not established that he had been unfairly dismissed and his claim was dismissed. The claimant appealed.

The EAT allowed the appeal. They concluded that if the Employment Tribunal had cause on the facts to consider that a material previous disciplinary sanction may have been manifestly inappropriate they should have heard evidence to determine whether it was. The Employment Tribunal did not do so in this case.

What does this mean for Employers?
Employers are entitled to take into account live warnings when considering whether to dismiss an employee for subsequent misconduct. A tribunal cannot then challenge whether those warnings should have been given, unless satisfied that the warnings were not made in good faith or were "manifestly inappropriate".

What the tribunal will consider is whether it was reasonable for the employer to have treated the employee's conduct, taken together with the previous warning, as a reason to dismiss.

Employers should ensure that a fair procedure is always followed when determining what sanction should be applied in response to an employee's misconduct. Employers should consider how they have treated similar instances of misconduct by other employees and whether an employee's subsequent misconduct is similar in nature to the conduct for which the previous warning was given.

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact Donna Ingleby on 01482 337314.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form.
Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 3 May 2013.

Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com