MAYER·BROWN

UK Employment Round-Up

December 2015

End of year UK Employment Round-Up

As the year draws to a close, we take a look back at some of the most significant cases heard this year and look forward to what key developments are anticipated in 2016 which will affect the employment law world.

2015 highlights

UK based employees must be sued in the UK

Decision: The case of *Petter v EMC Corporation*, which was decided by the Court of Appeal in the Summer, held that where an employee is based in the UK, any dispute about his employment contract must be brought before the UK courts. This principle applies even where the employer is based overseas and where the contract is stated to be subject to the law and courts of another country. The decision has potential to be applied widely as it will impact all disputes linked to an "employment contract", which the court interpreted widely to include share and stock plans operated by parent companies, not just disputes concerning the terms of the employment contract itself.

Continued impact: Many international employers carrying on business in the UK will operate stock plans governed by the law of another jurisdiction. It is, for example, very common for US companies to operate stock plans governed by New York Law. This case confirmed that, where those plans are extended to UK employees, the UK courts will have exclusive jurisdiction in determining an employee related dispute concerning the plan. This can be particularly important if the plan contains forfeiture provisions or restrictive covenants, as the UK courts may adopt a very different approach to the enforcement of these provisions than the courts of the jurisdction governing the rules of the plan. For example, the UK courts will apply UK principles of restraint of trade to determine whether restrictions in a New York law set of plan documents will be enforceable.

Petter v EMC Corporation

The View From Mayer Brown

MAYER·BROWN UK Employment Law

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Episode 83

This episode looks at three recent cases on whether a constructive dismissal can trigger collective redundancy consultation, a discretionary bonus case and how to calculate holiday pay for a part time worker whose hours increase during the year.

Episode 84

A review of three recent cases covers the recent Supreme Court decision on implied terms in contracts, an EAT decision on an exception to the normal TUPE rules and an Employment Tribunal case on a disability discrimination claim by an applicant for a job.

Special episode

In a Christmas special podcast Nick is joined by Kayne Jonsson and Victoria Johnson from the employment team who identify their top 12 cases for employers in the UK, and why these cases are particularly important.

UK Employment Law: for HR and in-house lawyers

LinkedIn

Join the discussion on LinkedIn

Our LinkedIn group is an excellent source of up-to-date employment law knowledge. We'd like to encourage you to post your own relevant discussions and contribute your own comments on the discussion page.

"Improper influence" from HR may lead to an unfair dismissal

Decision: In *Ramphal v Department for Transport* which was heard in the Autumn, the EAT looked at HR's influence on the decision to summarily dismiss an employee for gross misconduct. Whilst the investigating officer found that there was misconduct on the part of the employee, he did not believe it warranted dismissal. Instead he recommended a final written warning. Following an extensive period of communication between the investigating officer and HR, his findings changed to gross misconduct and summary dismissal. The employee brought a claim for unfair dismissal. This failed in the Tribunal. However, the EAT allowed the employee's appeal and the case was remitted to the same Tribunal to consider whether the influence of the HR team had been improper, and if so, whether this had had any material effect on the investigating officer's ultimate decision. The remitted hearing is expected to be heard in 2016.

Continued impact: The EAT's decision suggests that HR's advice in disciplinary decisions should be limited to law and procedure, unless the employer's disciplinary process provides for them to take an active role in the substantive decision. Where it is clear that HR has strongly influenced a disciplinary decision, there is a risk that this will taint the fairness of any dismissal. It is unclear from this case the extent to which a decision maker can ask for advice or assistance in coming to his/her decision. The fact that the case has been remitted indicates that it was not necessarily unfair for HR to act the way they did in this case. Whilst we wait for the Tribunal's decision next year, employers should consider carefully the extent to which their HR advice goes beyond policy and procedure and, if it does, whether this is consistent with the provisions of the disciplinary policy. In cases where advice goes beyond policy and procedure and this is not contemplated by the disciplinary policy, consider whether the advice should be given by a lawyer to allow it to be argued that legal privilege applies to avoid having to disclose the advice.

Ramphal v Department for Transport

Scope of associative discrimination claims widened?

Decision: *CHEZ Razpredelenie Bulgaria C-83/14*, heard by the European Court of Justice, involved a claimant who owned a shop in a district where the electricity provider installed electricity meters at an increased height compared to other districts. This was to avoid people tampering with the meters. The district was predominantly inhabited by people of Roma ethnicity and although the claimant was not of Roma origin herself, she claimed that Roma people were disproportionately affected by the electricity provider's policy since they were unable to monitor their electricity usage (as a result of the height at which the meters were located) and she suffered the same disadvantage. The ECJ confirmed that the electricity company's policy was discriminatory, even though it applied equally to non-Roma living in the district as well as those of Roma origin. It has been well established in the UK

30 seconds with...

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How long have you been at Mayer Brown?

It's been so long I've lost count of the years!!

What is the best thing about your job?

Definitely the people!

What job would you be doing if you weren't a legal secretary?

I always wanted to be a teacher in a primary school after work experience in a nursery when I was 16.....I'm not sure what happened to that?

What is your favourite item of clothing?

A horrible worn out green parka coat... my family hate it and I refuse to throw it... it's just so warm!

What super-power would you like to have and why?

To be invisible – this is for two reasons to be nosy (obviously!) and to annoy people by moving their things around...

that an associative discrimination claim can be brought in relation to direct discrimination. However, it is in relation to indirect associative discrimination that this decision is radical.

Continued impact: Although this decision relates to the supply of goods and services, it may have a significant impact on discrimination law under the Equality Act 2010 (the "EqA"). This decision blurs the lines between direct and indirect discrimination in relation to the tricky area of associative discrimination. It would appear that s19 of the EqA is out of step with the UK's European obligations since it restricts claims of indirect discrimination to those claims where individuals share a protected characteristic with a group who are disadvantaged by a particular provision, criterion or practice (i.e. it does not allow claims of indirect discrimination by association). This means that Tribunals will be invited to read words into the EqA to disapply that particular requirement or work around it so that it will be sufficient for an individual to show that they have suffered alongside the disadvantaged group even if they do not share the same protected characteristic. This decision widens the class of who will be able to claim for unlawful indirect discrimination. Employers will need to think carefully about how a group of individuals might be disadvantaged, even if they do not possess the characteristics protected by the EqA.

CHEZ Razpredelenie Bulgaria C-83/14

What is going to be happening in 2016?

When does the duty to consult collectively under Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") arise?

Awaited decision: The *USA v Nolan* case has been long running but the key question employers are eagerly awaiting still remains unanswered i.e. when does the duty to consult collectively arise? The case has been remitted back to the Court of Appeal which will decide this question. The Court of Appeal is expected to rule on whether the obligation to consult collectively arises when an employer proposes to make a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or whether the obligation only arises once the employer has actually made that strategic decision and is proposing redundancies. Watch this space.

USA v Nolan

Upcoming Events

Our event programme is now finished for 2015. We hope you were able to attend those of interest and relevance you.

If you would like copies of any of the slides, please click on the links below.

18 Nov - Social Media & HR Process Perfection

15 Oct – Managing an International Workforce

21 May – Crunch Time for Employee Status

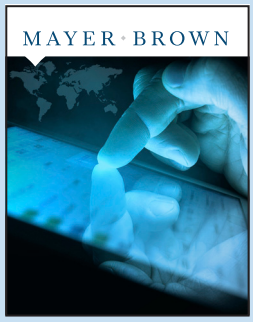
12 May – Insolvency & Employment: To Woolworths and Beyond

30 Apr – Looking Back, Looking Forward

28 Jan – Shared Parental Leave: The Legal Framework

If you have suggestions for seminar topics for our 2016 programme, please don't hesitate to email Stephen Hamilton-McLeod (Senior Business Development Executive) at smcleod@mayerbrown.com.

Global Tools & Resources



Click here to view our range of global tools and resources which highlight topical workplace issues across multiple jurisdictions , including our global guides, traffic lights and app.

Employment Tribunal fees challenge to go to the Supreme Court

Awaited decision: Unison's challenge against the introduction of Employment Tribunal fees continues. Earlier this year the Court of Appeal dismissed Unison's appeal against two High Court decisions on judicial review of the fee regime. Following that decision, Unison has applied for permission to appeal to the Supreme Court. A separate review into how effective the introduction of fees has been at meeting the original objectives, while maintaining access to justice is also being carried out by the Ministry of Justice. Consultation on any proposals for reforms to the fees and remissions scheme would follow and so this is an area to watch in 2016.

R (Unison) v Lord Chancellor and anr

Equal pay and gender pay gap reporting

Since the EqA came into force, the government has had the power to introduce regulations requiring employers to publish information about the difference in pay of male and female employees. To date, this has not been implemented, and gender pay gap reporting has only been done on a voluntary basis, although very few employers have published any such information. The Government is however required to introduce regulations providing for compulsory gender pay gap reporting for employers with at least 250 employees by 26 March 2016. The Government have recently announced that gender pay gap reporting will include information on bonuses and be extended to cover public sector employers but no draft regulations have yet been published.

The practical impact of this change is yet to be determined without sight of the draft regulations or the results of the consultation on point which concluded in September. Ahead of time, employers with more than 250 staff should start thinking now about how their statistics will look and how information could be presented. A crude comparison of male v female pay is almost certain to show a significant pay gap and adopting a more sophisticated approach (for example breaking information down by grade or function) could present a much more balanced picture and show a much reduced or, ideally, non-existent pay gap.

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

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