RMI Employment Law Bulletin Spring 2018

Welcome to the Spring Edition of the RMI Bulletin. In this update we aim to keep you up to round up some of the latest developments in employment law. Whilst this is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers.

Legislation

It is that time of the year again, from April 2018 the National Living Wage and the National Minimum Wage will be increasing.

Year	25 and over	21 to 24	18 to 20	Under 18	Apprentice
April 2017 (current)	£7.50	£7.05	£5.60	£4.05	£3.50
April 2018	£7.83	£7.38	£5.90	£4.20	£3.70

Case law developments

Whistleblowing

Whilst Whistleblowing has been an increasingly difficult area for employers over recent years, a recent case from the Employment Appeal Tribunal gives some comfort.

For many years a worker had to demonstrate 'good faith' in making a whistleblowing disclosure and this helped to protect employers from employees who were raising allegations simply as a means of revenge. Legislative changes some years ago removed the requirement for good faith when deciding liability. This meant that if an employee made a whistleblowing claim that satisfied the other criteria, the fact that it was brought in bad faith did not necessarily mean that the claim could not succeed against an employer. The issue of good faith now is relevant only to remedy (i.e. how much the employee might be awarded) rather than liability itself.

A case recently however has re-emphasised that, even in the present legislation, there is still the requirement that a worker believes that the disclosure is made in the public interest for it to be successful. In *Parsons v Airplus International Ltd* the Employment Appeal Tribunal has made clear that where an employee only had her own self-interest in mind when

making disclosures, rather than any belief that they were actually being made in the public interest, that was not protected.

It is possible that a disclosure made in a worker's self-interest may also be in the public interest and thereby protected, but in this case, there was a finding that an employee had no genuine belief that it was in the public interest and so the claims failed. The fact here that the employee hypothetically believed that they might have been in the public interest did not help her, when in fact she did not hold that belief at the time.

The case is good news for employers and reminds us that, although the good faith element in the previous legislation can no longer be relied upon, the requirement for public interest in the disclosure to some extent mitigates against an employee making disclosures for purely selfish reasons.

Employer's knowledge of employee's disability

The Court of Appeal has confirmed the importance of knowledge in a disability discrimination case.

To be liable for disability discrimination a Claimant would have to show not only (a) that they are disabled within the meaning of the Equality Act 2010 (which has its own specific definition), but also (b) that the Respondent employer knew or ought to have known (i.e. have constructive knowledge) of the disability.

In assessing this question, a previous case *Gallop v Newport City Council* confirmed that an employer cannot simply 'rubber-stamp' an unreasoned occupational health assessment of disability and rely upon that to argue it did not know of the disability.

In a case recently *Donelien v Liberata UK Ltd* the Court of Appeal found that an employer, on the facts before it, should not have been treated as knowing that an employee was disabled when the medical evidence wrongly regarded that employee as not disabled.

In *Donelien* the Tribunal held as a finding that the Claimant was, in fact, disabled within the meaning of the Equality Act, but that the employer was not liable because they did not know, and could not reasonably have been expected to know, of the disability. In *Donelien* the employer had taken reasonable steps to assess the employee's condition and had not simply 'rubber-stamped' the occupational health report, as had happened in Gallop. It relied upon an occupational health report stating the employee was not disabled, but also took into account return to work meetings and letters from the employee's GP in the assessment.

The case is therefore good news for employers who are defending disability claims where the employer did not know and could not reasonably be expected to know the employee's condition was serious enough to constitute a disability. It confirms that an employer who has taken reasonable steps to assess the employee's condition and concluded that the employee was not disabled should not be liable, even if a later Judge at a Tribunal takes a different view.

Perceived disability discrimination

In a recent case law development, the Employment Appeal Tribunal (EAT) has provided a sobering reminder to employers of the extent of the protected offered by the Equality Act in respect of disability discrimination. In *Chief Constable of Norfolk v Coffey* the EAT affirmed that it can be direct disability discrimination if a non-disabled job applicant is rejected because of a perception that a condition could become a disability in the future.

In the case the Claimant who was a serving Police Officer in the Wiltshire Police Force applied for a transfer to another force. She had a degree of hearing loss. Norfolk Police rejected her transfer request because of concerns she might end up on restricted duties should her hearing deteriorate. The tribunal found the decision was direct discrimination based upon a perception that the Claimant would be disabled in the future. The hypothetical comparator for disability purposes would be a candidate whose condition was not perceived as likely to deteriorate. The EAT considered there would be a gap in the protection offered by Equality law if an employer wrongly perceiving that an employee's impairment might well progress to the point where it affected his work substantially could dismiss him or her in advance to avoid any duty to make allowances or adjustments.

The case reminds employers that protection from disability discrimination therefore applies to job applicants (i.e. those who are not yet employees) and those who are not yet disabled within the meaning of the Equality Act.

Case Studies

Suing employee for breach of contract

> *"I have an employee, John Smith, who walked out of the office on Monday of last week having cleared his desk and removed all his possessions. Next day we received a letter saying that he had resigned with immediate effect. His employment contract states that he has to give us 3 months' notice.*
>
> *We have made enquiries and there was absolutely no reason for him to walk out without giving the requisite notice period. We suspect he has found alternative employment and wants to join his new employer as soon as possible.*
>
> *Is there anything we can do?"*

The first thing to establish is whether he was legally entitled to walk out without giving the contractual 3 months' notice.

The only basis upon which he could resign with immediate effect would be if he could establish that the employer had fundamentally breached his contract of employment. It is important to remember that this is an objective test, i.e. would a reasonable person fully aware of the facts, think that the employer had breached the contract of employment.

Contrary to popular belief this is quite a difficult hurdle for the employee to establish. The employee has to show that the employer has done something fundamentally wrong in order to establish a breach. Thus, minor issues would not be sufficient.

In these circumstances on the facts of this case, the employee as a matter of law should have given 3 months contractual notice.

The employer therefore is entitled to sue the employee for damages for the failure to abide by the employment contract terms. Damages would normally be either losses incurred by the employer in terms of extra locum costs, or indeed damages for loss of business or reputational damage. The burden would be on the employer to establish the extent of damages.

Conclusions

This advice is general in nature and it will need to be tailored to any one particular situation. As an RMI member you have access to the RMI legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

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