RMIF Employment Law Newsletter
Winter 2018

Welcome to the Winter Edition of the RMIF Newsletter. In this update we aim to give you a round-up of 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.

In The News

GDPR: Employee imprisoned for unlawfully accessing personal data

Companies have been under a duty to protect personal data for over 20 years. However, with GDPR coming into force 25 May 2018 and Data Protection Act 2018 increasing these protections and setting a new standard, data protection has been in the forefront of the industry over recent months.

On 12 November the ICO released details regarding the prosecution of a motor industry employee under the Computer Misuse Act 1990 (more details can be found here).

In this case a rogue employee of a Bodyshop had been using the company access to the Audatex system to remove personal data using a colleague's log-in details. The employee would then sell the details to accident management companies resulting in nuisance calls and complaints This conduct had continued for over 9 months, even after he left the first bodyshop, and only came to light when the first bodyshop concerned noticed a sharp increase in complaints regarding customer data and reported the issue to the ICO.

After an investigation the employee concerned was charged with securing unauthorised access to personal data between 13 January 2016 and 19 October 2016 and was sentenced at Wood Green Crown Court in North London to 6 months imprisonment.

The employee concerned is now also the subject of proceedings under the Proceeds of Crime Act, which could result in the recovery from the employee of any benefit obtained as a result of the offending.

Mike Shaw, Head of Criminal Investigations at the ICO, said:

"Although this was a data protection issue, in this case we were able to prosecute beyond data protection laws resulting in a tougher penalty to reflect the nature of the criminal behaviour…

Data obtained in these circumstances is a valuable commodity, and there was evidence of customers receiving unwarranted calls from claims management companies, causing unnecessary anxiety and distress.

The potential reputational damage to affected companies whose data is stolen in this way can be immeasurable. Both Nationwide Accident Repair Services and Audatex have put appropriate technical and organisational measures in place to ensure that this cannot happen again."

Conclusion

With GDPR and data protection being in the forefront of the industry recently this is an important case and provides some interesting guidance; both as a warning and a reassurance, for businesses who may have been caught out by rogue employees.

This is a landmark case as the ICO has, for the first time, used the Computer Misuse Act 1990 to deal with a data breach, thereby giving the courts a wider range of sentencing powers. With this case the ICO appears to be signalling that they will use all the tools at their disposal to deal with data breaches where they result in a significant impact on data subjects.

What is reassuring is that the ICO does not appear to have taken action against either the bodyshop concerned or Audatex. Both organisations co-operated with the investigation and took steps to secure data going forward. This is good news for common sense.

Members are under a duty to take reasonable steps to minimise the personal data held and to secure the same whilst in their possession. We would strongly advise that any RMI members who have not reviewed their data processing or security processes recently consider doing so. Remember, as an RMI member you have access to lawyers who specialise in the motor industry as well as precedent documents and other resources designed to give you a head start when constructing your own policies and procedures.

Parental Bereavement (Leave and Pay) Act 2018

In UK employment law the rights of an employee to paid time off to deal with a family emergency is quite limited. Certain types of statutory leave such as maternity, paternity and shared parental leave have pay provisions but when for example a close relative dies or there is some other serious family crisis, employees have to rely upon a limited right to unpaid time off to deal with the emergency.

In one particular area, the death of a child, this has always been considered woefully inadequate. The Government has now proposed to fill this hole by introducing the Parental Bereavement (Leave and Pay) Act 2018. This has now received Royal Assent.

Under the new laws there will be a right to two weeks of time away from work for those employees who have lost a child aged under 18. The full Regulations will follow which will contain, amongst other matters, details of how much pay will be payable during the leave.

The Government has said it anticipates bringing the Act fully into place by April 2020.

Case Law Updates

Sexual orientation discrimination: Christian Bakers and Gay Cakes

One of the more unique discrimination cases in recent years has finally come to a definitive conclusion follow the ruling of the Supreme Court the case of in *Lee v Ashers Baking Company Ltd and Others*.

Ashers Baking Company is a family-owned business with strong Christian beliefs, particularly regarding gay marriage. Mr Lee asked them to bake a cake with a photo of Bert and Ernie from Sesame Street and the wording 'Support Gay Marriage'. Asher's Baking Company declined to bake it due to their religious beliefs, and Mr Lee consequently brought a discrimination claim through the Northern Irish courts. The court therefore had to decide whether Mr Lee had been directly discriminated against due to his sexual orientation by the bakers' refusal to bake a cake.

The case succeeded at first instance and before the Northern Irish Court of Appeal. The ruling by the Supreme Court therefore provides good guidance. The court ruled that as the refusal by Asher's Baking Company to bake the cake was not because of Mr Lee's sexual orientation, which was irrelevant to their decision and the decision not to bake the cake was not direct discrimination in the ordinary sense.

The Supreme Court was also not satisfied that this was associative direct discrimination as a result of Mr Lee's likelihood to associate with the gay community. For associative discrimination to succeed there needed to be an association with particular persons, and discrimination due to that association. That was absent in this case. That the message had something to do with sexual orientation of some people was not sufficient to make out the claim.

When considering their decision, the Court relied heavily on the rights relating to religion and expression under Articles 9 and 10 of the European Convention on Human Rights. These rights include an entitlement not to be forced to express a political opinion in which you do not believe. Infringement of those rights could not be justified by an obligation to supply a cake iced with a message with which the bakers profoundly disagreed.

As motor traders, we are unlikely to be selling many cakes. However, this case does set important principles that will apply in claims of discrimination going forward.

Time limits for Employment Tribunal Appeals

The Employment Tribunal operates under a strict timeline. As with all courts these timelines can be waived or extended. In the recent case of The Governing Body of Tywyn Primary School v Aplin, The Employment Appeals Tribunal (EAT) was asked to consider whether a strict approach was required when considering cross appeals.

Mr Aplin initially succeeded before the tribunal. The Respondent appealed and was given permission to appeal. The usual EAT order requires an Answer and Notice of Cross-Appeal to be filed by the same deadline. Mr Aplin applied for an extension of time of 2 weeks over Christmas to "file documentation for the appeal hearing". The EAT Registrar treated that as an application to extend time to file the Answer but not any Cross-Appeal. Time was extended for the Answer only, though that was not clear from the written order.

Mr Aplin filed an Answer and Notice of Cross-Appeal at the same time as each other. This was filed in the extended time for the Answer but out of the original time limit for the Cross-Appeal. The Registrar refused an extension of time stating that there were strict time limits and that extensions for both appeals and cross-appeals were not granted except in "rare and exceptional cases".

The EAT held that this strict approach was incorrect. In making their decision the EAT said:

> *"the analysis of the nature of a cross-appeal and the practical and policy reasons why such a step is reactive [to an appeal]...illustrates why in my judgment the strict approach to time limits for initiating an appeal do not apply to cross-appeals...There is only a cross-appeal if an appeal has been initiated. It would be wrong to reason that because a Respondent [to an appeal] has had an ET Decision for some time they should be bound by the strict approach to timing which applies to appeals."*

Whilst this may be one for the HR specialist, it is one to note as it is not uncommon for employees to appeal any decisions should the employer succeed. We would strongly advise that any RMI member seeks advice from a specialist employment lawyer as soon as the appeal is received in order to avoid the issue entirely..

Investigations and unfair dismissal

A key element in any fair dismissal of an employee with over 2 years' service is that the employer must follow a fair procedure and conduct a reasonable investigation into any allegations, especially where misconduct is alleged. Such an investigation includes gathering all relevant evidence that it is reasonable to investigate. The investigation does not have to be perfect, but within a band of reasonable investigations that another employer could have undertaken in the circumstances. The extent and depth of the investigation also clearly depends upon the seriousness of the matters being investigated.

In the case below, the Employment Appeal Tribunal (EAT) supported an employer when it failed to take some evidence from potential witnesses. It concluded that the employer was reasonable in excluding such evidence, under circumstances where the excluded evidence could not have really changed the employer's view.

In Hargreaves v Manchester Grammar, Mr Hargreaves was a teacher with an unblemished record until it was alleged that he had grabbed a pupil, pushing him against the wall and putting his fingers to the pupil's throat. He was dismissed. The tribunal found the dismissal fair. Mr Hargreaves appealed to the EAT, contending the employer's investigation was inadequate, given the career-changing impact of the allegation. Also, the employer had failed to disclose to the disciplinary panel evidence from potential witnesses who had said they had seen nothing.

The EAT dismissed the appeal. The tribunal had correctly directed itself as to the higher standard of investigation that might be expected, given the very serious nature of the allegation. It was within the band of reasonable responses to decide not to put forward to Mr Hargreaves and the disciplinary panel details about interviews with those who had seen nothing. It did not follow that, because those individuals had seen nothing, nothing had happened. The tribunal permissibly concluded the employer had reasonably formed the view that the excluded evidence was immaterial and could not assist.

The tribunal was entitled to conclude the employer had conducted a fair investigation and that the dismissal was not unfair.

Comment

The above case shows there is some degree of latitude for employers in such matters, however employers should generally be careful to investigate with all potentially relevant witnesses and that remains the safest option. Employers must remember that, in any investigation, they are looking for all the evidence (not only evidence that supports the charges against the employee).

Case Studies

Unfair Dismissal

> *Is it necessary to hold a meeting with an employee before dismissing them for some other substantial reason?*

An employer can rely upon a number of potentially fair reasons to dismiss an employee under the Employment Rights Act 1996. In addition to the usual grounds, such as capability, conduct and redundancy, the Act allows a further potentially fair reason under Section 98(1)(b) which is a "catch all" called "some other substantial reason" or "SOSR". Under this heading an employer can justify a dismissal which does not fall neatly into some of the other categories, provided the reason is genuine and substantial.

In the reported case below, the employer proceeded to dismiss for this reason without holding a meeting and the question therefore was whether that dismissal was necessarily unfair, because of the absence of such a meeting? Was it always necessary to hold a meeting before dismissing?

Not always, held the EAT, in *Hawkes v Ausin Group (UK) Ltd.*

The Claimant was a reservist with the Marines. He signed up (voluntarily) for a 7 week overseas call up. His contract of employment permitted a week's unpaid holiday per year for his reserve duties. Mr Hawkes informed his employer that he would need 7 weeks' leave in order to complete the call up. After some enquiries, Ausin Group found out that the call up was not mandatory and did not want him to go ahead with it.

Once the Respondent realised that the Claimant had chosen to go, despite the call up not being mandatory, he was summarily dismissed.

The EAT held that this was not a misconduct case where it would usually be considered necessary to hold a meeting in order to consider the employee's explanations. It said this was a dismissal for some other substantial reason. In that context, it was open to the tribunal to make a finding of fact that a meeting would not have changed the position because of the Claimant's firm commitment to the exercise. Accordingly the process followed, with no meeting, was not necessarily unfair.

This case is fairly fact-specific. It should not be taken by employers in the motor industry to mean that a meeting before dismissal, when an SOSR dismissal is contemplated, should always be dispensed with. It does confirm that in some circumstances the absence of a meeting does not always render a dismissal unfair.

Managing Return To Work

> *"We have had a member of staff come back from maternity leave in June. Following a request from her to reduce her hours, her role in the company also changed. Where do we legally stand if the hours she now works do not suit the needs of the business? She works Wednesday, Thursday and Friday mornings but our busiest times are Monday and Friday afternoons. Her hours therefore could cause us issues going forward. In addition, since her return she has had a bad attitude, complaining that she is doing more work than others and this is affecting morale."*

A change in hours following a flexible working request is a permanent change. If you need to change her hours now you will ultimately treat it as a variation of terms and conditions. Consult with her and seek her consent to enforce the change.

If she refuses to accept the change and the business cannot continue this status quo (which could be exploring whether you can find alternative employees to carry out the busy periods) then there are two options;

1. Enforce the change as unilateral change
2. Dismiss and seek to re-engage on the new terms.

Both carry risks, as with the first it would risk a breach of contract if consent is not given. If the employee has more than two years' service, she could resign and claim constructive dismissal. With the second option, clearly as there is a dismissal then she could not accept the re-engagement and claim unfair dismissal. Due to the risk therefore, it is best to try to

seek the employee's consent, explaining the problems caused to the business in relation to her working hours against the needs of the business and see if you can obtain consent.

In relation to the bad attitude, this can be addressed either informally or formally. If you decide to take it as a more formal route then you should follow your disciplinary procedure and if this is the first case where there have been problems with her, and there is no other live warnings on her personnel file, it is likely to result in a first stage warning, i.e. either a verbal warning or a written warning subject to what your policy provides.

Transfer of Undertakings (Protection from Employment) Regulations 2006 with an asset purchase

> *"We are looking to purchase the trade and assets of another existing business. As we are not interested in purchasing the Company itself, what is our liability to the employees currently employed in that business?"*

Although you are only looking to purchase trade and assets, the purchase may still fall under the TUPE Regulations 2006.

The TUPE Regulations are an important part of UK labour law. When they apply can be complicated, but where they apply they protect employees whose business is being transferred to another business. Failure to consider them can lead to significant financial penalties of the businesses concerned.

When do they apply?

A relevant transfer can occur when a business or part of a business (and or undertaking) is transferred from one employer to a new employer as a going concern i.e. there is a transfer of an economic entity which retains its identity after the transfer.

An 'economic entity' means an organised group of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. In deciding whether there has been a relevant business transfer, the crucial question is whether or not there is a transfer of an economic entity which retains its identity after the transfer and is carried on by the transferee. In answering that question, all the factual circumstances will be considered, including:

- The type of business;
- Whether tangible assets such as premises, assets and equipment are transferred – although a relevant transfer may still take place even where no property is transferred to the transferee by the transferor;
- Whether intangible assets such as goodwill and customer lists are transferred;
- Whether the majority of employees are taken over by the transferee and, if not, the motive of the transferee in not taking them on;
- The degree of similarity between the activities carried on before and after the transfer; and
- Whether there has been any break in the performance of the activities.

Whether TUPE applies to a particular business transfer is not a simple question to answer since each case will turn on its own facts and ultimately, it will be a matter for an employment tribunal to decide if there is a disagreement between the parties.

TUPE does not apply to:

- The transfer of shares in a company. This is because when a company's shares are sold to new shareholders, there is no transfer of the business – the same company continues to be the employer. In short, for TUPE to apply, the identity of the employer must change.
- The transfer of empty premises or assets only (for example, the sale of office equipment alone would not be covered, however, the sale of a business as a going concern which includes the equipment would be covered).
- The situation where a client buys in services from a contractor in connection with a single specific event or task of short-term duration i.e. a one-off contract rather than the two parties entering into an ongoing relationship for the provision of the service. There is no statutory definition of what exactly constitutes 'short-term duration'.
- Arrangements between client and contractor which are wholly or mainly for the supply of goods for the client's use.

If your purchase involves a going concern then the safer legal approach is to assume TUPE does apply, and look to inform and consult in the usual way. If you expect to re-employ the staff then it would be prudent to proceed under TUPE.

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

Motor Industry Legal Services (MILS Solicitors) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.