RMI Employment Law Bulletin
Autumn 2018

Welcome to the Autumn Edition of the RMI Employment law email bulletin. Please note: In this bulletin we aim to keep you up to date on some of the latest developments in employment law and although the bulletin 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.

This season we have been searching for interesting developments in employment law (and those which don't involve gay bakers)! Whilst the GDPR is less prevalent in employment law news this season (a welcome relief) there have been some announcements in the news that may affect employers and some interesting case law on Tribunal time limits and discrimination:

News

- **Post Brexit Immigration**
- **Law Commission Consultation on reforming employment law**
- **Parental bereavement (leave and pay) Act 2018**

Case law update

- **Time limits, when a tribunal decision is sent to the wrong address**
- **Establishing disability**
- **Causation in discrimination arising from disability**

In the News

Post Brexit Immigration

The Migration Advisory Committee (MAC) has published a report of recommendations for the UK post Brexit immigration system. It recommends making it easier to hire skilled workers who migrate to the UK than lower skilled workers and suggested giving no preferential treatment for EU citizens. It also recommended abolishing the current cap on sponsored work visas under tier 2 (general visas). It is reported that the cabinet unanimously agreed with the recommendation for a principle of no preferential treatment towards workers from the EU. Of course, with the present uncertainty regarding Brexit and the future of this Government, nothing unfortunately is guaranteed.

Consultation Paper reforming employment law hearing structures

The Law Commission has issued a consultation paper on reforming employment law. The issues on which it was seeking views include :-

1. Extending limitation periods in Employment Tribunals, mostly to 6 months from the present 3 months (plus ACAS extensions).

2. Raising or removing the £25,000 breach of contract claims and allowing Tribunals to hear breach of contract claims whilst the employee is still employed (at present such claims have to be brought in the County Court).

3. Proposals to allow multiple Respondents to seek contributions from each other.

The Law Commission is an advisory body only, but its recommendations are often taken seriously by the Government, so these proposals may yet be in future legislation.

Parental Bereavement (Leave and Pay) Act 2018

It has been announced that the Parental Bereavement (Leave and Pay) Act 2018 has received royal assent. This will provide a right to two paid weeks of time away from work for those employees who have lost a child aged under 18.

Will await further Regulations. It is anticipated the Government wants to introduce the Act fully by April 2020.

Comment

The rights to paid time off for family emergencies, or the death of close family members is severely lacking in the UK and many agree that this Act will provide better support for anyone in such tragic circumstances.

Case Law Updates

Sending an Employment Tribunal Decision to the wrong address

Time limits for appeals run from when a Tribunal decision is sent to the parties, but what happens if it is sent to the wrong address? Is it still deemed to be sent to the parties?

The Court of Appeal held yes in *Rana v London Borough of Ealing.* In 2 joined cases before the Court of Appeal, the Tribunal Decisions were erroneously sent to a former representative, i.e. the wrong address. The Court of Appeal held that what matters is when the Decisions were sent. If time runs from the date of despatch this is, from a practical point of view, inherently more certain than the date of delivery.

If however a Judgment has not come to the attention of a party through no fault of their own or their representative, it would be unfair that time should be running before they became aware of it. The recourse here was therefore that the Tribunals had a discretion to extend time under a different rule (rule 37) so that parties in such circumstances would have to rely on this discretionary power.

Disability Discrimination: Establishing Disability

Under the Equality Act 2010 an employee has the burden of proof to prove that he or she has a condition which satisfies the test under the Equality Act and has to lead with evidence.

In *Mutombo-Mpania v Angard Staffing Solutions Limited* the Employment Appeal Tribunal (EAT) said an employee cannot prove disability without leading with evidence on the impact of the medical condition on his or her normal day to day activities. They further went on to find that the employer in this case did not have constructive knowledge of disability on the facts, partly because the employee denied having one.

On the facts here, the employee did not indicate disability on any application form and failed to disclose it on a health form. He went on to say that he had hypertension which necessitated him avoiding regular night work. He said his symptoms included headaches, fatigue, breathing difficulties and lack of confidence. The Claimant however provided no evidence to the Tribunal of the dysfunctional impact of this alleged impairment on his day to day activities and it was held that he therefore failed to discharge the burden of proof. On the issue of knowledge of disability, the Tribunal found vague reference to a "health condition" was not enough for constructive knowledge. The employee had not done enough to alert the employer to his condition and the seriousness of the same. Furthermore, the employee had previously worked nightshifts before and had denied having a disability, so the employer was not fixed with knowledge to be liable.

All such disability cases turn on their own facts, but this one was welcome news for the employer.

EAT confirms looser causation tests for discrimination arising from disability

A form of disability discrimination under the Equality Act (Section 15 of the Equality Act 2010) involves the concept of "something arising in consequence of disability". This is a very common claim in a Tribunal. Such discrimination occurs when, for example, although the dismissal/treatment is purportedly on the ground of some other aspect, e.g. conduct or capability, that conduct or capability is nevertheless related back and arises from the disability.

In *Sheikholeslami v University of Edinburgh* the Scottish EAT has confirmed that the test for this form of discrimination entails a looser connection than a strict causation test and may involve more than one link in a chain of consequences.

The facts were complicated, but involved a University Professor who was suffering from work related stress and depression. She was dismissed when she couldn't return to work. The Tribunal originally found that the employer was not liable because she was dismissed not because she was absent, but rather because she was unwilling or unable to return to work in her existing post and the Tribunal found there was no cause or connection between this refusal to return and her disability.

The decision was overturned however by the Employment Appeal Tribunal on appeal. The Tribunal applied a too stricter test of causation to the question of whether the University had mistreated the Professor because of something arising in consequence of the disability. The Tribunal had identified the key issue as being whether the employee's refusal to return to her existing role was because of her disability or for some other reason such as having been badly treated in the department. The EAT said however this was not a binary question, both reasons could have been at play. What if her disability had caused her to experience anxiety, stress and an inability to return to the place where she perceived the mistreatment and hostility to be located, leading to the refusal to return?

The critical question the EAT said was whether, on the objective facts, her refusal to return arose in "consequence of" rather than being "caused by" her disability. The EAT then applied similar reason to the reasonable adjustments claim and allowed the appeal.

Comment

This is a worrying case for employers. We have reported (in previous updates) on the increasing difficulty for an employer to argue, if there is a disability and the employer is aware of that disability, that another reason, e.g. conduct / capability, is the reason for dismissal, rather than any form of discrimination.

Employers should therefore be aware that matters, which seem like straightforward capability or conduct issues, may be argued to have been affected by a long-term health condition and accordingly employers could be liable in such circumstances.

Don't forget, this advice is general in nature and 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.

Michael Simpson
Solicitor
Motor Industry Legal Services

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