RMIF Employment Law Bulletin
Summer 2018

Welcome to the Summer Edition of the RMIF Employment bulletin. 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.

In this seasons update, whilst many RMIF members continue to wrestle with the introduction of the GDPR and drafting continues apace, we have decided in this update to review some recent case law updates, including the recent high publicity Supreme Court decision in the case of Pimlico Plumbers v Smith which will have wide ranging implications for employers, particularly those reliant on subcontracting. We then go on to look at Employment Appeal Tribunal guidance on the right to appeal and finally a case which considers the distinction between what amounts to a mere "allegation" and what more is required for a "protected disclosure" in whistleblowing claims.

Case law updates

Employment Status

Many important employment rights are only given to employees. For example, only persons with the status of 'employee' can claim unfair dismissal, maternity leave and redundancy rights.

Not all people who work for others are considered to be employees. Some fall instead into the wider category of 'workers' (who have a different set of employment rights e.g. unlawful deduction of wages, national minimum wage, holiday pay, discrimination, whistleblowing and pension auto-enrolment) and some work for others, but remain independent contractors.

Facts

The recent Supreme Court decision of *Pimlico Plumbers Ltd v Smith* confirmed that a plumbing operative who was engaged in an agreement which described him as self-employed was actually undertaking work personally for the company such that whilst he did not work under a 'contract of employment' he was still a 'worker'. The Court unanimously dismissed the employer's appeal against the previous decisions of the Employment Tribunal, EAT and Court of Appeal which had all previously held that he was a worker.

The Court reached this conclusion after considering two principal factors – whether Mr Smith had undertaken to personally perform his work or services for Pimlico, and whether Pimlico was neither his client nor his customer.

The terms of the contract clearly envisaged performance by Mr Smith personally, referring to his skills, competence, conduct and appearance. The Court found that whilst Mr Smith had the contractual right to appoint a substitute, the limitation of it was significant in that the substitute had to come from the ranks of Pimlico's operatives. In view of this the Court held that the Tribunal was entitled to hold that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance.

The Court found that features of the contract, such as Pimlico's tight control over Mr Smith's attire and the administrative aspects of any job, the severe terms as to when and how much it had to pay him, and the suite of covenants restricting his working activities following termination, meant that the Tribunal had been entitled to conclude that Pimlico could not be regarded as a client or customer of Mr Smith.

This is another important decision around the 'gig economy' and is consistent with previous Tribunal decisions around Uber drivers, Addison Lee bicycle couriers, CitySprint couriers and Hermes couriers.

Comment

The employers in this long running saga were understandably annoyed that Mr Smith and similar workers could "have their cake and eat it" in the sense that they could have benefitted from the preferential tax treatment for many years working on self-employed arrangements, whilst now also claiming worker rights. The issue of employee status is something of a mess in UK employment law and is something that really needs a statutory review. In the motor industry, the case may have ramifications in particular sectors, where employers purport to use self-employed relationships, e.g. cleaning, valeting and driving.

Rights of Appeal

Is it fair to refuse to give a right of appeal against dismissal where the employer has reasonably (but mistakenly) reached the conclusion that an employee has no right to work in the UK?

This was a question considered by the Employment Appeal Tribunal (EAT) in *Afzal v East London Pizza Ltd.*

Facts

The Claimant had the right to work in the UK but failed to produce evidence before the end of his limited leave to remain in the UK expired. On the day the leave would have expired Mr Afzal sent an email to his employer with evidence of his application to the Home Office which automatically extended his right to work. Unfortunately the attachments with the evidence could not be opened and the Respondent dismissed the Claimant because of the risks involved, not least to avoid any civil and criminal penalties under the Immigration Asylum and Nationality Act 2006.

When dismissing the employee the employer failed to offer the right of an appeal and argued in the Tribunal that there was nothing to appeal against, as new evidence they said would not have undermined the reasonableness of the Respondent's belief at the time of the dismissal.

The EAT rejected that argument holding that the whole process, including the appeal was relevant to the question of fairness. It was held that given the production of evidence of right to work could have happened during an appeal process in various ways the contract could have been revived "without fear of prosecution or penalty".

Comment

There are occasionally, particularly with short serving employees, reasons not to offer an appeal particularly where an ex-employee is particularly vexatious or difficult and is short serving and there are no grounds for claiming discrimination for automatically unfair dismissal. This case however reiterates the general importance of an appeal process as part of the disciplinary procedures and how important the appeal process can be. It is important to remember that, as an employer, an appeal can often "cure" problems / defects with any dismissal.

Protected Disclosures / Whistleblowing

In whistleblowing, to be protected an employee must show they have made a "protected disclosure". It has been held in the past that for any disclosure to be protected it must contain information which, in the belief of the worker making the disclosure, is in the public interest and tends to show breach of one of the factors listed in the Employment rights Act 1996 :

a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

A key issue in case law has been what constitutes "information" for the disclosure to be protected. There is a distinction between making a general "allegation" and when that allegation contains information, which makes it protected.

The Court of Appeal looked at this in the case of *Kilraine v London Borough of Wandsworth*. The Court failed to give comprehensive guidance on how to spot whether a disclosure is a disclosure of information or merely an allegation, but there was some important points to note in the Judgment :-

1. The word "allegation" and the word "information" are not mutually exclusive terms. The Court supported the Employment Appeal Tribunal's comments that an allegation can sometimes contain information to make it protected.

2. Words that are too general and devoid of factual content capable of showing one of the factors listed in the Employment Rights Act 1996 will not amount to "information" and will not be protected.

3. One must not just look at the words. Words that would otherwise fall short of information can be boosted by the context or surrounding circumstances. The example given was that the words "you have failed to comply with health and safety requirements" fall short of a disclosure information on their own, but could constitute information if accompanied by a gesture, pointing (for example) to needles lying on the hospital ward floor.

4. Finally, the determination of whether disclosure gives information in order to be protected for whistleblowing is always a matter of objective analysis by the Tribunal, i.e. it is the Tribunal's view after considering all the evidence, rather than any subjective view of the employer or employee, which is determinative.

Comment

Since the removal of good faith from the requirements to succeed in a whistleblowing claim, the question of what constitutes information and what constitutes merely an allegation remains one of the lines in the sand by which an employer can defend a whistleblowing claim, so the courts analysis of this area is very helpful.