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Welcome to NeTWork, your Employment Law Newsletter from Taylor Walton Solicitors

This month we discuss:

- ECJ gives Judgment in the Woolworths case;
- British Gas lodges further appeal in Lock case;
- EAT give guidance on changes to whistleblowing legislation;
- Employment aspects of the Conservatives Manifesto;
- Vicarious liability for harassment.

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ECJ gives Judgment in the Woolworths case

The European Court of Justice (ECJ) has given its judgment in the Woolworths and Ethel Austin cases on the meaning of "establishment" for the purposes of determining when collective redundancy requirements apply.

The ECJ has followed the Advocate General's opinion (reported in the March edition of NeTWork). The ECJ agreed with the Advocate General that "establishment" for the purposes of Article 1(1) (a) of the European Collective Redundancies Directive denotes the local employment unit to which the workers made redundant are assigned to carry out their duties and the Directive does not require that the number of dismissals in all of the employer's establishments are aggregated in order to determine whether the threshold for collective redundancy consultation is met.

The case will now return to the Court of Appeal to determine whether, on the facts, each branch of Woolworths and Ethel Austin was a separate establishment.

This decision will be welcomed by employers who have recently faced difficulties in knowing when the threshold of 20 employees was reached where redundancy dismissals were being implemented in different locations. However, employers should bear in mind that although the "unit to which the workers are assigned to carry out their duties" will often be obvious, this will not always be the case. The Advocate General's opinion set out an example of where matters may not be straightforward. If an employer operates several stores in one shopping centre, it would not be inconceivable that all of those stores should be regarded as forming a single local employment unit for the purposes of calculating the threshold. Given the high level of financial consequences of making a mistake about whether the collective consultation obligations apply, employers with any concerns should seek advice.

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British Gas lodges further appeal in Lock case

British Gas has lodged an appeal against the recent employment tribunal decision in Lock and others v British Gas Trading Ltd and another, which found that commission and similar payments should be included in holiday pay. The full background to this case was reported in the October 2014 edition of NeTWork.

It has been reported that British Gas is appealing on two grounds:

1. The tribunal had been wrong to decide that Bear Scotland Ltd and others v Fulton (reported in the November 2014 edition of NeTWork), a case about overtime had any bearing on the outcome of Lock which concerns commission payments; and

2. The EAT in the Bear Scotland case incorrectly concluded that domestic legislation could be interpreted purposively to give effect to EU law.

It is expected that the EAT will hear the appeal towards the end of this year.

EAT give guidance on changes to whistleblowing legislation

Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed

In Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed, the Employment Appeal Tribunal (EAT) considered the meaning of the words "in the public interest" which were added into the whistleblowing legislation by the Enterprise and Regulatory Reform Act 2013.

In order to be protected against detriment or dismissal under the whistleblowing legislation, a worker must have made a qualifying disclosure. This is any disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six specified types of wrongdoing has taken place, is taking place or is likely to take place

Although protection for whistleblowers was introduced by the Public Interest Disclosure Act 1998, until recently there was no "public interest" test in the legislation. The words "in the public interest" were added into whistleblowing legislation by section 17 of the Enterprise and Regulatory Reform Act 2013 for disclosures made on or after 25 June 2013. This change was intended to reverse the effect of Parkins v Sodexho Ltd, in which the EAT held that the definition of a qualifying disclosure was broad enough to cover a breach of the whistleblower's own contract of employment, despite the fact that this did not appear to have a "public interest" aspect. The government felt that this case fundamentally changed the nature of the whistleblowing legislation by widening its scope beyond what was originally intended.

In this case, Mr Nurmohamed was employed as a senior manager at the Mayfair branch of Chestertons, the estate agent. On three occasions between August and October 2013 he made disclosures to the area director and the HR director in which he complained about manipulation of the company's accounts which he believed had an adverse effect on his commission income. His complaint was based on an assertion that the company was deliberately supplying inaccurate profit and loss figures to its accountant which overstated actual costs and liabilities incurred, resulting in lower commission payments for around 100 senior managers (including himself). This in turn made the company appear more profitable, to the benefit of its shareholders.

Mr Nurmohamed was dismissed and brought various claims against Chestertons. An employment tribunal found that he had been automatically unfairly dismissed because he made protected disclosures and that Chestertons had subjected him to detriment on grounds that he had made protected disclosures.

When considering the meaning of public interest, the tribunal remarked that it was not required that a disclosure had to be of interest to the entirety of the public as it was inevitable that only a section of the public would be directly affected by any given disclosure. The tribunal concluded that it was Mr Nurmohamed's reasonable belief that the disclosures were in the interest of 100 senior managers and that this was a sufficient group of the public to amount to being a matter in the public interest. This was the case even though Mr Nurmohamed was mostly motivated by concern about his own income.

Chestertons appealed the finding that the disclosure was made in the public interest. It argued that:

1. It could not be said that disclosures made in the interest of 100 senior managers were "in the public interest" as this was not a sufficient section of the public; and

2. It was for the tribunal to determine objectively whether or not the disclosures were of real public interest and it failed to do so.

The EAT dismissed the appeal and held that the public interest requirement had been satisfied. The EAT noted that:

1. Although Chestertons sought to argue that the tribunal must itself determine whether the disclosures were made in the public interest, this was not what the statutory wording required. The correct question is whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest. The EAT accepted that the public interest test can therefore be satisfied where there was no public interest in the disclosure being made, provided that the worker's belief that the disclosure was in the public interest was objectively reasonable.

2. In this case, the protected disclosures concerned the manipulation of accounts which potentially adversely affected payments to 100 senior managers. While Mr Nurmohamed was principally concerned with his own position the tribunal was satisfied that he did have the other senior managers in mind and it was reasonable for the tribunal to conclude that a section of the public would be affected and that the public interest test was satisfied.

3. The fact that Chestertons was a private rather than a public company was not relevant to whether or not the disclosures were in the public interest.

This case makes it clear that it may be relatively easy for whistleblowers to satisfy the public interest test. Employers should be cautious about concluding that a disclosure has not been made in the public interest following this decision.

Employment aspects of the Conservatives Manifesto

This month the Conservatives won the 2015 general election with a small majority. We have set out below some of the pledges contained in the Conservatives Manifesto which may have an impact on employers and employees in the coming years:

The Conservatives have pledged to:

1. Ensure strikes are only ever the result of a ballot in which at least half the workforce has voted and introduce tighter controls relating to industrial action in health, education, fire and transport.

2. Increase the National Minimum Wage to over £8 by the end of the decade and support the "Living Wage".

3. Reduce the burden of employment law through tribunal reforms and support 27,000 new business mentors.

4. Establish a new Small Business Conciliation service to mediate in disputes.

5. Take further steps to stop abuse of exclusivity in zero hours contracts.

6. Impose sanctions for employers that fail to ensure their sponsored migrants comply with the terms of their visa.

7. Create three million more apprenticeships.

8. Abolish employer's National Insurance Contributions for apprentices under 25.

9. Require companies with more than 250 employees to publish the difference between the average pay of their male and female employees.

10. Make volunteering for three days a year a workplace entitlement for people working in large companies and the public sector.

11. Help small businesses take on new workers through provision of the Employment Allowance.

12. Scrap the Human Rights Act and introduce a British Bill of Rights.

13. Negotiate new rules with the EU and hold to a referendum on membership of the EU by the end of 2017.

Vicarious liability for harassment

Southern v Britannia Hotels Ltd and another

In this case an employment tribunal awarded £19,500 for injury to feelings to a casual worker who was subjected to gender harassment.

The Equality Act 2010 defines harassment as unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. Gender is one of the protected characteristics.

An employer has a statutory defence in cases of harassment where it can show that it took all reasonable steps to prevent the individual who harassed the Claimant from doing that thing, or from doing anything of that description.

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Miss Southern worked as a waitress in a hotel and her line manager was Mr Nkorol. Miss Southern was subjected to sexual harassment by Mr Nkorol on several occasions. Miss Southern raised this with another of her line mangers, Miss Crann, who told Miss Southern to lodge a written complaint about Mr Nkorol. Miss Crann took no further action despite the fact that Miss Southern did not lodge a written complaint.

Shortly after speaking to Miss Crann, Miss Southern was required to attend a meeting with the hotel manager Mr Whittaker in relation to a separate investigation relating to bullying. During this meeting, Miss Southern confided in Mr Whittaker about Mr Nkorol's inappropriate behaviour towards her. Mr Whittaker asked Miss Southern to lodge a formal complaint and Mr Whittaker undertook an investigation in the matter.

The tribunal found that Mr Whittaker's investigation was conducted poorly. No detailed particulars of the harassment were requested and a witness to certain incidents who supported Miss Southern's version of events was only spoken to briefly.

Mr Whittaker concluded his investigation on the basis that some of Mr Nkorol's behaviour was inappropriate. Mr Nkorol was not subjected to disciplinary action although he was asked to desist from this behaviour in future.

Before hearing the outcome of her grievance, Miss Southern had already lodged a claim at the tribunal for harassment. Following receipt of the tribunal claim a new HR manager, Ms Buck, was asked to re-investigate the matter. During this investigation the previous witness's evidence did not corroborate Miss Southern's claims but as Ms Buck failed to read the papers relating to the first investigation she was unaware of the inconsistency of the witness's evidence.

Ms Buck concluded that there was no conclusive evidence of harassment. Miss Buck found that Mr Nkorol had kissed Miss Southern's neck on occasion but she was of the opinion that Miss Southern had encouraged this to a degree. Again, no disciplinary action was taken but Mr Nkorol was required to attend a bullying and harassment course. Miss Southern made an unsuccessful appeal against this decision.

The tribunal held that Miss Southern had been harassed by Mr Nkorol and that the employer was vicariously liable. The tribunal was of the opinion that the statutory defence was not available for Britannia in this case for several reasons:

1. Although Britannia had comprehensive policies on harassment, no steps had been taken to implement the polices.

2. Miss Crann had actual knowledge of the harassment and had done nothing to stop it re-occurring.

3. Three separate investigations by three senior managers had been inadequately conducted. The tribunal made the following comments in relation to the investigations:

    a. During the first investigation, Mr Whittaker had failed to suspend Mr Nkorol pending the outcome of the investigation. He had also failed to follow up on the witness evidence and although he found in Miss Southern's favour, no disciplinary action was taken against Mr Nkorol.

b. During the second investigation, Ms Buck failed to familiarise herself with all the previous papers and did not remedy Mr Whittaker's flawed investigation. The tribunal were of the view that Ms Buck was trying to reject the complaints so as not admit liability on behalf of Britannia.

c. The appeal again failed to explore the evidence competently and the manager hearing the appeal was unable to provide an explanation for obvious omissions in the questioning of the witness.

The tribunal awarded Miss Southern damages at £19, 500 for her injury to feelings.

When an award for injury to feelings is made the tribunal will consider a number of factors. This will include the manner in which the employer dealt with any grievance raised by the employee. Although the tribunal noted that the harassment was not of the worst type there were several factors that made it worse. One of these factors was the dismissive approach taken by Britannia when investigating Miss Southern's concerns.

This case is useful for illustrating to employers of how not to conduct investigations into discrimination allegations. The failure by the employer to conduct an investigation rigorously and with integrity at each stage prevented the employer for relying on the statutory defence and was one of the aggravating features which resulted in Miss Southern's injury to feelings award being increased.

Employment Law Workshops

Taylor Walton is providing free employment workshops on a variety of topics designed to assist and prepare businesses for the upcoming changes.

Please see our website for more details by clicking on the links below:

Employment Law Workshops for HR Managers. Find out more

Employment Law Workshops for Businesses without an in-house HR resource. Find out more

If you have any questions about these or other employment issues please call Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk