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

This month we discuss:

- Zero Hours Contracts;
- Whistleblowing - Dispute about contractual terms can be a matter of "public interest";
- Working grandparents will be entitled to shared parental leave and pay;
- Transfer of Undertakings - employees temporarily laid off may still be part of an organised grouping.

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Zero Hours Contracts

Under a zero hours contract the employer does not guarantee to provide the individual with any work and pays the individual only for work actually carried out.

The government has published the draft Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 which are intended to prevent employers including exclusivity clauses in zero hours contracts. An exclusivity clause is a contractual provision which prevents individuals doing work under any other contract or arrangement.

The draft regulations provide:

- A right for employees working under zero hours contracts not to be unfairly dismissed if the reason, or principal reason, is that the employee has failed to comply with an exclusivity clause. The right not to be unfairly dismissed is not subject to a qualifying period of employment.
- A right for workers working under zero hours contracts not to be subjected to any detriment by, or as a result of any act, or deliberate failure to act, done by an employer for the reason that the worker has failed to comply with an exclusivity clause.

In addition, the Department of Business, Innovation and Skills has published guidance on zero hours contracts aimed at employers. The guidance provides further information on zero hours contracts and how they should be used.

Whistleblowing - Dispute about contractual terms can be a matter of "public interest"

Underwood v Wincanton plc

In this case, the Employment Appeals Tribunal (EAT) considered how to interpret the words "in the public interest" for the purposes of determining whether or not there had been a protected disclosure under the whistleblowing legislation.

Background

The dismissal of an employee will be automatically unfair if the reason, or principal reason, is that they have made a protected disclosure. Further, it is unlawful for an employer to subject one of its workers to a detriment on the ground that they have made a protected disclosure.

In order for an employee or worker to be protected under whistleblowing legislation they must make a disclosure and the information disclosed must in the reasonable belief of the worker tend to show that one of following has occurred, is occurring, or is likely to occur:

- A criminal offence.
- Breach of any legal obligation.
- Miscarriage of justice.
- Danger to the health and safety of any individual.
- Damage to the environment.

In addition, for disclosures made on or after 25 June 2013, a disclosure will only be protected if the worker reasonably believes that the disclosure is "in the public interest". The whistleblowing legislation was amended in 2013 in an attempt to prevent workers pursuing claims under the whistleblowing legislation based on a breach of their employment terms and conditions.

The EAT in the case of Chesterton Global Ltd v Nurmohamed considered the meaning of "public interest" and held that it is not necessary to show that a disclosure was of interest to the public as a whole, as it is inevitable that only a section of the public will be directly affected by any given disclosure. A relatively small group (in this case, 100 senior managers) may be sufficient to satisfy the public interest test.

Facts and decision

In this case, Mr Underwood was an HGV driver with Wincanton plc. In November 2013, Mr Underwood, together with three of his colleagues submitted a written complaint regarding their terms and conditions of employment including in particular the way in which overtime was allocated among drivers. Mr Underwood was dismissed in June 2014.

Following his dismissal, Mr Underwood issued a claim in which he submitted, among other things, that the November 2013 complaint amounted to a protected disclosure and that his dismissal was automatically unfair.

In response to a tribunal order, Mr Underwood provided written submissions addressing why the November 2013 complaint was in the public interest. In these submissions, reference was made to the fact that some of the drivers who were granted less overtime had raised concerns regarding the safety and road-worthiness of vehicles.

The Regional Employment Judge struck out the claim. He observed that a dispute between an employer and employee relating to the terms of employment existing between them is not something which the public are affected by, directly or indirectly. Therefore, Mr Underwood could not have held a reasonable belief that the matter was in the public interest.

Mr Underwood appealed to the EAT. The EAT allowed the appeal noting that the Regional Employment Judge had not had the benefit of the EAT's decision in Chesterton when considering whether to strike out the claim.

In its judgment, the EAT considered whether the tribunal had applied too narrow a definition of "public" when applying the "public interest" test. It was clear from Chesterton that "public" could be constituted by a subset of the public, "even if that subset comprised persons employed by the same employer on the same terms". Therefore, in holding that a dispute between Mr Underwood and his fellow employees and Wincanton could never be said to be in the public interest, the tribunal had plainly applied too narrow a definition of "public".

Further, the EAT noted that the tribunal had directed itself that disputes relating to terms and conditions of employment could not constitute matters in the public interest. This was inconsistent with the decision in Chesterton and therefore a misdirection.

Finally, in relation to the tribunal's ruling on "reasonable belief", the EAT noted that in Chesterton, it was held that a matter between employees and their employer was capable of being a matter within the public interest. It followed that an employee could reasonably hold the belief that a disclosure relating to such matters could be within the public interest and the tribunal's conclusion on this point could not be sustained. The claim was allowed to proceed for hearing by the tribunal.

Comment

Following the EAT's decisions in Chesterton and now Underwood, it appears that the law has come full circle and a disclosure relating to the terms of an employee's contract is capable of protection under the whistleblowing legislation.

The Chesterton case is being appealed to the Court of Appeal but is not due to be heard until October 2016. In the meantime, it is likely that further cases involving individual contractual disputes will be held as being within the public interest following this decision.

Taylor Walton will be running a series of free workshops looking at this issue Find out more

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Working grandparents will be entitled to shared parental leave and pay

The Chancellor George Osborne, has announced that he will extend shared parental leave and pay to working grandparents. He stated that the new system will help support working families, as the government recognises the crucial role grandparents play in providing childcare.

Evidence suggests that nearly 2 million grandparents have given up work, reduced their hours or taken time off to help cut down childcare costs. The Prime Minister, David Cameron, had previously indicated that he was happy to consider the Labour party's suggestion to give grandparents parental leave.

The government intends to bring legislation into force by 2018.

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Transfer of Undertakings - employees temporarily laid off may still be part of an organised grouping

Inex Home Improvements Ltd v Hodgkins

In this case, the EAT considered whether employees who had been temporarily laid off work immediately before a service provision change could be part of an organised grouping of employees within the meaning of regulation 3(3)(a)(i) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006.)

Background

TUPE 2006 applies where there is a "relevant transfer". A relevant transfer can be a traditional "business transfer" under regulation 3(1)(a) and/or a "service provision change" (SPC) under regulation 3(1)(b). For there to be a SPC under TUPE 2006, certain conditions must be met including that there must be an organised grouping of employees situated in Great Britain before the change that has as its principal purpose the carrying out of the relevant activities on behalf of the client.

In this case the EAT considered whether an employment tribunal was correct to find that the temporary lay off of employees before an SPC prevented them from being part of an organised grouping of employees.

Facts and decision

Inex Home Improvements Ltd (Inex) employed the claimants to carry out painting and decorating work on the "Sandwell contract", which was subcontracted to Inex by Thomas Vale Construction plc (Thomas Vale). Thomas Vale released the work to Inex in tranches, each with a dedicated works number. During November and December 2012, Inex completed works order 8. It was anticipated that Thomas Vale would release works order 9 in January 2013. In the meantime, there was no work for the claimants and they were temporarily laid off on various dates in November and December 2012.
In January 2013, Thomas Vale issued works order 9 to Localrun (Decorating) Ltd (Localrun), rather than Inex. The work to be carried out under works order 9 was substantially the same as that previously carried out by the claimants on behalf of Inex under works order 8.

The claimants brought employment tribunal proceedings against Inex and Localrun. At a preliminary hearing, an employment judge held that, although there had been an SPC, the claimants' employment had not transferred to Localrun because, immediately before the SPC, they were no longer "an organised grouping of employees" within the meaning of TUPE 2006. The judge reasoned that the claimants could not be part of an organised grouping because they were not working as they had been temporarily laid off.

Inex appealed. The EAT upheld the appeal.

In the EAT's view, a temporary absence or cessation from work, or a temporary cessation of the relevant activities, did not, in itself, deprive employees who had been involved in the relevant activities of their status as an organised grouping of employees.

The EAT took the following factors into account in reaching its decision:

- Case law had established that the temporary closure of a business was not, in itself, sufficient to preclude the existence of a transfer.

- That there was nothing in the language of regulation 3, or in any of the authorities, that requires the organised grouping of employees to be actually engaged in the activity immediately before the SPC, or that suggests that a temporary cessation of activities would preclude the continued existence of the organised grouping.
- If the employment tribunal's decision had been correct, this would have identified a significant loophole in TUPE 2006 as the transfer of employees could easily be prevented by creating a temporary lay-off situation immediately before an SPC.

The case was remitted to the employment tribunal to consider whether, taking all relevant factors into account, immediately before the SPC the claimants were an organised grouping of employees within the meaning of regulation 3(1)(b) of TUPE 2006.

Comment

While previous case law has established that the temporary cessation of a business will not necessarily prevent a business transfer taking place, it is helpful to have a case that considers that case law specifically in relation to an SPC.

Taylor Walton will be running a series of free workshops looking at this issue during November.
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