Birketts

WELCOME TO THE NOVEMBER 2018 UPDATE OF

Employment Law

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In this month's issue we cover a range of interesting employment law decisions.

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Morrisons continues in its worthy mission to lead developments in the law of vicarious liability, with the latest decision from the Court of Appeal on whether the company could be held liable for the data protection breaches of a disgruntled (former) employee.

A further Court of Appeal decision considers whether individual directors were liable for substantial losses resulting from a whistleblower's unfair dismissal. We also look at an ECJ decision concerning payment in lieu of accrued holiday, and (yet) another EAT decision on employment status.

In addition to our 'quick fire' round up of employment law news, we also include our monthly immigration update.

Are you confused about what amounts to a fair dismissal for 'some other substantial reason'? Our next Early birds series in February 2019 aims to demystify SOSR dismissals. Coming soon at www.birketts.co.uk/events.

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Vicarious liability for disclosure of employee data

The Court of Appeal has upheld the High Court's decision that an employer was vicariously liable for the deliberate disclosure of its workers' personal data by a disgruntled employee.

Wm Morrison Supermarkets Plc v Various Claimants [2018] EWCA Civ 2339

Facts

In January 2018 the High Court ruled that Morrisons was vicariously liable for the deliberate disclosure of the personal data (via a file-sharing website) of a large number of its workers by a disgruntled individual, S, who had been employed as one of its internal auditors. The court was satisfied that there was a sufficient connection between the position in which S was employed and his wrongful conduct to justify holding Morrisons vicariously liable for his actions. S was convicted of various criminal offences under the Data Protection Act 1998 and sentenced to eight years' imprisonment.

Morrisons appealed to the Court of Appeal, arguing that it should not be held vicariously liable for S's actions.

> *"The individual's motivation... was not relevant to the finding of vicarious liability.*

Court of Appeal decision

The court has dismissed Morrisons' appeal. The remedy of vicarious liability was neither expressly nor impliedly excluded under the provisions of the Data Protection Act 1998. It agreed with the High Court's conclusion that S's actions at work and the disclosure on the internet was a seamless and continuous sequence of events. The individual's motivation, which in this case was to inflict damage on his employer rather than for any personal gain, was not relevant to the finding of vicarious liability.

Consequences

The consequences of this decision for Morrisons are likely to be very costly, as it will be required to pay a significant level of damages to a very large number (5,518) of its employees. The decision also significantly broadens the scope for claims against employers, even where (as in this case) they have compliant data protection policies in place and even if they are subject to the vexatious actions of a rogue employee. The risk of

reputational damage, as well as increased levels of fines under the GDPR, means that the consequences of the court's decision are potentially very far reaching.

... the consequences of the court's decision are potentially very far reaching.

Morrisons has already indicated its intention to appeal this decision to the Supreme Court, so we are likely to have another ruling on the case in due course.

QUICK FIRE

Parental bereavement leave

The Government has published a response to its consultation on parental bereavement leave and pay.

The new right was created under the Parental Bereavement (Leave and Pay) Act 2018, which received Royal Assent on 13 September 2018. Details of the eligibility requirements and the practical arrangements for taking the leave will be set out in separate regulations, which are not yet published.

The government proposes adopting a broad definition of a bereaved parent...

The Government proposes adopting a broad definition of a bereaved parent for the purposes of the leave entitlement. It will include all legal parents as well as those who have a parental relationship with the child that is not recognised in law.

Leave will be available to be taken either as a single block of two weeks, or as two separate weeks. For leave taken at the time of the child's death no formal notice will be required, but employees will need to give at least one week's notice if they elect to take leave at a later date. A declaration from the employee to confirm their entitlement to be paid statutory bereavement pay will be required, but a declaration will not be required in respect of the leave itself (one may be requested by the employer).

Draft regulations will be published in due course, with the new right due to take effect in 2020.

Personal liability for whistleblowing dismissal

The Court of Appeal has confirmed that individual directors can be held personally liable for losses incurred as a result of a whistleblower's dismissal.

Timis and another v Osipov [2018] EWCA Civ 2321

Facts

The claimant, O, had been briefly employed as CEO of International Petroleum Ltd. He made a number of protected disclosures relating to corporate governance and regulatory issues relevant to the company. He was then subjected to a number of alleged detriments on the part of two non-executive directors of the company.

Following the termination of his employment, O brought claims for both detriment and unfair dismissal on the grounds of making protected disclosures. The tribunal found that the principal reason for O's dismissal was the protected disclosures, upholding his unfair dismissal claim against the company. It also upheld his claims for unlawful detriment against the two non-executive directors, one of whom had issued the instruction to dismiss O to the other director. They were held jointly and severally liable with the company to compensate O for the losses he had incurred as a result of his dismissal, which were assessed by the tribunal as being over £1.7m. The tribunal's decision was upheld on appeal to the EAT.

> *It agreed that the individuals could be held personally liable for the claimant's post-dismissal losses.*

Court of Appeal decision

The court has dismissed the appeal, upholding the tribunal's decision that the individual directors could be held liable for detriment on the grounds of a protected disclosure, which resulted in the claimant's dismissal. It agreed that the individuals could be held personally liable for the claimant's post-dismissal losses. The whistleblowing legislation expressly makes provision for co-workers to be held personally liable for detriment, so there was no reason in principle why they should not be found liable in a case where the detriment amounted to a dismissal.

... the protection afforded to whistleblowers is equal to that applying in claims for discrimination...

Consequences

This decision confirms that the protection afforded to whistleblowers is equal to that applying in claims for discrimination, where individual co-workers can be held liable for their discriminatory behaviour. This will be particularly relevant in circumstances where the employer, as in this case, is insolvent or has limited financial resources. Tactically, it can be prudent to pursue the individual perpetrators alongside the employing entity. In this case, the two non-executive directors were covered by directors' and officers' liability insurance, making them a much better prospect for recovering a sizable award of compensation.

The advice follows research which showed that only one in four employers adapted their performance management systems for staff with disabilities or special needs.

QUICK FIRE

Tribunal fees to be reintroduced?

In answering questions before the House of Commons Justice Committee on 6 November 2018, Richard Heaton, permanent secretary at the Ministry of Justice, has confirmed that the Government is working on reintroducing fees for individuals seeking to pursue claims in the employment tribunal.

The Supreme Court decision in the UNISON case last year found the previous fee system to be unlawful, but it does not prevent the introduction of an alternative fee scheme provided it does not restrict access to justice. Mr Heaton stated that while there are no immediate plans to reintroduce fees, they are seeking a progressive scheme that still allows those who are unable to pay to pursue their claim.

Acas: performance management

Acas has published new advice for employers on conducting performance management procedures. The advice follows research which showed that only one in four employers adapted their performance management systems for staff with disabilities or special needs. Only one in ten used their systems for planning and monitoring employee training and development. The advice includes some tips for employers on how to treat staff fairly, including avoiding surprises by not waiting to raise concerns at an end of year performance review.

The advice is available on the Acas website.

Working time: accrued holiday

The European Court of Justice (ECJ) has given its judgment in two German cases concerning the right to payment in lieu of accrued but untaken annual leave under the Working Time Directive (WTD).

Kreuziger v Berlin (C-619/16) and Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu (C-684/16)

Facts

The cases both concerned workers who sought to claim a payment in lieu of their accrued but untaken holiday entitlement on the termination of their employment. Their requests were refused by their respective employers, in reliance on national (German) law. Claims to the national courts were rejected on the grounds that a payment in lieu under the Working Time Directive (WTD) applied only where the worker had been prevented from taking the leave.

The cases were referred to the ECJ to determine whether the provisions of the WTD precluded national legislation which excludes the payment in lieu of untaken holiday on termination where the worker did not apply to take the leave.

ECJ decision

The ECJ held that national law cannot provide for the automatic loss of accrued but untaken annual leave entitlement on termination, or at the end of the relevant reference period (the holiday year), on the basis that the worker has failed to seek to exercise their right to take holiday, unless the employer can show that it has properly enabled the worker to exercise their entitlement. The worker must have had an effective opportunity to take the leave owing to them and must not have been dissuaded from exercising their right to take leave.

The ECJ said that an employer must encourage the worker to take their holiday, while informing them accurately and in good time of the risk of losing that leave at the end of the applicable reference period. The onus is on the employer to ensure, specifically and transparently, that the worker is actually given the opportunity to take the paid leave to which he or she is entitled.

> *... national law cannot provide for the automatic loss of accrued but untaken annual leave entitlement...*

> *The worker must have had an effective opportunity to take the leave owing to them...*

... an example of the type of scenario when a post-transfer amendment to terms and conditions will not be found to be void.

The ECJ further ruled that an individual worker's annual leave entitlement, as provided under the terms of the WTD, is directly enforceable against private sector employers. It is, therefore, incumbent on national courts to disapply any provision of national law that is not compatible with the provisions of the directive.

Consequences

This decision suggests that accrued, untaken holiday cannot automatically lapse at the end of the holiday year. Many employers provide that an individual's accrued but untaken holiday entitlement cannot be carried forward to the following holiday year, or place limits on the amount of any carry over. This ECJ decision does not prevent employers from seeking to restrict carry over of holiday, but it does emphasise the need for employers to demonstrate that they have enabled workers to take their statutory holiday, and highlighted to them the consequences of not doing so.

... women were paid at a lower rate than men in a high majority of organisations.

QUICK FIRE

GEO summary of gender pay gap

The Government Equalities Office (GEO) has published a summary of the 2017/18 gender pay gap data.

The summary states that 100% of identified organisations complied with the duty to report gender pay gap data (94% by the deadline). Of the gender pay gaps reported, 77% of the median and 88% of the mean pay gaps were positive, meaning that women were paid at a lower rate than men in a high majority of organisations.

Among the lowest paid employees, 57% of employers have more women than men and among the highest paid employees, only 33% have more women.

According to the summary, 35% of employers found it 'difficult' or 'very difficult' to gather the data required to make the necessary pay calculations, but only 17% to do the actual calculations. As of May 2018, 48% of in-scope employers had published an action plan outlining how they intend to tackle their gender pay gap.

Alongside the summary, the Government has also published an Interim Gender Pay Gap Employer Insights Survey, which was designed to provide an update on understanding, attitudes and progress among private sector employers in the period December 2017 to January 2018. The findings of the survey were used by the GEO to drive reporting in the final weeks before the initial deadline. It includes information about employer attitudes and approaches towards reducing the gender pay gap.

Employment status

The Employment Appeal Tribunal (EAT) has upheld an employment tribunal decision that private hire drivers were 'workers', entitled to paid annual leave and the national minimum wage.

Addison Lee Ltd v Lange and others, UKEAT/0037/18

Facts

Three private hire drivers sought to claim holiday pay and the national minimum wage. Addison Lee (AL) maintained that the drivers were independent contractors, as provided under the terms of their Driver Contract.

"An employment tribunal held that the drivers were workers rather than self-employed contractors..."

The contract stated that drivers could choose the days and times when they wanted to work and there was no obligation on either side to offer or accept work. Most of the drivers hired AL-branded vehicles from an associated company. They had to log into a hand-held device through which they were assigned jobs. Once a job was assigned, the driver was expected to accept it and could only refuse if they had an acceptable reason. A sanction could be imposed on the driver for a refusal. Drivers were permitted to log off the system at any time when they were not transporting a passenger. They would have to work for a minimum of 25-30 hours per week to recover the costs of the hire vehicle, but most worked for around 50-60 hours per week.

An employment tribunal held that the drivers were workers rather than self-employed contractors and, therefore, entitled to the national minimum wage and working time rights. It found that despite the wording of the Driver Contract, there was an overarching contract providing mutual obligations for the company to offer, and the drivers to perform the work personally. The times they were logged on via the device constituted working time for the purposes of the Working Time Regulations 1998, since they were at the company's disposal. AL appealed the tribunal's decision to the EAT.

"The tribunal was entitled to take a 'realistic and worldly wise' approach of the parties' obligations..."

EAT decision

The EAT has dismissed AL's appeal, holding that the tribunal was entitled to find that the drivers, when logged on, were undertaking to accept the jobs allocated to them. It was not plausible that a driver would go through the training and induction process, and incur the expense of hiring a vehicle, without an expectation of having a fair opportunity of obtaining bookings. The tribunal was entitled to take a 'realistic and worldly wise' approach of the parties' obligations, ignoring the express contractual provisions.

... the government will shortly be taking forward proposals to reform workplace rights...

Consequences

This decision follows a previous EAT decision in May 2018 that an Addison Lee cycle courier was a worker. In view of the growing catalogue of similar 'worker' decisions, it was unlikely that the EAT would uphold the appeal in this case. As with all employment status decisions, it hinged on a factual analysis of the actual arrangements in place rather than relying on what was specified in the contractual documentation.

It has been reported that the Government will shortly be taking forward proposals to reform workplace rights, including giving workers in the gig economy the right to request a temporary or fixed hours contract after 12 months, and new legislation to clarify the definition of 'workers'. Details of the proposals have not yet been published.

QUICK FIRE

Annual report on modern slavery

The Home Office has published its 2018 UK Annual Report on Modern Slavery. The report sets out the actions taken by the UK Government, Scottish Parliament and the Northern Ireland executive to tackle modern slavery and human trafficking over the previous 12 months.

... 3,337 modern slavery offences were recorded by the police in England and Wales in the period to March 2018...

According to the report, 3,337 modern slavery offences were recorded by the police in England and Wales in the period to March 2018, a 49% increase on the previous year.

The Home Office has stated that it is writing directly to the chief executives of 17,000 businesses to encourage them to be transparent about modern slavery in their supply chains, or risk being named as breaching the law. Businesses with a turnover of more than £36m are required to publish annual transparency statements, setting out what they are doing to prevent modern slavery within their business and supply chains. It is currently estimated that only 60% of companies in scope have published a statement.

Respondents are also asked to consider the role of internal grievance procedures...

QUICK FIRE

Non-disclosure agreements

The Women and Equalities Select Committee has launched a new inquiry into the use of non-disclosure agreements (NDAs) in discrimination cases.

The Committee's recent inquiry into sexual harassment in the workplace made recommendations that the government should address the unethical use of NDAs. This latest inquiry has a wider remit to look at the wider use of NDAs in cases where any form of harassment or other discrimination is alleged.

Written submissions are invited by 28 November 2018. The Committee will consider a range of issues including whether the use of NDAs should be banned or restricted in harassment and discrimination cases and what safeguards are needed to prevent misuse. It will also look at the quality and independence of legal advice available to employees when negotiating severance agreements, given that this advice is paid for by the employer. Respondents are also asked to consider the role of internal grievance procedures, transparency obligations for employers and the role of boards and directors.

Non-disclosure clauses are frequently included as a standard provision in settlement agreements, and the use of such clauses may need to be reviewed in the future depending on the outcome of the Committee's inquiry and any subsequent legislative measures.

Immigration update

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In this month's immigration update we look at the new in-country visa application system, certificates of sponsorship, a further update on the EU Settlement Scheme pilot, and the Immigration Health Surcharge.

New in-country visa application system

The visa application process from within the UK is changing from 30 November 2018, following the Home Office's decision to enter into a contract with a new commercial partner, Sopra Steria. The aim is to provide a more streamlined application process, however, the implementation phase (with old and new systems operating in tandem) has not gone smoothly.

Under the new UK Visa and Citizenship Application Service (UKVCAS) process, applicants submit and pay for their application online and are then re-directed to Sopra Steria's website to book an appointment to attend one of their centres to enrol biometric information. This replaces biometric enrolment at a local post office. If the main applicant has dependants applying with them, the whole family must attend an appointment at the same time.

There are six free core service centres in Croydon, Birmingham, Manchester, Glasgow, Cardiff and Belfast. Appointments are also meant to be available for a fee 'starting at £60', at one of 50 local centres, most of which are located in local libraries. There will be centres in Cambridge, Norwich, Ipswich, Peterborough and Bedford and different parts of London. However, during the transition phase, we have become aware of delays in opening these local centres. There will also be one premium lounge in London.

Applicants are meant to be able to book an appointment and attend the UKVCAS centres within five days of submitting their application. However, our experience has seen that the appointments are not currently available as promised.

> *... applicants should note that even though they still have their passport, they must not travel outside the UK...*

Applicants can chose to upload copies of their supporting documents to Sopra Steria's website, or take them to their appointment and pay a fee of £35 for them to be scanned and uploaded. In both cases, applicants will retain their original documents. This is because the Immigration Rules have been relaxed, so that copy documents can be provided, rather than originals. This is by far the biggest change and should make the process easier for many applicants. However, applicants should note that even though they still have their passport, they must not travel outside the UK, as if they do their application will automatically be treated as withdrawn.

Applicants will also have a choice to purchase additional services such as walk-in appointments, out of hours appointments and document translation. There will also be an on-demand VIP mobile service available which can come to the applicant at their home or work.

... the premium service will provide a decision on the next working day.

The new system has led to some changes in processing times. It will no longer be possible to attend an appointment and get a decision on the same day. Instead, the premium service will provide a decision on the next working day. However, the priority service is being expanded and should be available for more types of application than before. This currently provides for decisions to be made within ten working days, with a plan to improve this to five working days from December 2018.

It should be noted that certain more unusual types of applications will not be able to use the new service and should continue to use the old system. For more information please see the Government guidance.

For advice on how to submit an application in your particular circumstances, please contact a member of the Immigration Team.

Certificates of Sponsorship – importance of job description

... migrants must only be sponsored to fill genuine vacancies that are skilled to at least RQF level 6.

The High Court has reminded sponsors that migrants must only be sponsored to fill genuine vacancies that are skilled to at least RQF level 6. If audited by the Home Office, sponsors need to be able to provide evidence of the work actually undertaken by employees.

R (Liral Veget Training And Recruitment Ltd) v Secretary of State for the Home Department [2018] EWHC 2941 (Admin)

Facts

Liral Veget Training (the company) sponsored four migrant workers, as a Human Resources Manager, Accountant and two Business Development Managers.

The Home Office carried out an unannounced inspection and interviewed the director of the company and the four sponsored workers. Each employee was asked to provide a description of the role they were performing. Their replies bore little resemblance to the job descriptions on their Certificates of Sponsorship (CoS). Although they had all been sponsored for managerial positions, they appeared to be working at a more administrative level.

The inspector concluded that the job descriptions on the CoS were exaggerated or incorrect and amounted to false representations of the roles. The company's sponsor licence was suspended and they were invited by the Home Office to submit evidence of the duties actually performed by the sponsored migrants.

When they failed to provide satisfactory evidence that the jobs were as described on the CoS, the company's sponsor licence was revoked. The company applied for judicial review, to quash this decision.

High Court decision

The High Court found that the Home Office was entitled to conclude that the actual jobs performed by the four employees were significantly different from the descriptions in the CoS.

... no room for artistic licence whether in the attribution of job titles or otherwise.

The Judge, Mr Andrew Thomas QC, noted: *"As a holder of a sponsor licence, the claimant was required to be scrupulously accurate in the information to be provided in the CoS submissions. There was no room for artistic licence whether in the attribution of job titles or otherwise."* He also reminded us that *"The licence is a privilege not an entitlement."*

The Tier 2 sponsor guidance provides for mandatory revocation of the sponsor licence if the sponsor has *"knowingly provided false statements or false information"* and/or if the sponsor has used *"an exaggerated or incorrect job description to deliberately make it appear to meet the requirements for the tier and category you assigned it under when it does not."*

In the circumstances it was reasonable for the Home Office to revoke the company's sponsor licence.

Sponsors must avoid inflating the scope of a role, in order to make it eligible for sponsorship.

Consequences

Tier 2 sponsors must be careful to only assign CoS for genuine vacancies, where the role falls within a SOC code that is deemed to be skilled to RQF level 6. Furthermore they must ensure that the job description included in the CoS accurately reflects the work the migrant will be doing. Sponsors must avoid inflating the scope of a role, in order to make it eligible for sponsorship.

If a migrant's role changes over time, this must be reported to the Home Office. Minor changes, within the same SOC code can be notified through the Sponsor Management System. More significant changes, such that the role now falls within a different SOC code, will trigger a requirement for a new visa application.

... sponsors should prepare employees for the fact that they may be interviewed by Home Office officials.

The Home Office may carry out an unannounced inspection at any time, and sponsors should prepare employees for the fact that they may be interviewed by Home Office officials. Sponsored workers should be able to talk confidently about the work they are doing and should be aware of the job description in their CoS. If necessary they may be required to provide evidence of their work.

Home Office officials usually ask for interview notes to be signed. It is then very difficult to dispute what was said. Sponsors and employees should not feel pressured into signing notes until they have had a proper opportunity to review them and correct any errors or missing information. They should always take a copy of the notes before the official leaves.

Our Immigration Team can help sponsors prepare for any potential audit and we regularly support sponsors who need assistance to resolve concerns raised by the Home Office.

EU Settlement Scheme pilot – further update

The Home Office is continuing to test the EU Settlement Scheme, ahead of its full launch in March 2019. The second phase of the pilot opened on 15 November 2018.

Individuals employed by higher education institutions with a Tier 4 sponsor licence are now eligible to apply.

Individuals employed by higher education institutions with a Tier 4 sponsor licence are now eligible to apply. However, their dependants cannot apply with them and we anticipate this may limit take-up of the pilot scheme.

The scheme has also opened for looked after children under the care of Kent County Council, Lincolnshire County Council, London Borough of Haringey, London Borough of Waltham Forest and Sheffield City Council and for individuals receiving support from Ashiana Sheffield, Coram Children's Legal Centre, East European Resource Centre Rights of Women, St Vincent Support Centre, The Cardinal Hume Centre and The Roma Support Group. Their applications are likely to be more complex and will be a better test of the scheme.

The third phase of the pilot is opening on 29 November 2018. This will cover individuals employed by an organisation in the health or social care sector in England, Northern Ireland, Scotland or Wales.

The Government remains committed to opening the scheme for everyone at the end of March 2019. However, we still do not know if it will be possible for EU nationals to apply as and when they wish, or if there will be some further phasing, to try and avoid overload of the system.

Anyone who is planning to apply for or renew a visa over the next three months should consider applying early in order to avoid the higher cost.

Immigration Health Surcharge to double

As reported in our October 2018 update, the Immigration Health Surcharge will double in December 2018. For most applicants the increase will be from £200 to £400 per year of the visa. For students and those on the youth mobility scheme, the change is from £150 to £300 per year of their visa.

Anyone who is planning to apply for, or renew a visa over the next three months should consider applying early in order to avoid the higher cost.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team.