Katten
KattenMuchinRosenman UK LLP

Employment Matters

What's top of Theresa May's To Do List?

The Queen's Speech on 19 June 2017 put immigration and data protection at the top of the UK government's employment law priorities:

- A new **Data Protection Bill** was announced to implement the new EU General Data Protection Regulation. The new law will give people greater rights over their personal data, including the right to be forgotten.
- A new **Immigration Bill** will be introduced to address the immigration status of European Economic Area (EEA) nationals and the forthcoming repeal of EU "freedom of movement" law. The status of EU nationals and their families will be made subject to relevant UK law provisions after Brexit.
- The **National Living Wage** will increase to 60 percent of median earnings by 2020, after which it will continue to rise in line with average earnings.
- While the UK government has stated it will continue to tackle the **gender pay gap** and aim to reduce discrimination on all grounds, no new measures have been announced.

Do Employees Have To Come Clean About Their Plans To Compete? No—"Employees Are Free To Make Their Own Way in the World…"

MPT Group v Peel

Background

All employees have a duty of good faith and fidelity to their employer. In *MPT Group Ltd v Peel*, MPT asked two departing employees what they intended to do after their employment ended. Neither admitted their plans to set up a competing business once their restrictive covenants had expired. MPT argued that, by lying to them about their future plans, the employees had breached their duty of good faith.

Decision

The judge held that while there was a general duty to answer truthfully, he declined to say that an employee is under a contractual obligation to divulge their future confidential plans. He confirmed that provided employees abide by enforceable restrictive covenants and do not misuse confidential information, employees are "free to make their own way in the world".

Comment

The court might have reached a different conclusion if the employees were sufficiently senior to owe fiduciary duties to their employer. The decision also may have been different had the employees intended to compete whilst still employed, or when they were bound by their restrictive covenants.

Mr Green, in Saudi Arabia, With a UK Employment Contract: A Case Update on Expatriate Employees

Background

In order for an international employee to persuade a tribunal that they have territorial jurisdiction to hear their claim, they have to convince the tribunal that they have a "sufficiently strong connection" with the UK.

But is the test objective or subjective? This recent decision says ***objective***—but tribunals also have to look at the bigger picture.

The company was registered in the UK and employed Mr Green as the managing director of its Saudi Arabian business. Mr Green lived in Lebanon, but commuted to Saudi Arabia for days at a time. He was paid in pounds and, although he was registered with HMRC, he was tax exempt in the UK. His contract of employment was governed by English law, contained a mobility clause that might require him to work in the UK, and his restrictive covenants applied covered the UK. Mr Green was made redundant and he brought claims before the employment tribunal in England.

The tribunal held that Mr Green was an expatriate employee, with a stronger connection to Saudi Arabia than the UK, so they did not have jurisdiction to consider his claim. He appealed.

Decision

The Employment Appeal Tribunal (EAT) held that the tribunal should have carried out an *objective* assessment whilst looking at all the factors. It should have focused on the fact that Mr Green worked for a UK business, rather than giving weight to the Company's *subjective* explanation for the jurisdiction clause. The parties agreed that the contract was governed by English law, so there was no dispute that a breach of contract could be claimed in the UK. In contrast, it was up to the employment tribunal to decide which country Mr Green had stronger ties to with relation to his employment claims.

Comment

This is a cautionary tale for employers who routinely use standard form contracts for international employees. The tribunal will make a comprehensive evaluation of the situation, taking into account all relevant factors, and won't simply rubberstamp an employer's reasoning. Businesses should think carefully about the legal system which might apply, whether they intend for employees to have employment rights in the UK and what is actually happening in practice.

Discrimination *"Because of"* Maternity Leave

Interserve FM Ltd v Tuleikyte

Background

Ms Tuleikyte brought a claim against her employer, Interserve, for direct maternity discrimination.

Interserve had a policy of terminating any absent employee who had not been paid in the last three months. The policy was automatically applied to Ms Tuleikyte, who was treated as having left the company. It later transpired that Ms Tuleikyte's unpaid absence was because she was on maternity leave, but was not eligible for statutory maternity pay.

In considering whether an employee is treated unfavourably 'because' she is taking maternity leave, the tribunal distinguishes between "criterion cases", and "reason why cases". "Criterion cases" are those where a criterion or policy is inherently discriminatory. The application of the policy constitutes the reason for the treatment and the tribunal need not look any further. In contrast, in "reason why

cases", the tribunal must consider the mental process of the alleged discriminator. The tribunal treated this as a "criterion case" and said that the blanket application of the policy was inherently discriminatory. Interserve appealed.

Decision

The EAT reviewed the case law on "criterion cases" vs. "reason why cases". The judge reiterated that just because a woman happens to be on maternity leave when unfavourable treatment occurs is not enough to establish direct discrimination. The EAT said that this was not a "criterion case" as there was no clear correlation between the policy and the protected characteristic. For example, a woman on maternity leave who received statutory maternity pay would not be affected by the policy, but an employee on long-term sick leave would. It was, therefore, necessary for the tribunal to go further and consider the mental processes of the alleged discriminator in order to ascertain the reason for their actions. The tribunal had failed to look at the "*reasons why*" Ms Tuleikyte was treated unfavourably, so the case was remitted.

Comment

This case is consistent with previous case law and serves as a helpful reminder of the difference between "criterion" and "reasons why" cases in direct discrimination claims.

The EAT also said that that an indirect sex discrimination claim may have been possible in this case, but Ms Tuleikyte failed to argue this in in the alternative. The application of the blanket policy may have had an adverse impact on women because they take maternity leave and may not qualify for statutory maternity pay, and, therefore, may be more likely to be disadvantaged by such a policy than their male contemporaries.

Holiday Pay: Three-Month Gap Confirmed

Fulton and another v Bear Scotland Ltd

Employers can breathe a sigh of relief as decision considerably limits the potential value of holiday pay claims.

The EAT has finally confirmed that a gap of more than three months between underpayments of wages breaks the series of deductions for bringing an unlawful deduction from wages claim. Employees are therefore limited to claiming back pay in relation to holidays they have taken since the most recent three-month gap.

Shared Parental Pay: A Father Succeeds in Claiming Sex Discrimination

Mr M Ali v Capita Customer Management

Background

Shared Parental Leave enables eligible mothers, fathers, partners and adopters to choose how to share time off of work after their child is born.

Mr Ali joined Capita Customer Management via a business transfer from Telefonica in 2013. As a male employee, Ali was entitled to two weeks of paid leave following the birth of his daughter. A female employee who also had transferred from Telefonica would have been entitled to up to 14 weeks of leave at full pay following the birth of a child. Following the birth of his daughter, Mr Ali took his two weeks paternity pay followed by a week of annual leave. Mr Ali's wife received medical advice that she should return to work early to aid in her recovery from post-natal depression, so Mr Ali asked his employer for further leave to care for his daughter.

Mr Ali was told that he was only eligible for shared parental leave under the Capita policy, entitling him to statutory pay. Mr Ali claimed that this would leave him at a financial disadvantage and was

therefore discouraged from taking further paternity leave. He argued that he should receive the same paid leave entitlement as a female colleague who had transferred from Telefonica and the fact that he was not eligible for the same length of paid leave amounted to direct discrimination on the grounds of sex.

Decision

The tribunal agreed that Mr Ali had been the subject of direct sex discrimination. The judge stated, *"It was not clear why any exclusivity should apply beyond the two weeks after the birth. In 2016, men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents depending on their personal circumstances, but the choice made should be free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity."*

Comment

This case may be somewhat concerning for employers who provide enhanced maternity pay to female employees. Case law has previously indicated that employers can provide better pay for female employees because of the unique position they are in due to giving birth and caring for the infant, but it looks as if the tribunal is moving forward with the social norms of the millennial generation.

Employers who have chosen to enhance maternity pay, but not shared parental pay, may wish to consider the commercial reasons behind their family friendly policies. However, nothing is set in stone at this stage as we wait to hear if this decision has been appealed to the EAT.

Watch this space!

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 20 7776 7663 or Sarah Bull at +44 (0) 20 7770 5222.