# Employment Law Update

by Lynsey Howes Issue 133 – January 2018

This month's Newsletter looks at refusing to work, surveillance cameras, the effective date of termination and communications with unions, some interesting topics to start the New Year.

## Discrimination and dismissal

Can an employee refuse to work if they have been the subject of a discriminatory demotion? No said the Court of Appeal in the decision of Rochford v WNS Global Services.

Mr. Rochford was employed as a Senior Vice president. He had been absent from work with back problem for nearly a year. Upon his return the Company prevented him from returning to his old duties. He was paid at the same rate and worked the same hours, but his duties were at a lesser level. No indication was provided by WNS Global Services as to when he would be permitted to return to his old duties.

As a consequence, Mr. Rochford refused to do any work at all. As a result of his refusal WNS Global Services dismissed him. The ET at first instance made a finding that his treatment was related to his disability and that that the lesser role was discriminatory. The ET also found that although the dismissal was procedurally unfair it was not discriminatory.

The employee appealed the decision that his dismissal was not discriminatory. The Court of Appeal rejected the appeal, finding that the ET was entitled to have found the decision to dismiss reasonable on the grounds that the Claimant in refusing to work was in breach of contract and that was misconduct. This was despite the fact that the reason he wasn't working was because of the employer's discriminatory treatment.

The Court commented that "it is not the law that an employee who is the victim of a wrong can in all circumstances simply refuse to do any further work unless and until that wrong is remedied." In other words, it is not for the employee to take matters into his own hands and simply refuse to work. Options open to an employee are to raise a grievance, to confirm they are working under duress or to leave and claim constructive dismissal, the action this employee took was not however permitted.

## Surveillance Cameras

This case is a European Court of Human Rights involves a supermarket who made a decision to install covert surveillance cameras to address suspected theft. CCTV camera where already placed around the store and clearly signed. The supermarket did not tell their workers about the new cameras, which were not signed and were very discreet. The European Court of Human Rights was asked whether this type of covert surveillance was a breach of Article 8, a right to privacy.

Yes, held the European Court. Article 8 had been violated. The original Spanish Court had said that it was justified, appropriate, necessary and proportionate and therefore the employers were able to keep the surveillance cameras. The European Court of Human Rights disagreed. Their decision was that video surveillance was a considerable intrusion, and that it was for employers to strike a fair balance between their needs and the rights to privacy.

The Court was clear that employees must be explicitly, precisely and unambiguously informed of the existence of any personal data file, how any data would be processed and the purpose of the collection. It was not therefore open to the employer to enlist this type of covert surveillance.

It is worth therefore ensuring that you are compliant with this area of law.

## Effective Date of Termination

The effective date of termination can be critical as to whether an employee is in time for bringing a claim in the Employment Tribunal or out of time. For the vast majority of cases, the time limit is 3 months less one day, subject to any extension in the time limit that may have occurred as a consequence of ACAS Early Conciliation.

In the case of Cosmeceuticals Limited v Parkin, the Employment Appeal Tribunal was asked to decide whether a notice of summary dismissal, which is later amended to a dismissal but with notice, moves the effective date of termination to the end of that notice period?

The Employment Appeal Tribunal held that it did not.

In this case, the Claimant was informed on the 1st September that she could not return to her job following a sabbatical, due to concerns about her performance. Three days later she was put on garden leave and on 29th September she was told that her notice would end on 23rd October 2015.

When the Claimant subsequently brought a claim, it was agreed that the 23rd October was the effective date of termination. The Tribunal found however, that on 1st September the Claimant was told that she was being dismissed, but the subsequent notice moved the effective date of termination to the expiry of that notice.

The Employment Appeal Tribunal disagreed, explaining that the effective date of termination was a concept enshrined in statute and as a consequence if she was told on the 1st September she was being dismissed, the subsequent giving on notice did not change that effective date of termination. Therefore for the purposes of calculating whether she was in time or out of time, the date was 1st September not the extended period when the notice expired.

This could prove a useful clarification if there is ever any dispute about the effective date of termination and whether a claim has been submitted in time. Clearly this was a good result for an employer.

## Communications with Unions

This decision of the Employment Appeal Tribunal concerns the case of Dhanda v TSB Bank. The Employment Appeal Tribunal was asked to consider whether communications between a Claimant and her Trade Union must be disclosed in any subsequent Employment Tribunal proceedings. The Employment Appeal Tribunal made a decision that it was not absolutely necessary unless the disclosure was needed to fairly dispose of the proceedings.

At the original Tribunal, the Employment Judge had on application from the Respondent TSB Bank, made an order for specific disclosure of all of her documentation relating to communications between the Claimant and her Union during the disciplinary process.

A barrister for the Claimant made arguments that this was unfair on the grounds of her right to privacy and freedom of association but the Judge at the Employment Appeal Tribunal did not consider those arguments. Instead, he made it clear that the Employment Judge had erred in making the unlimited disclosure order and

should have been clear when giving the Order that only those matters which were relevant and necessary and gave due regard to confidentiality and the necessity to fairly dispose of the proceedings should have been disclosed.

This decision shows that it is not always for the employer to see everything that has been discussed and rather a Tribunal must consider what it really needs in order to dispose of the proceedings fairly.

## And finally…..

This concludes the newsletter for January. We hope that it is as always useful and that you are all having a bright and prosperous start to the New Year.

Bye for now.

Lynsey and the team.

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