

Employment Law Update

by Lynsey Howes

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Two common themes in this month's newsletter, the old favourite holiday pay and that equally thorny and complex area disability discrimination. However, we will start by pepping things up with a quick look at a decision on bonuses. Enjoy.

Bonus

This case is not the usual situation where employee works, employee achieves targets or objectives, employee receives bonus. No, in this situation Mr. Craven was paid a £500,000 bonus advance which was repayable under his contractual terms if he resigned on or before 31 December 2016. The contract provided for 52 weeks' notice on either side.

On 23 September 2015 Mr. Craven resigned. His resignation letter confirmed that he was serving notice with effect from that date. The company JLT Speciality accepted the notice, and stated in their correspondence that the employment would end on 1 January 2017. In further correspondence JLT revised its position and confirmed a leave date of 31 December 2016. The Company also confirmed that the bonus advance was due to be repaid by 7 January 2017.

Mr. Craven refused to repay the bonus claiming amongst other things that the letter sent by the Company varied the contractual terms by providing a termination date of 1 January 2017.

The Company applied for summary judgment to enforce payment of the advance bonus. They lost and appealed. The Court of appeal rejected the argument that the terms of the contract had been varied and that the contract ended on 1 January 2017, stating that the letter was not an offer and, in any event, Mr. Craven did not continue to work for the company. The Court found that Mr. Craven was indeed responsible for repaying the debt as he had not stayed in employment with the Company for long enough.

Disability (1) and Contractual Benefits

The Employment Appeal Tribunal (EAT) in the case of *Awan v ICTS* has been asked whether there is an implied term that an employer will not dismiss an employee on long-term sick if that would deprive the employee of disability benefits.

The EAT found that in the circumstances of the particular case, yes there was.

Mr. Awan suffered with depression. He was paid so long as he was employed under a long-term disability benefit. If his employment ceased so did his entitlement to the disability payment.

The company, ICTS dismissed Mr. Awan on the grounds of capability, thus ending his entitlement to the benefit. ICTS argued that the dismissal was a proportionate means of achieving a legitimate aim and that as a consequence there was no discrimination.

The EAT disagreed, finding that once an employee had become entitled to the benefit under the scheme the employer could not dismiss on the grounds of capability because this would deprive the employee of that contractual benefit. In other words, the right to dismiss was frustrated by the contractual entitlement to long-term disability benefits.

It could therefore be worthwhile for employers to check their payment protection policies to ascertain whether their policies could prevent a dismissal on the grounds of capability for the same reasons.

Holiday Pay (1)

Are the heir(s) of a deceased employee entitled to receive payment for accrued and untaken holiday entitlement? This was the question put to the CJEU in the case of *Wuppertal v Bauer and Willmeroth Brossonn*.

Applying the Working Time Directive and the Charter of Fundamental Rights and Freedoms, the CJEU decided that those heirs were entitled to be paid annual leave that had accrued to the employee at the time of death.

The decision applied to both public and private employers meaning that in addition to outstanding wages, the heirs of a deceased employee also have a claim on any outstanding holiday pay.

Disability (2)

The definition of a disability is a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities. Within that definition there are some conditions which automatically qualify like cancer and HIV. Then there are other conditions which are specifically excluded, like for example a tendency to arson or as in this case to steal.

Mr. Wood worked for Durham County Council. One day he went into Boots the chemist and left without paying for items. The subsequent fixed penalty for shop lifting resulted in his dismissal from the Council.

Mr. Wood argued that he suffered from PTSD and dissociative amnesia, a mental impairment and as such he was a disabled person. He claimed that his condition resulted in him having a tendency to steal, which was the reason for his dismissal.

The Council conceded that Mr. Wood had PTSD and that this might amount to a disability, however they pointed to Regulation 4(1) (b) of the Equality Act (Disability) Regulations 2010, which included a tendency to steal as an exemption to the definition of disability within the meaning of the Equality Act 2010. They argued that as stealing and not the PTSD was the reason for the dismissal, the dismissal was not discriminatory. The Employment Tribunal agreed, dismissing the claim. On appeal, the EAT upheld the decision of the Tribunal, making clear that simply because stealing may have been a symptom of the PTSD and dissociative amnesia, it did not raise it above the excluded list. The claim was dismissed.

Holiday Pay (2)

Many holiday pay policies and indeed contracts contain terms which states - if you don't take annual leave in the leave year, you lose it. The CJEU was asked whether a provision of this type was in fact permissible.

The CJEU found that contractual provisions of this type were incompatible with EU law, unless the employer had diligently brought to the employee's attention the need to take leave and had allowed enough time for it to be taken.

The burden of proof said the CJEU was on the employer to make clear to the employee that the leave needed to be taken or would be lost and to do so accurately and with enough time for the leave to be taken in that leave year.

This decision is one that employers should give careful consideration, particularly for those with a holiday year that runs with the calendar year. The message is to regularly remind your employees of their duty to take leave and to make it clear that if they do not exercise this right having been given the clear and precise information, that the leave will in fact be lost.

And finally.....

And so ends another newsletter and given that it is November, it would not be complete without the annual bah humbug reminder about Christmas parties. Although some may wish to operate on the basis of what happens at the party stays at the party, the employment law realities are somewhat different.

Employers should therefore remind their happy (and perhaps soon to be intoxicated staff) that the normal rules of engagement apply, a refresher on the equal opportunities policy, some helpful guidance about what constitutes bullying and harassment and a warning that holding out the mistletoe is not to be encouraged. It is worth remembering that Christmas party antics can come back to bite in the new year, with employers potentially liable for the misdemeanours of employees at the work sponsored Christmas shindig. We don't want to be the party poopers, but even at the party certain boundaries must not be crossed and employees should be reminded to conduct themselves with professionalism.

And so endeth the ninth lesson...

Bye for now

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