EMPLOYMENT LAW UPDATE JULY 2016

UK votes to leave EU, what will happen to employment law?

On 23 June 2016, the UK voted to leave the EU. Until the shape of the UK's exit has been determined, its direct legal implications for employment law in the UK are unclear.

A significant proportion of the UK's employment law is derived from EU law, including discrimination rights, collective consultation obligations, transfer of undertakings regulations, family leave, working time regulations and the agency workers regulations. Commentators have been speculating about which of these may be repealed, and when. However, it is likely that EU law will continue to exert a significant influence on UK employment law for some time. It is unlikely that any government will repeal say the Equality Act 2010. There are some EU-derived employment laws that may be repealed sooner rather than later. These may include:

- Some aspects of the Working Time Regulations 1998, possibly those giving holiday rights to workers on long-term sick leave and the inclusion of commission and overtime payments in holiday pay. Commentators also think that the 48 hour working week may also be abolished.
- The Agency Workers Regulations 2010.

Certain law that are seen as unduly restrictive for example the TUPE regulations or redundancy collective consultation may also be varied. Some have suggested that the government could impose a cap on discrimination compensation (as unfair dismissal compensation is capped), something which the ECJ ruled was incompatible with EU law.

Much will depend on the kind of ongoing relationship the UK has with the EU. For example, if the UK adopts the "Norway model", becoming part of the European Economic Area (EEA), many EU regulations and directives concerning employment rights – although notably, not the Equal Treatment Framework Directive – will continue to apply, and these rules would be interpreted and applied by the European Free Trade Association (EFTA) court, which is also bound by decisions of the ECJ. It should be noted that, because the Equal Treatment Framework Directive does not apply, EEA countries are not obliged to put in place EU law prohibiting discrimination on grounds of race, disability, age, sexual orientation or religion and belief, although, as stated above, it would be very unlikely that these protections, which are enshrined in the Equality Act 2010, would be repealed in the UK. Even if we do not join the EEA, any deal which sees the UK remaining in the single market or which involves a free trade agreement with the EU is likely to require continued adherence to fundamental EU employment rights.

Acas Code of practice

In two cases on the Acas Code of Practice on Disciplinary and Grievance Procedures, the Employment Appeal Tribunal has held that the Code does not apply to ill-health dismissals where there is no culpable conduct by the employee.

The Claimant was dismissed on the grounds of ill health. It was conceded that the dismissal was unfair because of the failure to obtain an up to date occupational health report. At the remedy hearing, the Claimant contended that the Acas Code applied and that due to the unreasonable failure to follow the code he was entitled to an uplift of up to 25%.

The EAT agreed with the employment tribunal that the Acas Code did not apply. Rather, the Acas Code applies to all cases where an employee's alleged act or omissions involve culpable conduct or performance on their part that requires correction or punishment e.g. misconduct and poor performance. It was difficult to see how ill health fell into this category.

The position would be different where the ill health leads to a disciplinary issue such as a failure to comply with sickness absence procedures. In that situation the disciplinary procedure is invoked to address alleged culpable conduct.

In the second case the EAT said that the Acas Code did not apply to Some Other Substantial Reason dismissals based on a breakdown in the working relationship despite suggestions in two previous cases that it could.

Ms Stockman was dismissed by her employer, Phoenix House Limited. This followed a period of acrimony, in which she had brought an unsuccessful grievance against a fellow employee, and had been issued with a written warning for misconduct. The basis for dismissal was Phoenix House Ltd's view that the employment relationship had broken down to such an extent that it was irretrievable. An employment tribunal upheld her unfair dismissal claim. In its view, no reasonable employer would have concluded that the employment relationship was beyond repair to the extent that dismissal was a reasonable option. It also highlighted various procedural deficiencies, which rendered her dismissal procedurally unfair, and found that the procedure adopted failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures, with the result that any compensation awarded could be increased by up to 25%.

The EAT upheld the tribunal's finding that Ms Stockman's dismissal was both procedurally and substantively unfair. However, it rejected the tribunal's conclusion that the Acas Code of Practice – and specifically the 25% uplift for non-compliance – applied. The EAT observed that the Acas Code does not in terms apply to SOSR dismissals. Indeed, certain of its provisions, such as, for example, those relating to investigations, may not be of full effect where such dismissals are concerned. Clearly, elements of the Acas Code are capable of being, and should be, applied. Ordinary commonsense fairness requires that, for example, matters that were not fully vented between employer and employee should not be taken into account when deciding whether to dismiss. But to go beyond that, and impose a sanction for failure to comply with the letter of the Acas Code, was not what Parliament had in mind.

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