

Employment Law Update

by Lynsey Howes

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Time limits, harassment and Brexit. Just some of the topics to enjoy while sipping a glass of Pimms and soaking up some rays. It must be the July newsletter.

Time Limits

Two recent decisions about time, the first in respect of the two-year qualifying period for bringing an unfair dismissal claim. The employee was a few days short of the time limit to bring a claim and wanted to use the statutory one weeks' notice to bridge the deficit, giving her the two-year qualifying period of employment. The question was could she tag the week on the end to allow her to bring the claim? No held the Employment Appeal Tribunal she could not. She did not therefore have the qualifying period and could not progress her claim.

In the second decision, on appeals to the Employment Appeal Tribunal, the questions was what should the Employment Appeal Tribunal do if the notice of appeal is lost in the post and the Appellant has not chased it up? The Court of Appeal decided that because the Appellant had not chased up the lost item with the Employment Appeal Tribunal promptly, it was right for the Employment Appeal Tribunal to refuse the extension of time.

The EAT guidance booklet explicitly informed the Appellant that they should chase up the acknowledgement of service within 7 days and this had not been done after more than 5 weeks. The Court of Appeal could find no good reason for delaying, it was therefore legitimate for the Employment Appeal Tribunal to refuse an extension of time.

This shows the stringent criteria enforced by the Employment Appeal Tribunal for appeals.

Brexit

The Government has released two pieces of information in respect of Brexit, the first was the white paper about its proposals for a future with the European Union which subsequently resulted in the resignation of the Brexit Secretary and the Foreign Secretary but more interestingly for Employment purposes, the Home Office has released a Brexit tool kit for employers.

The tool kit includes posters, leaflets, videos and guides that can be shared with non-British national employees. It sets out how and when EU citizens can apply for pre-settled or settled status and can be translated into 23 different European languages.

The new tool kit aims to answer many of the employers' questions in relation to non-British nationals. An application for EU settlement will be available in phases and until its full launch in March 2021 with a deadline for application being 30th June 2021.

Trust and Confidence

There is an implied term of trust and confidence in employment contracts, however, does that implied duty of trust and confidence extend to an employers' duty to take reasonable care in the conduct of proceedings based on misconduct to protect that employee from any reputational or economic harm they may suffer as a consequence of those proceedings?

In a case of *James Bowen v Commissioner of Police of the Metropolis*, the Supreme Court held no. Their decision made it clear that whether a duty of care was applicable would depend in all the circumstances on whether it was fair, just and reasonable to apply that duty of care during any proceedings. In this case, the fact that this was a police matter, a duty to the public took it outside of that duty of care.

Successful Appeals against Dismissal

If an employment contract does not grant the right of reinstatement on appeal but the appeal is successful, should the employee still be reinstated despite the silence?

Yes, held the Court of Appeal, in the case of *Patel v Folkestone Nursing Home Limited*.

A care assistant was dismissed on two charges of misconduct. On appeal under the contractual procedure the carer was successful. One of the allegations was overturned as was the dismissal.

The Claimant refused to return to work and claimed unfair dismissal in the Employment Tribunal instead.

The Respondent argued that as the appeal had been successful and he had been reinstated, he hadn't in effect been dismissed. The Tribunal rejected that argument; however, the Court of Appeal overturned the Tribunal's decision, holding that in the context of an ordinary employment contract, the effect of a contractual right of appeal against dismissal is that it revives the original contract and extinguishes the original dismissal.

However, the Court of Appeal left open the possibility that the employees claim may have succeeded if it had been termed constructive dismissal due to the unsatisfactory nature of the appeal outcome.

Sexual Harassment

The Women and Equalities commission (a parliamentary committee) have now written a report on sexual harassment in the workplace:

- The report has made a number of recommendations including duty of employers to protect employees from sexual harassment.
- Reintroducing the controversial third-party harassment so that employers have to take reasonable steps to prevent harassment of staff by a third party.
- An extension of time for bringing a sexual harassment claim to 6 months and the time limit being paused while any internal grievance took place.
- Allowing Employment Tribunals to award punitive damages thereby creating a presumption of costs so that ordinarily a guilty employer would have to pay the legal costs of the employee.
- Limiting the use of confidentiality clauses in settlement agreements where there had been an allegation of sexual harassment and making it a professional disciplinary matter for lawyers to propose to use a non-approved confidentiality clause.

And finally.....

This ends the newsletter for July. We hope that you are all starting exciting and exotic holidays abroad, but for those of you left in the workplace, we are still here to answer your employment queries.

Bye for now.

Lynsey and the team.

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