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Employment Matters

ACAS Early Conciliation: Form Filling—Get the Name Right

Giny v SNA Transport Ltd.

Background

In *Giny v SNA Transport Ltd.*, Mr Giny named Mr Ahmed, a *director* of SNA Transport Ltd. (SNA), as the prospective respondent during the ACAS early conciliation process. He subsequently instructed solicitors, who prepared his claim form, and they correctly named the SNA as the respondent. Mr Giny argued that despite the “minor error” in mixing up the names, the claim should be allowed to proceed.

Decision

The Employment Appeal Tribunal (EAT) applied the two-stage test below and rejected the claimant’s application for reconsideration.

1. Is it a minor error? No—the claim is thrown out.
2. If it is a minor error, is it in the interests of justice to allow the claim to proceed?

In principle, the distinction between a natural (Mr Ahmed) and a legal person (SNA) could amount to a minor error; but each case should be considered on its facts, and in this case, it was not.

Comment

Evidently, the EAT is cracking down on administration. Get your details right, and don’t forget to dot your i’s and cross those t’s.

Whistleblowing: 100 Estates Agents Meet the “Public Interest Test”

Chesterton Global Ltd. v Nurmohamed

Background

The “public interest test” was introduced into the whistleblowing regime in 2013. It was intended to prevent workers from using whistleblowing laws to raise complaints about their individual contracts, and placed the onus on employees to prove that they reasonably believed their disclosure was made “in the public interest”.

Mr Nurmohamed worked as branch manager of Chesterton, an estate agency. He, along with about 100 of his colleagues, was entitled to commission as part of his job. Mr Nurmohamed believed the business was manipulating the company accounts to reduce commission payments to its employees, and he claimed that he was dismissed because he had reported his concerns.

Decision

The Court of Appeal (COA) considered whether Mr Nurmohamed's disclosure about a commission payment affecting 100 estate agents was something which could reasonably be believed to be in the "public interest".

Answer: Yes, it was.

The COA made clear that the mere fact that something is in a worker's private interest does not prevent it from also being in the public interest. This, however, will be heavily fact-dependent and should be looked at in the round. The COA adopted four criteria as a useful starting point in considering whether a disclosure is in the public interest:

1. The number in the group whose interests the disclosure served;
2. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. A disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people;
3. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
4. The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e., staff, suppliers and clients), the more a disclosure about its activities will likely engage the public interest (but this should not be overstated).

In this case, 100 employees were affected by the deliberate and significant manipulation of public accounts carried out by a prominent business in the London property market, so it was found to be in the public interest.

A key point was that employee *subjectively* believed that the disclosure was in the public interest (even after the event) and in the tribunal's view that belief was *objectively* reasonable.

Comment

The public interest test must be considered on the facts of each case. The COA has declined to put a figure on how many people must be affected before the public interest test is triggered.

Employers should note this clarification of the public interest test and the potential applicability of the whistleblowing legislation to the workplace, such that they should not assume that just because a complaint or disclosure is about a workplace matter or an individual's own employment terms that it cannot also be a whistleblowing complaint.

Contempt of Court: Employee Jailed for Deleting Evidence

OCS Group UK v Dadi

Background

OCS Group UK (OCS) sued Mr Dadi for sending confidential information belonging to OCS to his personal email. OCS obtained an order from the High Court against Mr Dadi, prohibiting him from making use of any that confidential information, disclosing the existence of the order to anyone and requiring him to preserve all documents pending trial. The order stated that any breach of the order would be a contempt of court that could result in imprisonment.

Despite the order, Mr Dadi deleted 8,000 emails from his personal email and informed various individuals about the order. After speaking to a lawyer, he was advised to admit what he has done to the court, which he did.

Decision

The court found that Mr Dadi's actions had been "deliberate and contumacious". Mr Dadi was sentenced to six weeks in prison for contempt of court, with the judge stating that "*the system will not work if people think they can ignore court orders and destroy evidence. Those who do so can expect terms of imprisonment*".

Comment

The case shows the clear need to heed the Court's warnings about penal consequences as contempt of court will not be taken lightly.

Consultation on the "Vento Bands": Injury to Feelings Payments are Expected to Increase

The Presidents of the Employment Tribunals have issued a consultation on increasing the vento bands in line with the Retail Price Index (RPI) rather than the Consumer Price Index.

The bands for damages for injury to feelings and psychiatric injury were updated for inflation eight years ago in *Da'Bell v NSPCC*. The Employment Appeal Tribunal (EAT) set the bands at:

- Lower band: £600 to £6,000
- Middle band: £6,000 to £18,000
- Upper band: £18,000 to £30,000

The EAT has since stated bands and awards for injury to feelings can be adjusted where there is cogent evidence of the rate of change in the value of money, but the bands have not been formally updated since 2009.

Should the bands be increased?

The Presidents of the Employment Tribunals have recommended using the RPI as the measure of inflation and provide a method for applying the uplift. They have proposed the following new bands:

- Lower band: £1,00 to £8,000
- Middle band: £8,000 to £25,000
- Upper band: £25,000 to £42,000

Responses to these proposals are invited by **Friday 25 August 2017**.

Comment

Increasing the bands in line with RPI would mean that they would probably then increase every 12 months without further consultation. "Injury to feelings" then becomes a significant head of loss, particularly in serious cases, and employers should be mindful that damages awards in discrimination cases, whilst not calculated on a punitive basis, could nevertheless go well beyond an employee's actual monetary loss.

Holiday Pay: Voluntary Overtime Included

Dudley Metropolitan Borough Council v Willetts

Background

As well as working normal hours, Dudley Council's quick response team, comprised of electricians and plumbers, etc., were called out to work in emergencies. The emergency call outs were classed

as “voluntary overtime”, for which the workers were entitled to additional standby and call-out payments. When they were working the voluntary overtime, the workers were carrying out the same tasks as specified under their contracts, and they did so for a sufficient period of time on a regular or recurring basis.

Decision

The EAT confirmed that to exclude such payments from holiday pay would result in a financial disadvantage to the workers. This might deter them from taking an annual leave, which is contrary to the purpose of the whole holiday regime. Holiday pay must correspond to “normal pay”. Employers must consider what the worker would have earned if they had not taken leave.

Comment

This decision follows the trajectory of the previous holiday pay cases and provides definitive guidance that voluntary overtime that is worked on a regular basis must be included in calculating holiday pay.

It is unlikely that this will expose many businesses to backdated claims for voluntary overtime because employees who have a break of more than three months between payments will be precluded from claiming unlawful deductions from wages. Ensure your payroll is up to speed!

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.

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