UK Employment Law Round-up

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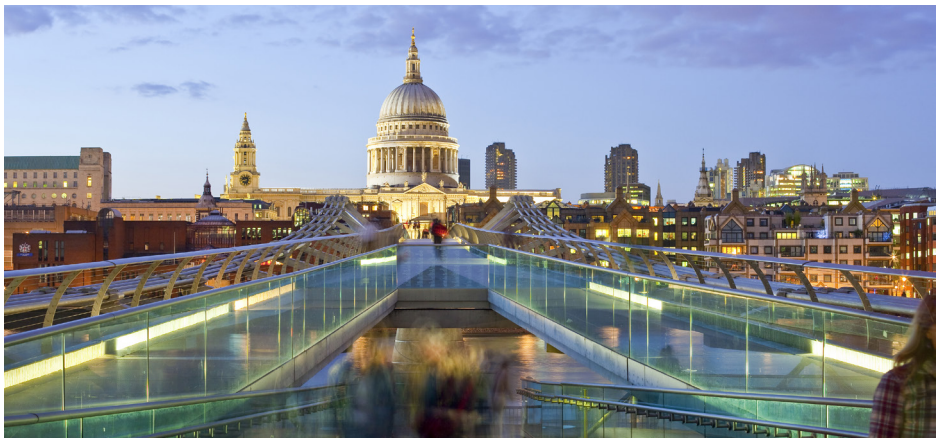
In this issue, we look at whether a job applicant can gain protection under the Framework and Equal Treatment Directives if the purpose of the application is to gain the status of someone who can make a claim to gain compensation.

In our case law review, we will also re-visit what constitutes "normal remuneration" when calculating holiday pay and whether a reasonable adjustment for a disabled employee can extend to payment protection.

We provide guidance on how offers of employment should be made to ensure that communication about employment is not misinterpreted by prospective employees.

We also report on the most recent developments regarding the Apprenticeship Levy and the changes to the taxation of termination payments.



In this issue...

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ECJ confirms that job applicants are not protected when applying for a job solely to bring a claim

In the recent German case of ***Kratzer v R+V Allgemeine Versicherung AG C-423/15***, the European Court of Justice (ECJ) clarified that the protection under the Framework and Equal Treatment Directives (the Directives) does not extend to job applicants where those applicants apply for a job solely to seek compensation, rather than to genuinely gain employment.

The facts

R+V Allgemeine Versicherung (R+V) advertised several graduate positions in various fields of expertise. Mr Kratzer (the Claimant) applied for the trainee solicitor position, citing his legal and managerial experience, which fulfilled the criteria set out in the advertisement. The Claimant received a rejection in response to his application.

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As a result, he claimed €14,000 in compensation as he believed that he had suffered age discrimination. R+V explained to the Claimant that its rejection was generated automatically (which was not its intention) and invited him to interview for the position he had applied for.

The Claimant declined this invitation. He stated that his future with R+V was conditional on R+V paying him the €14,000 sought.

After learning that R+V offered all four of the trainee posts to female candidates, the Claimant claimed a further €3,500 for discrimination because of sex.

The issue

The German Labour and Regional Labour courts rejected the Claimant's claim and appeal. The Claimant further appealed to the Federal Labour Court who stayed the proceedings while it awaited answers from the ECJ on the following questions:

1. Does Article 3(1)(a) of the Framework Directive and Article 14(1)(a) of the Equal Treatment Directive provide protection against discrimination to an individual whose application makes it clear they are not seeking recruitment or employment, but just the status of a job applicant in order to bring a claim for compensation?
2. If so, should this be considered an abuse of rights under EU law?

The court's decision

The ECJ referred to Article 3(1)(a) of the Framework Directive and Article 14(1)(a) of the Equal Treatment Directive which both extend protection to those "seeking employment".

Unsurprisingly, it stated that, where an individual makes an application for employment with the sole aim of gaining the status required to enable him to claim compensation for discrimination, the individual will not come within the scope of the Directives as he would not genuinely be "seeking employment". Therefore, the Claimant could not rely on the protection offered by the Directives.

The ECJ went on to further clarify that the Claimant could not be considered a "victim" of discrimination or a "person injured" in these circumstances as, if he did not want the job, he had not suffered "loss" or "damage" within the meaning of the Directives.

Whilst the ECJ noted that it was more suitable for the national courts to consider whether the Claimant's conduct was abusive, it offered its opinion, stating there were no grounds to believe this was the case here.

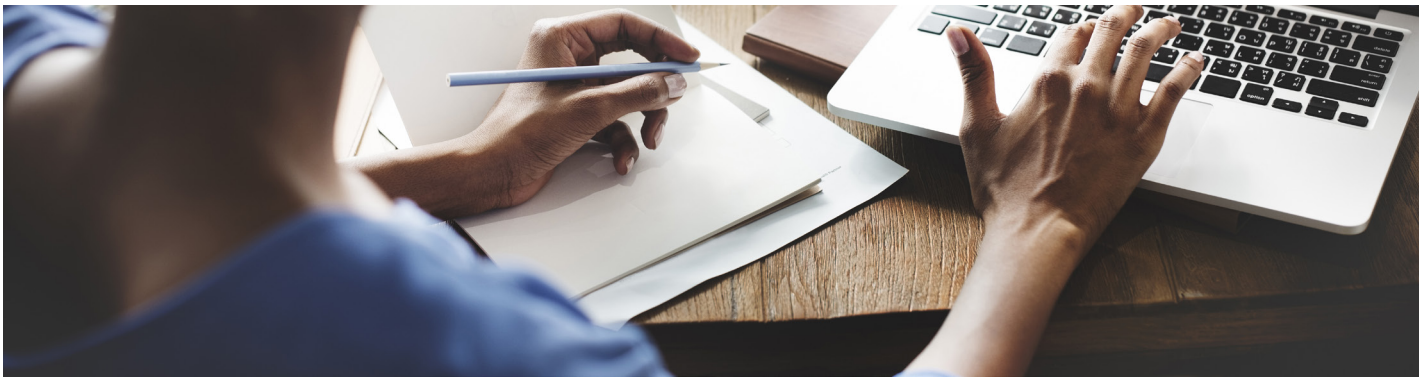
Comment

This case helpfully clarifies that where an applicant has no legitimate interest in the employment or occupation advertised, he cannot benefit from the Directive's protection. The ECJ's commentary also reaffirms that national courts should set clear expectations of how they will treat claims if an individual attempts to abuse the protections offered by EU law.

It also serves as an important reminder that employers should adopt a cautious approach to its application of automated selection criteria to avoid the same pitfalls (and prevent applicants from claiming discrimination whether this was intentional or not). It is rare for individuals to make applications solely to avail themselves of the ability to bring a claim, therefore employers should not reject job applications exclusively on the basis of such suspicions.

Holiday pay – what is "normal remuneration"?

It is well established that workers are entitled to their "normal remuneration" during the four weeks of annual leave granted under the Working Time Directive. However, what constitutes "normal remuneration" continues to be a contested area despite the recent developments in case law on the subject.



The EAT has already addressed the issue of contractual commission payments and non-guaranteed overtime payments, holding that these payments should be included where they are intrinsically linked to the performance of the tasks carried out under the contract of employment.

However, in the most recent claim, an employment tribunal was asked to consider whether the calculations of holiday pay for the 56 claimants employed by Dudley Council should include voluntary overtime, voluntary standby allowances and voluntary call-out payments. It was held that, although the rotas in question are voluntary, once an employee has signed up to the relevant rota, they are required to attend the workplace (or be available, if on standby). Therefore the payments are inherently connected to the work required to be done under the contracts. Furthermore, according to the Tribunal, as a number of the voluntary payments have previously been made with sufficient consistency and regularity, they could be properly identified as forming part of "normal remuneration" and should be included when calculating the workers' statutory holiday pay.

Whilst this most recent tribunal decision is non-binding, and each case will turn on its own facts, it demonstrates the direction that the case law in this area is taking. It applies the calculation of statutory holiday pay in line with the EAT's previous decisions; that these calculations should include the payments a worker normally receives under their contract of employment, having particular regard to the frequency and regularity with which the payment is made.

Employers might consider whether to wait for an appellate decision on this point or take action now. In any event, it would be advisable for employers to review the payments that they make to staff and assess their frequency and connection to the work being performed in order to identify any potential risks going forwards.

Brettle v Dudley Metropolitan Borough Council ET/1300537/15

Individual awarded £3,000 when job offer was withdrawn

The recent case of McCann v. Snozone Ltd ET/3402068/2015 demonstrates that verbal job offers can be legally binding and withdrawal of such an offer may constitute a breach of contract.

The facts

In this case, the employer (Snozone) engaged a recruitment agency to source suitable candidates to fill its maintenance engineer vacancies. Following two interviews, Mr McCann (the Claimant) received a call from the recruitment agency which offered him the job verbally. The Claimant's salary and start date were not discussed as part of this conversation.

Snozone subsequently denied that the Claimant had been offered employment and the Claimant brought a claim in the Tribunal for breach of contract.

The court's decision

It was held that Snozone, acting through the recruitment agency, had verbally offered the Claimant a job, which he accepted, and therefore created a contract of employment. As such, the Tribunal directed that the parties had created legal relations which could only be terminated by giving notice. It decided that, given Snozone withdrew the offer (therefore terminating the contract without notice), the Claimant was entitled to damages for breach of contract amounting to one month's salary as well as tribunal fees.

Comment

This situation highlights that clear communication in a recruitment process remains vital, whether you are using a recruitment agency, or recruiting directly. Employers are encouraged to make offers of employment to candidates in writing with an offer letter, rather than orally. An offer letter should set out:

- the job title and the offer of that job;
- any conditions that apply to the offer (which will enable the employer to withdraw the offer without breaching the contract if the conditions are not satisfied);
- the terms of the offer (for example the salary, working hours, place of work, holiday entitlement etc.);
- the start date and any probationary period;
- what action the individual should take to accept the offer (making it clear that the offer will not be deemed accepted until the required action is complete); and
- whether the letter is to form part of the contract of employment.

Is pay protection a reasonable adjustment for an employee who is placed in a reduced role for reasons of disability?

Employers are under duty to make reasonable adjustments to help disabled job applicants and employees in certain circumstances. This duty applies where a "provision, criterion or practice" applied by or on behalf an employer puts a disabled employee at a substantial disadvantage when compared to employees who are not disabled. In ***G4S Cash Solutions (UK) Ltd v Powell*** UKEAT/0243/15/RN, the EAT considered whether protecting an employee's pay comes within the scope of a reasonable adjustment.

The facts

Mr Powell (the Claimant) was employed by G4S Cash Solutions (UK) Ltd (G4S) as an engineer to maintain cash

machines. He developed problems with his back and became unfit for his usual jobs, which required heavy lifting and working in confined spaces. It was accepted the Claimant's back problem amounted to a disability.

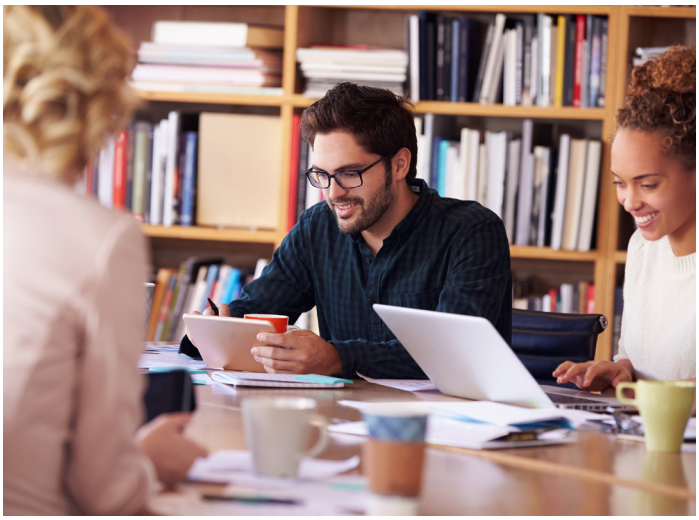
Following a period of sickness absence the Claimant took on a support role which had reduced physical demands. However, he preserved the same rate of pay as his original role as an engineer.

After 12 months in this post, G4S tried to reduce the Claimant's salary to a more appropriate rate for the support role he was undertaking as it did not require the engineering skills associated with the higher rate of pay. The Claimant refused to accept this discount and was dismissed.

The decision

The Claimant asserted that G4S should have allowed him to remain in his support role and continue to receive his higher engineer's rate of pay. He claimed that by failing to do so, G4S was in breach of its duty to make reasonable adjustments.

The EAT found that whilst pay protection is not automatically a reasonable adjustment, there are certain circumstances where it can be. The EAT concluded that this was a situation in which such an adjustment would be reasonable and should apply. It based its decision on the fact there was no sensible reason the duty to make reasonable adjustments should exclude any requirement to protect an employee's pay in conjunction with other measures to counter the disadvantage suffered by that employee because of his disability. Specifically, it highlighted that protecting an employee's pay in these



circumstances is no more than another form of cost for an employer, equivalent to the cost of providing extra training or support in other cases. Further, it identified that additional cost to an employer will often be a feature of the adjustment that an employer will be required to make for a disabled employee in any case.

Comment

This case demonstrates that, whilst typically employers should focus on the practical steps they can take to make reasonable adjustments, there are times when it is appropriate to make a direct financial adjustment to help keep a disabled employee in the workplace. Though it is fact-specific, this judgment reiterates that the key question for employers in cases such as this remains, "what is reasonable in the circumstances?" considering the adjustment contemplated and the resources available to the employer.

No SPC where subsidised bus service replaced by commercial venture

This month the EAT has revisited TUPE and the issues presented by a change in client. Specifically, it has considered whether TUPE can apply in the form of a service provision change when a subsidised bus service is replaced by a competitor.

The facts

Hull City Council (the Council) subsidised a park-and-ride bus service for CT Plus (Yorkshire) CIC (CTP) after CTP won a tendering exercise. In 2013, the Council invited other tenders. Stagecoach decided that it could run the service without a subsidy from the Council and set up its own service on the same route. The Council was not authorised to run a subsidised service in competition with a commercial service, therefore it ended its contract with CTP on 28 September. Stagecoach began operating its service the next day. CTP asserted that Stagecoach was obliged to take on its drivers under the service provision change principles in the TUPE Regulations 2006.

The court's decision

The EAT decided that TUPE did not apply. Specifically, the activity carried out before 29 September was the running of the park and ride service by CTP on behalf of the Council. However, from 29 September onwards, though the activity remained the same, this was not carried out "on the Council's behalf" but was instead undertaken by Stagecoach for its own commercial interest. Therefore, CTP's argument that the Council was the client both before and after the 29 September failed and Regulation 3(1)(b)(ii) was defeated.

Comment

The EAT's definition of "client" in this case is a useful reminder of how to interpret its meaning in a TUPE context. Though the users of the bus service (the passengers) essentially remained the same, they are not the clients for the purpose of the TUPE Regulations.

Though this particular scenario does not occur very often, it is likely we may see similar situations arise as a result of mounting pressure on councils to cut costs. Therefore, we might see an increasing number of employees in this position, without any right to transfer to a subsequent provider of services.

CT Plus (Yorkshire) CIC v Black and Ors

Government pushes on with the apprenticeship levy

Many businesses are urging the Government to delay implementation of the new apprenticeship levy until the impact on employers, of the recent vote to leave the EU, is better known. However, the Government is pressing ahead with its plans to introduce the levy on 6 April 2017.

It is hoped the apprenticeship levy will improve the focus placed on developing the skills of young people in England by encouraging more small enterprises to offer apprenticeships.

The Government revealed the main principles of the levy earlier this year, confirming that employers in any sector with a pay bill of more than £3 million each year will be required to contribute to the levy at a rate of 0.5 per cent of their annual pay bill through their PAYE arrangements. However, there will be a deductible levy allowance of £15,000 per year which will operate on a monthly basis and any unused allowance will be permitted to be carried over to the next month.

The Government's latest suggestions include:

- an ability for employers to access the funds generated from 1 May 2017;
- 90 per cent of the costs of the training to be paid by the Government in the case of smaller businesses;
- the ability for employers to use the levy to retrain existing workers in new skills, even if they have higher qualifications, on the condition the apprenticeship training is significantly different from their existing qualifications;
- an apprenticeship funding system made up of 15 "bands", each with an upper limit ranging from £1,500 to £27,000;
- the creation of a new register of training providers, which will be ready for use from April 2017; and
- an additional payment of £2,000 from the Government to employers and providers who take on 16 to 18 year olds, young care leavers and people with an education, health and care plan.

Whilst the most recent proposals are still under consultation, and may be subject to change, they give us an indication of what to expect in October, when the final regulations will be confirmed.

HMRC to change taxation of termination payments from April 2018

Currently, employees may receive the first £30,000 of any termination payment free of income tax and national insurance contributions (NICs) as long as they are not receiving a payment pursuant to their contract of employment.

It was announced in March 2016 that termination payments which are subject to income tax on any amount in excess of £30,000 would, in the future, also be subject to employer NICs. HM Revenue and Customs (HMRC) has now published draft regulations which introduce changes that will be part of the Finance Bill 2017 and a future National Insurance Contributions Bill. The following changes are expected to apply from April 2018:

- all payments in lieu of notice will be treated as earnings and will be subject to income tax and NICs regardless of whether they are contractual;
- termination payments in excess of £30,000 will be subject to employer NICs, but the whole termination payment will remain outside the scope of employee NICs;
- payments for "injury to feelings" will be excluded from the general exemption for injury payments, except where they relate to a psychiatric injury or a recognised medical condition; and
- the foreign service exemption (for employment outside the UK) will be abolished (with the exception of seafarers).

The good news is that the changes are likely to streamline this previously complex area and make it more simple. The continuing benefit for those receiving a termination payment, according to the draft legislation, is that the first £30,000 of any payment received will remain free from income tax and no part of their termination payment will be subject to employee NICs.

The precise wording of the draft legislation is open for consultation until 5 October, however the proposed developments may make terminating employment more expensive for employers for two reasons. First, employers are likely to experience increased liability for NICs. Second, employers may have to offer increased financial packages to counter the lower net figure exiting employees are likely to receive under the new proposals. Therefore, we may see any planned terminations brought forward in order to benefit from the current regime until April 2018.

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