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News, Legislation, Case Law Update: August in UK Employment Law

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UK votes to leave the EU

We could not write a roundup of news stories from the UK without referencing the UK's vote to leave the EU. The so-called "***Brexit***" has created uncertainty and speculation as to the implications of leaving the EU and what happens next. In relation to employment law, although exiting the EU will have implications for employment law, we consider that much that is in place will remain, not just in the short-term but in the medium and long-term too.

We have outlined the potential impact of Brexit on UK employment law in, Brexit: The Consequences for UK Employment Law. We will continue to provide updates on the actual impact of Brexit (rather than mere speculation) as it relates to employment and data protection law in the forthcoming months.

Guidance on the General Data Protection Regulation issued following Brexit

On 25 May 2018 the General Data Protection Regulation ("GDPR") is due to come into force. This is EU legislation concerning data protection rights, and would replace the current Data Protection Act 1998. Given the vote to leave the EU, there is now uncertainty as to whether this legislation will be implemented in the UK. However, as indicated by the Information Commissioner's Office ("ICO") and the UK's Data Protection Minister, irrespective of whether the legislation is implemented in the UK, the GDPR will be relevant for UK businesses. This is because of both its extra-territorial impact and its applicability to overseas operations.

Moreover, if the UK remains within the single market, then it is likely the GDPR will apply fully in the UK in any event. In addition, even if the UK leaves the single market, any country that wants to share data with EU member states has to provide sufficient protection so it is very likely that the UK data protection laws will need to be updated to ensure that there is an adequate level of data protection.

The ICO therefore recommends that organisations continue to make preparations for the introduction of the GDPR.

BIS call for evidence about restrictive covenants and their impact on entrepreneurship and innovations

The Department for Business, Innovation & Skills ("BIS") called for evidence on non-compete clauses. One of BIS' general objectives is to ensure that the UK has a competitive, flexible and effective labour market to encourage business success and growth. It therefore wants to explore whether such clauses "stifle entrepreneurship and innovations". The areas that the government is looking at include: (i) the prevalence of non-compete clauses in the UK; (ii) whether businesses use non-compete clauses; (iii) whether the clauses have prevented workers from moving from one job to another or starting their own business; (iv) whether the clauses are transparent; and (v) whether legislation to restrict the use of non-compete clauses would affect business or have unintended consequences.

The call for evidence closed on the 19th of July 2016. Given the current political changes in the UK it is difficult to be certain about when the Government will release any statement and/or proposals, but we will keep a watchful eye on any developments.

Employment Tribunal decisions to be made available online

Decisions from the Employment Tribunals in England, Wales and Scotland will be made available online beginning Autumn 2016. Previously, decisions could be ordered by mail for a fee or they could be obtained if you attended in person at offices in Bury St Edmunds or Glasgow. Only new judgments will be published online initially, a decision about whether past judgments will be published is still to be made. This step will vastly increase the ease of accessibility and potentially the publicity of such judgments. In addition, although Employment Tribunal judgments are not binding, they could provide a useful tool when searching for analogous cases and in seeing how tribunals have decided cases in the past.

Case Update

Employment Status - *Secretary of State for Justice v Windle and Arada*

In *Secretary of State for Justice v Windle and Arada* the Court of Appeal held that:

- supplying services on an assignment-by-assignment basis, rather than under an umbrella contract, can indicate a degree of independence and/or a lack of subordination, in the working relationship; and

- because lack of subordination is a factor that is inconsistent with employee status, this indicates that an individual is not an employee "in the extended sense" for the purposes of the Equality Act 2010 ("EA").

BACKGROUND

To be afforded protection under Part 5 of the EA 2010 an individual must be an "employee". The definition is broader than who would typically be classed as an "employee" and includes those who

work under a contract of employment, those who work under an apprenticeship contract and those who work under a contract personally to do work. The latter commonly being referred to as "employees in the extended sense".

FACTS

The claimants, Dr. Windle and Mr. Arada, were professional interpreters who both worked on multiple short-term contracts on a case-by-case base for, amongst others, Her Majesty's Courts and Tribunals Service ("HMCTS"). They claimed race discrimination on the ground that their terms were less generous than those accorded to British Sign Language interpreters. The interpreters claimed that they worked under a contract personally to do work so that they could be afforded protection under the EA.

During the period Dr. Windle and Mr. Arada worked for HMCTS, HMCTS was under no obligation to offer the claimants work, nor were they under any obligation to accept it when offered. They were paid simply for work done, with no provisions for holiday pay, sick pay or pension. They considered themselves as self-employed and were treated as such for tax purposes. The assignments did have to be completed in person, there was no substitution permitted.

PREVIOUS DECISIONS

The Employment Tribunal ("ET") dismissed their claims and decided that the claimants were not employees of the HMCTS but "self-employed professionals". It considered that in the light of the absence of any obligation on HMCTS to offer assignments or the claimants to accept them, there was no so called "umbrella contract" between the claimants and the Ministry of Justice. Therefore the claimants were not in a relationship of subordination and were not employed under a contract personally to do work.

The Employment Appeal Tribunal ("EAT") allowed the claimants' appeal asserting that the ET had misdirected itself by treating the absence of an umbrella contract as a relevant factor in the assessment of the claimants' employment status. The EAT stated that there was no need to fill the gap between assignments in order to show neither a contract of service nor continuity of service. The EAT noted that the lack of mutuality of obligation is only a relevant factor when deciding if there is an employment contract but not a contract personally to do work.

COURT OF APPEAL DECISION

The Court of Appeal allowed the appeal and restored the decision of the ET to dismiss the claims. It held that whilst the ultimate question must be the nature of the relationship during the period that the work is being done, the absence of mutuality of obligation outside that period may be a relevant factor in establishing the nature of the relationship, even for employment in the extended sense. The absence of an umbrella contract is relevant only if and to the extent that it contributes to the conclusion that the claimant is not in fact in a "subordinate" relationship characteristic of an employee.

COMMENT

- This case is another piece of the puzzle relevant to the uncertainties relating to an individual's working status. It shows that an ongoing contractual relationship between several

assignments is not a necessary requirement to prove employment status, but its absence can be an indication for there being none. This means that those who work on multiple short-term contracts, casual workers, freelance workers and zero hours workers are not necessarily protected by the EA.

ICO prosecutes former company employee for unlawfully obtaining client data

The Information Commissioner's Office ("ICO") has recently prosecuted an employee who illegally transferred information about company clients to his email account before starting to work for a competitor. The employee sent the sensitive information including personal data and purchase history of 957 customers of the waste management company he was working for to his personal email address.

The unlawful obtaining or disclosing of personal data or the information contained in personal data is a criminal offence under section 55 of the Data Protection Act 1998. It can be penalized by way of a fine up to £5,000 in the Magistrates Court or an unlimited fine in the Crown Court. The employee was fined £300 and ordered to pay a victim surcharge of £30 and costs of £405.98.

This follows the ICO taking action earlier on this year under the same section after an ex-employee of the insurance company, "LV=", attempted to get an existing employee of LV= to sell customer data to him. He was fined £300 and ordered to pay a victim surcharge of £30 and costs of £614.40. Another employee was fined £1000 and ordered to pay a victim surcharge of £100 and costs of £8654.40 after selling almost 28,000 customer records from the car rental company she worked for, for £5,000.

COMMENT

- It is useful to remember that criminal liability may attach to breaches of the Data Protection Act 1998 (in addition to civil liability).

- Companies would be well-advised to notify the ICO if they have a concern about an individual misusing personal data, especially employees who have access to customer data and/or are moving to competitors. Where they do so, it will help avoid criticism for covering up or not taking proper action to remedy a data breach.

- The recent action taken by the ICO comes at a time when it is calling for stronger sentencing power for people convicted of stealing personal data, including custodial sentences.

Jurisdiction of the UK's Equality Act 2010 - R *(Hottak and another) v The Secretary of State for Foreign and Commonwealth Affairs and another*

In the recent case of *R (Hottak and another) v The Secretary of State for Foreign and Commonwealth Affairs and another [2015] EWHC 1853 (Admin)* ("Hottak"), the Court of Appeal found that the territorial jurisdiction of the Equality Act 2010 (the "EA") is the same as that for unfair dismissal.

BACKGROUND

The EA is silent on its jurisdiction limits and there has been a degree of uncertainty as to whether its jurisdictional limits are the same as those for unfair dismissal. In claims for unfair dismissal, the

jurisdictional limits have been the subject of a number of judicial decisions. In the leading case, *Lawson v Serco [2006] UKHL 3* ("Lawson"), for employees who do not ordinarily work in the UK, "something more" than simply having an employer based in Great Britain is required. Lawson set out certain categories of employees, outside of those that normally work in the UK, that may qualify for protection, namely (i) expatriate employees, (ii) peripatetic employees who have their base in the UK, and (iii) those employees who have an "equally strong connection" with Great Britain. Two later Supreme Court cases (*Duncombe v Secretary of State for Childrens Schools and Families (No 2) [2011] ICR 1312* and *Ravat v Halliburton [2012] UKSC 1*) expanded upon that latter category holding that (i) it was necessary to look at whether there was a stronger connection with Great Britain and British employment law over any other system of law, and (ii) that the connection with Great Britain would have to be sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.

FACTS

In Hottak, the claimants were Afghan nationals who were interpreters with the British armed forces in Afghanistan. They worked for the British government as locally employed staff ("LES"). They claimed that certain schemes applicable to the Afghani LES subjected the Afghani LES to unlawful discriminatory detriment, contrary to the EA, as they were less generous in comparison to the schemes in place for LES in Iraq.

The key question in the case was whether the English court had jurisdiction to hear it: did the EA extend to Afghan LES?

COURT OF APPEAL DECISION

The Court of Appeal, upholding the decision of the Divisional Court, stated that the reach of the EA should be the same as that in relation to unfair dismissal. The Court of Appeal rejected submissions that because these are discrimination claims, the court should look upon the territoriality issue with greater sympathy than if they were simply unfair dismissal claims. There was no suggestion that anything other than Afghan law applied to the Afghani LES and their contracts. They had no physical connection or contact with Great Britain at all; their only connection to Great Britain was that their employer was the UK Government. Their connection to Afghanistan and Afghan employment law was strongest and therefore the EA did not apply to them.

COMMENT

Hottak provides helpful confirmation that the jurisdictional limits of the EA and unfair dismissal are the same. The case also provides a useful summary of when employees, who do not ordinarily work in the UK, may be able to get protection from UK employment law rules.

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