Proskauer

newsletter

October 2012

A monthly newsletter covering the latest developments in UK Employment Law.

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Case Update

STATUTORY HOLIDAY – HOW TO MANAGE HOLIDAY ENTITLEMENT FOR EMPLOYEES ON SICK LEAVE

The Court of Appeal has upheld the Employment Appeal Tribunals ruling in *NHS Leeds v Larner* and decided that employees who do not have the opportunity to take annual holiday entitlement because they are on long-term sick leave are:

- entitled to carry their unused holiday forward into the following year; as well as
- receive a payment in lieu of untaken holiday when their employment terminates.

The Facts

Ms. Larner went on sick leave in 2009 and had not returned to work at the NHS before by April 2010, when she was dismissed on grounds of ill-health. She made no request in the 2009/2010 holiday year to take or carry forward her annual holiday entitlement. Following the termination of her employment, Ms Larner claimed that she was entitled to a payment in lieu if untaken leave during 2009/2010 holiday year. The NHS defended the claim on the basis that, Ms. Larner failed to make the necessary request and further that she had, in their view, had the opportunity to take her leave but had failed to do so.

In the UK, the Working Time Directive (the "**Directive**") is implemented through the Working Time Regulations (the "**Regulations**"). In general, the Regulations and not the Directive applies directly to workers in the UK. An exception to this is for public sector workers – the Directive directly applies to them.

The Regulations do not provide workers with an express right to carry over holiday in cases where they have been unable to take it due to illness. However, the Employment Appeal Tribunal held that following recent European Court of Justice case law, the Directive gives workers are right to carry over leave entitlement without having to make a formal request and that on the termination of employment, workers are entitled to be paid out for the accrued but untaken holiday. The Employment Appeal Tribunal therefore determined that because the Directive applied directly to Ms. Larner, she was entitled to carry over her leave without making a formal request as well as receive a payment in lieu of untaken holiday on the termination of her employment in respect of the 2009/2010 holiday year.

The Court of Appeal however went one step further. It ruled that private sector workers should have the same rights as public sector workers in relation to holiday entitlement while on sick leave, notwithstanding the lack of express wording to this effect in the Regulations. This was on the basis that the Regulations had to be interpreted purposely and, in light of the Directive, public and private sector workers could not be treated differently.

What does this mean for you?

A worker who is sick during a period of booked annual leave is automatically entitled to take the leave at another time.

A worker who is on long-term sick leave for the whole leave year is entitled to carry forward leave if no request for leave has been made. However, in this case, the accrued holiday in question only related to the year prior to the termination of Ms. Larner's employment. The decision failed to address the following issue: should a worker be paid in lieu of untaken accrued holiday on termination of employment for untaken holiday over the course of his/her employment or whether the right to carry forward annual leave is limited in time. Time will tell…

COMPETITION – IS IT GROSS MISCONDUCT FOR AN EMPLOYEE TO TAKE PRELIMINARY STEPS TOWARDS SETTING UP IN COMPETITION?

No said the Employment Appeal Tribunal in *Khan and Another v Ladsker Child Care Limited.*

The Facts

Mr. Khan was a manager of care homes. He and a colleague put together a detailed business plan to set up a competing business with a view to seeking investors. An email was discovered on Mr Khan's office computer attaching a document, which, in the opinion of the employer, showed that he and his colleague were planning to compete with their employer by using information obtained through their employment. When this came to their employer's attention they were dismissed for gross misconduct, on the basis that by planning to set up a business in competition and using company resources to do so they had breached the term of confidence and trust that is implied into every contract of employment. The employees claimed that the plans were not serious, and should not have been of concern to the employer. Their internal appeal against dismissal failed and both claimed unfair dismissal.

The Employment Tribunal found the dismissals fair on the basis that the employer had a genuine belief that Mr Khan and his colleague were guilty of gross misconduct, and that this was within the "band of reasonable response" which it is open to an employer to make. The employees then appealed to the Employment Appeal Tribunal. The Employment Appeal Tribunal upheld the appeal holding that the Employment Tribunal had failed to consider whether the fact that the employees were planning to set up in competition was capable in law of amounting to a breach of the implied term of trust and confidence and gross misconduct. The Employment Appeal Tribunal held that an employee who intends to leave to set up in competition commits no breach of contract unless there are enforceable covenants in his contract or he misuses confidential information of his employer. The Employment Tribunal had also not considered if the information in the business plan constituted confidential information belonging to the employer.

The case was remitted to the Employment Tribunal to determine if the information that Mr Khan and his colleague had used for their business plan could be regarded as confidential information so as to entitle the employer to dismiss for gross misconduct.

What does this mean for you?

Employees are entitled to take preparatory steps to set up in competition and that doing so does not amount to gross misconduct entitling an employer to dismiss. The line between preparing to compete and actually competing is a fine one, and cases have sought to draw the line at the point at which an employee forms and irrevocable intention to compete. Dismissals will, however, be capable of being fair if the employee also breaches obligations of confidentiality by misusing their employer's confidential information for their own purposes. In addition, employers can further protect themselves by including express provisions in contracts of employment preventing employees from engaging in competitive activities during the course of their employment and requiring employees to report such activities or any other wrongdoing (whether they are their own or those of a colleague). It is unlikely that such terms are capable of preventing an employee from taking preparatory steps to compete (rather than actually competing), provided that such preparatory activities do not involve any wrongdoing (such as misusing confidential information). However, in practical terms, as well as acting as a deterrent, such clauses will certainly assist once an employee crosses the line and his/her activities go beyond the preparation stage.

DOES AN EMPLOYEE OWE FIDUCIARY DUTIES?

Not in the case of *Ranson v Customer Systems PLC*.

The Facts

Mr. Ranson was employed by Customer Systems PLC from 2001 to 2009. He held a senior position at the time he left but was not appointed as a statutory director of the company. Both before and during his notice period Mr. Ranson made preparations to set-up a competing business, Praesto Consulting (UK) Ltd. He was not subject to post-termination restrictive covenants contained, so Customer Systems PLC was unable to rely on those to protect itself. Instead, Customer Systems PLC alleged that Mr. Ranson had breached duties of fidelity and loyalty by not telling it that he had had dinner with a client in February 2009, shortly before leaving the company, where future work for Mr. Ranson was discussed. The High Court held in the company's favour and ruled that Mr. Ranson has breached his contractual duty of fidelity and loyalty. Mr. Ranson then appealed to the Court of Appeal.

The Court of Appeal distinguished employees from directors and held that while all directors owe fiduciary duties to their companies, only some employees owe similar duties where these are created in a contract of employment. The Court of Appeal upheld Mr. Ranson's appeal and found that he was neither liable contractually nor as a result of a breach of a fiduciary duty in respect of the incident complained about. Mr.Ranson was entitled to prepare to set up his own business and did not have a contractual obligation to report his own wrongdoings to his employer. Thus there was no breach of contract. Further, Mr.Ranson was not in a position of fiduciary responsibility. Such obligations did therefore not apply to him.

What does this mean for you?

Where someone has fiduciary duties, they are required to disclose both their own wrongdoing as well as that of others in respect matters falling within the scope of those duties. However, as this case demonstrates, there is uncertainty both as to whether an employee has fiduciary obligations and the scope of those duties. An express contractual term requiring such disclosure of wrongdoing avoids this uncertainty: it would have greatly assisted Customer Systems PLC.

News Update

EMPLOYMENT TRIBUNAL – FEES

The Government has confirmed its proposals for the introduction of Employment Tribunal Fees following public consultation. It is anticipated that the new fee structure will be put into effect in Summer 2013.

Currently no fees are payable by those wishing to bring a claim. The objective of introducing fees is for Tribunal users to bear more of the cost burden and to encourage alternative methods of dispute resolution, such as mediation. Fees are payable by Applicants in advance.

Fee levels will be determined by the type of claim. The fee for more straightforward claims ("Level 1 Claims"), such as claims for unauthorised deduction from wages, will be £160 for issue and £230 for the hearing. The more complicated, Level 2 Claims, including unfair dismissal, discrimination, whistleblowing, will be subject to an issue fee of £230 and a hearing fee of £950.

In addition, there will be charges for bringing certain applications.

In the Employment Appeal Tribunal, there will be an issue fee of £400 and a fee of £1,200 payable for a full hearing.

No issue or hearing fees will be payable by Respondents but Employment Tribunal judges will have a discretion to award costs against the unsuccessful party and order them to pay the fees paid by the successful party.

Employment Tribunal – Recommendation for New Rules

In November 2011, Mr. Justice Underhill, former president of the Employment Appeal Tribunal, was tasked with carrying out a comprehensive review of the Employment Tribunal Rules of Procedure. The aim was for him to produce a revised procedural code to ensure efficiency in handling claims.

The proposed new rules have now been published and are shorter and are aimed at being more accessible.

One of the key changes is that there will be an initial sift by an Employment Judge after the ET1 (claim form) and ET3 (the response to the claim) have been lodged. This will allow for the early consideration of whether there is an arguable complaint and defence

within the Employment Tribunal's jurisdiction. The Employment Judge could then either make case management directions or strike out a party's case for having no reasonable prospects of success.

Respondents will be able to apply for an extension of time after the deadline for the ET3 has expired. Currently, an ET3 received by the Employment Tribunal outside of the time limit is automatically rejected and default judgment entered. It is now proposed that where an ET3 is submitted late together with an application to extend, the time limit that the ET3 is not rejected pending the outcome of the application.

Aside from proposing changes to the Employment Tribunal Rules, Mr. Justice Underhill also recommended changes to primary legislation. He suggested that the Civil Liability (Contribution) Act should be amended to apply to discrimination claims brought in the Employment Tribunals. This would empower Employment Tribunals to apportion compensation between two or more respondents where both are found jointly and severally liable for an act of discrimination.

The Department for Business, Innovation and Skills has announced that there will be a period of consultation to consider these proposed changes prior to their implementation.

How to Handle Redundancy for Employees who are Pregnant or on Maternity Leave

ACAS has issued a "Good Practice Guide in Managing Redundancy for Pregnant Employees or those on Maternity Leave". This guide is useful but the section on suitable alternative vacancies has been criticised as being too simplistic. It fails to highlight that not only employees on maternity leave are to be offered a suitable vacancy before any other employee but that employees on additional paternity leave will have equivalent rights to priority over suitable vacancies.

Annual Employment Tribunal Statistics 2011/2012

From 1 April 2011 to 31 March 2012, the Employment Tribunals accepted 186,300 claims, a 15% fall on the number received in the previous year, and 21% lower than the number in 2009/2010.

In 2011/2012, the Employment Appeal Tribunal received 2,170 appeals and disposed of 2,220 appeals. This compares with 2,050 receipts and 2,000 disposals in 2010/2011.

The average unfair dismissal award awarded by the Employment Tribunal was £9,133 and the median average unfair dismissal award awarded by the Employment Tribunal was £4,560.

Redundancy Handling Booklet

The updated ACAS Redundancy Handling publication provides advice for employers on conducting a redundancy process. A new section of the booklet provides more in depth guidance on the role of the people who are tasked with informing and liaising with employees who are at risk of redundancy.

Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here.

Please feel free to contact your regular Proskauer lawyer or any member of our International Labor & Employment Group if you have any questions or need any assistance in evaluating this important newsletter. In addition, if you have any questions regarding the matters discussed herein, please contact either of the lawyers listed below:

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