Employment Newsletter

December 2019

BACKHOUSE JONES

6 April 2020 – Extension of IR35 to Private Sector

The IR35 tax rules are to be extended to the private sector. The rules are aimed at reducing tax avoidance for off-payroll contractors working through personal service companies. Since April 2017, public sector employers have been responsible for deciding whether IR35 applies, and for deducting tax and NICs from contractors' fees paid through PSCs when it does not. From 6 April 2020, the new rules will also apply to private sector businesses with an annual turnover of over £10.2 million or 50 or more employees.

Employer not liable for racist Facebook picture circulated by a member of staff

There has been a number of cases where employers have been found vicariously liable for the actions of their employees, even where these take place outside the workplace if they are in some way linked to work.

However, in the case of *Forbes v LHR Airport Limited*, the ET and EAT both decided that an employer would not be held responsible for the actions of its employee when she posted a racist imagine to her Facebook friends (including a work colleague) on her own device and in her own time.

The EAT said that, in order for the employer to be held responsible, there had to be a link between what was posted and their employment and, in this case, there was not as the employee had not shared the image amongst her colleagues and, in fact, had only sent it to one colleague who was in her friends list - who in turn showed it to Claimant.

The lines between work and home are often blurred and this is only one specific case. Employers should ensure that their employees are aware that if they use social media accounts to communicate with work colleagues, they must still adhere to work policies.

Does TUPE apply to limb 'b' workers, as well as traditional employees?

In a preliminary hearing of *Dewhurst v Revisecatch & City Sprint*, Judge Joffe has held that TUPE is to apply not only to employees, but also to workers under the definition of 'employee' under the Acquired Rights Directive.

Commentary

The Transfer of Undertakings (Protection of Employment) Regulation 2006 (TUPE) was created to protect the rights of employees should the business or service they work for, be sold or transferred to another owner. Under TUPE the employees of the original employer automatically become employees of the new owners/service providers and are to continue to enjoy the terms and conditions of their employment with the new employer.

The definition of 'employee' in relation to TUPE can be found under the Acquired Rights Directive and is 'an individual who works for another person whether under a contract of service or apprenticeship or otherwise…'. As it previously stood this definition of 'employee'

was to be interpreted in line with the definition provided by the Employment Rights Act 1996.

However, Judge Joffe ruled to the contrary, and focussed in particular on 'or otherwise' within the definition. Judge Joffe argued that the legislators created the definition of 'employee' to be broad by including 'or otherwise' and intended this to be interpreted to extend beyond the normal definition of 'employee' and include workers.

For employers this means they will be under an obligation to adopt workers contracts in the same way they would do for employees and will therefore not have to enter into new agreements with the workers. The impact this has on employers means where TUPE applies, you cannot restrict the contractual terms of staff who are considered to be workers.

However, this decision was only held at a preliminary hearing in the London Central Employment Tribunal, and therefore is not a legally binding authority. This means other employment tribunals are free to reach a different decision should the same issue arise.

Despite this, should the decision be appealed, as we expect it will do, if the Employment Appeal Tribunal upholds the judgment of Judge Joffe, the decision will then set a precedent to which other employment tribunals across the country will be bound by.

Royal Mail Group v Jhuti [2019] UKSC 55

The Facts

The Claimant in this case, Ms Jhuti, made protected disclosures to her line manager. In response to this whistleblowing, the line manager placed pressure upon her to withdraw the allegations.

As a result of her whistleblowing, the line manager became critical of Ms Jhuti's

performance and filed reports suggesting the Claimant was performing poorly. As a result of this 'poor performance', a senior manager was appointed to consider Ms Jhuti's future with the Respondent. The senior manager was not aware of any protected disclosures being made.

Following an investigation, the senior manager dismissed Ms Jhuti for poor performance. Ms Jhuti brought again a claim before the employment tribunal for unfair dismissal.

When this case was originally heard, it was held the principal reason the Claimant had been dismissed was not due to her whistleblowing, but rather the senior manager had a reasonable and genuine belief she was underperforming.

After numerous appeals this case appeared before the Supreme Court (SC). The question the SC were asked to consider was whether the tribunal had correctly identified the reason for the dismissal. Whilst it was accepted the senior manager had acted with a genuine and reasonable belief that the Claimant had been performing poorly, the SC held this was not the reason for her dismissal, rather the principal reason Ms Jhuti had been dismissed was because she had made protected disclosures to her line manager.

Commentary

This case highlights the courts are now prepared to look beyond the reason given for dismissals that the decision-maker adopts and are instead prepared to investigate further into a dismissal than they had done so before. If upon their searching the courts do find the real reason was hidden behind a fictitious reason, from the decision maker, the court must look to the hidden reason as the principal reason for the dismissal.

This decision appears sensible based on the specific facts of this case as there was an inherent sense of unfairness of the Claimant's dismissal. The decision in this case which concerned the hidden reasons for dismissal will apply to ordinary unfair dismissal as well as automatic dismissal as a result of protected disclosures. On that basis, it appears as though this decision may make it harder for employers to avoid liability for unfair dismissal, however, the Court accepted that the facts of this case were extreme and would be rare. Therefore, in most cases it will still only be the reasons of the decision-maker that will be relevant to an unfair dismissal claim.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

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