Employment Newsletter

January 2020

BACKHOUSE JONES

BACK in the Saddle for 2020

2019 was a big year for Backhouse Jones which had its 200th birthday. The same year also brought a number of changes in the HR arena for operators. So, what does 2020 have in store for you and your business?

Some of the things on the agenda include:

- agency workers – If you employ "self-employed" workers, the extension of IR35 to private sector as an anti-tax avoidance measure may be relevant to you. As well as the abolition of the 'Swedish derogation' in the rules governing agency workers;

- employment contracts - The entitlement to receive a statement of 'written particulars' is to be extended (on basic employment terms and conditions) to include workers as well as employees as a day one right; and

- seasonal workers - The reference period for determining an average week's pay is changing. The aim is to improve the holiday pay for seasonal workers.

Finally, one key area we will all be watching and waiting in respect of is Brexit. The effect of this on operators will become clearer as the political landscape evolves in 2020.

How can I keep up to date?

We will be addressing these issues and many more in a series of webinars, training sessions, articles and eshots over the next 12 months, starting in January with "Get you house in Order". This will be looking at road regulatory compliance reviews and how to check if you are complying with your financial standing obligations. Although these are predominantly Regulatory issues, employees and the legislation in relation to them is always relevant and will also be visited.

Statutory Illegality Defence

In the case ***Okedina v Chikale***, the Court of Appeal rejects an employer's argument that Ss. 15 and 21 of the Immigration, Asylum and Nationality Act 2006 (IANA 2006), which provides for penalties to be imposed on employers who employ people without the appropriate immigration status to work in the UK, renders a contract of employment unenforceable by either party.

The facts

Both parties in this case were Malawian nationals. Mrs Okedina, who was the employer, brought Ms Chikale (the employee) to the UK in 2013 to work for her as a live-in domestic worker. Mrs Okedina obtained a 6-month domestic worker visa and provided false information. The visa expired in November 2013, however Ms Chikale remained in the UK and continued to work for Mrs Okedina. Mrs Okedina kept her passport and applied for a visa extension on the false basis that Ms Chikale was a family member, but this was refused.

Mrs Okedina informed Ms Chikale that necessary steps were being taken to extend her visa, whilst Ms Chikale was unaware that she did not have the right to remain or work in the UK. She continued to work until June 2015 for 7 days per week, working long hours with low pay. She was summarily dismissed when she asked for more money. Ms Chikale brought claims in the employment tribunal for unfair and wrongful dismissal, unlawful deductions from wages, unpaid holiday pay, breach of the WTR, failure to provide written particulars and itemised payslips and race discrimination.

One of the issues discussed was whether Mrs Okedina could raise a defence of illegality on the basis that following the expiry of the visa, the employment contract was illegal, or illegally performed. This defence was rejected by the tribunal and found that the contract was not rendered unenforceable at common law.

As for common law illegality, the tribunal found as a fact that Ms Chikale did not knowingly participate in any illegal performance of her contract.

The employment appeals tribunal upheld this decision and permission was granted for Mrs Okedina to appeal to the Court of Appeal, however this appeal was dismissed.

Commentary

Section 15 of the IANA 2006 provides for a civil penalty to be imposed on an employer if they employ someone without the right to undertake the work for which they are employed. Section 21 IANA 2006 provides that it is a criminal offence if an employer knowingly employs somebody who does not have appropriate immigration status, or has reasonable cause to believe that employee does not have appropriate status.

There are two distinct bases on which a contractual claim may be defeated on the grounds of illegality, namely:

- statutory illegality, which applies where a legislative provision either prohibits the making of a contract altogether or provides that a contract, or a particular term, shall be unenforceable by a party. The knowledge or culpability of the party who is prevented from recovering losses is irrelevant. The Tribunal rejected this ground; and

- common law illegality, which arises where the formation, purpose or performance of a contract involves conduct that is illegal or contrary to public policy, and where to deny enforcement to either party is an appropriate response to that conduct.

When considering statutory illegality in the present case, the Court considered whether the legislation in sections 15 and 21 expressly prohibited the employment. The Court considered that a person would not be prohibited from employing someone in breach of immigration restrictions, but rather, the legislation provides for a penalty in the event of such employment. Further, the Court did not consider that it could imply an intention that Parliament intended to prohibit the contract of employment itself.

The lack of Ms Chikale's knowledge that she did not have leave to remain precluded Mrs Okedina from relying on the defence of common law illegality. The facts of this case

were unusual in that the employee was unaware that she did not have leave to remain in the UK. In most circumstances, the individual will be aware that they have overstayed their leave to remain and in that case, it would have been much more straight forward to establish common law illegality in that she would have had knowledge of the expiry in November 2013 and that she had participated in the contract in that knowledge.

Annual Leave Carry Over Rights

In the case ***TSN v Hyvinvointialan,*** the CJEU in TSN v Hyvinvointialan held that a member state of the EU is not obliged to permit carry over of annual leave in excess of 4 weeks from one holiday year to the next due to sickness absence.

Background

In the UK, most workers have the right to a minimum of 5.6 weeks' paid annual leave under the Working Time Regulations 1998 (WTR). For a full time employee, this will amount to 28 days. Of course, an employee's contractual provisions may give rise to additional holiday rights over and above the minimum 28 days.

The 28-day entitlement under WTR is made up of:

- the right under the Working Time Directive (WTD) to a minimum of four weeks' annual leave (20 days for full time employees) each year (WTD leave); and

- the domestic right to an additional 1.6 weeks' annual leave (8 days for full time employees), which represents the number of public holidays in the UK in a year, albeit these additional days don't have to be used on public/bank holidays (additional leave).

Ordinarily, WTD leave can only be taken in the leave year in respect of which it is due and if not, it will be lost. However, additional leave may be carried forward into the next leave year if there is a relevant agreement in place allowing the employee to do so. However, there are certain situations such as the one described in the below case which permits the employee to carry over unused holiday over to the next holiday year. The circumstances which permit carry over of statutory holiday include:

- where a worker has been told by an employer that leave will be unpaid which in turn, deters workers from exercising their right to leave. In this case, WTD leave will carry over possibly until termination of their employment (4 weeks only);

- where a worker has been unable to take their statutory leave in the year in which it was accrued because of maternity leave;

- where a worker has been unable to take their 4 weeks WTD leave in the year in which it was accrued because of taking sick leave, the employer must

allow this leave to be carried over. This may be limited in that holiday not used within 18 months of the end of the leave year in which it was accrued is lost. This approach has been confirmed in the CJEU case below meaning employers are not obliged to permit carry over in excess of 4 week;

- alternatively, carry over may be permitted where a worker did not have an effective opportunity to take their WTD holiday entitlement.

However, the last bullet can be contrasted with the situation where a worker could have requested paid leave but chose not to do so. This scenario cannot be described as beyond their control and therefore there is no right to carry over untaken holidays.

The Facts

In two combined cases, the CJEU considered aspects of Finnish law and collective agreements that provided for more holiday pay that the 4 weeks minimum under the WTD. In one of the cases, the employee was entitled to 5 weeks holiday and in another, the entitlement was 7 weeks. However, both respective employees were unable to take all their leave in one leave year due to sickness absence.

There were several matters referred to the CJEU out of these cases, however, the one of importance and relevance to this article was whether national/domestic rules preventing carry over of more than 4 weeks' leave to the next leave year were permissible.

The Grand Chamber of the CJEU said that in such a situation, "the rights to paid annual leave thus granted beyond the minimum required by the WTD are governed not by that directive, but by national law, outside of the regime established by that directive". Further, it said the "WTD must be interpreted as not precluding national rules or collective agreements which provide for the granting of days of paid annual leave which exceed the minimum 4 weeks, and yet exclude the carrying over of those days of leave on the grounds of illness". In other words, the WTD does not oblige EU member states to carry over untaken holidays over and above the 4 weeks minimum holiday provided by it, even where that member state grants additional holidays such as the additional 8 days in the UK.

This is therefore something to be aware of when dealing with employees on long term sick and who have therefore been prevented from taking annual leave. We are aware that not all operators will have their holiday year set as 1 January to 31 December, but it would still be appropriate for operators to give some consideration to whether there are any employees on long term sick and if so, whether they are eligible to carry over WTD leave.

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

Please note: This publication does not constitute legal advice

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