Cox Cooper Ltd
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Your quarterly bulletin on legal news and views from Cox Cooper Solicitors

Employment Law UPDATE

Individuals Personally Liable for Whistleblowing Dismissal, Court of Appeal Rules

In a landmark judgment, the Court of Appeal has confirmed that individual managers can be held personally liable for dismissal in whistleblowing claims *(Timis and Another v Osipov and Another)*.

The case concerned the former CEO of an oil exploration company who succeeded in an unfair dismissal claim against his former employer. His claim that two of the company's directors who had played a key role in the decision to dismiss him had subjected him to detriments for making protected disclosures was also upheld by an Employment Tribunal (ET).

That ruling was later confirmed by the Employment Appeal Tribunal and the company and the two directors were found jointly and severally liable to pay the man more than £2 million in damages. In challenging that decision, the two directors argued that it had not been open to the ET to award compensation against them, as individuals, for the losses occasioned by the man's dismissal as a dismissal claim could only be pursued against the employer.

In ruling on their appeal, the Court noted that the issue had real importance beyond the facts of the particular case and that whistleblower charity Protect had been permitted to put forward arguments as intervener. Because the company was insolvent, a finding of personal liability on the directors' part was critical to the man's case. Although the directors had the benefit of insurance, which would cover the full amount of his claim, that would not be so in every case.

In dismissing the appeal, the Court found that it is open to an employee to bring a claim under Section 47B(1A) of the Employment Rights Act 1996 against an individual co-worker for subjecting him or her to the detriment of dismissal. As the directors had been party to the decision to subject him to that detriment, their personal liability was established. The Court also found that, if a whistleblower is subjected to a detrimental act by a co-worker and that act results in dismissal, then losses arising can be recovered from the co-worker personally.

Where whistleblowing was a significant motivating factor behind the decision of an officer of a company to instigate a claimant's dismissal, the claimant may consider it worthwhile bringing not only a claim against the employer for automatic unfair dismissal but also a claim for detriment leading to dismissal against the individual behind the decision to dismiss, for whose actions the employer may be vicariously liable.

Clearly, any complaint linked to whistleblowing must be identified at an early stage and handled with extreme caution. We can advise you on your individual circumstances.

New National Minimum Wage Rates

The Government has accepted the recommendations of the Low Pay Commission as regards the National Living Wage (NLW) and the National Minimum Wage (NMW) rates that will apply with effect from 1 April 2019:

- The NLW, which applies to those aged 25 and over, will increase from £7.83 to £8.21 per hour;
- The NMW for 21- to 24-year-olds will increase from £7.38 to £7.70 per hour;
- The NMW for 18- to 20-year-olds will increase from £5.90 to £6.15 per hour;
- The NMW for 16- and 17-year-olds will increase from £4.20 to £4.35 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or those aged 19 or over and in the first year of their apprenticeship, will increase from £3.70 to £3.90 per hour.

The accommodation offset will increase from £7.00 to £7.55 per day for each day during the pay period that accommodation is provided.

Court of Appeal Rules Uber Drivers Are Workers

The Court of Appeal has upheld the decision of the Employment Appeal Tribunal (EAT) and ruled that drivers who use online taxi company Uber's app are 'workers' within the meaning of the Employment Rights Act 1996 (ERA), rather than self-employed contractors, and thus have the right to be paid the National Minimum Wage or the National Living Wage and to receive holiday pay. However, the Court has given the company permission to appeal to the Supreme Court *(Uber BV and Others v Aslam and Others)*.

Uber provides booking and payment services via the app. The documentation governing its relationship with drivers using the app states in no uncertain terms that Uber does not provide transport services and the drivers are independent contractors who contract directly with passengers. However, in 2016 a group of drivers brought Employment Tribunal (ET) claims challenging the assertion that they are self-employed. Their contention is that they are workers, as it is Uber that contracts with passengers to provide the driving services, and are therefore entitled to protections under the ERA, the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999. Uber maintains that it merely provides a means for drivers to run their own businesses, emphasising that they are not obliged to use the app at any given time, nor do they have to accept any particular trip offered.

The ET found in favour of the drivers, a decision that was upheld by the EAT in 2017.

The Court of Appeal has now dismissed Uber's challenge to the latter ruling. In a majority decision (Lord Justice Underhill dissenting), the Court found that the contractual terms do not

reflect the reality of the drivers' relationship with Uber. Drivers are under a positive obligation to work while they have the app switched on, and although they can accept or decline any given trip, Uber retains the ability to disconnect them from the app if they turn down fares too frequently.

Given the importance of the case, permission to appeal to the Supreme Court was granted.

This is a complex area of employment law, with employment status dependent on the individual facts in each case. The Government recently unveiled its 'Good Work Plan' (see https://bit.ly/2Q5tZVg), in response to the 2017 Taylor Review of Modern Working Practices, which it is hoped will lead to legislation clarifying the rights of those working in the 'gig economy'.

We can advise you on employment status or other contractual issues.

Job Interviews and the Risks of Asking Off the Cuff Discriminatory Questions

Questions asked of job applicants at interview should be carefully considered in advance and formulated with the benefit of legal advice. In one case where that signally did not happen, a 67-year-old man who was turned down for a park attendant's job succeeded in an age discrimination claim *(James v Coedffranc Community Council)*.

The man was one of 13 people who had applied for the local authority post and was considered one of the two strongest candidates. Whilst two members of the interview panel asked candidates the same set of questions, the third member was free to ask questions that seemed relevant to her, perhaps picking up on an earlier answer and asking for further information about that.

The unsuccessful candidate claimed that the third member of the panel had commented, "I've just noticed how old you are," before asking him, "How's your health anyway?" He had driven away from the interview with a growing sense of injustice and, after failing to win appointment to the post, swiftly lodged a complaint with an Employment Tribunal (ET).

In upholding his claim, the ET accepted his account of the interview and that he had felt his chances of appointment were good until the atmosphere of the interview was changed by the panel member's age-related comments. The local authority had not been able to prove that his rejection had nothing to do with his age, leading to the ET's conclusion that his advancing years had certainly been a factor.

The ET's ruling opened the way for the man to seek compensation. However, in the light of its decision, he reached a settlement with the local authority.

Personality Clashes at Work and How to Deal With Them – Court Guidance

Personality clashes in the workplace need sensitive handling if legal consequences are to be avoided. A Court of Appeal decision concerning an NHS employee who developed an extreme phobic reaction to a colleague who had bullied her serves as useful guidance to employers on how to deal with such issues *(Simmonds v Salisbury NHS Foundation Trust)*.

The two women worked in the same hospital department, but did not get on. Efforts were made to physically separate them in different offices after an internal inquiry found evidence that the employee had been harassed and bullied by her colleague. The latter was issued with a written warning, but difficulties continued, attempts at mediation failed and the employee eventually went off sick suffering from stress.

The employee was given three options: to return to work under the same conditions as before; to accept redeployment away from her colleague; or to resign. She rejected all of them and said that she wished to return to work but to have no contact with her colleague. The trust, however, decided that that was not an option and ultimately dismissed her, citing an irretrievable breakdown in working relationships.

The employee's unfair dismissal claim was later rejected by an Employment Tribunal (ET) and that decision was subsequently confirmed by the Employment Appeal Tribunal. Her claims of disability discrimination and a failure to make reasonable adjustments suffered the same fate.

In challenging the decision, the employee pointed out that she was the innocent party and that it was her colleague who had been found guilty of bullying. It was argued that the only reasonable choice open to the trust was to dismiss not her but her colleague and that it was perverse of the ET to find otherwise.

In ruling on the matter, the Court noted that the employee's idiosyncratic extreme phobic reaction to coming into contact with her colleague was involuntary and entirely genuine. Her bitterness that it was her, rather than her

colleague, who was dismissed was also entirely understandable. She had a psychological susceptibility to stress and was deserving of sympathy. However, the ET had been justified in finding that she did not suffer from a disability.

In dismissing her appeal, the Court noted that the colleague's bullying behaviour had not been considered so serious as to merit dismissal and had occurred about two years prior to the employee losing her job. The colleague had subsequently shown herself committed to making the relationship work, but that had proved impossible due to the employee's phobia.

The trust had been presented with an acutely difficult and sensitive situation, involving an unwelcome choice between two outcomes, neither of which might be considered fair to the employee concerned. A choice nevertheless had to be made between the two women and, although views as to the correct outcome might vary, the trust's handling of the issue had been reasonable and justified.

For assistance in managing a workplace situation of this kind and identifying all the options available for solving the problem, please contact us.

HSE – First-Aid Guidance and Mental Health

The Health and Safety Executive (HSE) has updated its guidance on first-aid in the workplace to remind employers of the need to cover mental health issues.

All workplaces must have first-aid provision at all times – i.e. equipment, facilities and suitably trained personnel – that is 'adequate and appropriate in the circumstances'. In order to determine what provision is needed, employers should undertake a first-aid needs assessment.

The guidance, which can be found on the website of the HSE (www.hse.gov.uk), itemises points for consideration when assessing the first-aid needs of the individual workplace, then goes on to suggest ways of managing mental ill health and making available appropriate support for anyone experiencing a mental health issue. As well as providing general information or training for managers and employees, employers should consider having personnel specifically trained to identify and understand symptoms of mental ill health and how to implement a support programme for anyone experiencing problems.

There are also case studies illustrating examples of first-aid needs assessments for different types of workplaces.

Executive Held to Non-Compete Clause in Share Allocation Agreement

Share allocations are a widely used means of incentivising staff, but they are rarely a free meal ticket and reciprocal obligations are usually imposed on those who benefit from them. That was certainly so in the case of an executive who took a job with a competitor a few months after he was dismissed from his post *(Ideal Standard International S.A. and Another v Herbert)*.

The man worked for a group that manufactured bathroom ceramics and fittings. His employment contract incorporated confidentiality provisions which survived his dismissal, but did not contain any other restrictions on his post-termination conduct. Prior to his departure, however, he had received a substantial number of shares in the group, subject to an agreement which, amongst other things, forbade him from working for competitors for 18 months following termination.

After discovering via his LinkedIn profile that he had joined a competitor about five months after his dismissal, the group launched proceedings. It was particularly concerned that he had, whilst employed by the group, enjoyed extensive access to confidential information which had a considerable shelf life. The group sought an interim injunction to prevent its use pending arbitration proceedings.

The man argued that a settlement agreement that had been concluded following his dismissal had the effect of releasing him from any further obligations under the share agreement. It was also submitted that the non-compete clause was unreasonable and placed an excessive restriction on his ability to make a living.

In granting the injunction sought, however, the High Court found that the group had raised serious issues to be tried. The share agreement had been negotiated in a commercial context and had the legitimate aim of protecting the group's goodwill. The man's shareholding was substantial and his position could not be equated to that of an employee who benefits from a small-scale share participation scheme. The group's interpretation of the settlement agreement was preferred and the balance of convenience also fell in favour of granting the injunction.

Commercially sensitive information is often the lifeblood of an organisation. The law can be used to protect a business in circumstances such as these.

Contact us if you would like advice on any of the issues raised in this bulletin or on any other employment law matter.

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