RMI Employment Law Bulletin
Winter 2022

Welcome to the Winter Edition of the RMI Employment law email bulletin.

With the current political turmoil, this autumn it seems impossible to predict the future course for employment law over the next few years. Those of you following updates over the course of the last few years will be aware that the Employment Bill had substantial changes to employment law, but then did not form part of the (then) Queen's Speech and nor did many of the proposals seem part of the Truss Government's agenda. The Government has however recently published the Retained EU Law (For Revocation and Reform Bill) which could lead to large changes in employment law, albeit the progress of the Bill is still as uncertain as ever in the present political climate.

In this update we have a quick look at that Bill, should it come to pass. We then turn our attention to some recent interesting case law.

News

- Retained EU Law (Revocation and Reform Bill)

Case Law Update

- Unfair dismissal time limits *(Cygnet Behavioural Health Limited v Britton)*
- Discrimination time limits (*Kumari v Greater Manchester Mental Health NHS Foundation Trust)*
- Redundancy selection criteria *(Mogane v Bradford Teaching Hospitals NHS Foundation Trust)*

Retained EU Law (Revocation and Reform Bill)

At the end of September, the Government published this Bill which could potentially lead to sweeping changes in employment law in the UK. Essentially the Bill is about de-regulating following Brexit and would allow the Government to remove large sections of legislation derived from the EU, much of which impacts upon employment law in particular.

Under the terms on which the UK left the European Union (European Union Withdrawal Act 2018) laws from the EU that were in existence on or before 31st December 2020 were preserved and became known as "Retained Law". The Bill proposes to repeal EU derived laws by the end of 2023, with an option to extend. The Bill's proposal is also to change the present principle that EU law is binding, unless the Government departs from it. If this all progresses, then the Government has to try to decide which retained laws to keep and which to bin and there are, well, quite a lot of them.

Comment

Whilst many employers would like to see the back of a fair amount of EU law relating to employment, there is a great danger of turmoil and uncertainty if such decisions are rushed through. Right-wing and left-wing commentators are particularly concerned given the automatic revocation principle in the Bill that it may simply create massive uncertainty, which is not good for employers or employees alike.

It is also not clear how the EU would react to such a move which may put the Government in breach of the Trade and Cooperation Agreement.

Unfair Dismissal: Time Limits

- *Cygnet Behavioural Health Limited v Britton*

Dismissed employees only have a certain amount of time after the dismissal in which to bring a claim in an Employment Tribunal. The basic time limit is three months from the effective date of termination (known as the EDT), however, employees can extend that if they lodge the matter with Pre-Claim ACAS Conciliation and so it is no longer the case that, after three months, employers can breathe a sigh of relief.

If an employee misses the time limit for bringing his claim but brings a claim in any event, then the Tribunal has to consider whether it was (a) *reasonably practicable* to present the claim within the primary time limits (three months or extended by ACAS Conciliation) and (b) if it was not reasonably practicable, whether he or she has presented the claim within a reasonable period thereafter. This is under section 11(2)(b) of the Employment Rights Act, 1996.

If you as an employer, are faced with a Tribunal claim, it is always worth considering the time limits and jurisdiction as the very first part of any defence, to see whether the claim might be struck out on such grounds.

In a recent case (*Cygnet Behavioural Health Limited v Britton*), the Employment Appeal Tribunal (EAT) gave a relatively pro-employer decision and on the facts of that case found that the employee was out of time.

Facts

In the claim, the Claimant had missed the primary time limit and had not then submitted his claim for a further 62 days. He pleaded a number of problems, including dyslexia, mental health problems and an ignorance of the time limit. He gave evidence that because he had started another job and was dealing with other issues in the claim (he had to deal with a Statutory Regulator of Healthcare Professionals during the time when he should have submitted the claim) he said that took up a lot of his time and so he had missed the original time limit.

The original Tribunal gave a judgment entirely in favour of the employee finding that his mental health, dyslexia and problems with his health, plus his new jobs and time dealing with the Regulator, had meant it was not reasonably practicable to meet the time limits.

The employer appealed that decision to the Employment Appeal Tribunal, that the decision was 'perverse'. The argument on appeal that the decision is perverse is a very high burden for the employer and to overturn the original decision the EAT must find that the original Tribunal's decision is irrational, fundamentally wrong, outrageous, or flies in the face of properly informed logic.

On the facts here, however, the EAT found those tests were met. It decided that he had been able to do a great many things from his dismissal to the expiry of the primary time limit and thereafter, including working various jobs, moving house and engaging an appeal, liaising with ACAS, etc. All of this meant there was no logical reason why he could not have met the original time limit or submitted the claim within a reasonable time thereafter. The claims were accordingly struck out.

<u>Comment</u>

The decision was a good one for the employer in the case and shows that the law should be interpreted in line with the actual phrase "*reasonably practicable*". It shows that simply having mental health problems will not mean that an employee can miss the deadline, particularly where other facts suggest that the employee is capable of dealing with other relatively complicated matters in their lives.

Employers should note however that the EAT also commented that, although the test for unfair dismissal claims of reasonable practicality failed, if any claim for discrimination had been brought, then there is a wider and more lenient test on the employee, known as the 'just and equitable test', which may well have been satisfied. Tribunals are far more lenient in such cases. Coincidentally another case this Autumn has looked at this test, which we look at next.

<u>**Discrimination: Time Limits**</u>

- <u>*Kumari v Greater Manchester Mental Health NHS Foundation Trust*</u>

Unlike unfair dismissal, in discrimination claims where a Claimant submits a claim that is out of time, the test is not whether it is reasonably practicable to extend time (as in the case above in this update), but whether it is "just and equitable".

<u>Facts</u>

In this claim, the Claimant presented complaints of direct discrimination and harassment to the Employment Tribunal which were beyond the original time limit. She also wanted to add a further complaint under the Equality Act, which was out with the original time limit.

At a preliminary hearing, the Employment Tribunal had to decide whether to extend time and, in its determination, took the view that the merits of the complaints appeared to be weak and that was a factor in refusing the extension.

When the Claimant appealed to the EAT, she argued that it was wrong in law for the Employment Tribunal to take account of its view of the merits at such a preliminary stage, when it did not have all the evidence, and where it did not consider it was so weak that it had no reasonable prospects of success. The Claimant also contended that as a litigant in person, she had not had fair warning that the merits of her proposed complaint would be considered.

The EAT dismissed the appeal by the Claimant. It held that the proposed merits of a complaint, which was not so weak that it would fall to be struck out, are not necessarily an irrelevant consideration when deciding whether it is "just and equitable" to extend time. It said that merits can be taken into account. If it does assess the merits at a preliminary hearing, that assessment must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing and taking into account that, at that stage, the Employment Tribunal does not have all the relevant evidence before it. The Employment Appeal Tribunal found that the Employment Tribunal had properly considered those points.

<u>Comment</u>

It is far easier for employees to extend time limits in discrimination cases on the "just and equitable test" than it is in unfair dismissal cases on the "reasonably practicable test". The case is a reminder however that it is still open to employers to put forward arguments about weak merits, if such an application is made, and that can be persuasive to a Tribunal.

<u>**Redundancy Selection Criteria**</u>

- *<u>Mogane v Bradford Teaching Hospitals NHS Foundation Trust</u>*

It is well established that employers must consult employees prior to dismissing them for redundancy. Where adequate consultation does not take place then employees with over two years' service can bring an unfair dismissal claim. In *<u>Mogane v Bradford Teaching Hospitals NHS Foundation Trust</u>* the Employment Appeal Tribunal (EAT) reminded employers of the importance of consultation.

<u>Facts</u>

In the case, the Trust (the employer) had to make redundancies. The Trust decided that the sole criterion for selection for redundancy (adopted without any prior consultation with the employees) was that Ms. Mogane's fixed-term contract was due to be renewed before that of her colleague. The employee was invited to a meeting and told that the Trust faced financial difficulties and was told of the criteria that it had chosen (the expiry of her fixed term contract being the soonest). The remainder of the redundancy process was an attempt to find her alternative employment.

Ms. Mogane challenged the decision of the employer claiming unfair dismissal. The original Employment Tribunal rejected her claim and it found that she had been fairly selected for redundancy. She appealed to the EAT.

The EAT allowed the appeal and went back to perhaps the most well-known cases in redundancy law in the UK, *Williams & Ors v Compair Maxam Ltd, 1982 and Polkey v AE Dayton Services (Ltd), 1988*, which made clear that consultation is not just an optional part of redundancy selection criteria but is fundamental to fairness.

It held that consultation had to be genuine and meaningful and importantly has to take place at a stage where an employee or the employee's representative can still potentially influence the outcome.

On the facts here, it found that there was no such consultation and no ability for the employee to affect the selection pool. It also found the employer, on the facts, had failed to explain why it was reasonable to make that decision without consultation. Unusually (because the EAT often sends matters back down to the Tribunal to decide again on the facts), the EAT substituted its own finding, that Ms. Mogane was unfairly dismissed for redundancy.

Comment

The case is a reminder to employers that even where choice of selection criteria seems obvious and commercially in the best interests of the employer, potential criteria and pooling should be discussed with employees before any final decisions on the criteria are made by the employer.

In Conclusion

Please note: In this bulletin we aim to keep you up-to-date on some of the latest developments in employment law and although the bulletin is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers. Any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.