RMI Employment Law Newsletter
Summer 2019

Welcome to the Summer Edition of the RMI Newsletter. In this update we aim to give you a round-up of some of the latest developments in employment law. Whilst this 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

In the News

In our previous update, we covered some of the key developments planned for 2019. April saw National Minimum Wage increases, gender pay gap reporting obligations for private sector employers, the introduction of itemised payslips for all workers and increases to SSP and SMP. There has actually been relatively little headline employment law legislation this spring and accordingly (as we are all bored of the "B" word) we are going to look at recent case law in this update.

One for the future: Note that increased protection for women and new parents is on the horizon. In response to Government consultations, the Women and Equality Select Committee has largely agreed with the Government's new proposals to provide an additional period of protection against redundancy for new mothers. Watch this space...

Case Law Update

- **Vento Guidelines updated**
- **Knowledge of disability**
- **Failure to provide a written statement of terms and conditions**
- **ECJ rules that employers must record daily working time**

Vento Guidelines Updated

Not new case law as such, but an update to existing case law. Those of our members who have had the pleasure of our assistance in Tribunal will be familiar with the case of "Vento". This is an old case that sets the bands for 'injury to feelings' awards, where discrimination (and other) claims are successful.

The Presidents of the Employment Tribunals (England & Wales) and (Scotland) have issued a joint second addendum to the Presidential Guidance originally issued on 5 September 2017. It contains the (now) annual update to the Vento guidelines, setting out the bands of awards for injury to feelings, adjusted for inflation.

The new bands are:-

- Lower band (less serious cases): £900 to £8,800
- Middle band: £8,800 to £26,300
- Upper band (the most serious cases): £26,300 to £44,000

These updated figures apply to cases on or after 6 April 2019.

Knowledge of Disability

In *Baldeh v Churches Housing Association of Dudley & District Ltd* the Employment Appeal Tribunal (EAT) has given a decision that will trouble many employers.

In this case there was an appeal against an Employment Tribunal's decision rejecting a claim of unlawful discrimination under s 15 Equality Act 2010 ("EqA 2010").

The Claimant was employed by the Respondent on six months' probation, and various concerns were raised about her performance. At a probationary review meeting, the Claimant's employment was terminated and, at an appeal hearing, the Respondent confirmed her dismissal. It was accepted that the Claimant was "disabled" by reason of depression at the relevant time. The Claimant brought a claim of disability discrimination, which was rejected by the Tribunal, and she appealed on various grounds, including whether the Respondent knew or ought to have known about her disability at the material time, and whether "something arising from her disability" materially influenced her dismissal.

The EAT held that the Tribunal's decision could not stand, and the issue of whether the Respondent's rejection of the Claimant's appeal against her dismissal was an act of discrimination on grounds of disability under s 15 EqA 2010 (and what compensation, if any, she was entitled to) should be remitted to be decided by a fresh Tribunal.

The decision appears to suggest that dismissal can be discriminatory if an employer does not know about the employee's disability at the time of the dismissal and only becomes aware of it later at the appeal hearing.

Comment

The decision is troubling for employers and whilst the EAT Judge was sympathetic to the employee, as a case that sets legal precedent, it could persuade employers into a blanket policy not to offer rights of appeal to those under 2 years' service. On the facts, it seems the employer was fixed with potential knowledge of disability through the appeal process.

Members should always take advice on any particular facts of any case, as there can be very good reasons for offering an appeal and potential uplifts to compensation if employers don't do so.

Compensation for failing to provide a Statement of Particulars of Employment

Employers are required to issue a Statement of Particulars of Employment to employees within 2 months of starting and there can be an increase in compensation (s38 Employment Act 2002) in a Tribunal if an employer doesn't do so.

Will an employer who provides a written Statement of Particulars of Employment late, but before a case begins in the Tribunal, have any award increased under s38 of the Employment Act 2002?

No, held the EAT in *Govdata Ltd v Denton.*

Mr Denton was employed by Govdata on 1st December 2015. He was later given a Statement of Particulars of Employment as required by s1 Employment Rights Act 1996. But not until 15th June 2016, long after the deadline to do so (2 months from employment starting). He was dismissed in August 2016 and brought a claim a few months later.

The EAT concluded his employer had met the requirement in s1, albeit late. S38 allowed for a Tribunal award to be increased, but only where the employer was in breach of their duty *when proceedings commenced*. Since late compliance was still compliance they were not in breach of their duty under s1. Accordingly, Mr Denton's award could not be increased.

Comment

The case is welcome news for employers, not that it should be used as a good reason for not providing Statements of Particulars of Employment within the timeframe, as it assists clarification of terms between both parties.

ECJ rules that employers must record daily working time

The Court of Justice of the European Union (CJEU) has ruled that employers must record working time and keep records of hours worked to fulfil its obligations under the Working Time Directive.

The question of working time records was considered by the CJEU in CCOO v Deutsch Bank SAE. The CCOO is a Spanish Trade Union which brought an action before the National High Court in Spain against Deutsch Bank. The question in the case was whether Deutsch Bank was under an obligation to record the daily working time of its employees. The Bank hours worked on a particular day were not always recorded. The Advocate General gave an opinion earlier in the year, suggesting that employers should keep records and the CJEU has agreed with that opinion. The Court has decided that if there was no requirement to keep records, it will be impossible to determine objectively or reliably the hours worked.

This Judgment means that in order to comply with the Working Time Directive (European Legislation) the Government has to change national law. At present the Working Time Regulations (and the Northern Ireland equivalence) have not therefore properly transposed the Directive into UK law. It is likely therefore that the Government will have to amend the Working Time Regulations. Needless to say that could yet be complicated by whatever happens with Brexit.

Motor Industry Legal Services (MILS Solicitors) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.