RMI Employment Law Bulletin
Winter 2019

Welcome to the Winter Edition of the RMI Employment law bulletin. It has again been a relatively quiet time for Employment law legislation with the Government's energy all taken up in another well-known matter. As we experience another season of legislative gridlock, we are looking again at case law developments in the update below.

Case Law Update

- **Covert Monitoring**
- **Redundancy pay cap**
- **Harassment**
- **Section 111a – improper behaviour**
- **Discrimination on grounds of religion and "belief": copyright**

Covert Monitoring

The Courts and Tribunals have at long grappled with the balance between surveillance of employees and the right under Article 8 of the European Convention on Human Rights to private life. In a recent development, the European Court of Human Rights in *Lopez Ribalda and others v Spain* held that covert surveillance of employees under suspicion of theft did not breach Article 8.

The decision was 14 to 3. The case concerned the installation of covert video surveillance in a Spanish supermarket where there was a high level of theft. Surveillance was limited to 2 weeks and the recordings were confined to a small group of individuals. Employees were not informed in advance. It was argued that Article 8 was infringed. The Court held that employees should have a limited expectation of privacy at work on a supermarket floor and found that the employer had taken reasonable steps to confine the circulation of the recordings. It agreed therefore with the original Spanish Court, that a fair balance had been struck and that the intrusion into private life was proportionate.

Comment

Covert recording should always be the exception rather than the rule, but the case gives some support for employers in such circumstances.

Redundancy Pay Cap

If an employee claims contractual and statutory redundancy payments at a tribunal, does statutory redundancy pay count towards the £25,000 cap for a breach of contract claim?

No, held the EAT in *Uradar v Lancashire Care NHS Foundation Trust*.

The Claimant's enhanced contractual redundancy entitlement was £43,949.04, contractually deemed inclusive of statutory redundancy pay (here £5,868). After dismissing the Claimant

in a redundancy exercise, the Trust refused to make any redundancy payments, asserting that it had offered suitable alternative employment. The Tribunal upheld the employee's entitlement to both statutory and contractual redundancy pay, the latter payment capped at £25,000 by the limit in the *Extension of Jurisdiction Order 1994*. The Tribunal held that the statutory redundancy pay was 'subsumed' with the contractual claim, so awarded £25,000 (not £25,000 + £5,868).

The EAT held that the tribunal erred in law, there were two causes of action, statutory redundancy pay and breach of contract. The doctrine of 'merger' found in wrongful dismissal claims whereby tribunal and (uncapped) civil court claims can't both be brought did not apply; the right approach here was to award £25,000 for breach of contract and £5,868 for Statutory redundancy pay.

The EAT commented that the £25,000 cap on contractual claims, unchanged since 1994, could be raised by a statutory instrument, and that the present cap can produce real injustice and was out of step with the wider powers of tribunals in other areas.

Harassment

In a harassment case, does proving that conduct created an offensive or humiliating environment by itself give rise to a *prima facie* case that such conduct relates to a protected characteristic?

Not always, held the EAT in *Raj v Capita Business Services*, dismissing the Claimant's appeal.

The Claimant's (female) manager had massaged his shoulders in an open office, which the Tribunal found was unwanted conduct producing an offensive environment for him. The Tribunal rejected part of the manager's evidence about the massages, but accepted that the conduct was not related to the Claimant's gender, the reason for it was misguided encouragement, so the harassment claim failed.

In applying the two-stage test in s136 *Equality Act*, the Claimant met stage one by proving unwanted conduct producing an offensive environment. By itself, this was not enough for stage two, to establish a prima facie case that the unwanted conduct related to a protected characteristic (here, the Claimant's sex); the burden of proof had not shifted to the Respondent to prove the reason for the conduct, and even then, the explanation was accepted.

There is no rigid rule of law that a Claimant, having met stage one, will shift the burden of proof for stage two if the Tribunal finds that a Respondent has given wrong or untruthful evidence about conduct or why it happened. The Tribunal had not erred in law by failing to approach the case on the basis that the burden of proof had shifted to the Respondent to show that the conduct in question wasn't related to the Claimant's sex. The Tribunal had anyway accepted a non-discriminatory reason for the conduct, so the appeal failed.

Section 111a – improper behaviour

Under Section 111a of the Employment Rights Act 1996, it is possible for certain conversations not to be included in any Tribunal evidence where the parties are trying to settle matters. There is an exception, however, if there is "improper behaviour".

Is it sufficient that a Claimant asserts there was improper behaviour by an employer when negotiating a settlement in order for evidence of those negotiations to be admitted in evidence?

No, held the EAT in *Harrison v Aryman Limited*.

Where improper behaviour is alleged as a reason for evidence of settlement negotiations to be admitted despite *s111A Employment Rights Act 1996*, it is necessary for the Tribunal to decide whether the behaviour was improper, by making findings of fact, before admitting it.

By contrast, where the Claimant's case is that the circumstances of any dismissal are such as to make the dismissal automatically unfair, it is sufficient for the Claimant to put their case in that way for that evidence to be admissible under *s111A Employment Rights Act 1996.*

Note that, because of the many exceptions to Section 111a of the Employment Rights Act 1996, we often advise RMI members to use this section with some caution and legal advice should always be obtained.

Discrimination on grounds of religion and "belief": copyright

Did the dismissal of an employee for asserting her moral right to own the copyright to her own creative works amount to discrimination on the grounds of belief?

No, held the Court of Appeal in *Gray v Mulberry Company (Design) Limited.*

The Claimant was asked to assign copyright in any works she created during her employment to her employer. She refused and was dismissed. She claimed the dismissal amounted to discrimination on the grounds of her belief in the moral right to own the copyright to her own creative works.

The Court of Appeal held that her refusal to sign the copyright agreement, and thus her dismissal, arose from her concern that the wording of the relevant clause failed to protect her own interests sufficiently. A debate or dispute about the wording or interpretation of an agreement could not be a philosophical belief within the meaning of the *Equality Act 2010.*

Comment

This is the latest in a series of cases which have tested the boundaries of what is meant by a "philosophical belief" and the Court of Appeal, in our view, has arrived at a sensible decision.

In Conclusion

Don't forget, 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.

Motor Industry Legal Services

Motor Industry Legal Services (MILS) 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.