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UK Employment Flash

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Supreme Court Rules on Legality of Pay Offers Outside Collective Bargaining Process

The Supreme Court ordered in *Kostal UK Ltd v Dunkley & Ors* that an employer's pay offer directly to members of a recognized trade union when its usual collective bargaining process had stalled (but had not been exhausted) amounted to an unlawful inducement in breach of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), entitling the employees to reject the offer and claim compensation of £4,341 each.

Section 145B of TULR(C)A was introduced to restrict an employer's ability to discourage employees from joining a union. It prohibits an employer from making a direct offer to a worker who is a member of a recognised trade union where the employer's sole or main purpose in making the offer is to achieve a "prohibited result," meaning a result that circumvents a collective bargaining process with the recognized union such that the relevant terms are no longer collectively bargained. If such an offer is made, each affected worker can accept or reject the offer and claim a mandatory award of compensation, currently £4,341, "in respect of the offer complained of."

This case, decided on 27 October 2021, concerned the automotive products company Kostal's attempt to negotiate an annual pay increase in 2015 and to offer a Christmas bonus in return for a variation of other terms in the employees' existing contracts. Unite, the recognized union, rejected the offer after a ballot of the affected employees. Kostal agreed to refer the dispute to ACAS (the Advisory, Conciliation and Arbitration Service), as is usual in disputes of this nature, but then wrote directly to the employees to offer the same package, telling them that if they did not accept, they would not receive the Christmas bonus. At that point, some accepted the offer. The following January, Kostal wrote again to the employees who had not accepted and this time offered a further increase in their pay if they accepted the new terms. It also threatened dismissal if they refused. Some, but not all, of the employees accepted at that time. A collective agreement was reached with Unite the following November. Certain employees claimed a breach of their rights under Section 145B of TULR(C)A in the Employment Tribunal.

Following appeals from the decisions in the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal, the case was referred to the Supreme Court. It found in favour of the trade union members and held that the offers made by Kostal outside the collective bargaining process amounted to an unlawful inducement, even if other terms of their contracts continued to be determined collectively. On the facts of the case, Kostal had not exhausted its collective bargaining procedure when it made the offers.

The Supreme Court noted that "an employer which has recognised a trade union for the purpose of collective bargaining and agreed to follow a specified bargaining procedure cannot be permitted with impunity to ignore or by-pass the agreed procedure, either by refusing to follow the agreed process at all or by being free to drop in and out of the collective process as and when that suits its purpose."

The employees' case, as asserted, would have had the practical effect of preventing the employer from implementing a pay increase or offering new terms and conditions to the workforce until an agreement is reached collectively. However, the Supreme Court went on to say that if the collective bargaining procedure with the recognised trade union has been followed and exhausted, there is nothing to stop the employer from making a direct offer to its employees — this would not give rise to a breach of s.145B as, once the procedure has been exhausted, it is no longer possible for the term(s) to be determined by collective agreement. In that case, "it cannot be said that the purpose of making direct offers was to procure the result that terms will not be determined by collective agreement when that otherwise might well have been the case."

Takeaways

Employers should ensure that:

- their collective bargaining procedures are clear as to when the collective bargaining process had been exhausted; and
- any attempt to make an offer direct to employees is taken only once the employer genuinely and in good faith believes its processes have been exhausted.

High Bar for Causation in Whistleblowing Dismissal Claims Clarified

In *Secure Care UK Ltd v Mott*, the Employment Appeal Tribunal overturned a finding of unfair dismissal in a whistleblowing claim where the whistleblower had been made redundant after making a number of protected disclosures. The Employment Appeal Tribunal held that the protected disclosures needed to be the "sole or principal reason" for the dismissal for it to be unfair.

The claimant in this case, Mr Mott, worked as a logistics manager for Secure Care UK Ltd and made several complaints to his employer regarding staff shortages, long working hours, lack of rest breaks and other staffing issues, which he argued amounted to a breach of health and safety regulations. Mr Mott was dismissed by reason of redundancy approximately six weeks later alongside two other staff members. He brought a claim for unfair dismissal pursuant to s. 103A Employment Rights Act 1996 (the Act), alleging that he had been selected for redundancy because of the protected disclosures he had made.

The Employment Tribunal (ET) upheld the complaint, finding that three of the claimant's nine disclosures met the statutory test for protected disclosures. These included the claimant (i) emailing several people at the company, including the senior manager, asserting that certain shift arrangements would not allow for adequate rest breaks for staff, (ii) emailing the senior manager and generally expressing his concerns that control room objectives could not be met if staffing levels were further reduced, and (iii) pointing out possible breaches by the company of the Care Quality Commission Regulations 2009, health and safety law, and the Working Time Regulations 1998. The ET held that, while there was a genuine redundancy situation, the claimant raising his concerns had a "more than trivial impact" on the decision to provisionally select him for redundancy and therefore, he had been unfairly dismissed.

The employer appealed, and on 23 February 2021, the Employment Appeal Tribunal (EAT) overturned the ET's finding on two grounds. First, the ET had applied the test for detriment by reason of making a protected disclosure under s. 47B of the Act, considering whether the protected disclosures "materially influenced" the employer's treatment of the claimant. The correct test applicable to an unfair dismissal claim under s. 103A of the Act, however, is whether the protected disclosures were the "sole or principal" reason for dismissal, which is a higher standard. Second, the ET had failed to confine its consideration to the three complaints that it had found amounted to protected disclosures, rather than the combined effect of all nine communications, some of which related to general staffing concerns. The EAT remitted the case back to the ET to consider these issues.

Takeaways

This case serves as a helpful reminder that the correct test of causation to be applied when an employee has been dismissed due to making protected disclosures is whether the disclosures were the "sole or principal reason" for dismissal. If a worker has suffered detriment short of dismissal as a result of having made protected disclosures, on the other hand, the test is whether the disclosures "materially influenced" the employer's treatment of the claimant. Employees, potentially tempted to make protected disclosures when their employment is at risk, will benefit from automatic unfair dismissal protection only if their protected disclosure constitutes the principal reason for the dismissal.

Government Consultation Suggests Making Flexible Working the Default

The Department for Business, Energy and Industrial Strategy published a consultation paper in autumn 2021 seeking views on proposals to reform the flexible working regulations so as to make the right to request flexible working arrangements a "day one entitlement." Several representative bodies, including the City of London Law Society's Employment Law Committee, have submitted their positive responses.

In light of extensive changes to working practices in response to the COVID-19 pandemic and commitments in the U.K. government's 2019 election manifesto to make flexible working the default model for employees in the U.K., the Department for Business, Energy and Industrial Strategy published a consultation paper in autumn 2021 seeking views from the public on proposals to reform flexible working regulations.

Currently, employees in the U.K. have the right to request flexible working arrangements (for example, working remotely or part time) once they have 26 weeks of continuous service.

The key proposals and considerations include:

- making the right to request flexible working patterns an entitlement from the first day of employment (a "day one entitlement"), rather than requiring 26 weeks of continuous service. This could include job applicants and employees still in their probationary period and would encourage employers to consider flexible working issues early in the recruitment process;
- whether the eight business reasons employers can currently give for refusing an employee's flexible working request (which include the burden of additional costs, ability to meet customer demand, inability to reorganize work among existing staff or recruit additional staff, and detrimental impact on quality of work or performance) all remain valid, or whether additional or different reasons should be included to address changes to the workplace brought about by the pandemic;
- requiring employers to suggest alternative arrangements to employees if they are unable to grant a flexible working request and an alternative is possible, rather than the current requirement to accept or reject the request;
- potentially allowing employees to make more than one flexible working request a year, for example, where an employee's personal circumstances have changed within any 12-month period;
- potentially reducing the current three-month period during which an employer has to provide a response to an employee's flexible request; and
- finding ways to encourage more employees to use their ability to request a temporary flexible working arrangement.

Importantly, despite the title of the consultation, the proposals do not change the current fundamental position that the employee's right is only a right to **request** flexible working conditions, rather than a default right to work flexibly. In addition, the U.K. government does not currently plan to introduce a statutory requirement for employers to state in job postings whether flexible working will be possible.

While employers are expected to handle employees' requests reasonably — for example, by following the ACAS Code of Practice — employers are not subject to a reasonableness test when deciding whether to grant or refuse a flexible working request. There is no current proposal to change this, although introducing a requirement that employers suggest an alternative would likely encourage further discussion about what constitutes a reasonable assessment.

Several organisations, including the Law Society and ACAS, welcomed the government's proposals, as they would encourage employees to make a request at the start of their employment and enable a transparent dialogue between the employer and employee at the start of the relationship. It is to be seen whether legislative changes will be implemented as a result.

Violence and Harassment Convention: Opportunity To Increase Protection Against Sexual Harassment in the Workplace

In combination with its response to the 2019 consultation on the prevention of sexual harassment in the workplace, the U.K. government's proposal to ratify the Violence and Harassment Convention No. 190 looks to enhance current protections and place a more active duty on employers to prevent harassment.

In our September 2021 update, we reported on the U.K. government's response to its 2019 consultation on the prevention of sexual harassment in the workplace (2019 Consultation). The proposal includes placing a positive duty on employers to prevent sexual harassment and a review of the time limit to bring discrimination claims in the Employment Tribunal.

On 15 November 2021, the government proposed to ratify the Violence and Harassment Convention No. 190 (C190), which recognizes the right to be free from violence and harassment in the workplace. If ratified, the government will need to ensure that all subsequent laws, regulations and policies are consistent with C190. C190 applies to all individuals, including interns, job applicants and volunteers, and all sectors. It also applies to any violence and harassment that is linked to or arises out of work,

which could be at a work-related social event or even during the commute into the office. These are examples of how C190 seems to go further than the protections currently in place in the U.K.

However, the U.K. government does not believe ratification would necessarily require any changes to legislation. Perhaps the intention to make changes to preventing sexual harassment in light of the 2019 Consultation has contributed to the view that no further changes would be needed. However, it is important to note that C190 extends beyond sexual harassment to other forms of violence, so it could easily place additional duties on employers, even if separate measures are brought in by the U.K. government, as is being suggested.

Takeaways

While neither the ratification of C190 nor the proposals on sexual harassment are yet in motion, it is worthwhile for employers to take note of the general move toward greater protection for all individuals in the workplace. Like the proposals arising from the 2019 Consultation, ratification of C190 is likely to lead to employers taking more active measures, such as improving training and raising awareness through policies and other resources, which is a focus of C190. Another possibility is that C190 would require employers to take greater responsibility in taking measures to prevent any violence or harassment in the first place, and provide active support in any scenario where it does occur. Employers would also have to think about how they can responsibly ensure that those individuals who they have less frequent contact with, or who may not have access to the same materials (such as interns or volunteers) are included in training and have the same support.

Overall, the announcement with regard to C190 is a useful reminder of the considerations many employers already proactively make to prevent harassment at their place of work.

Worker Status: A Tough Gig To Play

The debate on the correct status of workers in the gig economy continues. Three recent court decisions shine new light on the factual metrics to be considered, including an unfettered right of substitution, the level of control the employer is able to exercise and mutuality of obligations between the parties.

As highlighted in our February 2021 edition, the debate on the correct status of workers in the gig economy is rapidly developing. In three recent cases, the English courts laid down judgments on whether individuals working in the gig economy had worker status.

Under English law, an individual who is a "worker" has a variety of employment rights (*e.g.*, the right to paid holiday, minimum wage and sick pay) but is not granted full employment rights. This has proved to be a key battleground in the gig economy, and the Employment Appeal Tribunal's decisions in *Stojsavljevic and another v DPD Group UK Ltd* (21 December 2021) and *Johnson v Transopco UK Ltd* (18 January 2022), and the Court of Appeal's decision in *Stuart Delivery Ltd v Augustine* (12 October 2021), reinforced the importance for employers to find a balance between the control they exert over individuals engaged to provide services and those individuals' employment status. While worker status hinges on the particular facts, the English courts have considered, among other things, whether the individual is required to perform the services personally or is able to send a replacement (the right of substitution), the extent of the employer's control over the individual and whether there is a mutuality of obligations between the parties.

In *Stojsavljevic and another v DPD Group UK Ltd*, the Employment Appeal Tribunal determined that individual owner driver franchisees (ODFs) who provided parcel delivery and collection services did not have worker status. The EAT held that the ODFs had a broad right of substitution, notwithstanding that in practice the ODFs would only use cover drivers who were also ODFs or drivers of other ODFs. The contractual restrictions on ODFs sourcing drivers to perform delivery and collection services were limited. As a result, the EAT deemed that this genuine right of substitution was not consistent with employee and worker status and that the ODFs were independent contractors.

In *Johnson v Transopco UK Ltd*, a taxi driver who used the Mytaxi app to source passengers in addition to providing rides as a self-employed taxi driver brought a number of claims against Transopco UK Ltd that, in order to succeed, required him to first establish that he had worker status. Considering the parties' relationship holistically, the EAT determined the driver, Mr Johnson, was not a worker, notwithstanding that he had a limited right of substitution. The EAT held Transopco UK Ltd had limited control over whether its drivers undertook jobs through the Mytaxi app, and there were limited penalties if drivers rejected jobs through the app and focused on their own trade instead. Moreover, the EAT resolved that Mr Johnson did not have a relationship of dependency or subordination to Transopco (unlike previous worker status decisions), which was inconsistent with worker status.

The Court of Appeal decided in *Stuart Delivery Ltd v Augustine* that a courier working for the delivery company was a worker. The court placed particular reliance on the fact that if a courier was not able to find a suitable replacement for a slot they had elected to cover, they would have to complete the slot personally or face penalties. This limited right of substitution was not in line with an independent contractor status, and the court concluded the courier had worker status.

Takeaways

Considering these recent decisions, while it is clear that worker status will depend on the individual circumstances, there are broader principles that can be drawn. Employers should consider the level of control they want to exert over their workforce and whether these more naturally sit with worker status. In particular:

- Employers should consider whether individuals they engage have a right of substitution, the extent to which this is unfettered and its use in practice. The more fettered this right of substitution, the more likely those individuals will be deemed workers.
- Employers should also review how they incentivize individuals to take up gigs, particularly whether the individuals are free to reject gigs without penalty or are expected to make a certain level of commitment.
- Employers should assess whether the individuals they engage have a relationship of dependency or expect to be provided with work.

While the needs of employers vary, against the landscape of the rapidly growing gig economy and intense competition, getting the right balance between the level of control they exert over their workforce and each individual's employment status will serve them in good stead.

Further Institutional Investor Guidance for UK-Listed Companies for the 2022 Voting Season

Investor bodies have published updated guidance for the 2022 voting season. In the context of executive compensation, pay restraint remains a key theme, with confirmation that last year's COVID-19 guidance for remuneration committees continues to apply. There is also an ongoing focus on best practices and linking variable pay metrics to long-term ESG strategy.

The Investment Association (IA) (Remuneration Principles), along with Glass Lewis (2022 Policy Guidelines) and the Institutional Shareholder Services (ISS) (2022 Benchmark Policies) have published updated guidance for the 2022 voting season.

The expectation of pay restraint remains, as the impact of the pandemic on business and workforce pay and conditions continues to be felt, and the IA has confirmed that guidance previously issued in light of the pandemic continues to be relevant. Investor bodies are clear in their guidance that stakeholder experience and wider employee and market conditions must be factored into any remuneration decisions. Remuneration committees must clearly communicate the rationale for any significant increase to any elements of remuneration, and investors are expected to closely scrutinise disclosure around the assessment of nonfinancial targets in bonus outcomes. Where a company has relied on government or shareholder support, the expectation continues to be that bonuses should not be awarded.

Companies are urged to be mindful of "windfall gains" (essentially, a gain due to market movement only) under long-term incentive plans (LTIPs) and grant size where awards are granted at a time of share price volatility. Where the company's share price has fallen, remuneration committees should scale-back LTIP award levels at grant rather than using their discretion at vesting.

Effective disclosure of executive pay and alignment with best practice remain key areas of focus, in particular the process around benchmarking, post-employment shareholding requirements and pension contribution levels.

With investors increasingly focusing on companies' accountability for environmental, social and governance (ESG) matters, companies are encouraged to incorporate the management of ESG risks into their remuneration structures and performance metrics. The IA continues to note that ESG metrics should be quantifiable, clearly linked to value creation and the company's long-term strategy, and the rationale for choosing them should be disclosed to investors.

For more on this topic, see our February 7, 2022, client alert, "Executive Compensation: Current Issues for Remuneration Committees and Considerations for the 2022 Voting Season," in which we consider the areas of concern for investors and the challenges for remuneration committees in 2022.

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