UK Employment Law Round-up

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In this month's issue we consider the case of *Dronsfield v. University of Reading*, in particular the EAT's observations in that case about how disciplinary investigations should be conducted and the role of HR in finalising investigatory reports and disciplinary decisions.

We also look at a recent case on the definition of "worker" for whistleblowing purposes, which established that, in some circumstances, a "worker/employer" relationship may be established between an agency worker and an end user.

We consider the "cautionary tale" of Byron Burger on how not to assist in a Home Office investigation, with a brief reminder of the risk of not carrying out appropriate "right to work" checks.

Finally, we consider what's next for UK employment law – not just in the context of Brexit, but also in terms of the pledges and agendas our political leaders have set out.

In this issue...

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Dronsfield v. University of Reading UKEAT/0200/15

The recent case of *Dronsfield v. University of Reading* UKEAT/0200/15 has prompted some fairly sensationalist headlines. Take the Evening Standard, for example: "University of Reading art lecturer who had sex with 'vulnerable' student sacked". But what lessons can employers take away from the case?

The set of facts is fairly specific to institutions, such as universities, which have their own statutes and by-laws. However, the case does also have more general application and serves as a useful reminder to employers about how disciplinary processes should be properly carried out and documented.

Read more on page 2>

The facts

Dr Dronsfield was an associate professor at the University of Reading, where he enjoyed security of tenure. The university's activities are governed by statutes, including one which expressly deals with dismissal of academic staff. In order to dismiss, the university must have "good cause" for dismissal, in the form of one of the reasons specified in "statute XXXIII". The reason specified as pertinent to this case was "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment".

Dr Dronsfield's contract confirmed that his appointment was subject to the charter and statutes and that his appointment would not be terminated by the university other than under statute XXXIII.

An allegation was raised against Dr Dronsfield that he had failed to report a sexual relationship with a student who he was also responsible for supervising. A Professor Green was appointed to investigate the allegation, with support from Ms Rolstone, an HR partner.

Professor Green and Ms Rolstone produced a joint investigation report. Initial drafts were subject to review by the university's HR department and in-house lawyer. The final version of the report omitted a number of the initial findings that would have been favourable to Dr Dronsfield, including, in particular, a summary of findings that "in essence, there is no evidence to suggest that the conduct of Dr Dronsfield constituted 'conduct of an immoral, scandalous or disgraceful nature'".

Notwithstanding that finding, the report concluded that there was evidence that Dr Dronsfield had breached his duty of care towards students. In light of the investigation, a disciplinary panel was appointed, which, following a hearing, recommended dismissal. Dr Dronsfield's internal appeal was unsuccessful and he brought a claim for unfair dismissal.

Tribunal decision

The tribunal at first instance dismissed Mr Dronsfield's claim for the following reasons:

- In the tribunal's view, the words "immoral, scandalous or disgraceful" were qualified by the words that followed ("incompatible with the duties of the office or employment") and were, in effect, the language thought in 1926 appropriate to describe what in modern language we refer to as "gross misconduct".
- The tribunal indicated that it was troubled by the redactions to the investigation report following the involvement of HR and the in-house lawyer. However, it accepted the integrity of Professor Green's oral evidence that he signed off the report in good faith because it accurately represented his conclusions.

The appeal to the EAT

Dr Dronsfield appealed to the EAT, arguing that the tribunal had erred in equating the relevant wording with gross misconduct, and that it had failed to ask whether the conclusions of the investigation were fully expressed in the report and whether it was reasonable to dismiss having regard to what was omitted in the final version of the report. The EAT upheld the appeal and remitted the case to be heard by a fresh tribunal.

Section 98(4) of the Employment Rights Act 1996 (ERA 1996) requires a tribunal to review every aspect of the decision to dismiss, including the investigation, disciplinary process, the findings and the sanction imposed, against the standard of the reasonable employer. The university's duty had been to apply the wording in its statute. Alleged misconduct was to be judged against contemporary standards of what is immoral, scandalous or disgraceful. The EAT noted that whether this wording might, in any particular case, provide more protection to a member of academic staff from the modern concept of gross misconduct was irrelevant.

From the press reporting you may well think that Dr Dronsfield's behaviour was immoral, scandalous or disgraceful. However that will be a matter for the fresh tribunal to decide, bearing in mind that, in the initial draft investigation report, Professor Green concluded that Dr Dronsfield's behaviour was not so.

In respect of the investigation report, the EAT found that there was no reason to doubt the tribunal's finding that the final version of the report represented Professor Green's genuine conclusions after receiving honest and unbiased advice. However, the tribunal appeared to have treated these findings as conclusive. The EAT clarified that the test is not subjective integrity but objective fairness.

In particular, there was nothing to suggest that Professor Green had changed his opinion about whether Dr Dronsfield's conduct was immoral, scandalous or disgraceful; rather his opinion had simply been deleted. In order to determine whether it had been reasonable for the university to have decided that Dr Dronsfield's conduct had met the required standard for dismissal, the tribunal should have asked whether Professor Green had changed his opinion or simply omitted it and, if so, why.

EAT's observations on the nature of an investigation and the role of HR

Perhaps the most interesting takeaway point from this decision is the EAT's *obiter* observations about the conduct of an investigation.

The EAT was surprised that the investigation was produced as the joint responsibility of Professor Green and the HR representative. Best practice would be to have one, independent investigating officer. The EAT agreed with the observation in *Ramphal v. Department of Transport* [2015] IRLR 985 that HR's advice should be limited essentially to matters of law and procedure, as opposed to questions of culpability, which should be reserved for the investigating officer.

Separately, the EAT also noted that the alleged "victim" was not contacted at any stage of the investigation. The EAT considered that it would be generally good practice for someone in that position to be contacted in the course of an investigation to see whether they wish to contribute to it.

Comment

As set out above, these were a fairly unusual set of facts. However, where an employer does have particular requirements for dismissal set out in any internal rules or regulations it should abide by them. Adherence to those requirements will be relevant to assessing the fairness of the dismissal. Interestingly, although perhaps not surprisingly, according to reports, the university has indicated that it will be updating academics' contracts (governed by the university's internal rules), to bring them into line with non-academic staff (not governed by any internal rules).

Of more general application, employers should ensure that their procedure on the conduct of an investigation is clearly set out and that investigating officers are aware of their role and responsibilities. The decisions in this case and *Ramphal* both confirm the Supreme Court's judgment in *Chhabra v. West London Mental Health NHS Trust* [2013] UKSC 80. This effectively established an implied term that the report of an investigating officer for a disciplinary enquiry must be the product of his/her own investigations. Any subsequent review and alternation by a third party must be undertaken with this in mind and the investigating officer will need to be personally able to justify any changes made following a review.

Arguably what this case also highlights is the importance of privilege in investigatory and disciplinary procedures. It is not unusual for HR and legal advisers to have some input in finalising investigatory reports and disciplinary decisions. However, particularly in very sensitive matters which could result in dismissal, employers should take steps to ensure that the drafting process is protected by privilege. This is likely to involve ensuring that, insofar as possible, legal advisers are copied in on all correspondence relating to the disciplinary process and ensuring that all draft documents are marked "legally privileged and confidential".

The definition of "worker" for whistleblowing purposes

The Public Interest Disclosure Act 1998 (PIDA) creates two levels of protection for whistleblowers. The dismissal of an employee will be automatically unfair if the reason, or principal reason, for his/her dismissal is that he/she has made a "protected disclosure". PIDA also protects workers from being subjected to any detriment on the ground that they have made a protected disclosure. It is fairly common knowledge that the definition of "worker" under PIDA is wider than that under the ERA 1996. However, the recent case of *McTigue v. University Hospital Bristol NHS Foundation Trust* has highlighted just how widely the courts are willing to apply the definition.

Definition of "worker"

A "worker" is defined by section 230(3) ERA 1996 as: "an individual who has entered into or works under (or, where the employment has ceased, worked under) –

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

However, under section 43K ERA 1996, the usual definition of worker is extended in relation to the whistleblowing provisions to include a number of individuals who would not otherwise be covered. This extended definition includes agency workers and individuals supplied via an intermediary, provided that the terms of engagement are

not substantially determined by the workers themselves but instead by the person for whom they work (section 43K(1)(a)(ii)).

Section 43K(2) ERA 1996 confirms that, for the purposes of section 43(1)(a), "employer" includes the person who "substantially determines or determined the terms on which he [or she] is or was engaged".

Facts of the case

The claimant was employed by an agency, Tascor Medical Services Limited (TMS Ltd), which assigned her to work at a sexual assault referral centre operated by the respondent trust. The claimant had a written contract of employment with TMS Ltd but she was also subject to the trust's standard form contract, which, among other things, identified the supervisor under whom she would work, set out an absence notification procedure, and required her to cooperate with the trust in relation to issues of health and safety, clinical governance, and working time. The contract also reserved the trust's right to terminate the contract in circumstances where the claimant acted in a way that might jeopardise the quality of patient care. However, as is usual in an agency relationship, TMS Ltd would operate all disciplinary and grievance procedures, and was responsible for the claimant's remuneration.

The claimant was removed from her assignment in December 2013, and brought detriment claims based on disclosures she had made to the trust. However, the employment judge at first instance found that the tribunal had no jurisdiction to hear the claimant's claim against the work, because she was not a worker under section 230(3) or 43K ERA 1996.

The judge focused on section 43K(1)(a)(ii), which he interpreted to mean, on the facts of the case, that the trust would have to determine the more significant terms on which the claimant worked for TMS Ltd if the claimant were to be a section 43K worker in relation to the trust. The claimant appealed to the EAT.

EAT decision

The EAT allowed the appeal, holding that the tribunal had erred in its approach to whether the claimant was a worker under the extended definition in section 43K(1)(a)(ii) ERA 1996. It remitted the case to a fresh tribunal.

In her judgment, Mrs Justice Simler, President of the EAT, began by setting out the proper interpretation of section 43K(1)(a). She observed that the provision focuses on identifying who, as between the individual and the other parties (the agency and the end user), substantially determines the relevant terms. A comparison between the agency and the end user is not necessary. Under section 43(K)(2)(a), the "employer" is the person who substantially determines the relevant terms, so it is possible that both the agency and the end user could be the employer for these purposes.

It is not necessary to consider who determined the majority of the terms, or the most significant terms, as between the agency and the end user. Where two parties (other than the individual) have between them determined the relevant terms, but have done so to different extents, both parties might have substantially determined the terms.

The trust made a submission that the extended definition of worker only applies to individuals who do not fit into the standard worker definition in relation to any partner. The EAT rejected this submission and held that the correct interpretation is that the extended definition is only engaged where any individual is not a standard worker in relation to the respondent in question.

Accordingly, the fact that the claimant was a worker of TMS Ltd would not prevent her claiming section 43K protection with regard to the trust.

Comment

The decision is largely aligned with the reasoning in *Day v. Lewisham NHS Trust* and another UKEAT/0250/15, in which the EAT held that "substantially" in section 43K(1)(a)(ii) means "in large part". However, the cases follow a very different fact pattern.

The question in this case was not so much whether the claimant substantially determined her terms of engagement (it was not argued by the respondent that she did), but whether, where the terms of an agency worker's assignment are drawn from contracts with multiple parties, it is necessary to undertake an examination of which terms are derived from which party.

The EAT has confirmed that this exercise is not necessary for the purposes of section 43K(1)(a)(ii), although it may need to be carried out under section 43K(2), in order to work out who the relevant employer is. However, it should be noted that in some circumstances there may be two "employers" for these purposes.

Guidance on how to determine whether an individual is a worker within section 43K(1)(a)

In her judgment, Mrs Justice Simler helpfully set out a number of questions that should be addressed when determining whether an individual is a worker within section 43K(1)(a):

(a) For whom does or did the individual work?

(b) Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on s.43K in relation to that person. However, the fact that the individual is an s.230(3) worker in relation to one person does not prevent the individual from relying on s.43K in relation to another person, the respondent, for whom the individual also works.

(c) If the individual is not an s.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and, if so, by whom?

(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within s.43K(1)

(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them?

If any of these is satisfied, the individual does fall within the subsection.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral or implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within s.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under s.43K(2)(a).

Key takeaways from the case

The key takeaways from the case are that an agency worker may be able to bring a whistleblowing claim against an end user, provided that the terms of engagement are not substantially determined by the worker himself/herself; and that the fact that an individual may be a section 230(3) worker in relation to the agency does not automatically prevent that individual from being a worker under the extended definition in relation to the end user.

Byron Burger: A cautionary tale?

Popular "posh" burger chain Byron Burger has been at the centre of a media flurry, as 35 members of its staff were rounded up and arrested in a controversial immigration sting. The controversy largely relates to Byron's involvement in the sting.

The Home Office confirmed that, on the morning of 4 July 2016, immigration officers raided Byron branches and arrested 35 "migrant workers" of Albanian, Brazilian, Egyptian and Nepalese nationality. In the initial reports, a senior manager in one of the branches alleged that staff, some of whom had been employed by Byron for as long as four years, had been duped by Byron into attending a health and safety meeting at 9:30 am, but immigration officials quickly arrived and started to interview people.

Byron has confirmed that it facilitated the raid at the Home Office's request but has refused to respond to the claims that it set up the staff meetings on false pretence. As they say, sometimes silence speaks a thousand words.

As such, in amongst the few messages of support for Byron, the critics have shouted louder, calling for a boycott of the chain. Two London branches have already been targeted in the backlash, where activists went so far as to release cockroaches and locusts into the restaurants, forcing them to be closed to customers.

But what are the rights and wrongs of this incident? First, the Home Office has acknowledged that Byron complied with its legal obligations, in particular its obligation to carry out "right to work" checks. The Home Office has issued guidance on what checks employers need to carry out on new workers (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/536953/An_Employer_s_guide_to_right_to_work_checks_-_July_16.pdf). Provided that an employer has carried out the appropriate checks, it will have a statutory excuse against liability for a civil penalty if it later comes to light that any worker has been working illegally in the UK. Employers must therefore ensure that the necessary checks are carried out, as the penalty for failure to do so (up to £20,000 for each illegal worker) could be substantial.

The issue with the Byron workers is that, in the course of its own investigation, the Home Office identified that those workers at the centre of the alleged immigration breaches had provided false or counterfeit documentation as proof of their right to work in the UK. The Home Office then made a specific request of Byron to assist in its investigation, which Byron did.

Perhaps then the PR nightmare that is the Byron story should be treated as a cautionary tale of how not to assist in a Home Office investigation. The recent trend seems to show that the Home Office is really cracking down on illegal workers and, accordingly, Home Office investigations are likely to become a live issue for a number of employers. Employers need to balance their legal obligations against their more human responsibilities to their staff.

No one is condoning illegal working or the falsification of documentation. However, arguably, if Byron had dealt with the issue more sensitively and compassionately, it could have mitigated the negative press it received. In an era where people have the world at their fingertips, consumers are calling out to see the human face of business.

What's next for UK employment law?

In this time of flux, as we await the trigger of Article 50 and the results of negotiations between the UK and the EU, it is extremely difficult to predict what's next for UK

employment law. As we have previously commented, the extent to which UK employment law may change in light of Brexit is very much dependent on the relationship that the UK and the EU forge going forward. What we can say with some certainty, however, is that, in the short term, we are unlikely to see any major changes to UK employment law, directly resulting from Brexit.

Any changes to UK employment legislation are in fact likely to be driven by the political agenda, in other words which party is in government over the coming years.

What we do know is that, unless new Prime Minister Theresa May decides to call an early election, we are likely to have a Conservative government until at least May 2020. Whilst employment issues haven't been at the forefront of the Conservative agenda in the way that they have been for the Labour Party, May has already vowed to put worker representatives on boards of major companies and to impose stricter limits on executive pay.

Workers are already represented on boards in companies in many European countries, including Germany, Denmark and Sweden. It is hoped that, by having worker representation amongst the executive team, boards will move towards prioritising long-term decision-making, over short-term financial gain. May has not as yet set out any practical steps for implementing these plans but they have received the seal of approval from the Trades Union Congress.

In line with a number of the other changes to financial markets regulation in particular, May has outlined plans to give shareholders stronger powers to block remuneration packages, making votes binding rather than merely advisory.

So what are the opposition saying? Candidate for Leader of the Labour Party Owen Smith recently set out a Manifesto for Fairness at Work, including 25 pledges. These include, amongst other things, reintroducing wages counsels for those in the hospitality, retail and social care sectors; strengthening collective bargaining; improving collective trade union rights and repealing the Trade Union Act 2016; reintroducing "day one" unfair dismissal rights; abolishing zero hours contracts; enhancing the definition of "worker" to "outlaw bogus self-employment, strengthen rights and address agency labour issues"; and ensuring worker representation on all remuneration committees.

Current Leader of the Labour Party Jeremy Corbyn has not set out his employment-related plans is as much detail as Smith, but he has clearly stated that he would introduce legislation making it mandatory for all employers with over 250 employees to bargain collectively with recognised trade unions. His proposal has been compared to the French-style framework of union rights. Corbyn has explained that he sees this as the best way to guarantee fair pay and terms and conditions of work.

Like Smith, Corbyn also proposes the abolition of zero hours contracts, instead requiring all contracts to contain guaranteed minimum working hours. Corbyn has suggested that, where an employer wants employees to work beyond those hours in some circumstances, it will have to give reasonable compensation to the employees, akin to an "on-call" payment, for agreeing to make themselves available for additional work, whether they are ultimately asked to do so or not.

What is clear is that the political parties generally have very different agendas when it comes to UK employment law and workers' rights. However, there does seem to be some consensus that there needs to be a better system of checks and balances when it comes to executive pay.

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