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NEW LEGISLATION

Zero Hours Contract

The much talked about exclusivity clauses in zero hours contracts came into force earlier this year on 11th January 2016.

Section 27A (3) of the Employment Rights Act 1996 provides that a provision in a zero hours contract which prohibits the worker from doing work under any other arrangement is unenforceable. In other words the employee cannot be prevented from doing other work for other employers.

If an employee is dismissed for taking on other work that dismissal will be automatically unfair. Even if the employee is not dismissed but is subjected to a "detriment" (e.g. being denied work that would otherwise have been allocated to them), that detrimental treatment is unlawful.

There is no qualifying period of employment before an employee is protected, so this is another exception to the "2 year rule" which applies to "ordinary" unfair dismissal and protects employees from day 1 of their employment.

The Living Wage

The new "National Living Wage" will come into force on 1st April 2016.

It provides for a minimum rate of £7.20 per hour for employees 25 or over. The national minimum wage will be revised every year on 1st April.

For workers under 25, the rates will remain the same. These are currently: £6.70 for those aged between 21 to 25, £5.30 for those aged between 18 to 20 and £3.87 for those aged between 16 to 18.

RECENT CASE REPORT ON UNFAIR DISMISSAL

Dismissal for Misconduct and Consistency of Treatment

The Employment Appeal Tribunal ('EAT') recently overturned an Employment Tribunal judgment which found that an employer who dismissed one employee, had dismissed him unfairly because the other employee, who was also guilty of gross misconduct, was not dismissed.

In the case of MBNA v Jones [2015], the circumstances were that 2 employees, Mr Jones and Mr Battersby were out on a work related, corporate, social event at Chester Racecourse. An altercation occurred between the two, which resulted in Mr Battersby kneeing Mr Jones in the back of his leg and Mr Jones licking Mr Battersby's face. Later in the evening Mr Jones had his arms around Mr Battersby's sister; Mr Battersby therefore kneed Mr Jones in the leg, again. Mr Jones then punched Mr Battersby in the face.

Later on, after the event, Mr Battersby sent a number of texts to Mr Jones threatening, inter alia, to "rip your f*****g head off". There was, however, no further incident and Mr Battersby never carried out his threats.

Both employees were subject to disciplinary action. Mr Jones was dismissed on the basis that he had started the incident and had hit Mr. Battersby neither in self-defence nor with substantive provocation. Mr Battersby was given a final written warning.

The Employment Tribunal found that Mr Jones had been unfairly dismissed because the different sanctions applied were as a result of an unreasonable disparity of treatment between the 2 employees and their disciplinary hearings.

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On appeal, the EAT found that the Tribunal had made an error because Mr Jones' conduct was clearly serious enough to justify dismissal and leniency towards Mr Battersby does not therefore render that decision unfair.

The EAT stated the Tribunal had failed to apply the test set out in the case of Hadjioannov v Coral Casinos Limited and section 98(4) of the Employment Rights Act 1996.

The EAT reiterated the test in Hadjioannov which limited the extent to which inconsistency of treatment could render a dismissal unfair to the following circumstances:

1. If the employee had been led by an employer to believe that certain categories of conduct will either be overlooked or at least not dealt with by dismissal;

2. Where evidence as to decisions made in relation to other cases supports an inference that there was another reason for dismissal; or

3. The circumstances were so similar that it was not reasonable to dismiss when some other lesser penalty would have been appropriate.

The judge warned that Tribunals should scrutinise arguments based on disparity of treatment with particular care as it is rare for the evidence to show that there are other cases, which are sufficiently similar that only the same outcome can be justified. The approach to dismissals for misconduct, in accordance with section 98(4) of the Employment Rights Act 1996, should involve looking at how the employer dealt with the dismissed employee.

The Tribunal should consider whether the employer acted reasonably in the investigation, the disciplinary process, the conclusion and the sanction imposed. Recognising that there may be a range of reasonable ways in which an employer may react and if so, the Tribunal must not substitute its own opinion of what the response should have been but instead decide whether the employers response was one which would fall within that "range of reasonable responses."

It is the "range of reasonable responses" test which means that employers may treat similar cases differently as long as they have a reason to do so.

Practical Lessons to be Learnt

From a practical point of view an employer should make sure that dismissal is reserved for cases of "gross misconduct" (or cases where the employee is on a final written warning for misconduct). However, the employer does not have to dismiss for acts of gross misconduct as long as it is still clear that the employer regards the offence as potentially deserving of dismissal, the employer has a reason for not dismissing in the particular circumstances of the case and the employer must also make sure that he acts reasonably in each stage of the disciplinary process.