

Employment Matters October 2018

Published 12 October 2018

In this month's Employment Matters, we look at a disability discrimination claim, where the employer was found not to have discriminated against an employee in spite of the fact that an ill-health retirement procedure that it had followed was arcane and unwieldy, and another claim about the grounds on which bad faith can be alleged in a victimisation complaint. Of particular interest to lawyers and clients involved in investigations will be the important Court of Appeal decision on privilege, which overturns the earlier controversial judgement of the High Court about whether documents produced in investigations will be covered by litigation privilege.

We also cover a case (successfully appealed by our employment team) highlighting the importance of complying with tribunal rules.

This month, the EAT has held that an employee who had written to her employer giving "one month's notice" had not really resigned, meaning that her employer's refusal to reinstate her was potentially an unfair dismissal. At first glance a surprising decision, this is not (as we discuss) one about which employers need be too concerned.

Cases relating to changing terms and conditions in the context of a TUPE transfer are quite rare, and we cover an interesting case on this.

In news from outside the courts, the Migration Advisory Committee has now released its long awaited report on EEA Migration, and our immigration team consider its recommendations and the ramifications of these, if adopted, for employers below. The Parental Bereavement Leave and Pay Bill has received Royal Assent, becoming the Parental Bereavement (Leave and Pay) Act 2018. The Act will give all employed parents a statutory right to two weeks' leave if they lose a child under the age of 18, or suffer a stillbirth from 24 weeks of pregnancy. Employed parents will also be able to claim statutory parental bereavement pay for this period, if they meet the relevant eligibility criteria, which are similar to the eligibility criteria for statutory paternity pay. We expect this legislation to come into force in 2020.

The latest tribunal statistics published by the Ministry of Justice show an unsurprising leap in tribunal claims (of 165% for single claims) since tribunal fees were abolished last year. This is consistent with what we are seeing in practice.

Termination of Employment: Ambiguous Resignations

An employee's letter to an employer giving "one month's notice" was not a letter of resignation.

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Disability Discrimination: Incompetent procedure was not discriminatory

The Court of Appeal has held that an employer's use of an "arcane and unwieldy" to process an application for ill-health retirement was not disability discrimination.

[Read more](#)

Privilege: Judgement on litigation privilege overturned

The Court of Appeal has overturned a High Court decision about whether litigation privilege will apply to communications created during internal investigations.

[Read more](#)

TUPE: Changing terms and conditions following a TUPE transfer

The withdrawal following a TUPE transfer of an outdated and unjustified contractual entitlement was not void under TUPE.

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Employment Tribunal Procedure: Error in an ET1 form and extensions of time

We successfully appealed against an employment tribunal judgment which granted a claimant an extension of time to submit a claim for unfair dismissal and whistleblowing where the claim had been late because of an error on the ET1 form. The EAT

has held that, where a claim is re-submitted by solicitors to correct an error, and this is done out of time, the reasonableness of the solicitors' error must be assessed when deciding whether to allow an extension of time.

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Victimisation: When is a protected act done in bad faith

The EAT has held that an ulterior motive does not mean a protected act is made in bad faith where an employee genuinely believes the basis of the act to be true.

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Business Immigration: Migration Advisory Committee publishes long awaited report

The Migration Advisory Committee has now released its long awaited report on EEA Migration which runs to 131 pages and although there are some high points which will benefit employers, if implemented, there are no real surprises.

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Authors



Ceri Fuller

London - Walbrook

cfuller@dacbeachcroft.com