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earwiggin : employment law update

ENVIRONMENTAL VIEWS PROTECTED BY DISCRIMINATION LEGISLATION

Grainger Plc v Nicholson

In a case that has attracted a lot of media interest, the Employment Appeal Tribunal has confirmed that a belief in man-made climate change and the need to cut carbon emissions amounted to a "philosophical belief" for the purposes of the regulations which prohibit discrimination on the grounds of "religious or philosophical belief".

Mr Nicholson was employed by Grainger Plc as its Head of Sustainability. After he was made redundant in June 2008 he brought a number of claims including a claim that he had been discriminated against because of his strong views about climate change and the environment. The company argued that such a belief did not amount to a "philosophical belief" within the meaning of the Employment Equality (Religion or Belief) Regulations 2003.

The EAT upheld the tribunal's decision that Mr Nicholson's beliefs were capable of protection. In doing so, it provided useful guidance on the requirements that must be satisfied for a belief to come within the definition of "philosophical belief". In summary, it must:-

- be genuinely held;
- be a belief, not an opinion or viewpoint based on the present state of information available;
- be a belief as to a weighty and substantial aspect of human life or behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance; and
- be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The EAT also noted that, while support of a political party does not of itself amount to a philosophical belief, a belief in a political philosophy or doctrine (e.g. Socialism, Marxism or free-market Capitalism) may well qualify. A philosophical belief may also be based on science rather than faith (e.g. Darwinism).

The case will now return to the tribunal which will need to determine whether Mr Nicholson is as green as he claims to be and whether he was subjected to less favourable treatment because of his beliefs. This may not be easy - the fact that the company may have refused to act in accordance with his environmental beliefs will not in itself amount to discrimination. He will need to show that he was treated less favourably than one or more other employees (e.g. by being selected for redundancy) because of his beliefs.

In the meantime, it is likely that the case will lead to some people with strongly held beliefs seeking the protection of the discrimination legislation. Employers may wish to review their equal opportunities policies to ensure that they are broad enough to cover the types of beliefs identified by the EAT.

WRONGFUL DISMISSAL COMPENSATION

Edwards v Chesterfield Royal Hospital NHS Foundation Trust

It is well established that an employer who fails to follow a contractual disciplinary procedure before dismissing an employee may be found liable to pay compensation equal to the amount of salary that would have been paid during the period it would have taken to complete the disciplinary procedure. But can the employee argue for additional damages if he can show that, if the disciplinary procedure had been followed properly, he would not have been dismissed at all?

Dr Edwards was a consultant at Chesterfield Royal Hospital. He was dismissed for gross professional and personal misconduct. He claimed that the hospital failed to follow its disciplinary procedure properly and, had it done so, the allegations against him would have been dismissed. He therefore argued that he should therefore be entitled to damages for breach of contract equal to all his loss of earnings arising out of this dismissal (which would not be subject to the statutory cap on unfair dismissal compensation).

The High Court rejected Dr Edwards' argument that he should have the opportunity to prove that he would have been exonerated if the disciplinary procedure had been completed properly. Accordingly, his damages for breach of contract would be limited to his notice pay and his salary over the period of time it would have taken the hospital to complete its disciplinary procedure.

This is a welcome decision for employers. It is also helpful in illustrating why it makes sense for disciplinary procedures to be non-contractual. Not only will a contractual procedure be more difficult to vary but it may also lead to a higher award of damages in any wrongful dismissal claim.

HOLIDAY PAY ON TERMINATION

Beijing Ton Ren Tang (UK) Ltd v Wang

The EAT has upheld a tribunal's decision that an employee had a right to a payment in lieu of her untaken holiday entitlement for her entire period of employment rather than just the amount that accrued during her final year of employment.

Mrs Wang, a traditional Chinese Medicine professor, was employed to work in the employer's herb and health shop in London. She was not issued with a written contract of employment but it was verbally agreed that she was entitled to take 30 days' holiday per year. As it happened, she hardly took any of her annual leave entitlement. When her employment terminated after 7.5 years, she brought a claim alleging that she was entitled to a payment in lieu of all the untaken holiday that had accrued over her entire period of employment (a total of 131 days).

The employer argued that, since the Working Time Regulations 1998 precluded employees from carrying over holiday from one year to the next, her entitlement on termination was limited to a payment in lieu of the holiday that had accrued in her final year of employment. The EAT disagreed. It found that there had been an oral agreement when she started that she would receive a payment in lieu of her entire untaken entitlement when her employment terminated. According to the EAT, this took precedence over the "use it or lose it" principle in the Working Time Regulations. The employer was therefore ordered to pay Mrs Wang in lieu of her entire accrued entitlement of 131 days.

Although this decision turned on its slightly unusual facts, it is helpful in underlining the importance of a carefully drafted employment contract setting out an employee's entitlement to holiday pay. In particular, it is advisable for the contract to expressly provide that any payment in lieu on termination will be calculated by reference to the amount accrued during the holiday year in which termination takes place. It is also worth setting out the rules governing the carry over of unused holiday from one year to the next.

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