



XpertHR Weekly Podcast

Original XpertHR podcast: 18 December 2015

- Susan Dennehy: Hello and welcome to this week's XpertHR Weekly with me, Susan Dennehy. This week we will be taking our annual look at employment law cases for 2016. It's been an interesting year for employment cases. The most important and memorable cases, of course, were on holiday pay, but there were many more cases besides.
- With me this week to talk about the cases is Stephen Simpson, principal employment law editor at XpertHR. Welcome Stephen.
- Stephen Simpson: Hi Sue.
- Susan Dennehy: So Stephen, what are the main areas in which cases are pending? [0:00:34.1]
- Stephen Simpson: So, I'd probably mention three main areas where we've got cases pending. Firstly, holiday pay, of course. Secondly, redundancy consultation, as always. And then thirdly, there have been some interesting cases on whistleblowing.
- Susan Dennehy: And any other areas of interest for HR? [0:00:46.4]
- Stephen Simpson: So there are probably three other areas also to pick out, which are discrimination arising from disability, equal pay and religious discrimination.
- Susan Dennehy: So a whole range of employment areas.
- Stephen Simpson: Exactly.
- Susan Dennehy: Starting then with holiday pay, the calculation of holiday pay is proving elusive twenty years after the introduction of the Working Time Regulations. How has case law developed? [0:01:06.1]
- Stephen Simpson: So as everyone in HR will know, the single biggest problem area in recent years has probably been what counts as pay for holiday pay calculations, where the thinking in the case has entirely changed.
- Susan Dennehy: And what has the case law said, then? [0:01:18.7]
- Stephen Simpson: So cases such as *Lock v British Gas*, an ECJ which concerned commission, and *Bear Scotland v Fulton* from the EAT on overtime, have overturned the traditional approach that only basic pay has to be included in holiday pay calculations and all those extras such as commission and overtime pay.
- Susan Dennehy: The case law's still on-going though, isn't it, in this area? [0:01:38.0]

Stephen Simpson: Yes, so the *Lock* case on commission has returned to the UK courts where the first instance tribunal read words into the Working Time Regulations to require commission or a similar payment to be included in holiday pay.

Susan Dennehy: And the EAT has now heard the appeal in *Lock* and Stephen, you were there? [0:01:52.8]

Stephen Simpson: Yes, I went to the EAT hearing on 8th and 9th December, where the arguments really revolved around whether UK courts and tribunals can read words into the legislation or whether it's really up to ministers to come up with the wording and have the wording approved by parliament.

Susan Dennehy: And were there any other interesting arguments put forward? [0:02:09.3]

Stephen Simpson: So probably the other key argument that I thought was interesting was about whether the EAT in *Lock* is obliged to follow the EAT in *Bear Scotland*. So, one's about commission and the other's about overtime. So basically, is the EAT bound by its own earlier decision?

Susan Dennehy: So that's an interesting other argument running at the same time. So *Lock* is an important case then? [0:02:28.8]

Stephen Simpson: Yes. So, to point that out, really, the government intervened in this case, meaning that it actually presented arguments before the EAT. The government basically argued the case law we have is sufficient to allow words to be read into the Working Time Regulations without the need for further legislation.

I guess the other important thing to say is that British Gas apparently has around 1,000 potential claims from its workers waiting in the wings, pending the outcome of the appeal decision. So it just shows what a big issue it is for employers, if you multiply that by every employer in the UK.

Susan Dennehy: And do you know when we might expect the judgment? [0:02:58.4]

Stephen Simpson: So we don't have an exact date, but cases as complicated as this tend to take about three months for the judgment to come out. So, if I was guessing, I'd probably say March 2016.

Susan Dennehy: Let's move on and take a look at redundancy consultation that you mentioned. [0:03:11.1]

Stephen Simpson: So, I seem to talk about redundancy consultation every year in this annual podcast. So, earlier this year the big case was *Woolworths* and the ECJ, which found that there have to be twenty or more redundancies at one establishment, rather than across the whole organisation, for consultation to be triggered.

But, I think perhaps the biggest case in 2016 could be *USA v Nolan*, which is about timing of redundancy consultation.

Susan Dennehy: Remind us what *Nolan* said. [0:03:33.9]

Stephen Simpson: So this is a case about the closure of a US army base that resulted in a claim that the US government had breached its redundancy consultation obligations.

Susan Dennehy: And why has this case been around so long? [0:03:44.5]

Stephen Simpson: So the case unfortunately got bogged down in jurisdictional issues over whether the UK law in this area even applies to a foreign power on UK soil. The UK Supreme Court eventually did rule that it does in this particular case.

Susan Dennehy: And what's the next stage with this case? [0:03:57.8]

Stephen Simpson: So, the case now goes back to the Court of Appeal to consider the timing of redundancy consultation. So HR professionals will be hoping that the Court of Appeal provides some guidance on exactly when the timing of redundancy consultations start.

Susan Dennehy: And what are likely to be the main issues then? [0:04:11.3]

Stephen Simpson: So the key question, I think, is whether the duty to consult arises when the employer makes a strategic decision from which it definitely knows large-scale redundancies will follow or whether it's when the employer's contemplating a decision from which redundancies might follow. So, it's really about how certain you have to be about the redundancies before you start the consultation.

Susan Dennehy: That's always a very tricky issue. Shall we move on then and look at the third area that you mentioned – whistleblowing? Can you remind us about the cases on whistleblowing? [0:04:36.7]

Stephen Simpson: Sure. So we've started to see a trickle coming through of cases about a change to legislation that took place in June 2013. That change essentially provides that disclosure isn't protected unless the employee reasonably believes that the disclosure is being made in the public interest. So the case law really concerns what the meaning of that phrase is "in the public interest".

Susan Dennehy: And can you remind us why that change was made in 2013? [0:04:59.9]

Stephen Simpson: So, it was really to prevent employees from disguising normal grievances about their own contracts of employment as protected disclosures, which of course is not the purpose of the legislation.

Susan Dennehy: And a long time bugbear of employers. And what's the key case in this area? [0:05:12.9]

Stephen Simpson: So, the key case which is due to go before the Court of Appeal in 2016 is *Chesterton Global v Nurmohamed*.

Susan Dennehy: And the case involved the meaning of 'in the public interest' under the whistleblowing legislation. Can you tell us what happened in that case? [0:05:26.1]

Stephen Simpson: So, the claimant was a senior manager with a big estate agents who raised concerns about financial irregularities. He believed that the company's accounts were being fiddled to benefit shareholders,

which he said affected around 100 other senior managers' bonus and commission payments, as well as his own.

Susan Dennehy: So the issue there was whether that disclosure could be in the public interest? [0:05:45.2]

Stephen Simpson: Yes, so the EAT in *Chesterton* gave a liberal approach to that phrase and found that the claimant's concerns were in the public interest. A sufficient number of people were affected, to meet the test. So we'll find out in 2016 if the Court of Appeal agrees with that more liberal approach.

Susan Dennehy: And moving on again, shall we look at the other areas that you mentioned that might have a big practical impact on HR in 2016? [0:06:06.9]

Stephen Simpson: Yes, so discrimination arising from disability is one, I think, that's going to come up. I don't have a particular appeal case in mind here, but it's perhaps one of the biggest growth areas in employment law. So that's under s.15 of the Equality Act, so it's only really a matter of time before we have a big appeal case in that area.

Susan Dennehy: And this is the provision that replaced discrimination for a "reason related to disability" put to bed by the case of *Malcolm v Lewisham Borough Council*. The case law on this provision seems to have been a long time coming. Can you remind us what type of claim it would involve? [0:06:35.1]

Stephen Simpson: Sure. So, s.15 of the Equality Act makes it unlawful for an employer to treat someone unfavourably because of something arising in consequence of their disability. So, employers can justify the unfavourable treatment if it's a proportionate means of achieving a legitimate aim.

Susan Dennehy: And what sort of scenarios are caught? It's quite a wide provision, potentially catching a lot of scenarios, isn't it? [0:06:55.3]

Stephen Simpson: You do see different types of cases but I think the main one is when a disabled employee is sanctioned for their level of absence, ie the employee reaches trigger points under the employer's attendance procedure that result in warnings and perhaps eventually dismissal. So the absence arises in consequence of the employee's disability, so the employer has to be able to justify any sanctions or disciplinary action it takes as a result of the absences.

Susan Dennehy: And why do you think that might be a big concern in 2016? [0:07:20.1]

Stephen Simpson: So, from all the first instance transcripts we look at, we see the claimants seem to have woken up to this type of claim. So you do normally now see a s.15 claim along with the more traditional claims, such as failure to make reasonable adjustments under s.20. We've actually reported a few of these cases this year, including *Powell v DWP*, where the claimant was awarded £30,000 for disability discrimination. She was dismissed after exceeding her trigger point under the absence procedure by just a few days and she was dismissed.

Susan Dennehy: And do you have any appeal cases in this area? [0:07:49.6]

Stephen Simpson: In fact, we've had the recent Court of Appeal judgment in *Griffiths v Secretary of State for Work and Pensions*. The Court of Appeal made it abundantly clear that disability absence cases are better brought under s.15, than s.20. In *Griffiths*, the claimant failed to bring a claim for discrimination arising from disability.

Susan Dennehy: So just to recap then, she brought a reasonable adjustments claim, most cases are usually brought as reasonable adjustments claims, aren't there, but she should have brought her claim under the new provision of disability arising? [0:08:15.5]

Stephen Simpson: Yes, the judge said as much.

Susan Dennehy: What other areas would you like to highlight for employers? [0:08:19.8]

Stephen Simpson: So I thought we could look briefly at equal pay as that's a very topical area for employers with the forthcoming requirement for all large employers, ie those with 250 or more employees, to report publically on their gender pay gap.

Susan Dennehy: Now, we don't know much about this new gender pay reporting, do we at the moment? [0:08:35.0]

Stephen Simpson: No, we're still waiting for the details of the legislation, with draft legislation expected in early 2016. We do know that there's going to be a requirement to publish a single figure representing the pay gap, and also a single figure representing the gap in bonuses.

Susan Dennehy: So that may encourage more equal pay claims, you think? [0:08:51.6]

Stephen Simpson: Yes, I think clearly if a woman or a group of women or their union see that their employer has a massive gender pay gap they may investigate further and end up bringing an equal pay claim. Particularly in the private sector, I think, where mass equal pay claims are less common than in the public sector.

Susan Dennehy: And are there any big equal pay claims already in the pipeline? [0:09:09.0]

Stephen Simpson: So, I understand there are a group of equal pay claims expected against both Asda and Sainsbury's. In those cases, female shop floor workers are claiming equal pay with workers in distribution centres, who traditionally more often tend to be men. And so those work of equal value claims are definitely two to look out for.

Susan Dennehy: And that's likely to be thousands of cases, isn't it? [0:09:27.4]

Stephen Simpson: Yes.

Susan Dennehy: And finally you mentioned religious discrimination. Can you tell us a bit about those cases? [0:09:31.4]

Stephen Simpson: So, we've got two forthcoming religious discrimination cases currently with the ECJ that caught my eye recently. They concern

discrimination against Muslims for religious dress. So, obviously very topical.

Susan Dennehy: Can you tell us a bit about the first case? [0:09:43.6]

Stephen Simpson: So, one's a French reference called *Bouagnaoui v Micropole Univers*, in which an employee who wore an Islamic headscarf was told to remove it when visiting a client after a customer apparently complained about her appearance. The Muslim employee was dismissed after she refused. So the case appears to revolve around whether the need to adopt a neutral appearance is a genuine occupational requirement of the job sometimes.

Susan Dennehy: And what about the second case? [10:08.1]

Stephen Simpson: So this is quite a similar case, really. That's a Belgium reference called *Achbita v G4S Secure Solutions NV*. So there, a receptionist who was contracted out to another company, decided to start wearing a headscarf at some point, which apparently breached the company's rules.

Susan Dennehy: And those cases, they weren't employer complaints, they were third party complaints about the religious dress? [0:10:26.9]

Stephen Simpson: Yes, I think that's probably the interesting point in those.

Susan Dennehy: Thank you very much, Stephen, for that very interesting look at the cases.

Stephen Simpson: Thanks Sue.

Susan Dennehy: All the cases Stephen's mentioned are in the Law Reports section of our website. There's also a detailed report on the holiday pay hearing case.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. This is our last podcast for this year, so we'd like to wish you all a very happy Christmas. We are back again next year but until then, it's goodbye from us.