Employment Law dispatches

Willans LLP I solicitors

70 YEARS

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Welcome

Welcome to our end-of-year update in which we reflect on some recent high-profile cases including handling sexual harassment claims and recent case law concerning Uber, taking rest breaks, TUPE as well as carrying out 'without prejudice' discussions in the workplace.

We will announce our 2018 programme of seminars in the new year, but in the meantime we hope you have a peaceful and relaxing Christmas.

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Wishing you a happy and safe festive season - we look forward to working with you in 2018.

Matthew Clayton, partner and head of employment – *Chambers UK* rated: *"... he gets right to the point, with meaningful and practical advice."*

Legislation update

with Matthew Clayton

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The recent revelations regarding sexual misconduct in Hollywood and in the British Parliament have shown us that victims of sexual harassment and assault can take many decades to find the courage to speak out and report their experiences (not an easy thing to do if it concerns someone in a position of power). We should all be aware that the same can apply in any workplace.

The confidence to speak out will not be created unless there is a clear culture of openness within the organisation, and a recognition by staff that complaints will be treated seriously and dealt with confidentially. The responsibility for fostering such a culture falls fairly and squarely on those at the top of any organisation, but HR also has an important role to play.

To assist with this, and in light of the recent focus on such issues, ACAS has recently published fresh guidance for both employers and employees on dealing with allegations of sexual harassment. The guidance highlights various points which employers may not have immediately in mind:

- Men can be the victims of sexual harassment as well as women, and it is not always the case that the alleged harasser is senior to the alleged victim.
- Something can still be considered sexual harassment even if the alleged harasser did not intend it to be. It also does not have to be intentionally directed at a specific person; general workplace culture and behaviour can amount to harassment of an individual who is forced to put up with that environment.
- Employers also have a duty towards accused workers, pending a proper disciplinary process. Whilst a fair and thorough investigation will need to be carried out, accused workers should also be offered support and sensitivity during what can be a distressing time.

The ACAS guidance also reminds us that some types of sexual harassment, such as sexual assault and other physical threats, are a criminal matter as well as an employment law matter, and can (or should) be reported to the police. If a complaint is reported to police, or criminal court proceedings are being

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pursued, an employer must still investigate the complaint as an employment matter. The employer may then follow its disciplinary procedure, without awaiting the outcome of criminal proceedings, provided this can be done fairly.

Complaints of sexual harassment will usually only be considered at an employment tribunal if the worker makes a claim within three months of when the incident took place. Sometimes a complaint will be reported much later than this. An employer should always take such a complaint very seriously. In these circumstances, it is usually helpful for the worker and the employer to discuss what outcome they want - sometimes it might be that the worker now feels confident enough to speak out and wants to make sure nobody else in their workplace experiences what they went through.

There has also been a renewed focus recently on the implications of workplace harassment for mental health. The independent Stevenson/Farmer review, "Thriving at Work", published in October, recognises that good workforce mental health is good for business; the annual cost to employers of poor mental health is between £33 billion and £42 billion (with over half of the cost coming from presenteeism – when individuals are less productive due to poor mental health in work) with additional costs from sickness absence and staff turnover. By contrast, Deloitte's analysis of the case studies where investment has been made in improving mental health show a consistently positive return on that investment.

The review recommends that all employers should take the following steps, with public sector and private sector employers with over 500 employees taking additional steps:

- produce, implement and communicate a mental health at work plan
- develop mental health awareness among employees
- encourage open conversations about mental health and the support available when employees are struggling
- provide employees with good working conditions
- promote effective people management; and
- routinely monitor employee mental health and wellbeing.

The review recognises that this might be difficult for small and medium-sized businesses and the self-employed to implement, and suggests joining up with organisations who already work with these groups (for instance, one of the major banks is working in this area), and utilising relevant local organisations and networks.

Lastly, dealing with the loss of a child is one of the most difficult things to cope with in life and there is no current provision for this in employment law. A bill currently before Parliament seeks to address this by entitling all employees (regardless of length of service) to two weeks' parental bereavement leave if they lose a child under the age of 18. Statutory parental bereavement pay (which employers can recover from the government) will be payable to those with at least 26 weeks' continuous service.

Although the bill is a Private Members' Bill, it has government support and is therefore likely to become law – so watch this space.

Case law watch

with Jenny Hawrot
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Weekly rest breaks

The EU Working Time Directive requires employers to ensure that employees have a break of at least 24 hours in every seven-day period.

In *Maio Marques da Rosa v Varsim Sol,* the claimant was a casino worker, who claimed that his employer had not allowed him the required weekly rest break of 24 hours in every seven-day period, as he would often work 12 days straight. The European Court of Justice clarified the position, confirming that the 24 hours' rest could occur at any point in the seven-day period, including at the very start, or the very end. As such, it is not a breach of the Working Time Directive for employees to work for 12 days, consecutively, provided they have a break of 24 hours at the beginning and end of each seven-day period.

What should I do?

It is important to be aware of the rest breaks employees are entitled to under the Working Time Regulations, to ensure that these rest periods are offered to everyone. This is especially important where you operate compulsory or voluntary overtime practices. Whilst you must make sure that workers can take their rest periods, you do not have to force them to do so.

If an employee does not take the rest breaks that he is entitled to, it is advisable (in order to protect your position) to maintain a paper trail to evidence that the employee opted, voluntarily, not to take their rest break.

Uber and uber again

"There were no surprises in the EAT's decision which again hinged on the 'master and servant' relationship or employer and employee."

In this ongoing saga, the Employment Appeal Tribunal (EAT) has agreed with the Employment Tribunal (ET) that, when the app used by Uber drivers was switched on, the drivers were 'workers' and not self-employed contractors. This is despite the existence of written contracts professing the drivers to be self-employed.

As workers, the drivers are entitled to basic employment rights such as the minimum wage and annual leave, which had not been provided by Uber. There were no surprises in the EAT's decision which again hinged on the 'master and servant' relationship or employer and employee (as established in the age old case law of *Readymix Concrete*), and the importance of looking at the reality of the situation, not the paperwork (as established in the case of *Autoclenz Ltd.*)

At the time of writing, Uber has been refused permission to appeal the EAT's decision straight to the Supreme Court, and the appeal is therefore likely to be heard by the Court of Appeal in the Spring.

What should I do?

The long-established case of *Readymix Concrete* has been challenged on many occasions, but the principles laid down in this case are holding strong. As such, businesses are unlikely to successfully argue that someone is a self-employed contractor, if, in practice, they are treated like an employee.

It is therefore recommended that businesses ensure that the paperwork accurately reflects the reality of the situation, and if someone is labelled as a self-employed contractor, in practice, they are treated as such in all aspects of their work.

Risk assessments for breastfeeding mothers

"....ensure you undertake a full and thorough risk assessment for women who are pregnant or breastfeeding, to avoid the risk of a discrimination claim."

An accident and emergency nurse returned to work following the birth of her child. She was still breastfeeding at the time, so asked for an adjustment to her working pattern to accommodate this.

Her employer undertook a risk assessment in this regard, and concluded that her work was 'risk free', so her request for an adjustment to her working hours was declined. Crucially, the employer gave no explanation as to why her work was 'risk free'. The employee therefore claimed that she was discriminated against by her employer, as the risk assessment undertaken did not comply with the EU Equal Treatment Directive, which covers measures to improve health and safety for pregnant and breastfeeding mothers.

This case, *Otero Ramos v Servicio Galego de Saude,* was considered by the European Court of Justice who confirmed that if an employer fails to undertake a risk assessment, or carries out a defective one (such as giving no explanation for the outcome) for a pregnant or breastfeeding mother, there will automatically be a prima facie case of discrimination.

What should I do?

Very simply, ensure you undertake a full and thorough risk assessment for women who are pregnant or breastfeeding, to avoid the risk of a discrimination claim. Record and evidence all steps taken throughout the risk assessment, including the decision making process, to ensure that you do not breach the Directive.

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Fired and prejudice

"This case is a reminder to all employers that you cannot rely on anything said during 'without prejudice' discussions..."

It is a truth universally acknowledged that under the 'without prejudice' rule, employers in dispute with their employees can discuss an offer of settlement, off the record, without those discussions being disclosed in legal proceedings. However, there is a limit to this 'without prejudice' rule as the case of *Graham v Agilitas IT Solutions Ltd* demonstrates.

The claimant was at risk of dismissal due to his conduct. Before the company took any disciplinary action, they held a number of 'without prejudice' discussions with him. During these discussions, the claimant made various accusatory statements, including that he thought there was a conspiracy to remove him from the business. The company then relied on those statements to begin disciplinary action against him, citing gross misconduct and a breakdown of the implied term of mutual trust and confidence. The employee was subsequent summarily dismissed.

However, the claimant lodged claims for unfair dismissal, wrongful dismissal and unlawful deductions from wages. Importantly, in his claim, he referred to bullying and threatening behaviour by the company which occurred during the 'without prejudice' conversations. These were the same conversations which were relied on by the company as the basis for the disciplinary action against the employee.

At a preliminary hearing, the ET held that references to the 'without prejudice' conversations should be removed from the claim as they were protected by the 'without prejudice' rule, so were not admissible.

The claimant appealed this decision on the basis that the ET did not consider whether the company had in fact waived the 'without prejudice' rule by relying on comments made by him during the same 'without prejudice' meetings, when deciding to dismiss him.

The EAT overturned the ET's preliminary hearing decision, finding that the company could not automatically hide behind the 'without prejudice' rule when they, themselves, had relied on the 'without prejudice' discussions to dismiss their employee in the first place. The case has been passed back to the ET to consider this.

What should I do?

This case is a reminder to all employers that you cannot rely on anything said during 'without prejudice' discussions, without risking waiving the 'without prejudice' rule altogether. You cannot cherry pick aspects of the discussions to disclose.

Once you rely on any aspect of a without prejudice discussion, the whole discussion may be admissible in evidence. Legal advice should be taken before relying on aspects of a without prejudice conversation to support your position.

Known knowns and unknown unknowns

"Unfair conduct by individual managers or colleagues is immaterial unless it can properly be attributed to the employer."

We previously reported (in September 2016) on the case of *Royal Mail v Jhuti* when it was considered by the EAT. The EAT had arrived at the slightly strange conclusion that an employer could be guilty of dismissing an employee for having blown the whistle (which would automatically be unfair) even where the dismissing manager did not know about the whistleblowing.

This was because (the EAT said) Ms Jhuti's team leader had known about the whistleblowing and had manipulated a situation whereby Ms Jhuti was dismissed, even though he did not carry out the dismissal himself (which was decided by another manager who was unaware of the whistleblowing).

The Court of Appeal has now overturned this decision and has made it clear that when determining the reason for the dismissal, the tribunal should only consider the mental processes of the person who actually carried out the dismissal. Unfair conduct by individual managers or colleagues is immaterial unless it can properly be attributed to the employer.

The court did however comment that a dismissal decision which had been deliberately manipulated by, say, the CEO, might be viewed differently.

What should I do?

If certain people within the organisation are possessed of knowledge which might make it difficult or awkward for them to dismiss an employee, this case clarifies that it is effectively possible to 'insulate' the dismissal decision from that knowledge by carefully choosing the manager who is to make that decision.

If that person has no knowledge of background circumstances and is simply presented with the facts of the case, they may be able to make an 'untainted' decision. However you do need to be careful that the situation is not manipulated, or that it could not be interpreted as having been manipulated, in any way.

TUPE or not TUPE?

That was the question asked of the European Court of Justice (ECJ) in *Securitas v ICTS Portugal.*

Securitas took over a security services contract, but refused to accept the 17 staff who were employed on that contract. The ECJ had to decide whether the EU Acquired Rights Directive (ARD - which gives rise to the TUPE Regulations in the UK) applied. The ARD applies in cases "*where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*"

The ECJ held that where an activity is based essentially on manpower, the economic entity would not retain its identity if the new provider did not take on the employees, so there would be no ARD transfer.

If however the undertaking relied essentially on equipment, the new provider could not avoid the ARD applying simply by not taking on the staff. The Portuguese courts must now decide whether the transfer of the security services contract from ICTS to Securitas did indeed involve equipment or tangible or intangible assets.

What should I do?

It would be a brave employer which refused to take on a competitor's staff when winning a supply contract from them, hoping that it could thereby avoid the application of TUPE altogether.

There will need to be a careful analysis of what assets make up the service or undertaking which is being inherited, to determine whether TUPE applies. There will also need to be an analysis of which staff, if any, are assigned to the undertaking being transferred, since it is only those staff which would be inherited. Our team is able to assist with all of this analysis.

More news on our website **www.willans.co.uk**

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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