Employment law dispatches

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Willans LLP | solicitors

In this issue

Is video surveillance in the workplace ever a breach of an employee's right to privacy? Could telling a 'white lie' about the reason for an employee's dismissal land you in hot water? Was an employee's refusal to work in the face of a discriminatory demotion justified?

In this issue, we explore the above topics and more. We also introduce our 2018 employment law seminar series (on page 6), covering a range of need-to-know updates delivered in a practical, understandable way. We look forward to seeing you there.

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Stay one step ahead

Introducing our 2018 seminar series

Our employment law team regularly present seminars across the county which are hugely popular with local businesses. We cover the latest updates and changes to employment law, with practical tips for you to take away.

To see which topics are coming up, visit page 6.

Matthew Clayton
Partner, head of employment law

"... he gets right to the point, with meaningful and practical advice."
Chambers UK

Legislation update

with Matthew Clayton

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Recent immigration law changes

With the exit from the EU looming, UK business immigration is expected to undergo considerable upheaval over the next two years. We have already seen change this year, with amendments to the immigration rules taking effect 11 January 2018.

The key points are as follows:

- **Restrictions on timing of applications**: Tier 2 visa applications should now be filed no more than three months before the intended start date. This is a significant change from the old rule of there being no restriction on the timing of an application.
- **Start date delay restriction:** The start date of a migrant worker can be delayed for no more than 28 days after the start date noted on the certificate of sponsorship. If the start date is delayed longer than this, a new application will be required. This is also a significant change from the previous rule allowing a start date to be delayed for any period.
- **New reporting notification required:** Sponsors must notify the Home Office if their business size definition changes from small to large or vice versa. (UKVI guidance defines a small business as having less than 50 employees or turnover less than £10.2 million). This information was previously only required on making a licence renewal application.
- **New certification guidance**: Employees of sponsors are no longer authorised to certify documents.
- **Further Resident Labour Market Test exemptions:** New exemptions to the Resident Labour Market Test are being introduced in the higher education sector for researcher and reader posts. Exemptions will also apply to posts held by research team members or researchers

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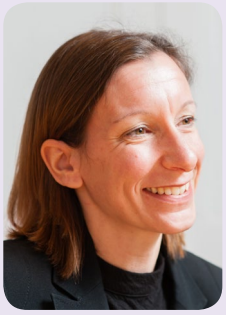
in receipt of supernumeracy research awards and fellowships.

- **Indefinite leave to remain:** Under new rules, Tier 2 visa holders who have more than 60 days between Tier 2 employments will no longer be precluded from applying for Indefinite Leave to Remain when they reach the qualifying period of five-continuous years in employment in the UK. Under the old rule a 60 day 'gap' between roles would prevent the five-year requirement being met.
- **Switching from Tier 4 to Tier 2:** Tier 4 visa holders on non-PhD courses can now apply to switch to Tier 2 when they finish their course, rather than having to wait until they have received their final results.
- **Visa dependents under the points-based system :** New changes now bring dependents under the 180 day requirement when making applications for indefinite leave to remain. Applications will not be permitted for those who have been outside of the country for more than 180 days in any 12 months during the qualifying period.

Several changes have also been made to the Entrepreneur Tier including restrictions on third-party funding, and applicants having to submit extensive additional documents, including previous client contracts for services.

The government also appears to be encouraging applications to the Tier 1 exceptional talent category as it has doubled the number of available endorsements from 1,000 to 2,000.



Helen Howes
Paralegal, specialises in business immigration

Case law watch

with Helen Howes
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Discrimination because of perceived disability

The Employment Appeal Tribunal (EAT) has upheld an employment tribunal decision that a police officer, who was turned down for a transfer to a different constabulary because of hearing loss, had suffered discrimination because of a perceived disability ***(Chief Constable of Norfolk v Coffey)***.

On requesting the transfer, Mrs Coffey underwent a pre-employment health assessment. The medical adviser noted her hearing was just below the required medical standard for recruitment but that she had undertaken an operational policing role with Wiltshire Constabulary without any undue problems. It was recommended that she undergo an 'at work' test, but this test never took place. Her request to transfer was declined on the basis that her hearing was below the required standard and it was inappropriate to risk increasing the pool of officers on restricted duties.

Mrs Coffey brought a claim for direct discrimination. She did not allege she had a disability. She argued that she had been treated less favourably because it was perceived she had a disability which was likely to get worse, leading to a substantial impact on her ability to carry out day-to-day activities. The EAT agreed and stressed that the question of discrimination depends not on whether someone actually is disabled (as a matter of law), but whether they are perceived as such.

What should I do?

It is essential that you avoid making stereotypical assumptions about an employee's condition, including how you think it may progress or deteriorate. Any decision concerning the individual's employment should be based upon their capabilities at the time, and on available medical information. It should be objective and based on fact, not assumption.

In this case it was key that the Norfolk Constabulary had failed to follow the medical adviser's suggestion that the officer undergo an 'at work' test.

Video surveillance in the workplace – a breach of an employee's right to privacy?

The European Court of Human Rights (ECtHR) has recently considered if video surveillance in the workplace is a breach of an employee's right to privacy under Article 8 of the European Convention on Human Rights.

In ***Antovic and Mirkovic v Montenegro (2017)*** two professors who taught at the University of Montenegro complained following the introduction of video surveillance in their teaching auditoriums. The purpose of the surveillance was to ensure safety and to monitor teaching. The professors complained about the need for the surveillance, and the cameras were eventually removed a year after their introduction.

> "These cases both clearly establish that an employee has a right to privacy at work – even if that workplace is public in its nature."

The professors brought claims for compensation for violation of their right to a private life under Article 8, and the unauthorised collection and processing of data on them. The ECtHR agreed their right to privacy had been breached and confirmed that Article 8 guarantees a right to a private life in the broadest sense and includes professional activities or activities taking place in a public context. It stated covert and non-covert surveillance of an employee at their workplace was a considerable intrusion into their private life. Compensation was awarded to the professors.

The decision of the ECtHR in ***López Ribalda and others v Spain*** is felt by many to move EU law on workplace monitoring too much towards the interests of employees. The case concerned a supermarket that installed cameras in one of its stores after stocktakes revealed significant losses (€7,800 in February 2009 rising to €24,600 in June). It was not clear if the losses were due to thefts by customers or staff so it installed some visible cameras at the entrance and exit doors to the store and some hidden cameras at the checkouts and tills. Staff were only informed of the visible cameras. The cameras caught a group of five employees stealing. On being shown the video evidence, the employees made full admissions and were dismissed.

The employees then brought a claim that the supermarket's failure to inform them of the hidden cameras breached their Article 8 rights (and also breached Spanish data protection law).

The ECtHR upheld their argument and stated that an employee has an expectation of privacy in their workplace and that this had been breached because the employees had not been told of or consented to the surveillance. It also noted that the footage had been taken over several weeks, had caught images of employees not guilty of theft, and had been seen by a number of people (for example the company's lawyer) prior to being shown to the employees. Each claimant was awarded €4,000.

What should I do?

These cases both clearly establish that an employee has a right to privacy at work – even if that workplace is public in its nature. In both cases the ECtHR highlighted that the breach would have been avoided had the employer informed the employees of the surveillance (despite the fact this would have prevented the Spanish supermarket from discovering which employees were stealing from it).

If it is necessary to install surveillance cameras, consider which employees are likely to be filmed and ensure that you clearly inform them of the camera's presence. Also consider having a policy in place which details the purpose of the surveillance and provides information on the retention of any footage.

Talk to a member of our team for further guidance, or read the Information Commissioner's guidance in its 'Code on CCTV' and Employment Practices code.

Rest breaks and compensatory rest

> “You are expected to be flexible in order to enable employees to take full rest breaks...”

Can an employee take shorter rest breaks in lieu of being able to take a full uninterrupted break under the Working Time Regulations? This was the question posed to the EAT in ***Crawford v Network Rail***. The nature of Mr Crawford's job as a signaller prevented him from being able to take an uninterrupted break of 20 minutes during his 8 hours shift. In lieu of this, he took several shorter breaks, which together added up to more than 20 minutes. He remained on call during these breaks.

Mr Crawford claimed that this arrangement was in breach of the Working Time Regulations. The EAT upheld Mr Crawford's claim, holding that compensatory rest must, as far as possible, amount to a single break from work that lasts at least 20 minutes and that an employer's failure to facilitate this would be a breach of the Working Time Regulations.

However, it did note that being on call during a break does not necessarily mean that the break cannot comply with the compensatory rest requirements. Network Rail was ordered to provide Mr Crawford with a way of achieving this.

What should I do?

When scheduling and designing shift and break arrangements, bear in mind the entitlement to a twenty minute uninterrupted rest break. You are expected to be flexible in order to enable employees to take full rest breaks, which may involve considering alternative working practices.

Ultimately a failure to enable an employee to take rest breaks in full could lead to employment tribunal claims and awards of compensation.

Offer of voluntary redundancy held to be contractual

An employer has been found to have breached the employment contracts of a group of employees because it failed to offer them the opportunity to apply for a voluntary redundancy package before dismissing them by compulsory redundancy. ***(Lynham Anor v Birmingham City Council, EAT)***

Birmingham Council announced proposals that it was to make redundancies. As part of those proposals, it posted a note on its intranet that it intended to offer a voluntary redundancy package to 'affected' employees, and that affected employees would be contacted and invited to apply for voluntary redundancy. However, the Council later moved away from this proposal and informed employees that voluntary redundancy was no longer available and that they would be made compulsorily redundant. The employees made a claim to the employment tribunal for breach of contract.

The Council defended the claim arguing that the employees had no contractual right to apply for voluntary redundancy. The EAT rejected this argument. It stated that the focus had to be on what the Council had communicated to its employees and to that end there had been a breach of contract because the notice stated that all affected employees would be contacted and invited to apply for voluntary redundancy – the Council was under no obligation to grant them voluntary redundancy but it was obliged to invite them to apply. The EAT also noted that at no time had the Council communicated that there was any restriction on the right to apply for voluntary redundancy.

What should I do?

On the back of this case, extra caution will need to be taken when publishing communications which contain statements that a company does not intend to be contractually bound by.

Care will be needed to ensure that there is express wording which clearly illustrates this. At the very least, communications should be reviewed prior to publication, and where necessary legal advice sought.

> “At the very least, communications should be reviewed prior to publication...”

Failure to disclose real reason for dismissal can be breach of trust and confidence

> "...you should always adopt an open and honest approach..."

The EAT has held that an employer breached its implied duty of trust and confidence when it gave a misleading reason for an employee's dismissal (***Rawlinson v Brightside Group Ltd***).

The employee worked as an in-house lawyer. The company had concerns about his performance, so much so that senior management deemed his position to have become untenable. This was not communicated to him. Instead, in an attempt to 'soften the blow', he was informed that an organisational review had resulted in a decision to use external legal advice and consequently he was to be dismissed following working his notice period, in order to facilitate handover of work.

He argued that the situation was subject to TUPE and that his employment should transfer to the external provider of legal advice. He resigned with immediate effect and brought a claim for constructive wrongful dismissal for his notice pay on account. He argued that his employer's failure to inform and consult him of the TUPE transfer breached and damaged the mutual trust and confidence that existed between them.

His claim was initially dismissed by the employment tribunal, but later upheld by the EAT. It stated that employers who mislead an employee about the reason for dismissal will generally act in a way which threatens to damage or destroy mutual trust and confidence.

It determined that the employer's intention to mislead the employee was to 'soften the blow' but also to keep the employment relationship alive so as to facilitate a handover period. This was deceit sufficient to be a fundamental breach of contract.

What should I do?

This case clearly demonstrates the risk taken when an employer fails to give the real reason for dismissal. Whilst an intention to conceal the real reason can be well-meaning, you should always adopt an open and honest approach.

Concealment of the real reason for dismissal might well be discovered by an employee making a subject access request or through documents being disclosed in tribunal proceedings.

Refusal to work, discrimination and misconduct

In ***Rochford v WNS Global Services*** the Court of Appeal (CA) considered whether an employee's refusal to work in the face of a discriminatory demotion was justified or whether it constituted misconduct.

Mr Rochford had been absent for an extended time with a bad back, which both parties agreed constituted a disability). On his return, he was required to work a reduced role. He remained on full pay. He was not given any indication of when his full role would recommence, which he argued was discrimination (the tribunal agreed). In response, he refused to carry out any part of his role despite being subject to disciplinary proceedings and warnings. He was dismissed for misconduct.

The dismissal was held to be procedurally unfair, but it was not found to be discriminatory. The CA rejected the argument that the employer was wrong to dismiss him for refusing to work when its discrimination had prevented him from working in his full role. His refusal was a breach of contract and misconduct and as such the dismissal was held to be fair. The court noted that an employee who objected to adjustments made had the options of resignation, working under protest, or to bring tribunal proceedings whilst remaining in employment.

What should I do?

It is often appropriate to have a gradual return to work after a long period of sickness absence, but wherever possible this should be by agreement with the employee and be based upon clear medical evidence.

Should an employee refuse to engage with any adjustments, you should obtain detailed legal advice before considering disciplinary action in order to avoid potential claims of discrimination.

> "...you should obtain detailed legal advice before considering disciplinary action..."

Introducing our 2018 employment law seminar series

Regardless of the size of your business, if you employ people you are likely at some point to be faced with employment law issues. Our seminars help you to refresh your knowledge, stay up-to-speed with the latest requirements and network with like-minded professionals.

Wednesday 21 February 2018, 1pm-4:30pm

CIPD and Willans' mock employment tribunal

The Pavilion, Hatherley Lane, Cheltenham

Click here to book

Thursday 19 April 2018, 9am-1pm

CIPD & Willans' employment law update

Stonehouse Court Hotel

Tickets will be released soon

Tuesday 26 June 2018, 7:30am-9:30am

Settlement agreements

National Star College, Cheltenham

Click here to book

Wednesday 3 October 2018, 9am-1:30pm

The law around recruitment

Stonehouse Court Hotel

Click here to book

"Excellent advice and guidance, very worthwhile attending."

'Early bird' discounts available. For prices and more information:

Visit the 'events' page on our website, or email events@willans.co.uk.

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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