Employment law dispatches

February | 2019

Willans LLP | solicitors

In this issue

We're just under 6 weeks away from Britain's departure from the EU, and while at the time of writing the government's next steps are uncertain, the legal implications of Brexit for businesses are a little easier for us to predict, and prepare for.

To help you feel as reassured as possible about the legal obligations on your organisation post-Brexit, our employment and corporate & commercial lawyers will be sharing practical insights to take away at our half-day workshop on 26 February in Cheltenham. More details are on the right.

In this issue, we'll also be covering some recent insights from case law, along with the employment law implications for some of the latest Brexit developments.

As always, if you need any more information on any of the topics discussed in this issue, do contact us and we'll be delighted to help you.

Matthew Clayton
Partner, head of employment law

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Partner, head of employment law

"...he 'provides calm, measured and commercial advice'"
The Legal 500 UK

Legislation update
with Matthew Clayton

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Upcoming changes in April

There is lots to say about Brexit and immigration later in this issue, but here is just a quick reminder of some changes occurring in April this year.

From 6 April 2019 all workers (not just employees) will have the right to an itemised pay statement and to enforce that right at an employment tribunal. The change will not apply to wages or salary paid in respect of a period of work before this date. A 'worker' is someone who is contracted to perform work personally other than in the context of a business/client relationship. The Department for Business, Energy & Industrial Strategy has published some useful guidance highlighting that additional information must be included in payslips for workers whose pay varies depending on the number of hours they have worked. The guidance also provides illustrative case studies and information on the necessary format of payslips, variations caused by unpaid leave of statutory sick pay and enforcement.

From 7 April 2019, statutory maternity pay, paternity pay, shared parental pay and adoption pay will be increasing from £145.18 per week to £148.68.

As of 6 April 2019, statutory sick pay will increase from £92.05 per week to £94.25.

Seminar this month

Brexit: employment, commercial & data protection law implications

Cheltenham | 26 February | 9am - 1:30pm (with lunch)

At this half-day workshop, we'll be providing practical, clear and solutions-focused advice to help your business prepare for our departure from the EU.

We'll be tackling head-on the commercial aspects of Brexit, for example terms of trading, distribution and agency agreements, along with the new rules for EEA workers in this country, the GDPR and how we can help your business be compliant in an ever-changing legal climate. There will be plenty of opportunities for you to ask questions and share your ideas and concerns with other businesses.

Date: Tuesday 26 February 2019

Venue: Manor by the Lake

Time: 9am - 1:30pm

Price: £45 + VAT including lunch

How to book: Please click this link to reserve your place via Eventbrite, or call 01242 542931 with any queries.

We look forward to seeing you there!

Helen Howes
Trainee solicitor

Brexit watch

with Helen Howes

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Right to work online checking service launched

Employers are now able to rely solely on the Home Office's online Right to Work Checking Service to establish if a person has a right to work in the UK. This means that businesses no longer have to request paper documents alongside using the service, as has been the case since its introduction in April 2018.

The service can be used to check the status of non-EEA nationals who hold biometric residence permits or cards and EEA nationals who have been granted settled status under the EU Settlement Scheme. EEA nationals who do not have settled status under the EEA scheme will still need to demonstrate their right to work through their physical documents. It is important that employers not only carry out the check, but also check that any photograph on the online check is the employee and retain a copy of the online check for at least two years after the individual's employment ends. Taking these actions and correct use of the check can provide a business with a statutory excuse against a civil penalty, should a problem arise. ■

EU Settlement Scheme – an update

The EU Settlement Scheme is now open for a public test phase. EU citizens living in the UK will need to apply under the EU Settlement Scheme if they want to stay in the UK after the planned Brexit transition period ends on 31 December 2020. The government also recently announced that it will waive the £65 fee for applying to the scheme, with those who had paid the fee during the pilot phase being reimbursed. ■

What happens if there is 'no deal'?

The government has said in a policy paper published in December that it will still go ahead with the EU Settlement Scheme in the event that the UK leaves the EU on 29 March with no deal, although it is most likely that the deadline for applying to the scheme would move forward to 31 December 2020 (as opposed to 30 June 2021 in the event of a deal). This means that until 31 December 2020 EU citizens can rely on their EU passport or identity card as evidence of their right to live and work in the UK. After this date, they will need to have either pre-settled or settled status granted under the scheme.

The government has also recently announced that in the event of a no deal, transitional arrangements will apply for a limited period to EEA citizens (and their family members) arriving in the UK after 29 March 2019. EEA citizens (and their family members) will be able to come to the UK for visits, work or study but if they wish to stay for longer than 3 months they will need to apply for European Temporary Leave to Remain (ETLR) - the fees for this application are not yet announced. If granted, this will be valid for 3 years and if EU citizens wish to stay for longer than 3 years they will need to make a further application under the new skills-based future immigration system, which will begin from 2021.

Irish citizens will not need to apply for ETLR and will continue to have the right to enter and live in the UK. ■

Jenny Hawrot
Associate, solicitor

Case law watch

with Jenny Hawrot

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Legal privilege

There is a legal concept known as 'litigation privilege' which allows a party to withhold evidence from court proceedings, where that evidence has come into existence for the 'dominant purpose' of being used in connection with actual or pending litigation. It allows parties to openly discuss their position, internally, but can also be a tool used to prevent the disclosure of unfavourable evidence, where that evidence falls in to that definition.

The scope of litigation privilege was considered recently in *WH Holding Limited and another v E20 Stadium LLP*. In this case, the parties were in a legal dispute, and certain emails were passed between members of E20's board, and between the board members and stakeholders discussing the commercial settlement of the dispute. The appellant (West Ham) had applied for disclosure of these emails. E20 resisted this on the basis that they were protected by litigation privilege, in that they were composed with the dominant purpose of discussing a commercial proposal for settling the parties' dispute, at a time when litigation was in reasonable prospect.

What should I do?

This decision reflects the courts' general reluctance to extend the protection afforded by litigation privilege.

You should keep careful tabs on the nature and extent of your internal discussions of litigation-related matters, and the records you create of such discussions.

As a general rule of thumb, do not write down anything you would not wish the other side to see!

Initially the High Court held that the emails were protected by litigation privilege. However, on appeal, the Court of Appeal held that the emails amounted to commercial discussions only, and there was no authority or justification for extending the scope of litigation privilege to purely commercial discussions. Consequently the court ordered their disclosure.. ■

Ill health retirement and disability discrimination

Mr Williams was employed by Swansea University from June 2000, and was a member of the University's pension scheme. He suffered from Tourette's syndrome and other conditions which satisfied the definition of disability for the purposes of the Equality Act 2010.

From 2000 to 2010 Mr Williams worked full time, but in 2010 his health deteriorated, and his hours were reduced by half as a reasonable adjustment to accommodate his disabilities. Following surgery his health deteriorated further, so in 2013 he applied for ill health early retirement under the University's pension scheme on the basis that he was likely to be permanently incapable of performing his duties.

The pension policy entitled him to a lump sum and annuity, plus an enhancement calculated on the basis of his (part-time) salary at the time of retirement.

Mr Williams claimed that basing his enhancement of his part time salary amounted to disability discrimination. He alleged that he suffered unfavourable treatment because of his disability, on the basis that, had he not been disabled, he would have been able to work full-time and his pension calculation would have been based on his full-time salary. The tribunal agreed, but the EAT, the Court of Appeal, and the Supreme Court did not.

The Supreme Court agreed with the Court of Appeal, holding that the 'treatment' in question was the immediate award of a pension. He had not received a lesser pension than would otherwise have been available to him if he had not been disabled. If he had not been disabled, and had been able to work full-time, the consequence would not have been calculation of his pension on a more favourable basis, but the complete loss of entitlement to any pension at all until his normal retirement date. ■

What should I do?

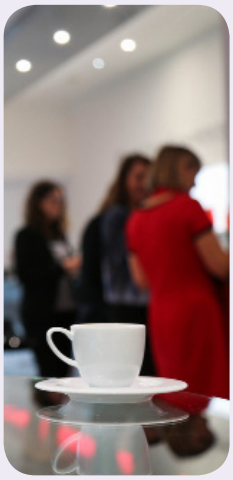
One of the purposes of disability legislation is to protect disabled employees against unfavourable treatment because of their disability. The Supreme Court's decision confirms that, broadly speaking, advantageous treatment (such as an early retirement pension) cannot be "unfavourable", even though it could have been more advantageous.

However, it's worth remembering that previous cases have established that it may be necessary to give a disabled employee preferential treatment by comparison with non-disabled employees in order to remove any disadvantage suffered.

Save the dates

Upcoming employment law workshops for 2019

If you are a HR professional, a director or executive responsible for risk management, and you feel you'd benefit from peace of mind that your employment practices are legally compliant, please do join us for our upcoming workshops. You'll gain practical, clear insights from our lawyers and there will be plenty of opportunities for networking and group discussion.



Tuesday 26 February **Brexit – employment, commercial and data protection law implications** | 9am-1.30pm including lunch | Manor by the Lake. Click here to book.

Wednesday 22 May **CIPD employment law update** | 1.30-4.30pm (1pm registration) | Business School, University of Gloucestershire, Oxstalls Campus. Click here to book.

Wednesday 2 October **Succession planning breakfast seminar** | 7.30-9am | National Star College

For more information
Please email events@willans.co.uk or call 01242 542931. We look forward to seeing you there!

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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