Employment Law dispatches

Willans LLP I solicitors

January 2017

Welcome

Welcome to our first edition of 'dispatches' for 2017. This year is a very special year for Willans as it marks 70 years since Alec Willans first hung up his brass plate in Cheltenham. Many things have changed since 1947 and our firm has modernised in many ways, but we still retain the integrity and client care ethos on which we were founded.

In this issue we update you on the latest developments in employment law - gender pay gap reporting, apprenticeship levy, cases about flexible working to name but a few.

We also outline our next seminar taking place in March. Our full seminar programme will soon be loaded on our website events page and will be emailed to you.

We look forward to working with many of you in 2017.

As always, please call if you wish to discuss any of these issues in more detail. Feedback is also gratefully received.

Employment law briefings

28 March, 7.30am - 9am (with breakfast)

A quick guide to data protection
Cheltenham

Data protection is a subject which strikes fear into many people's hearts. Our employment and corporate teams will give a quick and user-friendly overview of some of the most important issues relating to employee data and commercial relationships. They will also unwrap the EU's upcoming General Data Protection Regulation and explore what it means for UK businesses.

www.willans.co.uk/events

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

Legislation review

with Matthew Clayton

matthew.clayton@willans.co.uk

It's an appropriate time of year to turn our attention to what the coming twelve months might bring in terms of new employment legislation. The government's main attention will of course be on Brexit, and it will take some considerable time for any employment law changes to feed through from that; so changes this year are going to be quite modest. We have covered most of these in previous issues, but by way of reminder:

Mandatory gender pay gap reporting

The new gender pay gap reporting rules will come into force on 6 April 2017, with the first reports (relating to the 5 April 2017 snapshot date) having to be published no later than 4 April 2018 (not 29 April as previously thought before the legislation was finalised).

The reporting requirements will apply to private and voluntary sector employers with at least 250 employees.

Even though the first reports are not due for over a year it is important to start planning now, for a number of reasons. First you will need to include information about bonus pay, for bonuses paid over the period of twelve months leading up to 5 April 2017 – so that data can be collected, monitored and analysed almost immediately.

Secondly, gender pay gap reporting is as much a public relations issue as it is a legal issue. The government's strategy is to aim to close the gender pay gap using the power of publicity.

If your own data, either in relation to general pay, bonuses, or both, is going to publicly disclose some uncomfortable truths, then it is best that you know that in advance, so that you can plan how to deal with that news from a public relations perspective. For instance, you may wish to focus on the improvements which have been made and what your organisation is doing to close the gap.

Furthermore, conducting an informal advance audit in conjunction with your lawyers may ensure that legal professional privilege applies, so that you would not have to disclose it in any subsequent

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

Follow us at **@WillansLLP**

litigation over equal pay. If you would like our team to support you in this, please feel free to contact me.

Apprenticeship levy

The apprenticeship levy will come into force in April 2017. It will apply in theory to all employers in the UK, regardless of the sector in which they operate. The levy raised will be 0.5% of an employer's payroll, however an annual allowance of £15,000 per year will be given to offset against the levy, which means that only organisations with a payroll in excess of £3 million per annum will actually pay the levy.

The government will administer the funding generated for apprenticeships via a digital voucher system in England, and will allocate a share to each of the devolved administrations in Scotland, Wales and Northern Ireland.

Immigration skills charge

The government plans to use financial charges to encourage employers to recruit British workers instead of foreign migrants. From April 2017 a skills charge of £1,000 per migrant per year will be imposed on employers sponsoring foreign workers for a Tier 2 visa. Smaller employers and charities will pay a reduced rate of £364.

Salary sacrifice schemes

The Chancellor in his Autumn statement announced plans to roll back the tax breaks associated with salary sacrifice schemes. However schemes in respect of enhanced employer pension contributions and pensions advice, childcare benefits, the cycle to work scheme and ultra-low emission cars will still enjoy tax breaks. Schemes that predate April 2017 will survive until April 2018 in any event, and long-term schemes relating to cars, accommodation and school fees will survive until April 2021.

Industrial action

We expect the Trade Union Act 2016 to come into force some time in 2017. It is designed to address the perceived problem of strikes being called on votes with low turnout amongst union members. At least 50% ballot turnout will be required if industrial action is to be lawful.

Where a strike ballot relates to "the provision of important public services", a threshold of 40% of those entitled to vote must be reached in favour of the proposed action.

Case law watch

with Helen Howes
helen.howes@willans.co.uk

Flexible working

All employees with at least 26 weeks' continuous employment have the right to make a request for flexible working. A request can be made for any reason but, in practice, most are made by female employees wanting flexibility to care for children.

This means a refusal may result in a disgruntled employee claiming indirect sex discrimination. However two recent employment tribunal decisions, *Whiteman v CPS Interiors Ltd and others,* and *Smith v Gleacher Shacklock LLP,* have shown that the tribunals are not automatically on the side of the employee. In both cases, the employee's right to work flexibly had been refused and a claim for indirect sex discrimination was made to the tribunal.

Both were rejected, with the decisions highlighting that the business reasons behind a decision to refuse are for the employer to decide. In Smith, the tribunal held that it does not have any power to interfere with the employer's business judgement, so long as it can demonstrate that it has considered the correct facts and has analysed those facts in order to assess the impact on its business.

What should I do?

These are non-binding, first instance decisions so you should still be aware of the potential of an indirect discrimination claim.

When considering the feasibility of a flexible working request, you should (a) handle all requests in a 'reasonable manner' (as per the ACAS code), (b) respond within the required time limit, (c) make sure the reason(s) for refusing a request is one of the specified reasons, and (d) be prepared to justify your decision with evidence.

Most clients find it helpful to call us on receipt of a request, to talk through the process and rationale in order to ensure their decision can be justified should it be challenged.

Rest breaks

"You should ensure the structure of the working day adequately allows all staff to take their minimum rest break entitlement, and encourage a culture whereby it is expected that all staff take their breaks."

Most UK employers are aware that employees are entitled to a rest break under the Working Time Regulations 1988 (WTR). However, in reality many employees do not take rest breaks and will not complain that the right has been denied to them. Their perception may be that, given their heavy workload, it is their choice not to take a break.

The Employment Appeal Tribunal (EAT) has recently considered if an employer can rely on this defence if the employee later complains and tries to enforce their right to a rest break (*Grange v Abellio London Ltd*). It held that it could not, and stated that an employer can be deemed to deny the right to a rest break through arrangements of the working day; it is not necessary for there be an explicit refusal of the employee's request in order for there to be a denial of the right and breach of the WTR regulations.

What should I do?

You should ensure the structure of the working day adequately allows all staff to take their minimum rest break entitlement, and encourage a culture whereby it is expected that all staff take their breaks.

This can be done by sending out a written communication to remind staff that it is important (and expected) that they take their breaks, even in busy periods. A document like this can prove to be very helpful when defending a claim, should one occur.

Preparation of disciplinary investigation reports

The recent EAT case of *Dronsfield v University of Reading* has demonstrated that all documents produced as part of a disciplinary investigation can be relied on as evidence, even early drafts of the final report. The final version of the investigation report that the university relied on to dismiss the employee for gross misconduct was significantly altered following receipt of HR and legal advice.

In determining if the dismissal was fair, the EAT reviewed those changes between the drafts, looking at sentences and paragraphs which had been deleted or changed. The EAT expressed surprise that the investigation report was produced as though it was the joint responsibility of the investigating officer and the HR representative.

It held that, as per previous rulings (*Ramphal v Department of Transport [2015] EAT*), the report of an investigating officer for a disciplinary must be the product of their own investigations with any HR advice being limited to matters of law and procedure; questions of culpability must be reserved for the investigating officer.

What should I do?

This case demonstrates the willingness of a tribunal to accept evidence which compares and contrasts drafts of key documents produced as part of the investigation process. (You will need to produce these as part of the disclosure exercise pre-hearing, or in response to a subject access request).

You must therefore ensure that any review or alteration of a document is made with this in mind, and that HR and the investigating officer are absolutely clear on their roles, with the investigating officer aware that he/she may need to be able to explain any changes made following a re-draft of a document.

Employer not liable for director's assault on employee

"This decision does not change the law and does not mean that post-Christmas party drinks are outside the scope of employment for vicarious liability purposes."

In *Bellman v Northampton Recruitment Ltd,* the High Court has held that a company was not vicariously liable for an assault by its managing director on an employee in a hotel bar following the company's Christmas party. The assault took place in front of other employees and occurred following a discussion about work in which the managing director felt his authority was being challenged. In determining liability, the court focused upon the facts that the drinks were at a different location and separate from the Christmas party, that there were other guests other than employees present, and that conversation had been largely non-work related. Of key importance was the fact that this was an entirely 'impromptu drink' that had not been planned, and this was held to outweigh the fact that the company had paid for drinks and that the assault took place within a conversation about work. As a result the employer was not liable.

What should I do?

Proceed with caution. This decision does not change the law and does not mean that post-Christmas party drinks are outside the scope of employment for vicarious liability purposes. Each case will be determined on its specific facts.

You should therefore remind staff to conduct themselves in an acceptable manner whilst attending work social events as ultimately you could still be held liable for their behaviour.

EAT gives guidance on when stress caused by work may be a disability

"When trying to determine if an employee suffering from workplace stress could be considered disabled under the Equality Act, it is sensible to get independent medical advice which goes beyond the terms used by a GP in a sick note."

In *Herry v Dudley Metropolitan Council,* the EAT upheld a tribunal's decision that an employee, who was suffering from stress caused by difficulties at work, was not disabled within the meaning of the Equality Act because his stress was a reaction to difficulties at work rather than a mental impairment. It made this decision on the basis that he had failed to establish that this condition had a substantial adverse effect on his day-to-day activities.

The EAT observed that unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, are not of themselves mental impairments: they may simply reflect a person's character or personality. It commented that even though a doctor may be likely to refer to the presentation of such an entrenched position as "stress" (rather than as anxiety or depression), the question of whether there is a mental impairment remains one for the employment tribunal to decide.

What should I do?

When trying to determine if an employee suffering from workplace stress could be considered disabled under the Equality Act, it is sensible to get independent medical advice which goes beyond the terms used by a GP in a sick note.

It is helpful if this advice focuses on whether the employee's condition will have a substantial long-term effect on their ability to carry out day-to-day activities as this is likely to be a key consideration should the matter progress to tribunal.

Refusal to allow flexible working for breastfeeding employees was discriminatory

"This decision is not binding on other tribunals; however it clearly highlights that an employer is expected to try to accommodate a request to allow flexible working..."

In *McFarlane and another v EasyJet Airline Company Limited*, an employment tribunal has ruled that an employer's refusal to allow flexible working arrangements to enable two breastfeeding employees to express milk was discriminatory. Two female cabin crew had asked EasyJet if, on their return from maternity leave, they could not be rostered for shifts longer than eight hours as this significantly increased their likelihood of developing mastisis (a painful condition which can occur if breastfeeding women go for prolonged periods without expressing milk).

EasyJet refused their request on the basis that bespoke rostering would significantly impact its ability to deliver and manage its flying schedule. The tribunal held the refusal amounted to indirect sex discrimination. It could see no evidence of objective justification for the refusal, nor could it identify any examples where the introduction of bespoke rostering had caused the airline difficulty.

It was further criticised for failing to pay remuneration when suspending on maternity grounds (the employees were grounded whilst a resolution was sought) and also failing to offer suitable alternative work. It was ordered to pay compensation of £8,750 and £12,500.

What should I do?

This decision is not binding on other tribunals; however it clearly highlights that an employer is expected to try to accommodate a request to allow flexible working in order to enable a female employee to continue breastfeeding. If you are thinking of refusing a request you will need to be able to rely on clear objective evidence; EasyJet were criticised for their evidence being 'partially informed speculation'.

You will also have to demonstrate that no other suitable alternative work existed. You should also avoid asking the employee how long they expect to continue breastfeeding – the tribunal held this to be unreasonable conduct by EasyJet.

In other news….. EasyJet has also recently been before a tribunal for dismissing a flight attendant who failed to ask for a receipt, or clarify if two sandwiches that were given to her to eat by her manager had been paid for. As a result she was considered to have breached company policy and was dismissed for gross misconduct and theft. The case, having been partially heard by an employment tribunal, has been settled.

Apprenticeships

"If you are considering taking on an apprentice or increasing the number of apprentices in your organisation, it is worth spending some time now to review your key documents."

As Matthew has outlined in the legislation review section, the apprenticeship levy will be introduced this April. If you are considering taking on an apprentice or increasing the number of apprentices in your organisation, it is worth spending some time now to review your key documents.

This is particularly important given that apprentices are not always treated in the same way as employees. For example although apprentices are subject to the same policies and procedures, the ability to terminate an apprenticeship contract early is limited.

If a company were to get it wrong and breached the contract, an apprentice could claim compensation not only for loss of earnings over the remaining term of the agreement but also for the lost opportunity to qualify into their chosen career. This could significantly increase any compensation awarded.

What should I do?

We can help you to ensure that documents such as your 'apprenticeship contract' or 'apprentice agreement' set the terms of the relationship and rights of the apprentice in a manner that benefits your organisation.

It is important that you check that the most appropriate agreements or contracts are drafted before anything is agreed. You may also wish to check with your liability insurers as to whether they require notification if an apprentice is appointed and whether any premium or special terms may apply.

Introducing our fixed-price employment law support package which you can tailor to your business needs and budget

Our flexible and bespoke service enables you to select the support you need most whilst managing your exposure to potential risks.

Expert and practical employment law advice from a dedicated team of highly regarded employment lawyers from as little as £1.36 + VAT per employee, per month.

For more information please click on the link willans.co.uk/fixed-price support

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.

Employment law

Matthew Clayton
matthew.clayton@willans.co.uk

Charities & not-for-profit

Margaret Austen
margaret.austen@willans.co.uk

Litigation & dispute resolution

Nick Cox
nick.cox@willans.co.uk

Paul Gordon
paul.gordon@willans.co.uk

Agriculture & estates

Robin Beckley
robin.beckley@willans.co.uk

Corporate & commercial

Paul Symes-Thompson
paul.symes-thompson@willans.co.uk

Theresa Grech
theresa.grech@willans.co.uk

Residential property

Robert Draper
robert.draper@willans.co.uk

Property & construction

Nigel Whittaker
nigel.whittaker@willans.co.uk

Susie Wynne
susie.wynne@willans.co.uk

Jonathan Mills
jonathan.mills@willans.co.uk

Divorce & family law

James Grigg
james.grigg@willans.co.uk

Wills, probate & trusts

Simon Cook
simon.cook@willans.co.uk

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

Follow us at **@WillansLLP**