Employment law dispatches

January | 2019

Willans LLP | solicitors

In this issue

Welcome to 2019. We hope you have had a relaxing Christmas break and have returned to work ready to hit the ground running!

We thought we would take the opportunity to share our employment law 'highlights' of 2018 and also look forward to see what's on the horizon in the coming year.

It's likely that preparing for Brexit is high on your business' agenda, and we hope that you'll join us for some practical, smart and straight-talking insights at our upcoming half-day workshop next month. We will be on hand to offer guidance and reassurance on legal aspects that are likely to affect you, to help everything run smoothly in your workplace on 29 March and beyond.

So that you can start 2019 as you mean to go on, we're also offering a free business health check service, in which we'll check your employment documentation to identify any issues free of charge, with discounted rates for the provision of new documents, or amendments to existing ones. More details of this offer (available until January 31) are on page 2.

We wish you a happy and prosperous year ahead.

Matthew Clayton
Partner, head of employment law
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Matthew Clayton and Kym Fletcher of Willans' GDPR team

Upcoming seminar

Brexit: employment, commercial & data protection law implications

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

With March 29 hurtling towards us, are you still a little in the dark on the legal aspects of Brexit that are likely to affect your business? Join us at a half-day workshop designed to help you feel as confident and ready as can be for the upcoming changes this Spring.

What we'll cover

We'll be providing practical, clear and solutions-focused advice to help your business prepare for our departure from the EU.

At this half-day workshop, 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.

Matthew Clayton, Jenny Hawrot and Helen Howes will be discussing employment and immigration law and Chris Wills and Kym Fletcher will be covering the corporate & commercial aspects.

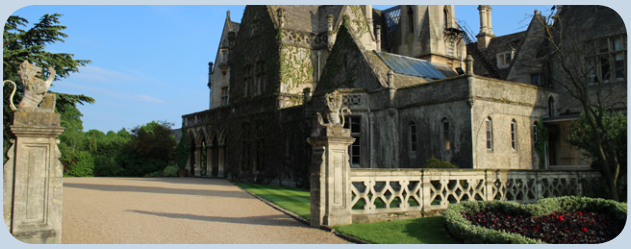
Date: **Tuesday** 26 February 2019

Venue: Manor by the Lake

Time: 9am - 1:30pm

Price: £45 + VAT including lunch (with early bird ticket price of £40 + VAT if booked before 31 January)

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



Manor by the Lake

Free business health check

Is your employment documentation fit for 2019?

The new year is a time when people often take stock with a view to making improvements for the coming year. Businesses should consider doing the same to ensure that they are fit, healthy, and prepared for 2019.

Employees are the foundation of any business, so deciding to review employment contracts and staff handbooks is one resolution which all organisations should make.

Why keep your employment documents up-to-date?

- It's the law!
- It protects the business when you are facing disputes
- It allows you to adapt to the changing needs of the business
- It allows you to adapt to the changing nature of employment relationships
- Both employer and employee know where they stand.

In January 2019 our employment lawyers are offering to check your employment documentation to identify any issues free of charge, with discounted rates for the provision of new documents, or amendments to existing ones.

Special rates (valid until end of January):

- Contract & handbook health check, with telephone conversation: Free
- Contract & handbook health check, with written report: £350 + VAT
- Existing contract update: £400 + VAT per contract
- New contract: £300 + VAT per contract
- Existing policy update: £100 + VAT per policy
- New policy: £100 + VAT per policy

How to take advantage of this offer

Please contact associate solicitor **Jenny Hawrot** at jenny.hawrot@willans.co.uk, via LinkedIn or call 01242 541566.

Matthew Clayton
Partner, head of employment law

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

A look back on employment law in 2018

with Matthew Clayton
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Employer's liability for data protection breaches

Regular readers of ***Dispatches*** will recall that back in January 2018 we reported that the High Court had held Morrisons to be vicariously liable for an employee's deliberate data breach (you may remember that the disgruntled employee deliberately disclosed the personal data of just under 100,000 of its employees). This was even though Morrisons was found not to have breached its own data protection duties.

Morrisons' appeal of that decision was heard towards the end of 2018. The Court of Appeal dismissed the appeal, commenting that the employee's motivation to damage the company was irrelevant (and even though the Court's decision itself increased that damage), and holding that there was sufficient connection between the employee's action and his employment to make Morrisons vicariously liable for the breach.

Given the level of damages involved (to at least some 5,518 employees who were claimants in the case), and the important legal principles at stake, Morrisons has indicated that it will seek to appeal to the Supreme Court. ■

What should I do?

In the event of a data breach the court will likely examine whether there were technical and organisational measures in place which could have prevented it. You therefore need to ensure that you can demonstrate you are complying with all aspects of the GDPR. In this case, Morrisons did nothing wrong itself, but was liable nonetheless because the employee was held to have acted in the course of his employment.

The court commented that employers should look to insure themselves against such eventualities, so you should review the extent of your cover. Unfortunately no amount of insurance cover can protect against the reputational damage involved, so you should also review your crisis response planning.

Court of Appeal: time to 'get real' on worker status

In the latest addition to the succession of cases last year on worker status (involving Pimlico Plumbers, Deliveroo and Addison Lee amongst others) the Court of Appeal has upheld the Employment Appeal Tribunal (EAT)'s decision that drivers working for Uber were 'workers' and not self-employed.

The principal point to come out of the Uber case was that the written terms of engagement, which say that Uber acts only as an intermediary between passengers and drivers who act as independent contractors, do not reflect the reality of the relationship, which is that Uber contracts with the passengers to provide driving services, which the drivers perform for it. As such, under established principles, the written terms could be disregarded when assessing employment status.

> "...the written terms of engagement... do not reflect the reality of the relationship..."

A similar point emerged in the Addison Lee litigation, where the EAT agreed with the employment tribunal's approach to focus on the reality of the working arrangements rather than the contractual documents in place. Although on paper the drivers were under no obligation to accept work and Addison Lee were not under any obligation to offer it, the reality of the situation was that the drivers were under an 'economic obligation' as they needed to work between 25-30 hours per week in order to recover the fixed costs of vehicle hire.

Employment status and collective bargaining rights

In an interesting twist, the High Court has upheld the decision of the Central Arbitration Committee in late 2016 that Deliveroo riders are not workers for the purposes of collective bargaining, and therefore the Independent Workers Union of Great Britain cannot claim statutory recognition on behalf of the riders. ■

What should I do?

There is no substantial change to the law following this decision as it merely follows the line of cases already decided. However, it does re-emphasise the need for contractual documentation to accurately reflect the reality of the working arrangement. If you are engaging staff in this manner, it is a good idea to regularly review your documentation, to ensure that it accurately reflects the working practices in place.

Please get in touch if you'd like us to review your contracts.

The 'Gay Cake' case

Although not strictly speaking concerning employment law, the case of ***Lee v Ashers Baking Company Limited*** and others attracted lots of publicity because of its importance for the law of discrimination in the provision of services. A bakery and its Christian owners had refused to provide a gay customer (the claimant) with a cake bearing the words "Support Gay Marriage". The Supreme Court held that in doing so, the bakery and its owners had not directly discriminated against the claimant on the ground of sexual orientation, religious belief or political opinion.

The court drew a distinction between the message on the cake (which was held to be the reason for refusal), and the personal characteristics of the customer and those associated with him. There was no evidence that Ashers had discriminated because of the claimant's association with the gay and bisexual community. The court took the view that support for gay marriage was not indissociable from Mr Lee's sexual orientation, as he had asserted; people of all sexual orientations can and do support gay marriage. ■

What should I do?

In the employment law and HR arena, it is likely that this case will make it harder for employees to establish claims of associative discrimination. It will not be enough to say that the reason for the less favourable treatment "has something to do with the sexual orientation of some people".

However it is important to remember that employees are protected by discrimination law even if they themselves do not possess the protected characteristic in question – it is enough if they are perceived to have that characteristic, or if they associate with people who do.

#MeToo and NDAs

The use of non-disclosure agreements (NDAs) in sexual misconduct cases has featured prominently in the news lately, with the stories concerning Harvey Weinstein and Sir Philip Green amongst others. NDAs are often incorporated into agreements settling sexual harassment claims, requiring the complainant to keep certain information or allegations confidential, usually in return for a financial settlement.

Concerns have been expressed that NDAs are being used to inappropriately silence victims of sexual harassment in the workplace. Those benefitting from NDAs would point out that the complainant has, after receiving legal advice, freely accepted a financial payment in return for the non-disclosure obligation, when they didn't have to do so. Furthermore, it always has been the case that NDAs cannot legally be used to prevent whistleblowing, and should not deter victims from reporting the matter to a regulatory body or the police. However, many victims say they were unaware of this (because it was not openly stated in the agreement) and therefore one must question the quality of the legal advice they received at the time.

Although most of the time NDAs are used appropriately, commercially and ethically, it is undoubtedly true that in some cases their use and enforcement could be seen as unethical. Recently the government has pledged to bring an end to the unethical of use NDAs, to consult on possible reforms to improve their regulation, and to make it clear when they are unenforceable.

It will be interesting to see how the government goes about defining what is a difficult grey line. ■

Jenny Hawrot
Associate, solicitor

Looking ahead to 2019...

with Jenny Hawrot
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EU Settlement Scheme

From March 2019, EU citizens in the UK will need to apply for either settled or pre-settled status if they wish to continue living and working in the UK. The status applied for will depend on the length of time the individual has been in the UK. Applications are made electronically via an app.

If you haven't already, then you would be well-advised to consider what percentage of staff will be affected by this, and what steps you need to take to ensure HR or managers are knowledgeable of the scheme and able to provide assistance to employees needing to evidence their right to be in the UK. Get in touch if you would like further details on the EU Settlement Scheme, or to talk through how we can help you to support staff having to make an application.

The government also published, just prior to Christmas, details of the proposed new immigration rules which will apply to anyone arriving from outside of the UK, including workers from the EU. These rules will be phased in from 2021. They will have to apply for a work visa under a points-based system, and will need to be sponsored by a licensed employer. Under the current system the proposed role must meet a minimum skill level (equivalent to degree level) and a minimum salary level (currently £30,000). The proposed new system significantly reduces the minimum skill level but retains the minimum annual salary, although the government is willing to consult on this point. Importantly the current 'resident labour market test' will be removed – a set of rules requiring employers to demonstrate that the proposed role cannot be filled by a settled worker. There may be some visas available for lower-skilled roles for up to one year, and the Tier 2 cap will be removed.

> "The government is renewing focus on compliance..."

The immigration skills charge will still remain (£1,000 for each year the sponsoring employer intends to sponsor an individual in work, to be paid upfront), so employing foreign workers will remain an expensive exercise even if some flexibility is being introduced in the process. The government is renewing focus on compliance, with a proposal to introduce checks on employers for 'retrospective compliance' with their sponsor licence duties.

Contact us for assistance with applying for a sponsor licence, or visas for foreign workers, or support and training to ensure your compliance regime will withstand scrutiny. ■

Veganism – a protected belief?

In March 2019, an employment tribunal will be asked to decide whether veganism can constitute a protected philosophical belief for the purposes of the Equality Act.

If it finds that to be so, then a full hearing will take place to determine whether a vegan who was dismissed by the charity for whom he worked was discriminated against on the grounds of his veganism.

He argues that he was dismissed after raising concerns that his employer's pension fund was investing in companies that tested on animals. In contrast, his employer reportedly argues he was dismissed for gross misconduct after failing to follow express management instruction.

The Good Work Plan: the story so far

The government has published a series of proposed changes to employment law, following the ***Good Work Review*** by Matthew Taylor in 2017.

Disappointingly, only a few of the proposals are backed up by any draft legislation; for the remainder there are not yet any dates or commitments to legislate. Further detail may emerge during the course of 2019, and we will keep you posted if and when the proposals become more concrete.

What we know so far is that, from 6 April 2020:

- the written statement of employment particulars must be given from day one of employment and must be given to workers as well as employees
- the rules will change for calculating a week's pay for holiday pay purposes, increasing the reference period for variable pay from 12 weeks to 52 weeks
- the 'Swedish Derogation' for agency workers will be abolished
- the percentage will be lowered for a valid employee request for the employer to negotiate an agreement on informing and consulting its employees.

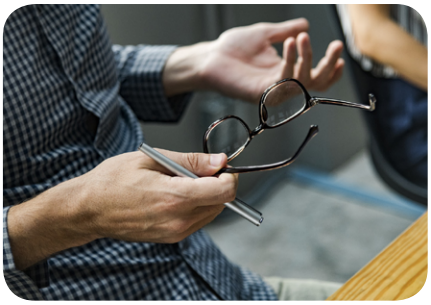
From 6 April 2019, penalties awarded by employment tribunals for aggravated breaches of employment law are being increased.

Tribunal fees to return?

The Ministry of Justice has confirmed that it may seek to reintroduce fees for employment tribunals.

Given the Supreme Court's decision that the fees were unlawful, any new fees introduced will have to be different from the previous regime.

As yet, no detail has been given, but it is possible that a new regime may include lower fees or fees being payable by employers.



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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