Employment Law dispatches

Willans LLP I solicitors

70 YEARS

June 2017

Welcome

Welcome to the June issue of *Employment Law Dispatches*.

In this month's edition we reflect on a range of recent cases, concerning topics such as holiday payments for 'gig' workers, the value of a day's pay, whistleblowing protection and the employment law considerations involved in psychometric testing.

Please do not hesitate to call us should you wish to discuss any of these issues in more detail. Feedback is also gratefully received.
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Upcoming briefings

6 July, 8:45am - 11:30am

Cyber crime & GDPR overview
Barclays, Brittania Warehouse, Gloucester

21 September, 9am - 1.30pm

Building flexibility into your workforce
Stonehouse Court Hotel

7 November, 7:30am - 9am

Managing and incentivising staff in a growing business
National Star College, Cheltenham

For more information, please visit **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 update

with Matthew Clayton
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DUP and Conservative deal 'unlikely to result in major shift in employment law'

Last month I wrote about the manifesto promises of the three mainstream political parties in Westminster regarding employment law. Little did I think it would be necessary to comment on the views of Ulster's Democratic Unionist Party on such issues – how wrong I was! So, rather after the event, I took a look at its 2017 Westminster manifesto.

The DUP is supportive of the National Living Wage (NLW) whilst acknowledging the pressures it can place upon small businesses. It seeks continued increases to the NLW, together with firm action against companies who fail to pay their staff the NLW.

It also supports the maintenance of the present workers' rights framework and for the UK to "lead the way in improving this framework as it has throughout its history." This seems broadly in line with Theresa May's commitment to preserve the current framework of employment law, even following Brexit.

The DUP is also concerned to ensure that Northern Ireland receives its fair share of the Apprenticeship Levy, and that this should be not less than the total levies which have been paid by businesses in the province.

Therefore the deal between the DUP and the Conservative party to support a Conservative government is unlikely to result in any major shift in employment law for the time being.

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Follow us at **@WillansLLP**

Jenny Hawrot - an experienced solicitor who advises individuals and businesses on the full range of employment issues.

Case law watch

with Jenny Hawrot
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Holiday payments for 'gig' workers

In *King v The Sash Window Workshop Limited* the European Court of Justice (ECJ) has been asked to consider whether a worker's paid holiday entitlement carries over to subsequent years if they have not taken paid holiday because their employer refuses to pay them (for instance, as in this case, because the employer takes the view that the worker is a self-employed 'gig' worker and not entitled to paid holiday).

The Advocate General (AG) of the ECJ has now given a formal opinion on the case. This is not binding on the ECJ, but is followed in most cases. A full judgment will follow.

The AG has said that in such circumstances the worker can claim he was prevented from exercising his right to paid leave. The right to paid holiday would then be carried over until the worker has been able to exercise it.

In this case the worker's paid holiday entitlement carried over until his employment terminated, when he was entitled to be paid in lieu of it. It is important to note that the three month time limit in holiday pay claims, considered in *Fulton v Bear Scotland* (see *Dispatches* November 2014 and February 2015), was not considered in this case.

The worker can try to establish through the courts and tribunals whether he is entitled to be paid for the leave, even if he has not asked to take his leave first. The AG took the view that the risk of not being paid for the leave would be a deterrent to taking it.

What should I do?

This case emphasises the importance of properly reviewing the employment status of any casual, self-employed or atypical workers in your organisation. If they could be deemed workers or employees with a statutory entitlement to paid holiday, you could face potentially costly claims for arrears of holiday pay.

Whistleblowing protection

"... dismissing (an employee) for speaking out is a high-risk strategy."

In *Beatt v Croydon Health Services NHS Trust* Dr Beatt raised various concerns over staff levels and patient safety in general, which were rejected in a report prepared by the NHS Trust. Dr Beatt was suspended, and dismissed for having made false and unfounded accusations.

The Court of Appeal (CA) was asked to look at why he was dismissed. The Trust argued that it genuinely believed Dr Beatt did not meet the statutory criteria for whistleblowing when it dismissed him, and that therefore his whistleblower status cannot have been the principal or operative reason in its mind for his dismissal.

The CA said there was no doubt that Dr Beatt had blown the whistle within the statutory definition of that concept. Therefore the question was simply whether his disclosures had been the reason or principal reason for his dismissal. This was an objective test. The state of the Trust's belief about his statutory protection when it dismissed him was irrelevant.

What should I do?

If an employee has made whistleblowing disclosures you must treat them very carefully; dismissing them for speaking out is a high risk strategy.

You would have to prove that their disclosures did not attract statutory protection – for instance, that they were not in the public interest, or they did not reasonably believe that the disclosures tended to show one of the six categories of failing set out in the legislation.

This can be difficult to do and is something on which you should take legal advice.

Breach of director's duties

"This case is a good illustration of the wide-ranging and hard-hitting remedies which the courts can bring to bear."

In *Clegg v The Estate and Personal Representatives of Pache and others* Mr Pache, a company director (who had since died) was sued by his co-director Mr Clegg for having misapplied company property for his own benefit in an alter ego company. Mr Clegg was looking for Mr Pache's estate to account to him (Mr Clegg) for the profits Mr Pache had made from his misdemeanours. There was a question as to how much of the alter ego company's profits could be said to have been earned from Mr Pache's actions.

The CA held that since Mr Pache had taken steps to conceal his conduct, it would not be for Mr Clegg to prove what profits emanated from Mr Pache's breaches of duty. Rather, Mr Pache's estate should account for **all** profits earned in the relevant period, less any profits it could show were independently earned.

What should I do?

This case is a good illustration of the wide-ranging and hard-hitting remedies which the courts can bring to bear. If you suspect that a senior employee or director has been acting contrary to the interests of the company then you should not hesitate to call us. It can be vital to secure the evidence at an early stage, in a way which can be used in court.

Tribunal jurisdiction regarding overseas employees

"...This case demonstrates the importance of having an accurate contract which reflects the intentions of the parties and the reality of the situation."

In *Green v SIG Trading Ltd,* Mr Green was managing director of operations for SIG in Saudi Arabia. He lived in Lebanon and commuted to Saudi Arabia for a few days at a time, and occasionally worked in the UK. Despite working abroad, Mr Green was paid in pounds sterling, was registered with HMRC, and his contract of employment stated that his employment would be governed by English law.

When Mr Green brought a claim for unfair dismissal in the employment tribunal, SIG argued that the tribunal did not have jurisdiction to hear Mr Green's claim as he was an employee in Saudi Arabia, not England. Even though he had a UK employment contract, SIG contended that this was just a standard contract that had been used for convenience. SIG argued that by working in Saudi Arabia for the Saudi Arabian part of the business, Mr Green had a stronger connection with Saudi Arabia than the UK, so he should not have statutory employment protection in the UK. The tribunal accepted SIG's arguments and concluded it did not have jurisdiction to hear the case.

Mr Green appealed and the Employment Appeals Tribunal (EAT) found it could not ignore the fact that the contract of employment was with a UK company and was expressly stated to be governed by English law. The tribunal had incorrectly accepted SIG's subjective explanation when it should have conducted an objective assessment of all the circumstances.

The case has been remitted to the tribunal, which may well still find (using the correct test, this time) that Mr Green did not have an adequate connection to the UK to benefit from statutory employment protection here.

This case concerned the tribunal's jurisdiction to hear a statutory claim of unfair dismissal. Contractual disputes are a separate issue; it is always open to employer and employee to choose which country's laws will apply to the contract, and which country's courts and tribunals will have jurisdiction to decide on contractual disputes. For senior and highly paid employees, contractual issues may well be more important.

What should I do?

If you have employees who live and work outside England and Wales, you should actively consider which country's jurisdiction and laws should govern their employment.

This case demonstrates the importance of having an accurate contract which reflects the intentions of the parties and the reality of the situation.

Reasonable adjustments in psychometric testing

"...if the adjustment is reasonable and proportionate, employers should accommodate that request."

In the case of *Government Legal Services v Brookes*, Ms Brookes applied for the position of 'lawyer' with the employer (GLS). As part of the application process GLS required Ms Brookes to pass a 'situational judgement test' which comprised of multiple choice questions. Ms Brookes had Asperger's syndrome and requested an alternative test format, backed up by a recommendation from her psychiatrist on the basis that a multiple choice format was not appropriate for her.

GLS declined her request, but did allow Ms Brookes additional time to complete the test. She failed, and brought a claim for indirect disability discrimination.

Both the employment tribunal and the EAT concluded that GLS had discriminated against Ms Brookes. This was because the provision, criterion, or practice of requiring applicants to pass a multiple choice psychometric test places people that have Asperger's at a disadvantage, compared to those who do not. They also concluded that whilst there was a legitimate aim to the psychometric test, the means of achieving that aim were not proportionate. This is because a multiple choice format was not the only way of assessing the competency of applicants.

What should I do?

You are required, under the Equality Act 2010, to make reasonable adjustments for disabled job applicants, where possible. This case demonstrates that you should explore and consider other means of achieving the aim of assessing applications. You should not simply reject requests for reasonable adjustments - especially those backed up by medical advice.

This does not mean that you are expected to move heaven and earth to accommodate a disabled job applicant's request for an adjustment, but if the adjustment is reasonable and proportionate, you should accommodate that request.

How much is a day's pay?

"An express provision in an employment contract can override the statutory apportionment principle..."

In *Hartley and others v King Edward VI College*, teachers went on strike for one day and so the College deducted 1/260 of their annual salary. The teachers argued that only 1/365 should have been deducted.

The Supreme Court agreed with them, referring to legislation dating from 1870 which stipulates that annual income payments are deemed to accrue from day-to-day (including weekends). Therefore only 1/365 of their annual salary should have been deducted. There was nothing in their employment contracts to counter this principle, they were employed on annual contracts and regularly worked outside their contracted hours, including weekends and holidays.

It was a key feature of the case that the claimants were expected to work outside of their contracted hours. This suggests the outcome may have been different if they had worked only within contracted hours. The decision could therefore affect professionals and company directors who might also be expected to work outside normal contracted hours.

What should I do?

An express provision in an employment contract can override the statutory apportionment principle, and many employment contracts will stipulate that deductions (e.g. for holiday taken in excess of entitlement) will be made at the rate of 1/260 of annual salary.

This would be something to consider if you wish to achieve certainty for employees who might be expected to work outside normal contracted hours and who do not currently have this provision in their employment contracts.

The GDPR is on the horizon - is your business up-to-speed?

You may already be aware that the General Data Protection Regulation (GDPR) comes into force on 25 May 2018.

We have created a handy **fact sheet** to explain what business owners may need to do to prepare.

Click here to download the fact sheet.

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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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