Employment law dispatches

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"...he gets right to the point"
Chambers UK

Legislation update

with Matthew Clayton

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Rights to itemised payslips extended

The Employment Rights Act 1996 has been amended to provide all 'workers' with a right to an itemised pay statement and to enforce that right at an employment tribunal. This right will come into force with effect from April 2019. The new legislation brings into force the government's commitment to ensure workers, and not just employees, are provided with an itemised pay statement, as recommended by the Taylor Review.

This change will undoubtedly increase administration, and may require an adjustment to payroll software. Make sure that you take the time before next Spring to look at all your 'off payroll' staff and decide whether they need to be provided with payslips, even if they are submitting invoices.

In the future, someone who is treated as self-employed but can prove they are a 'worker' (i.e. providing personal service other than in the context of a business/client relationship) will be able to claim that they have not received compliant payslips.

This should not present a significant risk in itself, unless you are making deductions (e.g. for PAYE (where applied) or for equipment or uniforms) which are not properly itemised in written statements, in which case compensation can be awarded. ■

New dress code guidance published

As the warm weather continues, the topic of dress codes is back on our minds.

You may remember that back in December 2015, a female receptionist at a corporate accountancy firm was sent home without pay because she failed to comply with her agency's dress code by refusing to wear high heels (the code stipulated women should wear heels of between two to four inches).

Amongst a media furore, the employee in question started a petition to make it unlawful for employers to insist women wear high heels, and this triggered a debate in the House of Commons. As a result, a joint inquiry was carried out by the House of Commons Petitions Committee and the Women and Equalities Committee. The report, which was published in January 2017, suggested that a review of the relevant area of the law should take place. It recommended that greater penalties should be available against employers who breach the law in order to make them more effective, and proposed

Get confident on the law around recruitment | Upcoming workshop

Our half-day workshop on 3 October at Stonehouse Court Hotel will shed light on what you can and can't legally do when it comes to recruitment. Click here to read more and to book.

that guidance to employers on dress codes should be improved as it felt that the law was not well understood.

In response, the Government refused to consider a review of the law. It stated that it considered the existing legislation to be sufficient because it has always prohibited employers from requiring a female employee to wear high heels. However, it did acknowledge that the law was not well understood and enforced, and consequently promised that new guidance would be issued.

That new guidance has now been published by the Government Equalities Office and aims to give guidance on how workplace dress codes and uniforms should comply with sex equality legislation. The use of the word 'aims' is deliberate and pertinent, as it is in no way detailed guidance – consisting only of six pages. It has been heavily criticised for being bland, vague and for failing to provide practical, helpful advice to employers trying to implement dress codes in a fair and measured manner.

It is also criticised for being unclear. For example, it notes that a requirement or expectation that a female employee wear high heels, make up, a skirt or have manicured nails may amount to unlawful sex discrimination, yet it qualifies this statement with the caveat 'assuming there is no equivalent requirement for men'. Given that there is no obvious equivalent of a man being required to wear such things, it leaves open questions such as whether a male employee being required to wear a suit and tie is an equivalent requirement? It also fails to point out that the existing laws cover all workers, and applicants for jobs (not just employees), and somewhat skims over other aspects such as religious symbols, transgender issues and the need to make reasonable adjustments for disability.

Overall we appear to be no further on. As ever it remains key that businesses operating a dress code should take an objective look at any policy, and take time to consider whether the impact of the policy affects, either directly or indirectly, one group more than another. If it does, you should seek advice as to whether its effect could be considered to be discriminatory and whether it can be potentially objectively justified. ■

> "...take time to consider whether the impact of the policy affects, either directly or indirectly, one group more than another."

Get confident in the law around recruitment

Join us for a half-day workshop this October

Good recruitment is the lifeblood of any organisation, but many employers are confused about what they can and can't legally do. For instance:

- Is it okay to only advertise vacancies internally?
- Can you still ask candidates to complete medical questionnaires?
- Is it okay to check them out on social media?
- When should the employment contract be issued?
- What are the rules about withdrawing job offers?

Matthew, Jenny and Helen in our employment law team will shed light on these and other issues in a half-day workshop this October. There will also be an opportunity for networking, a group discussion of best practice in the recruitment context, and other group-based exercises. It's aimed at directors (CEO, MD, FD) and senior executives with responsibility for HR and risk management issues, HR managers and advisors, and in-house legal advisors.

Date and venue: 3 October at Stonehouse Court Hotel, Bristol Road, Stonehouse GL10 3RA (close to junction 13, M5)

Timings: 9.00am - 1.30pm

Cost: £35 including lunch, refreshments and VAT.

How to book: Please **click here** for more information on how to book, or call 01242 542931. ■

Helen Howes
Paralegal

Case law watch

with Helen Howes
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Summary dismissal and misconduct

The case of ***Mbubaegbu v Homerton University Hospital NHS Foundation Trust*** illustrates that in some circumstances a series of acts of misconduct can, when taken together, amount to gross misconduct.

Mr Mbubaegbu was a surgeon and employed by Homerton University Hospital NHS Foundation for 15 years. His prior disciplinary record was unblemished with no previous warnings. However, he was shown to have not complied with new department rules and regulations introduced in 2013. He had been informed that his compliance with the new rules and regulations would be monitored. Following an investigation it was noted that there were 17 allegations of non-compliance. Mr Mbubaegbu was summarily dismissed for gross misconduct despite the Trust being unable to point to one allegation which on its own amounted to gross misconduct.

Mr Mbubaegbu issued a claim for unfair dismissal, and appealed to the Employment Appeal Tribunal (EAT) when this case failed. The EAT also dismissed his claim. It held that it was not necessary for there to be one particular act that amounted to gross misconduct for a summary dismissal to be fair. It was enough for there to be a ***'series of acts demonstrating a pattern of conduct to be of sufficient seriousness to under the relationship of trust and confidence between employer and employee'***. ■

What should I do?

This is undoubtedly a helpful decision for employers, although it does not necessarily mean that a decision to dismiss an employee without any prior warnings where there is no clear act of gross misconduct can automatically be justified.

Care needs to be taken to determine if the employee's actions can be viewed to undermine the relationship of trust and confidence.

We would always advise you to seek legal advice on the facts of the situation before taking action.

> "Care needs to be taken to determine if the employee's actions can be viewed to undermine the relationship of trust and confidence."

Recovery of training costs

An employment tribunal (ET) has held that an employee who went on maternity leave was discriminated against after her employer used a 'pause clause' to recoup training costs ***(Walworth v Scrivens Ltd).***

In 2010, Ms Walworth entered into a training agreement to assist her in qualifying as a dispensing optician. Under the terms of the agreement, she was required to pay back 100% or 50% of her £11,000 training costs if she left before December 2016 or December 2017 respectively.

In August 2015 she informed her employer that she was pregnant. Prior to her maternity leave commencing she was informed that the training repayment period would be 'paused' whilst she was on maternity leave.

Whilst on maternity leave she entered into discussions with her employer about her return. During these discussions, her employer informed her that if she

failed to return to work she would be expected to repay 100% of the training costs. Ms Walworth resigned stating that her contract of employment had been fundamentally broken and that she had been discriminated against and treated unfavourably on account of her becoming pregnant and taking maternity leave. Her employer withheld her accrued and untaken holiday and offset it against the £11,000 training costs it claimed it was owed.

Ms Walworth brought a claim for constructive dismissal, pregnancy and maternity discrimination and unlawful deduction from wages. The ET upheld all claims stating that the imposition and use of the 'pause clause' constituted unfavourable treatment and was unlawful discrimination as it arose because of Ms Walworth exercising her right to take maternity leave. She was awarded over £11,000.

What should I do?

It is important to note that this ET decision is not binding on other courts, but it should not be disregarded given the common nature of such agreements.

It clearly emphasises the importance of ensuring that all agreements are well-drafted and implemented in a way that is neither unfavourable nor discriminatory to specific groups of employees.

Disability discrimination and misconduct

When dismissing an employee for misconduct, does an employer discriminate if it did not know that the misconduct was linked to a disability? This was the question recently considered by the Court of Appeal in ***City of York Council v Grosset.***

Mr Grosset, an English teacher, was dismissed for gross misconduct following showing an 18-rated horror film to a class of 15-16 year olds without permission from the school or consent from pupil's parents. He subsequently brought a claim for discrimination arising from disability. He suffered from cystic fibrosis. The school was aware of this and did not dispute he was disabled. However, whereas the school argued his dismissal arose because of his act of gross misconduct, Mr Grosset argued that the school had discriminated against him by failing to take into account the fact that his judgement had been impaired because of his health deteriorating. He argued this was in direct consequence of the increased stress he was suffering at work following the introduction of new monitoring initiatives and new GCSE's by a new head teacher.

Following decisions in Mr Grosset's favour at both employment tribunal and the EAT, the school made a further appeal to the Court of Appeal. It also held that Mr Grosset had been treated unfavourably because of something arising from his disability. The Court stated that when considering a claim for discrimination arising from disability it is necessary to consider whether the employer treated the employee unfavourably because of an identified 'something' (in this case his showing the film) which arises in consequence of the employee's disability. It also went on to state that if an employer has knowledge of an employee's disability it must 'look into the matter carefully before taking any unfavourable action'. The Court noted that the school could not justify its treatment of Mr Grosset in light of the fact that it had not taken steps to reduce Mr Grosset's stress by reducing his workload.

What should I do?

This clearly shows that if you know an employee is disabled, you must take steps to ensure that you can evidence that you have considered all aspects of the matter prior to taking any action. This should involve obtaining medical evidence in order to consider if there is a link between the employee's actions and the disability.

This will enable you to evidence that you considered all factors when deciding if any action was necessary and help demonstrate the decision was justifiable.

Variation of contract

The Supreme Court has recently considered whether a 'no oral modification' clause in a written contract is valid and can be enforced in light of there being a subsequent oral agreement varying the terms of the original written contract. ***(Rock Advertising v MWB Business Exchange Centres).***

MWB had rented out serviced offices to Rock under a licence agreement. Over time, Rock built up significant arrears of rent. Rock argued that it had reached an oral agreement with MWB as to the terms on which those arrears would be repaid. MWB contended that no such agreement had been reached and it also argued that within the licence agreement, there was an express clause which stated that all variations to the licence had to be agreed and set out in writing and signed on behalf of both parties before they took effect. MWB argued that this had not occurred and was therefore the end of the matter.

The case has gradually worked its way through the courts. Whilst the judge at first instance agreed with MWB and held that the variation had no effect, the Court of Appeal did not agree and held that such clauses were unenforceable. Consequently there was much anticipation of the Supreme Court's decision.

The Supreme Court agreed with the judge at first instance and held that the 'no oral variation' clause was valid, and that consequently the alleged oral variation could not take effect. The Court reasoned that to allow oral variation would potentially open the informal agreement of such matters to abuse or misunderstanding. It also commented that the requirement of a written agreement assisted corporations to restrict the negotiation of such agreements to those with the relevant authority within the company. ■

What should I do?

This decision is a useful reminder that it is always a good idea to check the underlying contract when seeking to amend an agreement, and to follow the formal procedure noted in the contract to effectively vary the terms of it. Even if both parties are amenable to the change, it is important to double check the procedure set out, and to check if there is a 'no oral variation' clause.

Unfair dismissal and misconduct

Does misconduct always need to be gross in order to make a dismissal without prior warnings fair?

Mr Barongo worked in pharmaceutical sales and was disciplined following his failure to complete two compulsory training courses by a deadline set by his employer ***(Quintiles Commercial v Barongo)***. He admitted missing the training but said it was not deliberate, he had simply prioritised other work commitments. These mitigating arguments were not accepted by his employer and he was consequently dismissed on notice for gross misconduct. On appeal of his dismissal, his misconduct was re-categorised as 'serious', however his dismissal was upheld. He consequently brought a claim for unfair dismissal.

Mr Barongo initially won at the ET. It held his dismissal was unfair, stating that if the conduct was not 'gross', an employee should not be dismissed without warning. However, on appeal to the EAT this decision was overturned. The EAT held that there is no requirement in the unfair dismissal legislation that the conduct must amount to gross misconduct. It also criticised the ET for taking a rigid view rather than considering the entire circumstances. The case has been remitted to a new tribunal to be heard again. ■

What should I do?

This case appears to suggest that employers can dismiss for a 'first offence' where misconduct is not so bad as to constitute gross misconduct and no prior warnings have been given. However, it is important to note that the EAT did not decide that the dismissal was fair; it simply noted that it was not necessarily unfair.

Any decision must still fall within the band of reasonable responses. Therefore, if you are considering dismissal, you should always obtain detailed advice bespoke to your situation and your business.

> "Any decision must still fall within the band of reasonable responses..."

Unlawful harassment – the importance of context

The EAT's decision in ***Bakkali v Greater Manchester Buses*** highlights that the context of a potentially discriminatory comment is as important as the wording used. In order to be discriminatory a comment must be genuinely related to the relevant protected characteristic.

Mr Bakkali, a Moroccan Muslim, started a conversation with a non-Muslim colleague about an article he had seen concerning Islamic State. He commented that the article had contained 'positive' comments about IS regarding their combat skills and enforcement of law and order in place of chaos. A few days later in the works canteen, the said colleague asked Mr Bakkali whether he was 'still promoting IS'. Mr Bakkali was angered by this, and there followed a confrontation between the two colleagues. Following an investigation and disciplinary procedure, Mr Bakkali was dismissed for gross misconduct. He brought a tribunal claim of direct discrimination on the grounds of his race/religious belief.

His tribunal claim failed. The ET disagreed that he had been subject to discrimination. It did not consider his colleague's question to be because of Mr Bakkali's race or religion. The ET held that it had been made in light of their earlier conversation. The EAT agreed with this view and also commented that the test for harassment was whether the conduct was 'related' to the protected characteristic and required a 'more intense focus' on the context of the offending words or behaviour. It therefore concluded that no harassment had taken place. ■

What should I do?

An employee's complaint of harassment can often include an allegation of a conversation or 'banter' crossing a line and subsequently being viewed to be discriminatory. This decision clearly illustrates that there can be a defence to an otherwise seemingly inflammatory and discriminatory remark.

You should therefore ensure that you always carry out a thorough and objective investigation to obtain all the facts and entire context of any remark made, and not just consider the act in isolation.

> "This decision clearly illustrates that there can be a defence to an otherwise seemingly inflammatory and discriminatory remark."

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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