Employment Law dispatches

Willans LLP I solicitors

March 2017

Welcome

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

In this issue, we bring you the latest in employment law, from changes to business immigration and statutory payment rates through to a run-down of recent cases in the courts and how they may affect you.

We are excited to announce this year's latest series of seminars within this issue (page 5) and hope that you can join us.

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

28 March, 7:30am - 9am (with breakfast)

A quick guide to the General Data Protection Regulation, Cheltenham

Data protection is a subject which strikes fear into many people's hearts, and the EU's upcoming General Data Protection Regulation (GDPR) is set to bring the UK's data protection laws into the 21st century.

Our employment and corporate teams will unwrap and demystify the GDPR, exploring what it means for UK businesses and their commercial and employee data.

To book please visit **www.willans.co.uk/events**.
See a full list of upcoming seminars on page 5.

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

Business immigration changes

The new Immigration Skills Charge will be applicable from 6 April 2017 to employers sponsoring non-EEA employees. Sponsoring employers will be required to pay £1,000 per employee per year, and this will be payable up front at the time of allocating the certificate of sponsorship. A reduced charge will apply to smaller businesses and charities.

Given the substantial cost of the upfront payment, employers may consider building clawback provisions into the employment contracts of sponsored employees. However there is a risk these could be attacked as unlawfully discriminatory and so this should be approached with caution, and advice should be taken.

Two further changes will also make it more expensive to sponsor employees. Also effective from 6 April 2017 is the increase to the minimum salary threshold for 'experienced workers' within Tier 2 (general).

The new threshold will be £30,000 per annum. There is also a new minimum salary threshold for those workers coming to the UK on an intra-company transfer; this will be £41,500 per annum.

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Uplift of statutory rates

It is the time of year when various statutory payment rates are reviewed. The main changes to apply from 6 April 2017 are as follows:

National Living Wage (25 and over)	£7.50ph
National Minimum Wage (21 to 24)	£7.05ph
National Minimum Wage (18 to 20)	£5.60ph
National Minimum Wage (under 18)	£4.05ph
Apprentice rate (under 19, or 19 or over and in first year of apprenticeship)	£3.50ph

Maximum amount of 'a week's pay' (for calculating eg statutory redundancy payments)	£489pw
Maximum compensatory award for unfair dismissal (in addition to notice pay and 'basic award')	£80,541

Statutory sick pay	£89.35pw

Statutory maternity pay (First six weeks – 90% of average weekly earnings. Remaining weeks at the statutory rate or 90% of weekly earnings if lower)	£140.98pw
Statutory paternity pay (Statutory rate or 90% of employee's weekly earnings if lower)	£140.98pw
Statutory shared parental pay (Statutory rate or 90% of employee's weekly earnings if lower)	£140.98pw
Statutory adoption pay (First six weeks – 90% of average weekly earnings. Remaining weeks at the statutory rate or 90% of weekly earnings if lower)	£140.98pw

Case law watch

with Jenny Hawrot
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Religious clothing

Regular readers of *Dispatches* may remember the case of *Achbita v G4S Secure Solutions* in which a Muslim employee who had affirmed that she wanted to wear a headscarf to work was told that she could not, and was then dismissed. G4S (in Belgium) argued in its defence that it operated a policy of 'neutrality', banning the wearing of all political, religious or similar signs of faith.

The case has recently been heard in the European Court of Justice (ECJ). It held that G4S's policy did not amount to direct discrimination on grounds of religion because it prohibited all religious signs, and therefore did not treat one religion less or more favourably than another. The ECJ further concluded that the rule indirectly discriminated on the basis of religion (and consequently placed Muslims at a particular disadvantage) but held this to be lawful owing to the fact that the company's wish to project itself as neutral was a legitimate aim (provided it applied to only customer-facing employees).

What should I do?

You should still be very cautious of introducing any policy which places a blanket ban on political, philosophical or religious symbols.

Serious thought would have to be given to how such a ban would be implemented, adhered to and received by employees. It is very likely to give rise to discrimination if it is applied incorrectly.

If you wish to convey a neutral image, an alternative solution may be to relocate the particular employee to a non-customer facing role, rather than introducing a company-wide policy.

Commission and holiday pay

"If you employ staff that receive commission, this could affect you."

The Supreme Court has refused British Gas the right to appeal in the high profile *Lock v British Gas* case.

This case caused quite a stir when the Court of Appeal ruled that employees, whose wages include an element of commission, should be paid 'commission' when they take holiday, and not just their basic wage. In principle, this means that any such employees could claim against their employers for past holiday pay, which did not include an element of commission.

The Supreme Court has now denied British Gas the right to appeal, meaning that the Court of Appeal's decision is considered good law, and binding.

What should I do?

If you employ staff that receive commission, this could affect you. From now on employees who are paid commission as part of their wages must be paid commission whilst on annual leave, and not just their basic salary. We can help you in assessing the extent of your future obligations.

In theory, the decision in *Lock* means that employees could claim up to 2 years' back pay for underpaid holiday. However, certain limitation periods will apply to this, so it would be wise to seek legal advice, before writing cheques.

Religious discrimination

The Employment Appeal Tribunal (EAT) has held that London Underground's refusal of an employee's request for holiday to attend religious festivals was not discriminatory.

The claimant argued that he needed to take five consecutive weeks' leave in order to attend religious festivals in Sardinia, and that his employer's refusal to allow him to do so was indirect discrimination. He was a Roman Catholic and had been granted the leave in previous (but not consecutive) years.

The EAT held that although his religious belief was clearly genuine, the requirement to attend the festivals was not. It believed his motivation was to spend time with his family as opposed to being the manifestation of his belief.

Gareddu v London Underground Ltd.

What should I do?

You should continue to respond to requests to take time off for religious reasons on a case-by-case basis, as attendance at religious festivals is certainly capable of being a manifestation of an employee's religious belief (and therefore a refusal may constitute indirect discrimination).

You should make careful enquiries into the employee's reasons for wishing to attend - try to reach a view as to whether attendance is a central tenet of the employee's commitment to the religion, or whether it is simply a matter of preference.

However, be wary of any expression of scepticism about this, which could be interpreted as unfavourable treatment or harassment! If you do turn down a request, make sure that you have good business reasons for doing so, and that there is no less detrimental way of dealing with the issue.

Repayment of company loans

"...it is good practice to include properly drafted wording into any loan agreement about what happens to the loan on termination of employment."

An employee who took voluntary redundancy has been told that he must pay back a company loan which had been paid to sponsor him through university. The terms of the loan were that repayment would be waived if he worked for the company for five years after finishing his studies. The employee argued that this requirement should not apply where he had been made redundant. The Privy Council held that he must pay it back, as he had elected to leave the company when he did not have to. Although Privy Council decisions are not binding on UK courts, they are persuasive, and as such this decision will be of relevance to any employer offering conditional loans to its employees.

What should I do?

This case was concerned with interpreting the terms of this particular loan agreement.

In order to reduce any risk or uncertainty it is good practice to include properly drafted wording into any loan agreement about what happens to the loan on termination of employment. The same can apply to the repayment of training fees and other advances.

Employer has a duty to make reasonable adjustments even if a request is not forthcoming

"This case is a clear reminder that all adjustments need to be considered, not just those suggested by the employee."

Ms Kuranchie was disabled and suffered from dyslexia and dyspraxia. She spoke to her manager about her disability and how the lack of reasonable adjustments were resulting in her having to work longer hours to ensure she got her work done.

As a result of her complaint, her manager authorised specialist equipment and a static desk. She then requested flexible working asking to compress her 36 hours into four days. This was also complied with. The company did not reduce her workload.

Ms Kuranchie complained that the failure to reduce her workload placed her at a disadvantage compared to her non-disabled colleagues as it took her longer to complete the work due. Neither the dyslexia report the claimant had shown to her employer, nor the claimant herself, had suggested a reduced workload.

The EAT agreed with the employment tribunal that the employer should have reduced her workload to avoid the disadvantage. It stated that it was the duty of an employer to make reasonable adjustments, even if the adjustment request does not come from the employee. (*Home Office (UK Visas & Immigration) v Kuranchie*)

What should I do?

This case is a clear reminder that all adjustments need to be considered, not just those suggested by the employee. You must therefore be able to evidence that you have suggested and considered all reasonable adjustments, not just those suggested by the employee.

Your considerations should include factors such as the cost of the adjustment (in light of the company's size and financial resources), any disruption the adjustment may have on the business and its activities, and the degree to which the adjustments will ameliorate the employee's disadvantage. Evidence of your considerations will be key to defending a claim, so document your thought process.

Subject access requests

"This indicates that the use of subject access requests as a tool to obtain disclosure of information pre-litigation will be increasingly tolerated by the courts."

Longstanding readers of *Dispatches* may remember that in 2015 we reported on the case of *Dawson-Damer and others v Taylor Wessing and others*, in which a group of claimants were in dispute with a trustee company based overseas.

Each individual in the group had submitted individual data subject access requests (DSARs) to the trustee's firm of solicitors based here in the UK, asking for copies of all personal data held by the solicitors relating to them.

The solicitors declined to comply, relying on the argument that the information was protected by professional legal privilege, and so the group applied to the High Court for an order to require compliance.

The High Court held that the DSARs were made with the improper motive of seeking documents related to the litigation and therefore refused the order, on the basis that the purpose of a DSAR is not for it to be a pre-litigation disclosure tool.

However, the Court of Appeal has recently overturned this decision, ruling that the High Court was wrong to decline to enforce the request. It stated that only information which is subject to legal professional privilege under UK law will be exempt from disclosure, and that as there might therefore be more potentially disclosable material, it might be proportionate for the legal firm to search for it.

It also stated that there was no rule which provides that there must be "no other purpose" to a DSAR. This indicates that the use of DSARs as a tool to obtain disclosure of information pre-litigation will be increasingly tolerated by the courts.

What should I do?

It is generally a good idea to try to limit the scope of a subject access request as far as possible. For example, you can ask a data subject to narrow their request by requesting further information about when the data was processed and what it was processed for.

However, this case does suggest that this must be proportionate to the organisation and its size and the request made. Also remember that you will be required to comply by a stated deadline.

"it is recommended that, as part of any occupational health assessment, employers ask for specific confirmation that the employee is disabled."

Harassment and disability

It may seem obvious, but, in case there was any doubt, the EAT has ruled in the case of *Peninsula Business Services v Baker* that if an employee wants to successfully bring a claim for harassment on the grounds of disability, that employee must, in fact, be disabled.

In this case, the employee in question had dyslexia, which was confirmed by a psychologist and also in a separate occupational health report. This report did suggest that the employee 'may' be disabled, but the employee was never confirmed to be disabled.

Some time later, the employer placed the employee under covert surveillance as it was concerned that he was not devoting his time at work, to his work. The employee said that this amounted to harassment on the grounds of his disability and brought a tribunal claim against his employers to this effect.

The EAT held that disability discrimination protection only applies to those who are actually disabled. Just because an employee asserts that they are disabled, does not mean that in fact, they are disabled. In the absence of any disability, the employee lost his case.

What should I do?

If you are concerned about an employee's disability status, it is recommended that, as part of any occupational health assessment, employers ask for specific confirmation that the employee is disabled for the purposes of the Equality Act 2010.

Take away some top tips from our employment law seminars

Regardless of the size of your business, if you employ people you are likely at some point to be faced with employment law issues.

As well as refreshing knowledge and staying up-to-speed with employment law requirements in an organisation, our seminars provide a networking opportunity to share ideas with other like-minded professionals.

Upcoming seminars

Tuesday 28 March 2017, 7:30am-9am

A quick guide to the General Data Protection Regulation

National Star College, Cheltenham
(£15 pp includes breakfast)

Tuesday 9 May 2017, 9am-1:30pm

Employment law update

Stonehouse Court Hotel, Stonehouse
(£30 pp includes lunch)

Thursday 21 September 2017, 9am-1:30pm

Building flexibility into your workforce

Stonehouse Court Hotel, Stonehouse
(£30 pp includes lunch)

Tuesday 7 November 2017, 7:30am-9am

Incentivising staff in a growing business

National Star College, Cheltenham
(£15 pp includes breakfast)

Find out more specific event details or book online via Eventbrite by visiting **www.willans.co.uk/events**

Please contact us on **01242 542916** or email **events@willans.co.uk** to book.

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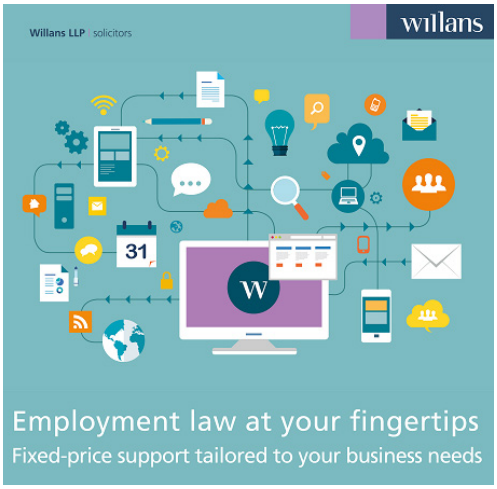

Contact

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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