Employment Law dispatches

Willans LLP I solicitors

70 YEARS

May 2017

Welcome

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

Next month's general election is fast approaching, and as Brexit looms, we bring you a round-up of the main parties' manifesto pledges relating to employment law.

We also give a run-down of recent cases that have appeared in the courts, with practical action points.

As always, please call if you wish to discuss any of these issues in more detail. Feedback is also gratefully received.
matthew.clayton@willans.co.uk

Upcoming employment law briefing

21 September, 9am - 1.30pm

Building flexibility into your workforce, Stonehouse Court Hotel

In this half-day workshop, our employment law team will guide you through the maze of flexible and alternative working arrangements which are increasingly becoming the norm.

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

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

Brexit and the general election

Although all the polls are predicting a win for the Conservatives in next month's general election, we thought we should look at each of the main parties' manifesto commitments regarding employment law. It is a subject which has featured surprisingly highly in this year's campaign, and of course the shadow of Brexit looms over everything.

What everyone is keen to know is whether workers' rights will be protected following Brexit. Currently EU law provides a minimum standard for UK employment rights, but Brexit would in theory bring an end to that guarantee. UK primary legislation which gives effect to EU employment law could only be changed by another act of parliament, however much EU employment law is implemented in the UK by means of statutory instruments (regulations) which are much easier for a government to change. Some EU treaty rights (such as equal pay) have direct effect in the UK currently, without the need for implementing legislation. Those would end automatically upon Brexit, unless they are enshrined in UK law.

Furthermore, following Brexit, the UK courts would no longer be obliged to follow the decisions of the European Court of Justice (ECJ), which hitherto has frequently extended workers' rights further than the UK courts would have done. This could lead to the re-litigation of controversial judgments such as those relating to the calculation of holiday pay.

Brexit would also bring an end to the creation of new UK law derived from the EU. EU directives would no longer have to be implemented in the UK and the UK courts would not be obliged to follow ECJ decisions on EU directives already implemented in the UK.

In an attempt to allay fears, the Prime Minister has confirmed that workers' existing legal rights will be guaranteed during her period in office. The

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**

"Perhaps the biggest factor will be what longer term political pressures for deregulation are at play."

'Great Repeal Bill' will convert all current EU law into domestic law, and ECJ judgments will be given effect in UK law at point of exit. The intention is that "EU-derived law, from whatever quarter, will be transferred into UK law in full at the point of exit."

Unsurprisingly the Labour Party's manifesto also contains a commitment to preserve worker rights following Brexit, alongside a full complement of other employment law policies, which are too numerous to list in full here. Those currently enjoying 'worker' status would be given full employment rights, and there would be a presumption of employment status for all, with the employer having the burden of proving otherwise. Umbrella companies would be banned and a commission would be created to modernise the law around employment status. Employment tribunal fees would be abolished. Zero-hours contracts and unpaid internships would be banned, and a maximum pay ratio of 20:1 would be introduced in the public sector and for companies bidding for public contracts. Sectoral collective bargaining would be introduced.

The Labour Party also plans to introduce four new statutory holidays, double paid paternity leave to four weeks, reinstate employers' liability for third-party harassment, and bring in a civil enforcement system for the new gender pay gap reporting regime. Recent changes to the TUPE Regulations would be rolled back and a Labour government would consult on statutory bereavement leave, and bringing redundancy protection 'more into line' with European regimes.

By contrast the Conservatives have taken a more targeted approach, promising to introduce a statutory right for employees to take a year's unpaid leave to care for a relative, and statutory leave for parents whose child has died. Protections would be introduced for people working in the 'gig economy', as well as for pensions in the wake of the BHS scandal. A statutory right to training would also be brought in. The national living wage would be increased by 60% of median earnings by 2020, and then by the rate of median earnings. Shareholders would be given greater control over senior executive pay. Listed companies would be obliged to have worker representation on their boards, whether by means of advisory panels, a non-executive director or a directly appointed worker representative, although they would not have to have actual employees in the boardroom.

The Liberal Democrats are calling for more employee engagement, fair contracts and transparency over pay. Matthew Taylor, Chief Executive of the Royal Society for the encouragement of Arts, Manufactures and Commerce who is leading a review of the future of work, has recently identified a lack of employee engagement as one of the key factors in the UK's productivity gap. The Liberal Democrats look to build on his review by modernising employment rights to "make them fit for the age of the 'gig' economy." They, too, plan to tackle abuse of zero-hours contracts and to abolish employment tribunal fees. They have a number of proposals to promote payment of the living wage and would encourage the creation of a 'good employer' kitemark which would be gained by such things as paying the living wage, avoiding unpaid internships and adopting name-blind recruitment.

The future of employment law after this general election and beyond March 2019 will depend on a number of factors – not just politicians' manifesto commitments, but also the attitude of the UK courts to future ECJ decisions. They may no longer be binding on UK courts after we leave, but to what degree will they be viewed as persuasive? However, perhaps the biggest factor will be what longer term political pressures for deregulation are at play, given the new economic landscape we are likely to find ourselves in after March 2019 and the desire to paint Britain as a country which is 'open for business' on the global stage.

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

Case law watch

with Jenny Hawrot

jenny.hawrot@willans.co.uk

Redundancy dismissal of part-time employee was unfair and discriminatory

In the case of *Fidessa Plc v Lancaster*, Ms Lancaster was employed as an engineer, and when she returned from maternity leave she moved to part time working (at her request). A subsequent reorganisation included a reduction in her team from three to two. Although one role was very similar to her own, it required some work to be done from the office after 5pm which she could not do because of the need to pick up her daughter from childcare.

Her existing role included this work although she was allowed to complete it from home later in the evening. This flexibility would not be available in the restructured role. Ms Lancaster did not apply for the role because of this (and a lack of career progression) and was made redundant. She claimed unfair dismissal, indirect and direct sex discrimination, harassment and part time worker detriment.

The Employment Appeals Tribunal (EAT) upheld the tribunal's decision that she suffered a disadvantage by having to undertake work after 5pm and from the workplace. It stated that this was a disadvantage more likely to be suffered by women, since a greater proportion of women than men have to collect children from childcare at the end of the working day.

What should I do?

A requirement to work after hours, and to have to do so at the workplace, is indirectly discriminatory unless it can be justified. If you are considering redundancy procedures involving female part-timers, you should reflect on whether newly created roles preserve any existing flexibility, and if not, be prepared to evidence that this is a proportionate means of achieving a legitimate aim.

When does contractual notice of termination take effect when the contract doesn't specify?

"The question of when notice was deemed to be received was of vital importance"

Mrs Haywood was made redundant by her employer, an NHS Trust. She had told the trust that she would be away on holiday from 19 April – 3 May. During this period the trust sent three letters to her confirming her redundancy and purporting to terminate her employment with 12 weeks' notice on 15 July. One letter was sent by recorded delivery and read by Mrs Haywood on her return from holiday on 27 April (it was incorrectly dated 21 April); another was sent by standard mail, and the third was sent electronically to her husband's email address and read by him on 27 April.

The question of when notice was deemed to be received was of vital importance, because if her notice period expired after her 50th birthday she would be entitled to a higher pension, and for this to take effect notice had to have been given after 26 April. Her contract did not expressly say when notice was deemed to be received.

The Court of Appeal held that if the employment contract did not specify otherwise, notice would take effect from the date it is received by the employee in the sense of them having personally taken delivery of the letter containing it. This was the 27 April and therefore Mrs Haywood was entitled to the higher pension. (*Newcastle upon Tyne NHS Trust v Haywood*).

What should I do?

This case highlights the extreme importance of having a well-drafted contract of employment. You should review yours to ensure they contain clear provisions setting out how notice should be given and when it is deemed received.

You should also ensure that notice is given according to any contractual terms. If sending by email, send with a delivery and read receipt notification, or by registered mail if posting.

(Please note that the legal principles are different if looking at termination dates for statutory claims such as for redundancy purposes or unfair dismissal.)

Nominal damages awarded despite taking confidential information

"...the court's focus will be upon how the information has been used and to what gain or loss."

Two employees worked together to copy numerous files containing confidential information in the months before they left their employer, to set up a competing investment management business.

Whilst the copying and removal of the confidential information was a breach of their contracts of employment, very few files taken had been accessed or used after they left their employment and because of this their previous employer could not show any financial loss.

In its claim against them it argued it was entitled to damages representing the hypothetical payment it would have bargained for if they had sought the company's agreement to use the information. The company claimed £15 million.

This was rejected and instead the company was awarded nominal damages of just £1 per employee, on the basis that the former employees had not used the confidential files to obtain any benefit, and the company could not show it had actually suffered any financial loss. (*Marathon Asset Management LLP & Anor v Seddon & Ors)*.

What should I do?

This case demonstrates that even where there is unequivocal wrongdoing, the court's focus will be upon how the information has been used and to what gain or loss.

It is therefore critical to gain advice prior to taking action, to ensure that the action taken is cost-efficient as well as being the most effective.

Sleeping at work - working hard or hardly working?

"Four factors should be considered when determining whether a person is working..."

Many roles require employees to be on call overnight, or undertake sleep-ins, and it has been a much debated question whether workers should be paid the national minimum wage when they are sleeping in these circumstances. The EAT has, rather unhelpfully, decided that 'it depends'.

In *Focus Care Agency v Roberts*, the EAT said that each case will depend on its facts, but that four factors should be considered when determining whether a person is working:

- the employer's purpose for engaging the worker, ie. is the employee required to be there due to a regulatory or contractual requirement?
- the worker's activities limited by the requirement to be present at the employer's disposal? I.e. do they have to be present at a particular location?
- does the worker have a lot of responsibility if they are woken up? I.e. what happens if they are called upon? Do they just call emergency services, or do they handle the situation themselves?
- does the worker need to act immediately if they are woken up? I.e. do they need to act immediately, or can they instruct others to act?

If two or more of these factors are present or answered in the affirmative, the employee will probably, maybe, be considered as working at times when they are asleep and will hence have to be paid the national minimum wage (or national living wage) for those hours.

What should I do?

The decision in this matter is not particularly definitive, but the above factors are useful indicators.

In the light of this, you should consider each instance on its facts, and if unsure speak to one of our team.

Are you up-to-speed on the GDPR?

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.

Redundancy process – allocating new roles and dismissing unsuccessful employees

"The employment tribunal was criticised for not focussing on the basic elements of a fair redundancy process..."

In *Green v London Borough of Barking and Dagenham*, Ms Green was put at risk of redundancy, along with 2 other colleagues, as part of a wider collective redundancy process. There were 2 positions available, which were judged to be equivalent to the three current posts. Each of the 3 employees had to apply for the new posts by undertaking a test. The claimant scored the lowest out of the 3 employees and was made redundant. She alleged that she was unfairly dismissed.

The employment tribunal found that the dismissal was fair, but did so by focussing on why Ms Green was not appointed to one of the remaining positions, rather than why she had been selected for redundancy. In doing this the tribunal relied on a case from 2011, *Morgan v Welsh Rugby Union*, which had decided that where a new post was being created, it would be fair for the employer to focus on the appointment process to the new role, rather than the redundancy of the old role.

The EAT found that the tribunal had placed inappropriate reliance on the Morgan case. The present case was not about the creation of a new role, but rather the reduction of three roles into two. The appeal was allowed and the matter has been remitted to the employment tribunal for a re-hearing.

What should I do?

The EAT did not say that the council was not entitled to carry out its selection process in the way that it did. A process that looks forward – seeking to determine who would be best qualified and who has the most relevant abilities and skillset – can still be fair. However the employment tribunal was criticised for not focussing on the basic elements of a fair redundancy process.

Therefore, you would be well advised to always bear these key factors in mind – for instance, the composition of the selection pool, the importance of consultation, and the right of appeal.

Indirect discrimination – criteria for a successful claim

"These judgments have clarified the basic requirements of indirect discrimination..."

The Supreme Court has ruled, in 2 separate cases, that there is no need for claimants to establish the 'reason' for their particular disadvantage, but rather, the causal connection between the provision, criterion or practice (PCP), and the disadvantage suffered, is the key element which must be present for indirect discrimination to be established.

In *Essop and others v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice*, the claimants brought indirect discrimination claims for the protected characteristics of age and race, and religious discrimination, respectively.

The Supreme Court confirmed that there is no requirement for claimants to prove why the PCP put a particular group with a protected characteristic at a disadvantage. Claimants just have to prove that the PCP caused a particular disadvantage to that group. No 'context' is required.

Whilst establishing the reason why the PCP put the group at a disadvantage will make it easier to prove that discrimination occurred, it is not essential.

What should I do?

These judgments have clarified the basic requirements of indirect discrimination, and consequently removed a hurdle for claimants who bring indirect discrimination claims.

In theory, employers have one less line of defence to these types of claims. Of course, employers are still able to successfully defend indirect discrimination claims if they are able to demonstrate an objective justification, and these cases make that all the more important.

You should make sure that any PCP which might impact adversely on a protected group has a legitimate purpose, and that there is no less detrimental way of achieving it.

Upcoming employment law seminars

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.

"Excellent advice and guidance, very worthwhile attending."

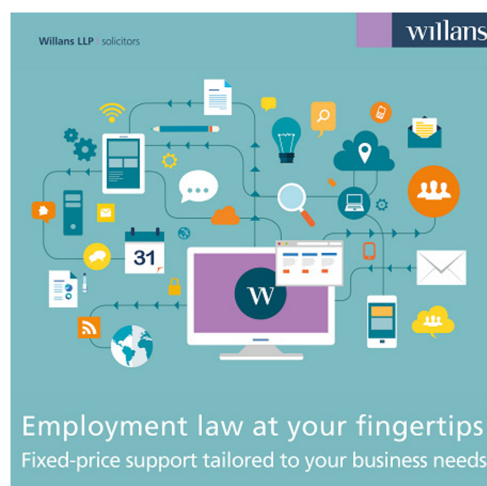
Introducing our fixed-price employment law support package which you can tailor to your business needs and budget

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

We can help you with drafting contracts, settlement agreements and policies, deliver in-house training, give you round-the-clock access to a suite of template policies and letters, or you can choose to speak to our qualified solicitors – no call centres in sight!

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

For more information please click on **this link**.



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

More news on our website **www.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