Employment law dispatches

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Willans LLP | solicitors

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Unless you've been living under a rock for the past year, you'll know that the General Data Protection Regulation (GDPR) is now in force.

If you've already opted in, we'll continue to deliver informative, useful and practical updates. If you haven't, we hope this isn't goodbye; you can still give your consent by completing our quick online form.

Matthew Clayton
Partner, head of employment law

"... he gets right to the point, with meaningful and practical advice."
Chambers UK

Legislation update

with Matthew Clayton

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GDPR: 25 May was "merely the start of the journey"

The world seems to have gone GDPR-mad in the last few weeks, so I thought it would be good to remind you of a few tips to keep you sane now that the regulations are in force.

1. Unless you are Facebook or Cambridge Analytica, the Information Commissioner's Office (ICO) are not likely to be kicking your door down, so don't panic! The ICO have repeatedly stressed that they will be taking a collaborative approach and will be seeking to encourage compliance rather than punishing non-compliance. They have also said that 25 May was not a cliff-edge; it was merely the start of the journey.

2. It's impossible to work out what you need to do to prepare, unless you have got a good idea of what data you have and are handling. So start off by conducting an information audit, if you haven't done so already.

3. Everyone has become very excited about obtaining positive and unequivocal consent from data subjects, but in fact that may not be the best legal justification to rely on, either legally or commercially. Think about the other options – particularly whether you need to be processing the data to fulfil a contractual obligation towards the data subject, or whether you are legally obliged to do so, or whether there are legitimate interests for processing (the latter may apply to existing business customers, particularly in the context of digital marketing).

4. Cyber security is important, but don't forget about hard copy data. If it is kept in a structured filing system, then it will be covered by GDPR too. Many data security breaches arise in the context of hard copy data – files left on trains, briefcases stolen, or documents being 'eyeballed' on a desk. Make sure your staff are aware of the risks.

5. There will now be a legal obligation to report any data security breaches to the ICO without undue delay, and, where feasible, within 72 hours of becoming aware of the breach, if it is likely to result in a risk to 'the rights and freedoms of individuals'. Start planning how you would respond to any such incident. You may also be required to inform the individuals whose data has been compromised, so there is also a public relations angle to this.

Do get in touch with us if you feel you need help with GDPR – we have been assisting a large number of clients with GDPR preparation recently.

Jenny Hawrot
Solicitor

Case law watch

with Jenny Hawrot
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Is a pre-cancerous condition a disability?

This was the question asked in ***Lofty v Hamis.*** Ms Lofty had a pre-cancerous lesion which she was told could result in skin cancer. She was treated for it but remained absent from work due to related health issues (including skin grafts and extreme anxiety). She repeatedly failed to attend meetings to discuss her absence and was consequently dismissed. She presented a tribunal claim for unfair dismissal and disability discrimination. The employment tribunal (ET) upheld her claim for unfair dismissal but dismissed her claim for disability discrimination on the grounds that she did not have cancer and therefore could not benefit from the provisions in the Equality Act that deem cancer to be a disability.

The Employment Appeal Tribunal (EAT) disagreed. It commented that 'pre-cancer' can be medical shorthand for a particular stage in the development of cancer and does not necessarily mean that there is no cancer. It held that the definition within the Equality Act was satisfied. ■

What should I do?

This decision appears to extend the protection of the Equality Act to include pre-cancerous conditions, although it is important to note that this decision was specific to skin cancer and the medical evidence presented in the case.

Nevertheless, the key message is to not reach any conclusions about a condition or take decisions before obtaining detailed, independent medical evidence.

Timing of notice of termination

The Supreme Court has recently clarified when notice is deemed to take effect if an employment contract is silent on the matter.

In ***Newcastle Upon Tyne NHS Trust v Haywood***, the timing of notice was particularly pertinent, given that the claimant's 50th birthday potentially fell within the notice period, leading to her being entitled to a considerably more generous pension than otherwise would be the case. She was contractually entitled to 12 weeks' notice. On 19 April she went on holiday. On 20 April, her employer sent notice of termination by recorded delivery and ordinary post. She read this letter on her return from holiday on 27 April.

The key question was whether notice was deemed to take effect (a) when the letter was delivered in the ordinary course of post, (b) when it was delivered to the address, or (c) when it came to the attention of the employee it was addressed to and when she had had an opportunity to read it. If notice was deemed to have been delivered before 27 April she would have received the lower pension. Her contract of employment was silent about how notice was deemed given.

The Supreme Court held that notice was only deemed effective when read by the employee – or when she had had a reasonable opportunity to read it. In this case, it was therefore not deemed to be given until the 27 April, thus entitling her to the higher pension. ■

What should I do?

Clearly giving due notice of dismissal in person (as is good employee relations practice) removes any ambiguity about the date of dismissal. Where it is foreseen that communication in person is not possible, it is good practice to ensure that the employment contract is drafted to include clear unambiguous wording as to when notice will be deemed to take effect.

Shared parental leave (SPL)

> “It seems difficult to rationalise an argument that no part of maternity leave could be said to be for caring.”

Regular readers of ***Dispatches*** may recall the case of ***Ali v Capita Customer Management Ltd*** where an employment tribunal held that it was direct discrimination for an employer to offer enhanced maternity pay and not offer enhanced parental pay to men on shared parental leave.

This decision has recently been appealed and significantly the EAT has overturned it, commenting that the purpose of paid maternity leave is for the health and well-being of a woman in pregnancy, confinement and after recent childbirth; its purpose is not, stated the EAT, for caring. Consequently it held that a man taking shared parental leave is not comparable with a woman who has recently given birth and is not capable of being subject to direct discrimination.

In ***Hextall v Leicestershire Police***, the EAT considered an appeal against an employment tribunal's finding that a failure to pay a male employee enhanced shared parental pay was not discriminatory. The claimant, a police officer, had claimed that paying different rates of pay amounted to unlawful sex discrimination (both direct and indirect). In contrast to the tribunal in ***Ali,*** the tribunal in ***Hextall*** dismissed these claims. However, the EAT held that the employment tribunal had been wrong in its analysis and noted that an employer paying enhanced maternity pay, but paying only statutory rate on SPL, is potentially applying an indirectly discriminatory practice that puts men at a disadvantage. This disadvantage arose because, unlike new mothers, men cannot choose whether to opt for SPL or to stay on maternity leave and receive enhanced maternity pay; they only have the option to receive the flat rate.

The case has been remitted back to the tribunal on this specific point, and so it will remain to be seen whether the indirect discrimination, if established, can be objectively justified.

It is fair to say that the EAT's decision in ***Capita Customer Management Ltd v Ali*** has raised more questions than it has answered, particularly in respect of the purpose of maternity leave. Some commentators have questioned why, if all of maternity leave is for the purpose of recovery from childbirth, is it lawful to curtail all but two weeks of it for the SPL regime? It seems difficult to rationalise an argument that no part of maternity leave could be said to be for caring. ■

What should I do?

In essence these cases appear to be saying that the practice of paying men and women differently in respect of maternity and shared parental leave is capable of being potentially indirectly discriminatory, but does not directly discriminate. As such, any indirectly discriminatory practice will only be lawful if it can be objectively justified.

That said, this is a far-from-settled area of the law, and for the time being it would be wise to take detailed advice before implementing any policies treating men and women differently.

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The General Data Protection Regulation (GDPR) came into force on 25 May. If you find this bulletin valuable and want to keep receiving it, click here to opt in.

Unfair dismissal and fixed-term contracts

A recent decision in the EAT, has highlighted the importance of following a fair procedure when not renewing a fixed term contract of an employee ***(Royal Surrey County NHS Foundation Trust v Dryzmala)***.

The claimant was a doctor who had been employed on successive fixed-term contracts for almost three years. Before the end of her most recent one she was interviewed for a permanent vacancy. She was unsuccessful for the position, but members of the interview panel indicated that there may be other roles available for her. This was not followed up. She was given notice that her fixed-term contract would not be renewed. The notice letter did not mention her having the right to appeal nor did it mention alternative employment. After an unsuccessful grievance, the employee brought claims of age discrimination and unfair dismissal.

The employment tribunal rejected her claim of age discrimination. In respect of the unfair dismissal claim, it held that whilst the reason for the dismissal was fair (the fixed period of her contract coming to an end), it was made unfair by the employer's failure to follow a fair procedure. It particularly criticised the employer's failure to follow up the discussion about possible alternative roles which it had instigated, and its initial failure to allow the employee to appeal the dismissal.

The EAT agreed with this decision. It further identified the importance of following a fair procedure when not renewing a fixed-term contract, and to include following up on employer-led discussions that had taken place earlier in the contract about possible alternative roles. ■

What should I do?

Whilst this is a good reminder to adopt a fair process when taking the decision not to renew the fixed-term contract of an employee who has unfair dismissal rights, the EAT did not state that an employer is required to consider alternative employment every time a fixed-term contract expires. It did, however, clearly stipulate that where an employer has instigated discussions about an alternative role, this should be followed up regardless of when during the life of the contract, those discussions took place.

In light of this, it is sensible to keep a clear written record that such a discussion has taken place in order to ensure this point is addressed in the dismissal procedure (should the individual have accrued two years' service at that point).

Does silence equal acceptance of a contract variation?

When Nottingham City Council wished to harmonise a variety of pay systems it operated, it implemented a single system with new pay scales. After the new system was introduced, the council brought in a two-year pay freeze. Throughout this period, no affected employee raised a grievance, nor was there any industrial action. When the council proposed an extension of the freeze, the unions brought a collective grievance and subsequently brought claims to the tribunal for unlawful deduction of wages on the basis that there was a contractual right to incremental pay progression.

Following an appeal to the EAT, the Court of Appeal was asked to decide if the employees should be taken to have accepted the variation to their contracts by working for two years under the pay freeze. It held that they should not. The Court further handed down guidance, which noted that acceptance of a variation of contract should only be inferred from an employee's conduct where that conduct has no other reasonable explanation except acceptance.

It also noted that collective protest may suffice even if individual employees say nothing, and an employer's reliance on inferred acceptance will be weakened where the employer represented that there was no variation of contract and therefore acceptance was unnecessary ***(Abrahall v Nottingham City Council).*** ■

What should I do?

This decision is somewhat unnerving as it seems to suggest that an employee who has not expressly consented may be able to argue later that they had not consented to the change, and was in fact, working under protest.

In essence, however, what the Court of Appeal makes clear, is that when an employer seeks to vary a contractual term, an objective approach should be taken. If a contractual variation places the employee at a disadvantage, particular care should be taken to resist temptation to 'downplay' that variation and clearly communicate the change through an honest and transparent procedure. Should a claim arise, this will help to avoid a tribunal being able to infer that there was no variation.

Ultimately, it is always best practice to obtain each employee's written express acceptance of the variation.

Another employment status case…

The EAT has held that a cycle courier engaged by Addison Lee is a worker for the purposes of the Working Time Regulations. As a consequence the claimant, Mr Gascoigne, is entitled to holiday pay. The EAT particularly noted that there was mutuality of obligation between Addison Lee and Mr Gascoigne, noting especially that when he was logged in to the app used by the company to offer work, he had to accept jobs offered to him. ***(Addison Lee Limited v Gascoigne)***. ■

What should I do?

This case doesn't mark any deviation from the similar cases heard before it and further demonstrates the court's willingness to look into the reality of the situation and relationship between the individual and the business, rather than simply accepting how the relationship is defined on paper.

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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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