

# Employment law dispatches

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Willans LLP | solicitors

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## Welcome

Welcome to the latest edition of *Employment Law Dispatches*. There is much to report on in this issue, particularly on the legislation front, with many new developments coming into force in April this year.

We also report on some of the more interesting and relevant employment law cases of the last few months.

As always, if you need any more information on any of the topics discussed in this issue, do contact us and we'll be delighted to help.

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## At a glance

- Post-Brexit employment update
- New SAR guidance from the ICO
- Injunctions against suspension
- What amounts to a 'philosophical belief' for discrimination purposes?
- More case law & legislation updates

## Legislation update

### IR35 and off-payroll working rules



On 7 February 2020 HMRC and HM Treasury announced a change to how the extension of the off-payroll working rules to the private sector will apply when they take effect on 6 April 2020. Addressing concerns raised by business, the extension will only apply to services provided on or after 6 April 2020.

The changes will apply to large companies only (a company is 'small' if it meets two of the following criteria: turnover less than £10.2m, balance sheet total under £5.1m, less than 50 employees).

HMRC has also updated its online CEST (Check Employment Status for Tax) tool, in response to criticism about how it operated. Additional guidance and examples relating to the tool have also been published.

#### Find out more about the changes

We are running a seminar in conjunction with recruitment experts Sanderson Solutions Group plc on the off-payroll working changes. We will also welcome guest speaker Caroline Harwood, partner and Head of Share Plans and Employment Taxes at Crowe.

The seminar is on 5 March 2020 from 9:15am to 12pm at Brickhampton Court Golf Club. Tickets cost £50 including VAT and brunch. To book and find out more, please [click here](#). ■

## New rates for April 2020

New rates for various statutory payments have now been announced, to take effect from April 2020.

National Living Wage (25 and over)	£8.72 ph
National Minimum Wage (21 to 24)	£8.20 ph
National Minimum Wage (18 to 20)	£6.45 ph
National Minimum Wage (under 18)	£4.55 ph
Apprentice rate (under 19, or 19 or over and in first year of apprenticeship)	£4.15 ph
Statutory sick pay	£95.85 pw
Statutory maternity pay / maternity allowance	£151.20 pw
Statutory paternity pay	£151.20 pw
Statutory shared parental pay	£151.20 pw
Statutory adoption pay	£151.20 pw



## Written statements of employment particulars

From 6 April 2020 the obligation on employers to provide a written statement of employment particulars will be extended to workers, as well as employees. It becomes a day one right – the majority of written particulars must be provided in a single document on or before the date on which the employment commences.

Certain aspects can be communicated after this date, but no later than two months after the beginning of employment. These aspects are the particulars relating to pensions, collective agreements, any training entitlement provided by the employer, and certain information about disciplinary and grievance procedures.

Some particulars do not have to be included in the written statement itself, but must be contained in another reasonably accessible document (for instance a policy or staff handbook). This other document must be referred to in the principal statement itself. These particulars are those relating to incapacity and sick pay, paid leave, pensions and any non-compulsory training entitlement for which the employee does not have to pay.

### What's new?

The statement will be required to contain the following additional particulars:

- the days of the week the worker is required to work, whether the days and working hours may be variable and how any variation will be determined;
- any paid leave to which the worker is entitled;
- details of any other benefits provided by the employer that are not already included in the statement;
- any probationary period, including any conditions and its duration; and
- any training entitlement provided by the employer, including whether any training is mandatory and/or must be paid for by the worker.

### List of items that now need to be included:

- The names of the employer and employee.
- The date the employment starts and the date the employee's period of continuous employment began (for employees only, not workers).
- Pay (or method of calculating it) and interval of payment.
- Hours of work, including normal working hours.
- Holiday entitlement and holiday pay.
- The employee's job title or a brief description of the work.
- Place of work.
- A person to whom the employee can appeal if they are dissatisfied with any disciplinary decision relating to them or any decision to dismiss them.
- A person to whom the employee can apply for the purpose of seeking redress of any grievance relating to the employment and the manner in which any such application should be made.
- The days of the week the worker is required to work and whether working hours or days may be variable, with details of how they may vary.
- Any other benefits provided by the employer.
- Any probationary period, including any conditions and its duration.
- Any training entitlement provided by the employer, any part of that entitlement which the worker is required to complete and any other required training in respect of which the employer will not bear the cost.
- The notice periods for termination by either side.
- Terms as to length of temporary or fixed-term work.
- Terms related to work outside the UK for a period of more than one month.

If you need tailored advice on this, please get in touch. ■

## Parental bereavement leave

The government has laid draft regulations before Parliament to introduce a right to parental bereavement leave. From 6 April 2020, all employees who lose a child under the age of 18, or suffer a stillbirth after 24 weeks of pregnancy, will be entitled to 2 weeks' statutory leave to be taken in one block or as two separate blocks of a week.

Employees with at least 26 weeks' service, who meet minimum earnings criteria, will also qualify for Statutory Bereavement Leave Pay (at the same rate as Statutory Paternity Pay). The government has indicated that employees would have up to 56 weeks from the date of death (or stillbirth) to use up their leave entitlement. ■

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## EU Withdrawal Agreement

The European Union (Withdrawal Agreement) Act 2020 (WAA) received Royal Assent on 23 January 2020. It ratifies the UK-EU withdrawal agreement and implements it into UK law.

The WAA lacks the provisions to safeguard existing EU-derived workers' rights which existed in the previous version prior to the general election. Although they lacked any real teeth, their removal may be seen by some as symbolic. However the government has said that the removal was simply in order to aid the passage of the Bill through Parliament and that it intends to legislate separately to protect and enhance workers' rights.

The WAA also gives the government the ability to make it easier for employment tribunals to diverge from ECJ and domestic decisions on EU-derived employment rights. This may particularly be used in cases on the Working Time Regulations, which have for a long time required some very creative interpretation by the tribunals to keep in step with ECJ decisions. ■



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## Removal of the Swedish derogation

On 6 April 2020 the 'Swedish derogation' will be removed from the Agency Workers Regulations 2010. This was a mechanism whereby agency workers did not need to be given pay parity with permanent colleagues after twelve weeks, if they were paid between assignments when not working for a hirer.

The removal of the Swedish derogation has effectively already come into force, because there is no longer any point in including derogation clauses in workers' contracts as they will by now not reach the 12 week point until after 6 April 2020. ■

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## Timescales for complying with data subject access requests



The Information Commissioner's Office (ICO) has amended its guidance on the timescale for complying with a data subject access request. Previously, if the data controller needed to seek clarification of the request from the data subject, the guidance (which was made under the old Data Protection Act 1998) said that the timescale for complying with the request would be paused until the clarification was provided.

The new guidance, which is in line with the GDPR and the Data Protection Act 2018, makes it clear that the one month time period for compliance (or three months in complex or multiple cases) is no longer paused until the controller receives the requested information. This could create particular difficulties for employers who may have to identify numerous people or departments holding the personal data, sift the information obtained, and redact any information relating to third parties. ■



**Jenny Hawrot**  
Associate, solicitor

## Case law watch

with Jenny Hawrot

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### Injunctions against suspension

A solicitor employed by an NHS Trust has obtained an injunction against her suspension, allowing her to resume most of her duties (*Harrison v Barking, Havering & Redbridge University Hospitals NHS Trust*). She had a wide spectrum of duties, but was suspended following concerns about her handling of a clinical negligence case.

The High Court granted an injunction because it was strongly arguable the NHS Trust had breached the implied duty of trust and confidence; in particular having no reasonable and proper cause for suspending her from most of her duties. Criticisms of her inquest and medico-legal work, which purported to justify the suspension, had been made after the decision to suspend, and she was not presented with any evidence of these allegations.

There was no evidence that enabling her to undertake normal duties (excluding clinical negligence casework) would harm the Trust. ■

#### What should I do?

Normally, suspension should be an act of last resort. Consider the evidence available at the time, whether it may be necessary to suspend, and why. If possible, record those reasons in writing.

Don't suspend simply as a knee-jerk reaction, or because your disciplinary policy says suspension should normally occur where gross misconduct is alleged.

## Just launched | Our 2020 seminar series

From helping companies get to grips with the new IR35 off-payroll working reforms through to a roundtable interactive discussion on immigration license compliance, our 2020 seminar series has been put together to equip decision-makers with the practical knowledge they need to keep up with the latest legal requirements.

**5 March IR35 and engaging contractors – the April 2020 changes, with Sanderson PLC** | 9:15am-12pm | Brickhampton Court Golf Club | £50 (inc VAT & brunch)  
*Book by 18 February for an early bird discount.*

**26 March | Employing non-UK nationals: your questions answered on business immigration** | 9am-10:30am | Willans LLP, 34 Imperial Square, Cheltenham | Free (inc coffee and pastries)

**20 May | GDPR: Two years on** | 7:30am-9:30am | National Star College, Cheltenham | £18.50 (inc VAT & light breakfast). *Book by 20 April for an early bird discount.*

**16 June | Shareholder agreements for owner-managed and start-up businesses** | 8:30am-10:30am | Brickhampton Court Golf Club | £18.50 (inc VAT & light breakfast) *Book by 16 May for an early bird discount.*



**15 October | Autumn commercial and employment update** | 9am-1:30pm | Brickhampton Court Golf Club | £50 (inc VAT & brunch) *Book by 1 September for an early bird discount.*

**To book or find out more,** [click here](#), call 01242 542931 or email [events@willans.co.uk](mailto:events@willans.co.uk). We look forward to seeing you there.



## Covert monitoring

We previously reported on the decision of the European Court of Human Rights in the case of *Lopez Ribalda and Others v Spain*, in which it was decided that a supermarket employer had infringed the human rights of its employees by engaging in covert video surveillance when they were suspected of thieving at work.

That decision has now been overturned – the Grand Chamber of the ECHR found that the workers' privacy had not been violated, nor had there been any violation of the right to a fair trial. ■



### What should I do?

If you are engaging in covert surveillance of your staff, you should be very careful how it is done.

It should only be done for very good reasons, should be as limited as possible in its scope whilst allowing you to collect the necessary evidence, and should be balanced with appropriate safeguards for privacy.

For instance, surveillance in private places such as toilets or cloakrooms would be very hard to justify.

It is worth referring to Part 3 of the Information Commissioner's Employment Practices Data Protection Code which provides useful guidance.

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## No backstop on recovery of unauthorised deduction from wages

The Court of Appeal has held, in the case of *Bath Hill Court (Bournemouth) Management Company Limited v Anthony Colletta*, that, in a claim for unauthorised deduction from wages relating to non-payment of the national minimum wage, there was no backstop date on the recovery of deductions.

This enabled Mr Colletta to claim 15 years' worth of losses. ■

### What should I do?

Mr Colletta's claim pre-dated the coming into force of the 2014 Deductions from Wages (Limitation) Regulations, which subsequently implemented a backstop of two years on recovery for deductions. So this decision is of relevance only to historic underpayment cases, such as holiday pay cases. If you have not already assessed the extent of your exposure to historic holiday pay claims, you should do this now – we can assist.

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## Cost of legal advice on settlement agreements

The EAT has commented (in *Solomon v University of Hertfordshire*) that £500 + VAT was a reasonable fee for a solicitor advising an employee on a settlement agreement, if they were simply explaining the terms and effect of the agreement. However if they were also advising about the merits of the claim and likely compensation award (i.e. whether the settlement sum on offer was reasonable) then that amount was "wholly unrealistic". ■

### What should I do?

These comments were technically non-binding but, nonetheless, they reflect our view that £500 + VAT is a reasonable contribution to make to legal fees under a settlement agreement, and now seems to be the standard.

## What can amount to a philosophical belief for discrimination purposes?

In recent months various claimants have explored the boundaries of what amounts to a philosophical belief earning them protection against discrimination. In *Gray v Mulberry Company (Design) Limited*, Ms Gray was dismissed when she refused to sign a copyright agreement granting the intellectual property in any designs, creations etc to her employer. She said she believed it extended to her artistic activities outside work and might interfere with her own work as a writer and film-maker.

She claimed she had been discriminated against on grounds of her philosophical belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output, except when that creative work or output is produced on behalf of an employer."

The employment tribunal, Employment Appeals Tribunal (EAT) and the Court of Appeal all found that the asserted belief was not sufficiently cohesive to form any cogent philosophical belief system; dispute about the wording or interpretation of an agreement could not amount to a philosophical belief, and it was that dispute which had resulted in Ms Gray's dismissal.

More successful was Mr Casamitjana's attempt to seek protection for his ethical veganism, which has been much reported on in the press (*Casamitjana Costa v League Against Cruel Sports*). This

decision is quite understandable when you realise the extent to which the claimant's beliefs dominated his life. The claimant only worked in the field of animal protection and avoided relationships with non-vegans. Further, he:

- ate a 100% vegan diet, avoided foods that could potentially harm animals in their production, such as figs, and would not allow any food or product containing animal products into his home;
- avoided using products tested on animals, wearing animal-derived products, financial products which invested in companies that carried out animal testing, or using bank notes manufactured using animal products;
- walked rather than used public transport for journeys under one hour to avoid accidental crashes with wildlife.

The tribunal held that ethical veganism was without a doubt a belief which obtained a high level of cogency, cohesion and importance.

Philosophically, it is rooted in the ancient concept of ahimsa ("not to injure"), an important tenet of Jainism, Hinduism and Buddhism. There was no conflict between veganism and human dignity, and ethical veganism did not in any way offend society or conflict with the fundamental rights of others. ■

More news on our website [www.willans.co.uk](http://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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