Employment law dispatches

Willans LLP | solicitors

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Welcome...

...to the latest issue of Dispatches, bringing you recent case news and updates from the world of employment law. You'll also find details enclosed on our upcoming seminars and webinars, taking place across the next few months – we'd be delighted if you joined us!

As always, we're here if you and your business need our support.

At a glance

Cases & news covering:

- fire & rehire
- suspensions
- flexible working
- holiday entitlement
- sponsor licences
- share incentive plans

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Legal updates

Fire & rehire: government consultation underway

The government has published a draft Code of Practice on fire and rehire, and a 12-week consultation period has commenced.

The draft code sets out steps employers should take when considering making changes to employees' contracts of employment, including:

- re-examining business plans
- considering any alternative ways to achieve its business objective
- engaging in meaningful consultation in good faith
- considering alternative proposals made by employees
- engaging in a genuine exploration of whether alternatives are workable or will meet their objectives
- not imposing contractual changes unless all alternatives have been fully explored.

The code will apply regardless of the number of employees affected but does not apply to redundancy situations. Failure to comply can increase any compensation awarded by up to 25% in the event of an employer's misconduct.

The consultation closes on 18 April 2023. At the time of writing, the government has not proposed a timeframe for bringing the Code of Practice into force.

New regulations on exclusivity terms for lower income workers

On 5 December 2022, the Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 came into force.

This means that, for workers earning less than the lower earnings limit for National Insurance purposes (currently £123 per week), employers will not be able to enforce an exclusivity clause in their contract.

The regulations are expected to affect around 1.5 million workers.

Updated guidance published surrounding suspensions

In September, Acas published new guidance on how to handle the suspension of workers.

Amongst other things, the guidance confirms the principle that suspension is a serious step and should not be an automatic or 'knee-jerk' reaction.

It should only occur if it is needed to protect the investigation, business, employee under investigation or other staff.

The new guidance can be viewed by clicking here.

Flexible working is becoming the default

The introduction of the Employment Relations (Flexible Working) Bill means that flexible working is here to stay.

The bill introduces several changes to the current flexible working process:

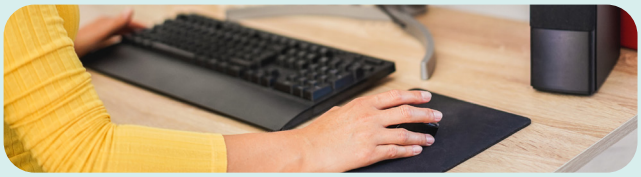
All employees will be able to:

- make a flexible working request from day one of employment
- make two requests in a 12-month period.

All employers will:

- have just two months to respond to requests
- discuss an alternative with the employee, before they decline a request

The bill is currently in the report stages in the House of Commons and will likely receive royal assent later this year.



Free webinar | 21 March | 4pm

Global mobility – where are we now for UK employers?

Our expert employment law & business immigration team are running a free webinar to bring you the latest on employing overseas workers in your organisation and how to manage the process.

Register your interest at **www.willans.co.uk/events**

Free seminar | 27 April | 9am

Leonardo Hotel, Cheltenham, GL51 0TS

Employment law update with CIPD

In this in-person session for the CIPD, our experienced employment team bring you the latest on legislation, case law and immigration with practical advice for your organisation.

Useful for HR professionals and senior managers, tickets are available now for members and students of CIPD.

Register your interest at **www.willans.co.uk/events**

Business immigration update

Sponsor licence holders: The latest changes you should know for your business

The UK Home Office has published some important changes to its guidance for sponsor licence holders.

Exemption from immigration skills charge

Subject to new regulations being approved by Parliament, the Home Office intends to exempt sponsors with licences in the Global Business Mobility – Senior or Specialist Worker (SSW) category from the immigration skills charge. It is expected that in 2023, SSW workers assigned from EU businesses for under three years will be exempt. This could save large sponsors around £3,000 per employee.

Reporting of changes to start dates

The duty to report on delays to staff start dates has been amended.

Under the new guidance, sponsors do not need to report if the start date is delayed for a period under 28 days. Even when the delay is greater than 28 days, there is a chance they won't need to stop sponsoring a worker. Sponsors will need to report delays over 28 days and provide reasons, however.

One caveat is that UKVI may still cancel a visa if they do not believe the delay is justified. The guidance lists some acceptable reasons, including:

- travel disruption due to natural disaster, military conflict or pandemic
- working out contractual notice periods
- requiring an exit visa for their home country but there are administrative delays getting this
- illness, bereavement or other compelling circumstances.

Reporting of unpaid leave

Under the new guidance, sponsors could keep employing the worker if they take four or more weeks' unpaid leave in a calendar year, though they must report the reasons for the leave on SMS. UKVI must then be satisfied with the reason for the leave and can cancel the worker's permission if they are not.

Right to work checks

The guidance reminds sponsors that they must carry out right to work checks for all workers before they commence employment, including sponsored workers. It is especially important to do so when there is a delay to the start date of more than 28 days, as there is a risk that UKVI could cancel the worker's visa, bringing the risk of a civil penalty.

Another reminder in the guidance is that when a worker is changing role – even within the same organisation – right to work checks should be carried out once their new UKVI application has been approved.

For more information and guidance on right to work checks, our recent webinar hosted by our experienced lawyers is available to re-watch on catch-up now.

If you are a sponsor and would like advice on how these changes may affect you, please contact our employment law & business immigration team. ■

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Case law watch

Pro-rated holiday entitlement for part-year workers: New government consultation

Last year, we reported on the controversial *Harpur Trust v Brazel* case. Our previous article can be found here.

Now, a new government consultation paper calls the ruling in *Harpur Trust v Brazel* a "disparity" that it wants to address as "part-year workers are now entitled to a larger holiday entitlement than part-time workers who work the same total number of hours across the year."

The consultation paper proposes to fix this bias by introducing legislation that allows employers to pro-rate statutory holiday entitlement for part-year workers in proportion to the number of total annual hours they work.

Calculating holiday entitlement

The government is proposing that holiday entitlement for part year/irregular hour workers should be calculated based on a reference period of the most recent 52 weeks, including those in which no work was undertaken. The number of hours worked in that reference period should then be multiplied by 12.07%. This will give you the holiday entitlement in hours.

How to apply this in practice

In practice, the government proposes a 'fixed reference period' for long standing employees – for example, the employer's most recent holiday year.

For employees in their first year of employment, it is proposed that holiday entitlement should be calculated at the end of each month. This is then based on the actual hours worked in that month multiplied by 12.07%, giving you the monthly holiday entitlement hours they have accrued.

There are also questions over how much holiday entitlement a worker uses up when they take a 'day' annual leave, especially where their daily hours vary. The consultation proposes that employers should calculate an average working day based on the average number of hours worked in the relevant reference period (as above).

Alternatively, it is proposed that employers calculate the average hours worked on specific days of the week in the reference period. However, this method is not particularly attractive as it would generate a lot of administrative work for employers.

Calculating holiday pay

This will remain the same as set out in our previous article, which can be found at the top of this page.

What will this mean for me?

It's important to note that the above are just proposals at present, so, currently, you don't have to do anything. The consultation is closing on 9 March 2023, but given that it seems to be a priority for the government, it probably won't be too long before we see the results.

If you have already changed your method of calculating holiday pay in line with the Supreme Court judgment, it isn't necessary to make any further changes just yet as the *Harpur Trust v Brazel* judgment is still binding.

However, it will be useful for you to double check that you are keeping an up-to-date, accurate record of the hours worked by atypical workers because this will aid calculating holiday pay in the coming years, particularly if these proposals go ahead.

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Consistent minor lateness: a fair reason for dismissal?

In the case of *Tijani v House of Commons Commission*, in 2017, after being late on 17 out of 20 working days Ms Tijani received a first written warning. In 2018, she was issued with a final written warning following an investigation which found she had been late 50 times in six months, with her lateness ranging from two minutes to 33 minutes. Following these warnings, she continued to arrive late for work, and was dismissed in 2019.

Ms Tijani submitted a claim unfair dismissal on the basis that:

- she did not think she had done much wrong
- she had not been informed of any impact of her lateness on the business
- her dismissal was not proportionate to the number of times she was late
- other colleagues were late and were not dismissed.

The Employment Tribunal, and later the Employment Appeal Tribunal (EAT), held that the employer had acted reasonably and the dismissal was fair. Ms Tijani knew she was on her final warning and that dismissal was likely if she persisted in her lateness, which she did.

The employee's perception that her lateness did not amount to a business issue was not relevant. There was no need for the employer to prove any 'knock on effect' to the business.

Other employees had been treated differently, but that was because their attendance improved following their warnings, whereas Ms Tijani's did not. The EAT found that, regarding her lateness, 'enough was enough' and her dismissal was fair.

What should I do?

You can have confidence taking disciplinary action where an employee persistently commits acts of minor misconduct (such as being late), if you follow a reasonable and fair procedure, including giving warnings. It is also important to note that – with minor misconduct – dismissal should be with notice.

It is also wise to have a thorough written disciplinary policy which can be followed during any relevant procedure and produced at any subsequent tribunal hearing. ■

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Can a non-privileged document acquire legal privilege ex post facto?

In *University of Dundee v Chakraborty*, the claimant, Mr Chakraborty, raised a grievance against his line manager. The university launched an investigation and appointed a senior employee, Professor Daeid, as the investigating officer.

Professor Daeid presented her findings in a report in February 2022. External solicitors were then instructed to review the report. Following that, both external solicitors and Professor Daeid made amendments to the original report and created a revised copy.

The original report was not released to the claimant. The revised version was submitted to the Employment Tribunal (ET) in advance of a hearing, stating on its cover:

'***Note:*** *This report was amended and reissued on 23.06.2022 following independent legal advice.*'

The claimant made an application for an order requiring the university to disclose the original report. The university resisted the application claiming that the original report was protected by 'legal professional privilege' (meaning it was not disclosable), arguing that if they were to disclose the original report, the claimant would be able to work out the legal advice the university had obtained. The ET sided with the claimant and the university appealed to the Employment Appeal Tribunal (EAT).

On appeal, the university argued that although the original report was not privileged at the point it was created, it acquired privilege retrospectively. This is because comparison of the two reports would disclose what legal advice had been given.

The EAT confirmed the ET's decision to order disclosure of the original version of the report. It held that – although any advice given by the university's solicitors, and any revised version of the report created later for the purpose of litigation would be privileged – such privilege did not extend to the report retrospectively. The original version of the report was simply an investigative response to a grievance, rather than communication between a client and a lawyer for the purpose of giving legal advice, nor was it created in contemplation of litigation.

What should you do?

This case is a valuable reminder that the application of legal privilege is very fact-specific and that a document created as a part of the internal investigation process may not, in certain circumstances, be covered by privilege. Employers should be mindful of that and be aware that under certain circumstances draft reports may be subject to disclosure in litigation. ■

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Share Incentive Plan considered part of employee's overall renumeration

In *Ponticelli UK ltd. v Gallagher*, the claimant had participated in a share incentive plan (SIP) that enabled him to acquire shares in his original employer's parent company by way of salary sacrifice.

He joined the plan via a separate partnership share agreement (PSA) with the parent company and SIP trustees. The PSA was not considered a part of his contract of employment – nor was it mentioned.

The claimant's employment was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to Ponticelli UK Ltd in May 2020 and his participation in the SIP ended immediately on transfer.

The claimant requested to be provided with an equivalent SIP by Ponticelli but was denied, so he brought a claim before the employment tribunal. He argued that his right to participate in a SIP transferred to Ponticelli under TUPE. The tribunal – and later the Employment Appeal Tribunal (EAT) – decided in the claimant's favour.

The EAT found that the partnership share agreement created mutual rights and obligations, including an agreement that deductions will be made from the claimant's monthly salary towards the purchase of shares. The obligations under the agreement arose 'in connection' with the contract of employment so were caught by the wording of TUPE, meaning the SIP was part of his overall financial package.

Consequently, the EAT found the claimant was entitled to participate in a SIP of 'substantial equivalence' following his transfer, and declared that his terms and conditions of employment should be updated to reflect this.

What should you do?

This case shows how important it is to conduct thorough due diligence when dealing with a TUPE transfer. Particular attention to any schemes in place that provide remunerative benefits to transferring employees is key, as these may be caught by the broad wording of the regulations. ■

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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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