Employment law dispatches

Willans LLP | solicitors

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At a glance

Cases & news covering:

- termination letters
- dismissals
- flexible working
- discrimination

Welcome...

...to the latest issue of Dispatches, bringing you recent case news and updates from the world of employment law and business immigration.

Meet the team below – our contact details can be found throughout the newsletter. As always, we're here if you and your business need our support.

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Business immigration

Sponsorship licences & changing working conditions

During this time of economic unrest, businesses may be looking to work in a more flexible way – to adapt to the changing business needs, including changing employees' place of work or amending their duties to cover a gap in resources. Whilst making such changes can be relatively straightforward in usual circumstances, this may create a risk of 'illegal working' or 'non-compliance' for businesses with employees working under a sponsorship licence.

Sponsored employees are restricted in what they can do. For example, they are only allowed to undertake the work detailed in the job description on the certificate of sponsorship. That work must fall under the specific job code on the certificate of sponsorship and they must meet the relevant salary thresholds for that job code. UKVI must also be informed of their working hours and place of work. Therefore, if employers change sponsored employees' duties and working hours as a result of changing business needs, they will need to ensure that those changes fall within the same criteria detailed on the certificate of sponsorship. If they don't, a new visa application must be made. Further, those changes should not be implemented until the new visa has been issued and a new right to work check undertaken. Failure to do this would result in illegal working and a breach of your sponsorship licence, which could result in your licence being downgraded, suspended and/or revoked.

What should you do?

If you propose to make any changes to the sponsored role (even minor ones) you should check whether the proposed changes fall within the sponsorship licence criteria. If they don't, you will need to obtain a new certificate of sponsorship to cover the proposed changes before the employee starts working in the changed role. UKVI has published guidance setting out these obligations and duty to carry out regular right to work checks.

Illegal working is a current priority for the government and they are clamping down hard on the issue. As such, this should be a priority for businesses with a sponsor licence to avoid any adverse implications. Get in touch with our team if you have any questions.

Case law watch

Can a letter marked 'without prejudice' amount to effective communication of dismissal?

Mr Meaker was a data centre operations technician who suffered from back injuries that resulted in prolonged periods of sick leave and permanent "limitations on his ability".

On 5 February 2020, he was handed a letter marked "without prejudice", informing him of a mutually agreed termination.

The letter went on to state:

- his final date of employment 7 February 2020
- basic payment package
- information regarding his P45
- the details of a further payment if he signed a settlement agreement.

Mr Meaker did not mutually agree the termination as the letter suggested and rejected the settlement offer. On 14 February 2020, the employer paid him his basic payment package and, on 19 June, Mr Meaker brought a claim for unfair dismissal.

The Employment Appeal Tribunal (EAT) held that the letter of 5 February amounted to an effective letter of termination from the employer and his termination date was 7 February, as set out in the letter. Therefore, the claimant's unfair dismissal claim was out of time, due to the three month limitation period.

The EAT found that, despite the letter being marked 'without prejudice', the document amounted to an effective termination letter. It clearly stated a termination date, monetary entitlement and notification that the employee would soon be in receipt of his P45. It was therefore held that this was clear communication of termination of employment, which was not contingent upon anything else taking place.

What should you do?

This case confirms that even if correspondence is marked 'without prejudice' it doesn't preclude it from amounting to an 'on the record' dismissal. Consequently, you should be careful to use language in any without prejudice correspondence which does not indicate that the termination is definite. In this case, the employer was lucky the employee submitted his claim out of time, and had it been presented within the three month limitation period, the employee would likely have had a successful claim.

If you need assistance from our employment team when it comes to dismissals, please get in touch. ■

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Seminar: Employment law update with CIPD

Our sold out seminar will provide the latest on legislation, case law and immigration with practical advice for organisations.

If you were lucky enough to get a ticket, we look forward to seeing you in Cheltenham on 27 April!

Flexible working: Offer of an alternative working arrangement could amount to discrimination even if it was never applied

In *Glover v Lacoste UK Ltd.*, the claimant was initially employed by Lacoste UK on a full-time basis. Before maternity leave, she worked five days a week, as set out in a rota. During her maternity leave, Ms Glover made a flexible working request, asking to work three days a week to accommodate childcare. Her request was rejected.

Ms Glover appealed the rejection and, in response, the employer made an alternative offer, to work part-time, four days a week. However, under this alternative arrangement she was required to be 'fully flexible' and work on any day of the week, including weekends, making it impossible to make childcare arrangements.

Her solicitor wrote to Lacoste asking them to reconsider the request, failing which Ms Glover may have no option other than to resign and claim constructive dismissal. Lacoste agreed to her original request and Ms Glover returned to work on that basis, but subsequently brought a claim for indirect sex discrimination, due to the alternative proposal.

Ms Glover claimed that the 'full flexibility' requirement (as required under the employer's alternative offer) put women – who are, typically, primarily responsible for childcare – at a disadvantage in comparison to men, and that practice cannot be objectively justified.

The Employment Tribunal (ET) rejected her claim because the alternative option was never actually applied to the claimant. It did, however, state that had such a requirement been applied, then it would be discriminatory and unjustifiable. The claimant appealed.

The EAT found that once a flexible working request is decided on by an employer, it is applied to the employee, even if the employee does not actually return to work on such a basis and it could therefore form the basis of a discrimination claim. The EAT has remitted the claim back to be heard by a new ET.

What should you do?

This case is a valuable reminder for employers that a detriment caused by an initial discriminatory decision cannot be 'undone', even when such a decision is later overturned on appeal. Employers should always carefully consider any flexible working request.

If you have any questions regarding flexible working requests or internal procedures, our employment law team is here to help. ■

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Failure to provide access to adequate toilet facilities amounts to sex discrimination

In *Miller v Earl Shilton Town Council*, the EAT upheld the ET's decision that the failure to provide adequate toilet facilities for women amounted to direct sex discrimination.

The employer operated from a building that also hosted a playgroup. The only female toilets in the building were located in the part of the building where the playgroup was hosted, making the female toilets inaccessible due to safeguarding measures in place. As a solution, the respondent asked its female employees to use the men's toilet, consisting of a single cubicle and a trough urinal. As such, Ms Miller brought a claim for sex discrimination.

The EAT found that the claimant was not provided with toilet facilities that were adequate to her needs, because of the risk of seeing a man using the urinal and the lack of a sanitary bin. The EAT therefore concluded that the claimant was treated less favourably than her male colleagues when required to use male-designated facilities and such treatment clearly constituted a detriment and amounted to direct sex discrimination.

What should you do?

Employers should be mindful of providing adequate toilet facilities for their staff to avoid any potential claims. The Workplace (Health, Safety and Welfare) Regulations 1992 state that facilities are suitable if they are either separate for men and women, or at least with lockable doors. When in doubt, the HSE guidance is a good starting point for employers considering the suitability of their workplaces from a health and safety point of view.

If you have any questions relating to the topics discussed above, please do not hesitate to contact our team of employment law experts. ■

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Can an employee with a disability be fairly dismissed for refusing to wear a face mask?

Yes, held the Employment Tribunal (Scotland) in *Shields v Alliance Healthcare Management Services (Alliance Healthcare*).

In 2021, Alliance Healthcare introduced a compulsory face mask policy as a precautionary measure for all employees. Ms Shields – a warehouse operative – suffered with vertigo and refused to wear a face mask. As a result, she was sent home for not adhering to company policy.

Alliance Healthcare attempted to consult with Ms Shields regarding alternatives such as lone working, working from home and staggered start/end times, however none of these were practical due to the nature of her job role. There was also discussion about an alternative face mask, but Ms Shields did not want to participate in trialling these.

Ms Shields resigned and brought a claim for constructive unfair dismissal and disability discrimination.

The tribunal concluded that vertigo did amount to a disability, but found that Alliance Healthcare were justified in the introduction of the new measure due to the legitimate aim of minimising covid-19 transmission in the workplace, which concurrently meant as the demand for supply of life saving medication increased, Alliance Healthcare could still perform to meet the demand of the public. Additionally, they did all they could to ensure an appropriate alternative was sourced.

All claims brought by Ms Shields were therefore dismissed.

What should you do?

This case is a positive reminder for employers that – provided you have taken all steps to genuinely consider all possible alternatives and have acted reasonably – you can justify not accommodating unreasonable requests of disabled employees to the detriment of the needs of the business.

Do you need legal support from our employment law experts? If so, please don't hesitate to contact us – we'll be happy to help. ■

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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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