Employment Law dispatches

Willans LLP I solicitors

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Welcome

Welcome to another edition of Dispatches.
In this issue we consider the proposals of the main political parties in relation to zero-hours contracts. We also discuss recent tribunal decisions on disabilities in the workplace, whether an employee can be dismissed after sending an inappropriate email five years ago, maternity entitlement and holiday pay.
Please do give us a call if you wish to discuss any of these issues in more detail, and as always, any feedback on this edition is gratefully received.
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Matthew Clayton
Partner and head of employment – *Chambers UK* rated: *"He is responsive, commercial, understands where employers are coming from and gets right to the point, with meaningful and practical advice."*

Legislation review

With Matthew Clayton

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Zero-hours contracts

In last month's issue we reported on the manifesto proposals of the main political parties regarding employment law, and noted that the current government is already pressing ahead with legislative reform on zero-hours contracts.

Preventing abuse of zero-hours contracts is a common theme among the three main parties, although there are differing ideas on how to tackle it. The main abuse identified is where unscrupulous employers require "exclusivity" from their workers i.e. they cannot work elsewhere, even on days when they are not required to work by their main employer. This can leave workers in a "no man's land" with no income.

Both Labour and the Liberal Democrats seem to favour the idea of granting such workers the right to a "regular contract" once they have worked regular hours for a period of time (12 weeks, in Labour's case).

The Liberal Democrats also propose a formal right to request a fixed contract (presumably similar to the right to request flexible working). If this latter idea did indeed reflect the flexible working regime, it would not **oblige** the employer to offer a regular contract, but would only allow it to reject the request on certain specified grounds.

The Conservative manifesto is less specific, promising merely to "eradicate abuses of workers, such as […] exclusivity in zero-hours contracts", without saying how. It is probably safe to assume that their plans would mirror the draft regulations recently published by the current government, following consultation.

That consultation sought views on extending the exclusivity ban to include low income contracts (referred to as "prescribed contracts") as well as zero-hours contracts. The government proposed this because, if a straightforward hours threshold for the ban was imposed, it would be difficult to know where to set the threshold. Too low, and employers would simply avoid it by providing the bare minimum of hours and requiring exclusivity from their workers. Too high, and flexibility for employers might be harmed, which might hamper job creation.

As a result, both an hours and an income-based threshold have been proposed. Put another way, exclusivity clauses will be unenforceable in contracts under which a worker works less than a threshold number of hours each week, or is guaranteed less than a threshold level of weekly income.

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Legislation review

Neither the number of hours, nor the minimum income has been specified in the draft regulations. The latter would be calculated by multiplying the hours threshold by the national minimum wage.

Individuals who receive a basic pay rate of £20 an hour (or more) for each hour worked under the contract will not benefit from the prohibition on exclusivity terms. This is in order to address the unintended consequence that workers with high hourly rates, but a low number of guaranteed hours, might be caught by the regulations.

These regulations are still in draft and may change before they are brought into force – particularly if the next government decides to take a different approach. Watch this space!

Asim Khan
Solicitor

Case law watch

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Is type 2 diabetes a disability?

In *Metroline Travel Ltd v Stoute*, the Employment Appeal Tribunal (EAT) considered whether type 2 diabetes is a disability under the Equality Act's definition of 'a long-term physical, mental or psychological impairment which has a substantial and adverse impact on day-to-day activities'.

The original tribunal ruled that without the treatment of a controlled diet, the employee would have suffered effects from the diabetes and that consequently this met the above definition and the employee was disabled.

On appeal the EAT overturned this decision stating that mere abstention from sugary drinks was not in itself a 'controlled diet' and as such did not constitute 'treatment'. Consequently type 2 diabetes is not considered to be a disability under the Equality Act definition.

What should I do?

This case illustrates that for a condition to be considered a disability, it must be more than just clinically well-recognised. However, it could be argued that this decision somewhat generalises type 2 diabetes in that it assumes treatment of the condition to only involve avoidance of fizzy drinks. It perhaps also makes the assumption that the medical consequence of not following a controlled diet is not itself disabling.

It is always good practice to be as accommodating as possible when dealing with employees suffering from clinically recognised conditions.

Bonus scheme based on attendance is discriminatory

"If you operate a bonus scheme which is linked to attendance levels, it is essential that you take advice to ensure there is sufficient flexibility within the scheme to avoid non-payment being on discriminatory grounds."

It is discriminatory for an employer to exclude from its bonus scheme those employees who have received a formal warning for sickness absence (*Land Registry v Houghton and ors*).

The Land Registry was found to have treated disabled employees unfavourably, despite there being a reasonable adjustment in place which delayed the issue of a warning to an employee who was absent due to a disability.

The EAT ruled it was irrelevant that the HR officer, who made the decision not to pay the bonus, had no knowledge of the employees' disabilities, as the non-payment was still directly linked to disability-related absences.

What should I do?

The tribunal and the EAT focused on the fact that there was no discretion to ignore the warning when determining entitlement to a bonus.

If you operate a bonus scheme which is linked to attendance levels, it is essential that you take advice to ensure there is sufficient flexibility within the scheme to avoid non-payment being on discriminatory grounds.

Case law watch

How far-reaching is the duty to make reasonable adjustments?

Does an employer have to make reasonable adjustments for an employee whose family member is disabled?

This was considered in *Hainsworth v Ministry of Defence*. The Court of Appeal (CA) was asked to consider if, under the Equality Act, the MoD had a duty to make reasonable adjustments on account of an employee's daughter being disabled (she had Downs syndrome).

The CA stated that the wording of the Equality Act makes clear that the reasonable adjustment duty only applies where an employee or job applicant is disabled; it does not impose a duty on employers to make adjustments for a non-disabled employee who is in some way associated with a disabled person.

What should I do?

Although there is no duty on an employer to make a reasonable adjustment in this scenario, an employee may still make a flexible working request based on needs arising from their child or family member's disability. It would be good practice to do all that is reasonably possible to assist the employee concerned.

How much effort must an employer make to find out if an employee is disabled?

"Care should be taken to ensure that any decisions made regarding a potentially disabled employee are based on a current medical diagnosis..."

An employer's duty to make reasonable adjustments is triggered when they have actual or constructive knowledge of an employee's disability; constructive knowledge arises where the employer could reasonably be expected to know of the disability.

In *Donelien v Liberata UK Ltd* the EAT considered how far an employer must go in its investigations to find out if an employee is disabled. Liberata UK Ltd relied, in part, on a flawed occupational health report in determining that an employee was not disabled.

The EAT ruled that, despite the report being flawed, they had done enough to avoid having constructive knowledge of the disability owing to the fact that they had taken other steps to ascertain if the employee was disabled.

What should I do?

Care should be taken to ensure that any decisions made regarding a potentially disabled employee are based on a current medical diagnosis; an employee can move from not being disabled to being disabled as a result of their changing condition. (This can happen when there is an accumulation of conditions that together cause the absence, rather than one clear diagnosis.)

It is also advisable to investigate further, if medical evidence is conflicting or non-specific.

Can an employee be dismissed for sending an inappropriate email five years ago?

A senior employee of Leeds Football Club was found to have forwarded a pornographic email from his work email address over five years ago.

On discovery of this, he was dismissed. The High Court had to consider if his dismissal was fair given that the act of misconduct occurred years ago.

It held that his actions constituted a repudiatory breach of his contract by breaking the implied term of trust and confidence.

His dismissal was ruled to be fair. It did not matter that the forwarded email was not discovered for five years, or that it was only discovered on account of an alleged 'finishing exercise' undertaken in order to avoid having to make a substantial contractual termination payment.

What should I do?

This case does not give the green light to begin searching an employee's email history for potential acts of misconduct; it is unusual for a court not to take a dim view of this kind of action.

The decision in this case is guided by the fact that the employer, as a football club, was open to intense media and public scrutiny, and, because of this, the employee's act of forwarding inappropriate images to a more junior female member of staff was considered to be gross misconduct in that any subsequent claims of harassment would have likely attracted negative media exposure.

Case law watch

Maternity leave, redundancy and suitable alternative roles

"It held that the trigger is when the employer becomes aware that the employee's role is redundant or potentially redundant..."

When a women is on maternity leave, and a redundancy situation arises, her employer is legally bound to consider her (albeit it gives her preferential treatment) for all suitable alternative roles.

The EAT was recently asked to consider at what point this duty is triggered – when the employee on maternity leave is formally placed on notice of redundancy; when she is first identified as being at risk of redundancy; or when the redundancy restructuring exercise is complete - as was argued by Sefton Borough Council (*Sefton Borough Council v Wainwright* (EAT)).

It held that the trigger is when the employer becomes aware that the employee's role is redundant or potentially redundant; the employer cannot wait until a restructure is complete before putting the woman on a redeployment list. She must be offered a suitable alternative in the new structure (so long as one exists). The EAT also stated that the female employee should not be required to undergo a competitive interview for the post.

What should I do?

As soon as you identify that an employee on maternity leave is at risk of redundancy, it is vital that you consider their position alongside all potential alternative roles. It is worth noting that this duty does not make employees on maternity leave immune from redundancy.

Too ill to resign?

Can an employee who is signed off sick retrospectively claim constructive dismissal and explain the delay to be due to the fact that they were too ill to resign at the time that their contract was breached?

This question was recently considered by the EAT in *Colomar Mari v Reuters Ltd* where the employee concerned waited 18 months before handing in her notice and claiming constructive dismissal. In the interim period she had accepted sick pay.

The EAT upheld the original tribunal's decision that the employee had affirmed her employment contract by accepting sick pay and that because of this she could not succeed in a constructive dismissal claim.

What should I do?

You should not assume that this case sets a precedent that an employee who is on sick leave (and who is in receipt/or has been in receipt of sick pay) cannot later claim a breach of contract, as each case is guided by its individual facts.

Holiday pay must include commission – an update

"The ET inserted new words into the Working Time Regulations to reflect the ECJ's decision..."

Following the ECJ's decision last year, the employment tribunal has (finally!) handed down its decision in *Lock v British Gas.*

The ET held that Mr Lock's pay should include an element for his commission (he was a salesman with a basic salary with variable commission paid in arrears which did not accrue when he was on annual leave).

The ET inserted new words into the Working Time Regulations to reflect the ECJ's decision. This will impact on future holiday pay entitlement for those employees whose remuneration includes commission (or similar payment) which varies with the amount of work done (or the outcome of that work, for example sales achieved).

What should I do?

Regular readers of Dispatches will note that although this will impact on future holiday pay entitlement, there will be a limit of a 2 year cap placed on backdated claims which is effective from 1 July 2015. See our February 2015 issue.

Employment law to go seminar series

Take away some top tips from our breakfast seminar series.

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Please contact us on 01242 542916 or email events@wilans.co.uk to book.

Dates and topics

14 May 2015 (Cheltenham venue)
Disciplinary processes - FAQs

22 September 2015 (Cheltenham venue)
'Ask the expert' - put your questions to the speakers

19 November 2015 (Gloucester venue)
Employment law changes this year and next

26 November 2015 (Cheltenham venue)
Employment law changes this year and next

Cheltenham venue - National Star College, Ullenwood, Cheltenham, Gloucestershire GL53 9QU
Gloucester venue - Holiday Inn Express, Waterwells Business Park, Quedgeley, Gloucester GL2 2AB

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