Employment Law dispatches

Willans LLP I solicitors

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Welcome

We are nearly at the end of 2015, so it seems like a good opportunity to look back over the last year and pick my Top 10 employment law developments. If nothing else, it's a useful reminder of the constantly shifting landscape which HR practitioners have to deal with on a day-to-day basis. So, counting down our review of year is as folllows:

Review of the year

With Matthew Clayton

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10. **Obesity can be a disability.** So said the European Court of Justice (ECJ) in the case of *Kaltoft v Municipality of Billund* in December 2014; and the decision was followed in a Northern Ireland tribunal in 2015 in the case of *Bickerstaff v Butcher*. We will see the first English case very shortly, I expect, especially given the incidence of obesity in the population.

9. **An employee may not actually have to possess a protected characteristic in order to claim discrimination.** This seemed to be the implication of the ECJ's decision in *CHEZ Razpredeleinie Bulgaria*. Admittedly, this was not an employment case, but the suggestion seems to be that if the provision, criterion or practice impacts a protected group, anyone who is affected by it can claim discrimination, even if they are not associated with the group or perceived as belonging to the group. It remains to be seen what this means for employment law – but it could be significant.

8. **Clauses in zero-hours contracts which prohibit workers from working elsewhere are now unenforceable.** Take note, Sports Direct et al.

7. **When considering collective consultation, you can look at each 'establishment' in isolation.** After the Employment Appeals Tribunal (EAT) had panicked HR practitioners all over the country by suggesting in the Woolworths case that multi-site employers needed to count redundancies across the whole organisation when assessing whether they had to conduct collective consultation, the ECJ decided that this was wrong and that we could all go back to how it had always been done – i.e. counting the number of redundancies in each 'establishment'. However, don't assume that a separate site is always a separate 'establishment'…

6. **Employment Tribunal fees.** Unison's legal challenge to the new fee regime has failed at every stage of the process due to lack of evidence presented. However there seems to be a growing consensus that the current fee system does impede access to justice and there are a number of official reviews underway.

5. **US Safe Harbour arrangements have been deemed invalid by ECJ.** If you are transferring employee data to the US, then you may not be compliant with the Data Protection Act. EU authorities are working on a long-term 'fix', but in the meantime you will need to take steps to remain compliant if you have been relying on the 'Safe Harbour' arrangements hitherto.

4. **The National Living Wage** takes effect from April 2016, at a rate of £7.20 for workers aged 25 and above. That's a £910 per annum increase in earnings for a full-time worker on the current national minimum wage.

3. **Shared Parental Leave.** We have not seen much take-up yet, but this is definitely a radical overhaul of the system, and an interesting exercise in social engineering – an attempt to normalise 'working fathers'. However the degree of flexibility which employees have in taking the leave makes it a scary proposition for employers.

Partner Matthew Clayton
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."

Seminars

Our 2016 'employment law to go' series will be announced in the next issue of Dispatches.

If you have any suggestions for topics which you would like us to consider please email me:

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1=. **My top two picks are tied at first equal. They are: travelling time/working time and calculation of holiday pay.** I wasn't able to choose between them, because both ECJ decisions have a profound effect on the most basic elements of the employer/employee relationship – how much you pay your staff, and how long they work for.

In the *Tyco* case we were told that, for peripatetic workers, their travelling time to the first job of the day counts as working time for the purposes of the Working Time Directive (but they don't necessarily have to get paid for that time).

The ECJ also told us at the end of 2014 that compulsory non-guaranteed overtime had to be factored into the calculation of holiday pay, if it represented 'normal remuneration'.

This year we have started to see follow-up cases in the UK: the case of *Lock v British Gas* was heard before the ECJ earlier this month on the question of whether commission has to be factored into the holiday pay equation – a decision is awaited. And, in Northern Ireland, the Court of Appeal has held that there is no reason (in principle) why voluntary overtime should not be included in statutory holiday pay, provided it is worked regularly enough to amount to 'normal remuneration'.

Commiserations to the many runners-up, including interesting decisions about employees' use of social media, how widely applicable a whistleblowing issue has to be in order to be 'in the public interest', and how quickly carried-over holiday needs to be taken.

Case review watch

With Jenny Hawrot
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Jenny Hawrot
Solicitor

Unilateral variations to employment contracts can trigger collective consultation

The Spanish case of *Pujante Rivera v Gestora Clubs Dir SL and another* has upset the traditional understanding of how collective consultation rules apply to employers who are dismissing and re-engaging employees en masse. The employee had resigned in response to the employer unilaterally varying his employment contract, in circumstances where the change was significant and detrimental. The Spanish court asked the ECJ whether this amounted to a redundancy for the purposes of collective consultation. The answer was 'yes'.

"Redundancy" under collective consultation legislation has a much wider meaning than that of statutory redundancy. The ECJ has held that if an employer changes an employee's terms of employment to their material detriment, through dismissal and re-engagement, this amounts to a redundancy. According to the ECJ, where an employee then resigns in response to that detriment, this amounts to an 'indirect redundancy' and should be counted towards numbers for collective redundancy.

What should I do?

If you find yourself in a situation where you need to force through contractual changes, you risk being ambushed as a result of this decision.

Employees could choose to resign en masse before you have taken any decision to terminate contracts. They could then bring claims, not only for constructive dismissal, but also for 90 days' pay each, as a 'protective award' for failing to collectively consult.

You can mitigate this risk by ensuring that you have collectively consulted from the outset, if it is possible that the threshold numbers could be met (20 or more 'redundancies' in a 90 day period).

Care should be taken at the outset to establish the nature of the changes, how many employees will be affected by the changes, and over what time period.

How do you calculate holiday entitlement if an employee increases their hours?

"The ECJ held that annual leave should be calculated on the basis of the hours and days actually worked by the employee when the holiday was accrued..."

In the case of *Greenfield v The Care Bureau Limited*, the employee in question increased her hours from one day a week to twelve days every fortnight. Following the termination of her employment, the employee claimed payment for accrued but untaken annual leave on the basis of her new, increased hours.

The ECJ held that annual leave should be calculated on the basis of the hours and days actually worked by the employee when the holiday was accrued, and not the hours and days worked at the time when the annual leave was taken. This followed a previous ECJ case where an employee reduced their hours.

What should I do?

Calculating holiday entitlement and payment is complicated at the best of times, let alone when employees change their working patterns or work irregular shifts. It is a topic which we are regularly asked about.

When calculating holiday accrual and payment entitlement for employees with changed or irregular working patterns, it is important that you refer to the hours and days worked when that holiday was accrued.

Duty to report mass redundancies

"Failure to do so can result in an unlimited fine."

The Department for Business, Immigration & Skills (BIS) has failed in its attempt to prosecute three former directors of City Link.

BIS brought its case on the grounds that the directors did not give it sufficient notice that they were planning to make redundancies. Under collective redundancy legislation, employers must notify BIS at least 45 days in advance of dismissing 100 or more staff at one location. In this case, BIS was notified on 26 December 2014 and the redundancies were made just five days later.

Coventry Magistrates' Court found that prior to 26 December the directors did not know that redundancies were going to be inevitable. The directors had been given a 'firm' offer to purchase the company, and therefore had every hope of saving it and its workforce, and redundancies were not contemplated. The case was therefore dismissed and the directors acquitted.

What should I do?

Employers planning to dismiss 100 or more staff at one location must notify BIS 45 days in advance of the dismissals taking place. Failure to do so can result in an unlimited fine.

It is therefore important to ensure that you comply with this legislation. What this case clarifies is that for this duty to arise, the employer must know that redundancy dismissals are unavoidable. Therefore, the duty to inform BIS will only arise where dismissals are inevitable.

Reasonable adjustments in redundancy selection process

"If employees are off sick during a redundancy process it is important to include them in the consultation."

In *Waddingham v NHS Business Services Authority*, a disabled NHS employee, whose job was at risk of redundancy, failed to achieve the required score in an interview for an alternative post. At the time of the interview, the employee was signed off sick due to cancer treatment. It was held that the employer's conduct amounted to discrimination arising from disability, as they had failed to make reasonable adjustments to the selection process.

The tribunal found that the employee was not appointed to the new role because of his poor performance at interview, and that his poor performance was due to his disability. Even though the employee indicated that he wanted to proceed with the interview, it was held that the employer should have assessed the employee's suitability for the post on the basis of existing information about his performance, and not by means of a competitive interview. The tribunal did however indicate that it was not necessary for the employer to lower the pass mark, but instead identify another means of assessment.

What should I do?

If employees are off sick during a redundancy process it is important to include them in the consultation, take medical advice regarding any reasonable adjustments, and consider all alternative assessment options to accommodate any disability.

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.

Employment law

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