Employment Law dispatches

Willans LLP I solicitors

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Welcome

Welcome to the latest edition of 'dispatches'. In this issue we update you on the latest developments in our line of work and announce our extensive seminar programme at which we hope you and colleagues can join us. We have scheduled as many sessions as we could based on your suggestions of topics. Please see the back page for further details.

We have also teamed up with the Growing Gloucestershire Conference which is offering dispatches' readers discounted tickets for bookings made this month. 200+ business professionals come together for one day (29 June) to network and learn from some of Gloucestershire's finest speakers - Matthew is one of them!

Please call if you wish to discuss any of these issues in more detail, and as always, any feedback is gratefully received. matthew.clayton@willans.co.uk

Photo provided courtesy of photographer, Will Davis

See us at Growing Gloucestershire Conference 2016

29 June 2016, The Growth Hub, Gloucester

To take advantage of Willans' exclusive early bird ticket discount (available until 29 February), please click this link and use promotional code Willans-GG2016. Conference details click here.

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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Parliament is not planning to introduce much in the way of new employment legislation in 2016, but these are the main highlights:

Zero-hours contracts

The government has gradually been legislating to ban the exploitation of workers on zero-hours contracts, in particular the unfair requirement of exclusivity. Such clauses have been unenforceable since May last year. However, the final piece in the armoury was put in place on 11 January this year. From that date, employees on zero-hours contracts have the right not be unfairly dismissed if they take up work elsewhere in breach of an exclusivity clause.

Any such dismissals will be automatically unfair, and employees can avail themselves of this protection from day one (ie. the standard 'two years' service' rule for unfair dismissal does not apply). Furthermore, both workers and employees on zero-hours contracts have the right not to be subjected to a detriment for failing to comply with an exclusivity clause.

In theory this should guard against the more disguised pressure placed by unscrupulous employers on workers who work elsewhere, by simply not offering them further work. However, there are two problems with this.

First, it is for the worker to prove that they have suffered a detriment and this means they would have to prove there was work available, that they weren't offered it, and that this was because they had taken up work elsewhere in breach of a contractual exclusivity requirement.

The second problem is that the new regulation doesn't give any protection against employers behaving badly where there isn't an exclusivity requirement. An employer might have a worker on a zero-hours contract which doesn't explicitly require that the worker doesn't accept work elsewhere.

However, an unscrupulous employer might still ensure that in practice the person does not take up work elsewhere, by not offering them any further work if they do.

This would not be an obvious breach of the new regulations, as there is no exclusivity clause in the contract in the first place, so the worker would have no clear-cut legal redress.

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He would have to argue that there was an implied term of exclusivity, which could be hard to do, particularly as zero-hours arrangements are often flexible and unpredictable by their very nature.

However someone who had previously worked regular hours for an extended period of time, and was then denied work, might find it easier to argue their case.

Taxation of termination payments

Last summer the Office of Tax Simplification made various proposals to simplify how payments on termination of employment are taxed. It was recommended that all payments in lieu of notice should be taxed in the same way, regardless of whether or not they are contractually-based.

Furthermore it was suggested that the £30,000 tax exemption should be removed and replaced by an exemption for redundancy payments only, or alternatively an exemption which increased with length of service.

However, contrary to expectations, no such measures appeared in the Chancellor's autumn statement, so they are therefore hotly anticipated in the spring budget. We will keep you informed.

Statutory rates

There is no proposal to increase the statutory rates of maternity pay, paternity pay, adopted pay, shared parental pay or sick pay this year. But remember, the National Living Wage will be introduced from 1 April 2016 - £7.20ph for workers aged 25 and over.

Gender pay gap reporting

Last year the government consulted on introducing a requirement for businesses to publish pay information, in a bid to address the gender pay gap. Following that consultation new regulations are expected this coming spring, which will detail precisely what information will need to be published. However it has already been announced that information about bonuses will be included.

The regulations would appear pretty toothless if this had not been included, since bonuses are often the key differentiator between men's and women's pay.

The regulations will apply to all employers with 250 or more employees. We expect that the threshold will be assessed on a 'group' basis, but this remains to be confirmed.

If you fall within this bracket, we recommend that you conduct an informal equal pay audit in advance of the new requirement coming into force. This will help you to identify and remedy any potential issues, before you have to publish any disparity.

It is worth remembering that if you conduct this exercise in conjunction with your lawyers then legal professional privilege may apply so that you would not have to disclose it in any subsequent litigation over equal pay. Please contact us if you would like any assistance.

Focus on - business immigration

With Helen Howes
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Major changes to business immigration rules likely

It seems likely that major changes to business immigration rules will be made in April this year following the publication of a report by the Migration Advisory Committee.

The government commissioned a review of current business immigration rules in respect of Tier 2 visas (the main category of work visa in the UK). Although no changes have been agreed, it is clear that the recommendations will make it more expensive for employers to hire and retain migrant workers.

The recommendations include a minimum wage threshold, an annual immigration skills charge of approximately £1,000 per worker (applicable to both Tier 2 General and Intra-Company Transfer (ICT) routes) and 'improvements' to the existing resident labour market test.

It further suggests there is greater scrutiny of ICTs to ensure that the role being filled is a sufficiently skilled role (this is likely to mean a more detailed job description is required) and that workers entering the country in this fashion have two (rather than one) years' service.

A new Tier 2 (ICT) visa is also suggested for workers carrying out work on-site for third parties. It is expected that any changes made will be implemented around April 2016.

We will update you as and when more information about the proposed changes becomes available.

Case law watch

With Laura Davis
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Absence management policies and reasonable adjustments

In the case of *Griffiths v Secretary of State for Work and Pensions*, Ms Griffiths was absent on sick leave for over 60 days, during which time she was diagnosed with fibromyalgia.

When she was given a formal written improvement warning under the DWP's attendance management policy, she argued that the DWP had acted in breach of the Equality Act by failing to make the following two reasonable adjustments:

- first, that it should have disregarded any absence arising from her disability, with the consequence that the written warning should be withdrawn.
- secondly, that the policy should have been modified to allow her to have longer of periods of absence before any sanctions were triggered.

The Court of Appeal held that Ms Griffiths' proposed adjustments were not steps that the DWP should reasonably be expected to take. In reaching this decision, it took into account that further periods of absence were likely and would not be of such limited duration that a short extension to the trigger points in the policy would remove Ms Griffiths' disadvantage.

The court held that the duty to make reasonable adjustments under the Equality Act 2010 is triggered where an employer operates an absence management policy and an employee's disability places them at a substantial disadvantage in terms of their likely level of absence compared with their non-disabled colleagues.

However, depending on the circumstances, it will not always be considered reasonable to adjust the rules of these policies, and in this particular case it was not reasonable.

What should I do?

If you operate an absence management policy, consider whether this might place any employee, whom you know (or ought reasonably to know) has a disability, at a disadvantage compared to those who are not disabled.

If this is the case, consider whether there are any reasonable adjustments you might make to the policy to remove that disadvantage, including extending the trigger points for disciplinary sanctions and/or disregarding certain disability-related absences.

Whether such adjustments are reasonable will depend on the specific circumstances so consider taking legal advice where matters are not clear cut.

Instruction not to speak Russian was not discriminatory

"...an instruction to an employee not to speak in Russian, her native language, did not amount to direct discrimination."

In the recent case of *Kelly v Covance Laboratories Limited*, the Employment Appeal Tribunal (EAT) held that an instruction to an employee not to speak in Russian, her native language, did not amount to direct discrimination. This ruling should not be taken as authority that it will always be lawful to give such an instruction, but the facts of this case gave the employer a sufficient reason to do so that was unconnected with the employee's race or national origin.

Covance Laboratories had recruited Mrs Kelly as a contract analyst in its animal testing facility. Given that it had already suffered considerable disruption and security breaches due to animal rights activists posing as employees, Covance became concerned when Mrs Kelly started spending excessive periods of time in the bathroom speaking on her phone in Russian.

Her line manager told her to speak only in English at work so that her colleagues could understand what she was saying. She submitted a grievance and shortly prior to the grievance hearing, she was suspended due to concerns about leaving her unsupervised when many of the senior management were away from the office. The EAT dismissed her claims of race discrimination, victimisation and harassment.

What should I do?

This case raises interesting questions for employers who have a diverse workforce, which is of course becoming increasingly common. For example, would such an instruction be lawful if the intention was to promote employee integration and avoid cliques developing? Would such an instruction be lawful if it related to employees' conduct during their lunch break?

In circumstances where employers wish to instruct their staff to speak only English, they must be able to show that it is a 'proportionate means of achieving a legitimate aim'. In practice this means that they must have a very good business reason for the instruction (as opposed to it just being preferable), that it is entirely unconnected with the particular race/native language of the employee(s) concerned and that it does not go further than is necessary.

The employee's right to privacy versus the employer's right to monitor

"... suggested that monitoring employees' emails and internet use is now acceptable and that engaging in personal correspondence during working hours justifies dismissal. This is simply not the case."

Many headlines in the press following the ruling of the European Court of Human Rights (ECHR) in *Barbulescu v Romania* suggested that monitoring employees' emails and internet use is now acceptable and that engaging in personal correspondence during working hours justifies dismissal. This is simply not the case.

The ruling itself and UK-specific legislation mean that employers still need to exercise caution before monitoring and taking disciplinary action against their employees for the misuse of IT systems.

Mr Barbulescu was employed by his employer as head of sales and was asked to set up a Yahoo account for the purpose of responding to clients' enquiries. It was around this time that the entire workforce was informed that personal use of the internet was not permitted and that they would be monitored in this regard.

When Mr Barbulescu was found to have used the Yahoo account for personal communications in breach of the company's policy, he was dismissed. His subsequent claim that the company had breached Article 8 of the European Convention relating to respect for private life and correspondence was considered by Romania's national courts before being referred to the ECHR.

The ECHR held that personal telephone calls from business premises and personal emails from work accounts would usually be covered by the convention's notions of 'private life' and 'correspondence' and as such, the default position is that employees will have a legitimate expectation as to the privacy of such communications.

However, such rights have to be balanced with the employer's interests, and clear policies on the part of the employer can take such communications outside the scope of Article 8, as long as the monitoring is proportionate, limited in scope and designed to check that employees are undertaking their work properly.

For example, in the Barbulescu case, the employer had prior concerns about how much work he was doing and then only relied on the fact that he had sent messages of a personal nature rather than on the specific content of the messages. Consequently, Mr Barbulescu's claim failed.

What should I do?

It is of the utmost importance to have a comprehensive and bespoke internet and email policy in place setting out the rights and responsibilities of your staff, when and how monitoring will be conducted, how any personal data collected will be processed and used and specifying that breach of the policy will result in disciplinary action.

The policy must be communicated clearly to all staff (ideally they will sign to confirm they have read and understood the policy), accompanied by training (if appropriate) and must be consistently applied. Beyond the policy, employers should avoid monitoring constantly or using automated systems, and should only do so where there are prior, legitimate concerns regarding the employee's conduct.

Failure to offer voluntary redundancy was age discrimination

"Ensure that employees of all ages are offered the same opportunities."

In the case of *Donkor v Royal Bank of Scotland*, as part of a redundancy exercise, RBS had offered the opportunity to take voluntary redundancy to two regional directors who were younger than 50. It did not extend this offer to Mr Donkor because he would have become entitled to a severance payment of approximately £500,000, most of which would derive from early retirement enhancements.

Mr Donkor lodged a claim for indirect age discrimination. His claim failed at first instance since the tribunal decided that his circumstances were materially different from the two younger directors, on the basis that they were not entitled to early retirement benefits and could not therefore be his comparators for the purposes of discrimination.

The EAT disagreed and held that the additional expense of termination was a direct result of Mr Donkor's age and therefore not a factor that would invalidate a comparison with the two younger directors.

The EAT has sent the case back to the tribunal to determine if RBS can objectively justify the discriminatory treatment.

What should I do?

Ensure that employees of all ages are offered the same opportunities, whether for voluntary redundancy, promotion, training, additional benefits, etc. Any difference in treatment will need to be objectively justified and it is unlikely that higher costs will be a sufficient reason for these purposes, particularly if the cost is a direct consequence of an employee's age.

Take care to calculate the potential cost of a restructuring exercise in advance, particularly if you intend to offer employees the right to take voluntary redundancy and there is a possibly that they could have the right to early retirement enhancements.

Take away some top tips from our employment law seminars

As well as refreshing knowledge and staying up-to-speed with employment law requirements in an organisation, our seminars provide a networking opportunity to share ideas with other like-minded professionals.

Find out more specific event details by visiting www.willans.co.uk/events.
Please contact us on 01242 542916 or email events@wilans.co.uk to book.

Dates and topics

Tuesday 22 March 2016, 7.30am - 9am
New tax year, new employment laws: Employment law update over breakfast
Cheltenham (£15 pp includes breakfast)

Wednesday 23 March 2016, 7.30am - 9am
New tax year, new employment laws: Employment law update over breakfast
Gloucester (£15 pp includes breakfast)

Thursday 24 March 2016, 11.30am -12.30pm
Why your business needs a social media policy
Cheltenham Chamber of Commerce, Cheltenham
Non-members are welcome

Tuesday 10 May 2016, afternoon
Social media, the law and you
Direct Marketing Association, Cheltenham
Non-members are welcome

Wednesday 29 June 2016, 8.15am - 4pm
Top tips for protecting your business legally
Growing Gloucestershire Conference
Gloucester (early bird price for readers until 29 February)

Thursday 22 September 2016, 9.00am - 1.30pm
Handling grievances & conflict management: 'Back to school' employment law workshop & lunch
Cheltenham (early bird price of £25 pp until 31 May)

Early November (date tbc) 2016, 9.00am - 10.30am
Recruiting and maintaining the best trustee board: A spotlight on charities to support Trustees' Week
Cheltenham (£15 pp)

"Excellent advice and guidance, very worthwhile attending."

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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