Employment Law dispatches

Willans LLP I solicitors

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Welcome

April and May are due to be busy months for employment law and more detail has been emerging about the reforms being implemented in the near future. We report on these in this month's issue, as well as our new seminar topics and dates.

Please do get in touch with us with any feedback on this edition. Email **matthew.clayton@willans.co.uk**

Matthew Clayton
Partner and head of employment – *Chambers UK* rated: *'a "very efficient and practical" lawyer'.*

Legislation review

With Matthew Clayton
matthew.clayton@willans.co.uk

ACAS conciliation

From 6 May this year, anyone wishing to bring employment tribunal proceedings against their employer will be required to contact ACAS first, to explore "early conciliation" for a month. They will then get an Early Conciliation (EC) certificate from ACAS, which will allow them to present a tribunal claim.

This is all well and good for the purposes of reducing the number of employment claims going through the tribunal system. However, the major flaw in the scheme is that the employee's only duty is to contact ACAS. Neither the employee nor the employer is obliged to engage in conciliation. If either party does not wish to, the employee will get an EC certificate anyway, and will then be able to present a claim to the tribunal. So the scheme would appear to be largely toothless.

If both parties wish to engage in conciliation, but conciliation fails, the employee will get an EC certificate and will be able to present a claim.

Similarly, if the month expires without settlement being reached (or six weeks where ACAS has extended the period by agreement) then an EC certificate will be issued and the employee will be able to present a claim.

The scheme is optional from 6 April 2014 until 6 May 2014, but if a prospective claimant does contact ACAS in the prescribed method during that period, they will not be able to pursue a tribunal claim unless they have obtained an EC certificate.

Time limits for bringing employment claims are short – typically three months – and therefore it has been necessary to introduce "stop the clock" provisions to allow early conciliation to take place. Time will cease to run on the claim from the date the employee contacts ACAS, to the date they receive an EC certificate. In all cases they will have at least a month after receiving the EC certificate in which to present a claim.

Flexible working

One temporary relief for employers is that the planned changes to the flexible working regime, which would have opened it up to all employees, not just parents and carers, are not being introduced in April 2014.

However, they are still likely to be implemented at a later date, yet to be confirmed.

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

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Legislation review

Financial penalties

"…The penalties will be between £100 and £5,000, payable to the government…"

New regulations have confirmed the implementation, on 6 April 2014, of the power of employment tribunals to levy financial penalties against employers who are in breach of employment rights, where the breach has one or more 'aggravating factors'.

The legislation does not set out what might amount to 'aggravating factors' - ultimately this will be for the tribunal to decide, taking into account all the circumstances. However, the explanatory notes to the legislation indicate that factors more likely to lead to imposition of a penalty are – large, well-established employers with dedicated HR support; a long or repeated breach; and/or deliberate, malicious or negligent behaviour. Conversely, penalties are less likely for: small or newly-established employers with limited HR support; short or one-off breaches; and/or genuine mistakes.

The penalties will be between £100 and £5,000, payable to the government, and will have to take into account the employer's ability to pay. Where a financial award is made in the employee's favour on the claim, the amount of the additional penalty will be 50% of the amount of the award (subject to the above limits). There will be a 50% remission of the penalty if it is paid within 21 days.

It will only be possible to know the true impact of these changes once employment tribunals start to apply the law. However, the possible threshold for 'aggravating features' is low enough, and the level of potential penalties high enough, for this to become a material litigation risk for employers, and therefore, a significant factor in settlement negotiations.

Annual review of rates

The eagle-eyed amongst you may have noticed that the overall cap on unfair dismissal compensation (currently £74,200) and the cap on a week's pay for various statutory purposes (currently £450) did not increase on 1 February as normal. That is because the annual review date for these figures has been moved by legislation to 6 April each year. It has just been announced that from 6 April 2014 the cap on a week's pay will increase to £464 and the overall cap on unfair dismissal compensation to £76,574 (or 52 weeks' pay, if lower).

Other statutory rates which are increasing on 6 April 2014 are as follows. The weekly rate of statutory sick pay will increase from £86.70 to £87.55. The weekly rates of statutory maternity pay, statutory adoption pay, statutory paternity pay and additional statutory paternity pay will increase from £136.78 to £138.18.

Laura Davis
Associate, solicitor

Case law watch

With Laura Davis
laura.davis@willans.co.uk

Is it possible to place an employee on garden leave for 12 months?

The High Court considered this question in the case of *JM Finn & Co. Ltd v Holliday*. The starting point is to have a clear and express clause in the employee's contract. Without this, failing to provide work for a prolonged period of time may entitle them to resign and claim constructive dismissal, particularly if they can show that their skills would atrophy during that time. Beyond this, garden leave clauses, just like any other restrictions, will only be enforceable if the employer can show that they go no further than is necessary to protect a legitimate business interest.

The fact that an employee is getting paid during the restricted period will not secure their enforceability.

In this case, Mr Holliday was a stockbroker and the court accepted that, unusually, the employer needed 12 months to reinforce its relationships with his clients.

What should I do?

Ensure your garden leave clauses are tightly drafted in conjunction with other terms in the contract, such as those that deal with exclusive service and notice. Also consider what business interest(s) you might need to protect, and how this can be achieved with minimal impact on the individual.

Case law watch

Enforceability of restrictive covenants

"...the court decided that personal interfacing was of most importance when seeking to secure customer loyalty; simply having information about her relationships would not provide sufficient protection for her former employer."

As mentioned in the previous case, post-termination restrictions will only be enforceable if the employer can show that they go no further than is necessary to protect a legitimate business interest.

In *East England Schools CIC v Palmer*, the High Court held that a recruitment agent working in the education sector could legitimately be prevented, for 6 months, from soliciting or dealing with candidates or schools that she had dealt with in the 12 months prior to her departure.

This was despite Ms Palmer's contention that much of the information about those candidates and schools was already in the public domain via social media.

On this point, the court decided that personal interfacing was of most importance when seeking to secure customer loyalty and therefore simply having information about her relationships would not provide sufficient protection for her former employer.

What should I do?

Contrary to popular belief, properly drafted restrictions can be enforced where necessary to protect business interests. They can be particularly useful where your employees could take unfair advantage of the personal relationships built up with customers etc whilst working for you. We can assist you in preparing restrictions which are appropriate in their scope and extent, and in enforcing restrictions which are already in place.

Sunday working

The latest in a string of cases on religious discrimination, Mba v Mayor and Burgesses of London Borough of Merton concerned a Christian who, when required to work on Sundays, filed a claim of religious discrimination.

The Court of Appeal agreed that the council's requirement was indirectly discriminatory on grounds of religion, but held that in those particular circumstances, it was justified as a proportionate means of achieving a legitimate aim (i.e. providing adequate cover for a children's care home).

Another important point to take from this case is that an employee does not need to show that their belief (in this case that Sunday should be a day of rest and worship) is a core component of their faith; just that they genuinely hold the belief themselves.

What should I do?

Think carefully about whether any work requirements will place an individual at a disadvantage as a result of a protected characteristic (eg race, age etc). If so, explain why it is necessary, the alternative solutions you have considered and that you have carried out a balancing exercise between the impact on the business and the individual.

When is gross misconduct not gross misconduct?

"...you will not be able to dismiss without notice unless the employee's conduct does actually amount to a repudiatory breach of contract."

In the case of *Robert Bates Wrekin Landscapes Limited v Knight*, Mr Knight worked as a gardener for RBW. His employment contract provided that "breach of the employer's or customer's security rules" amounted to gross misconduct. Those rules stated that any vehicle leaving the customer's site would be subject to security searches and that removal of any property required a 'property pass'. Mr Knight's van was searched and a bag of bolts belonging to the customer was discovered. He was summarily dismissed for theft and for breach of the security rules.

The tribunal accepted that he had forgotten to hand in the bolts, and therefore, although it was found that he had technically breached the security rules, it was accepted he had not acted deliberately. On appeal, the EAT held that, in the absence of any deliberate breach or guilt, his actions did not amount to a repudiatory breach of contract and therefore RBW was not entitled to dismiss summarily, even though on the face of it what he had done was identified in the employment contract as gross misconduct.

What should I do?

Summary termination clauses will always be interpreted restrictively - even though your employment contract might identify something as gross misconduct, you will not be able to dismiss without notice unless the employee's conduct does actually amount to a repudiatory breach of contract. Make sure your termination clauses and disciplinary procedures are clearly worded, and that managers are trained in how to deal with and assess such cases. We can carry out a document review and provide training.

Case law watch

Without prejudice discussions

Where a 'live dispute' exists between an employer and an employee, it is possible to have a "without prejudice" conversation about the employee's proposed departure without that conversation being disclosable at a later date.

In the recent case of *Portnykh v Nomura International Ltd*, the company announced its intention to dismiss Mr Portnykh for misconduct. He refuted his culpability and requested that his dismissal be classed as redundancy, which was agreed. Correspondence around terms of settlement was then exchanged. The question for the Employment Appeal Tribunal (EAT) was whether there was a live dispute such that the correspondence could be labelled 'without prejudice'. The EAT held that even where negotiations appear amicable, an actual or potential dispute (in this case about the reason for termination) will be sufficient.

Last summer, the concept of 'protected conversations' expanded the traditional scope of the 'without prejudice' rule. However, it would not have been possible for the company to utilize that protection here, since the employee was claiming automatic unfair dismissal (whistleblowing).

What should I do?

If you are entering severance discussions with an employee, consider whether the content of those discussions, or the fact they took place, might prejudice your position if they were referred to in a tribunal claim. This is an area where it can be important to seek legal advice.

Changing terms and conditions following a TUPE transfer

"...tribunals can effectively negate your cost-cutting attempts and force you to take an employee back on their original pay..."

Mrs Hazel, along with about 1,500 other employees, had her employment transferred to The Manchester College under TUPE in August 2009 *(Hazel & another v The Manchester College)*. In January 2010 the college proposed about 200 redundancies, together with changes to terms of employment for the remaining staff, in order to avoid further redundancies. Mrs Hazel was not placed at risk of redundancy, but was offered a new contract which involved a pay cut. She refused to agree to the new terms and was dismissed in July 2010.

The Court of Appeal has recently held that the dismissal was automatically unfair because it was connected with the TUPE transfer. Even so, the college might have had a defence if the dismissal had been linked with the other redundancies. However, the court found that the principal reason for the dismissal was that Mrs Hazel had refused to agree to the new terms, therefore, there was no defence.

The court upheld the tribunal's original order to re-engage Mrs Hazel based on the new terms and conditions, with the exception of the salary, which would be restored to its previous level and then 'red-ringed' until other salaries caught up.

What should I do?

This case ably highlights the risks of changing employment terms following a TUPE transfer. Given that tribunals can effectively negate your cost-cutting attempts and force you to take an employee back on their original pay, it is important to make sure that any changes you do try to make are watertight and made with the benefit of considered legal advice.

Caste discrimination

In the case of *Tirkey v Chandok & another*, an employment tribunal has allowed a claim for caste discrimination to proceed on the basis that the definition of "race" in the Equality Act 2010, which includes "ethnic origin", is wide enough to encompass caste.

The tribunal also found that caste discrimination was covered by Article 14 of the European Convention on Human Rights (the general right to freedom from discrimination) and the EC Race Directive which outlaws descent-based discrimination.

This decision was made irrespective of the fact that the government has already decided to amend the Equality Act 2010 to provide expressly that caste is an aspect of the protected characteristic of race, but has not yet done so.

What should I do?

Although this is only a non-binding first-instance decision, it would be wise to update your equal opportunities policy now given that the legislation is going to change anyway. We can help with this, and provide a general review of your equal opportunities policies if you wish.

New seminar dates and topics announced

Employment law 'to go' seminar dates

Dates & topics

Thurs 15 May 2014

Top 5 employment law issues for professional practices

Venue: National Star College, Cheltenham

Tues 8 July 2014

Auto-enrolment and what it means for your employment contracts

Venue: National Star College, Cheltenham

Tues 23 September 2014

Managing staff sickness and accommodating disabilities

Venue: National Star College, Cheltenham

Tues 18 November 2014

Employment law update

Venue: tbc, Gloucester

For more information or to book visit **our website www.willans.co.uk/events**.

Our employment team has had a positive response to our series of employment law breakfast briefings and therefore, we are extending the dates. The topics have been selected from feedback requested by delegates.

As the employment law landscape is endlessly evolving, it can be a task in itself for employers to keep on top of the law. Our breakfast briefings are aimed at providing you with the top-line facts; a quick and digestible overview of changes. Take away some top tips from our breakfast seminar series.

Who should attend?

- Directors (CEO, MD, FD) and senior executives with responsibility for HR and risk management issues
- Human Resources managers and advisors
- In-house legal advisors

Why attend?

- Refresh your knowledge or ensure you are up-to-speed with employment law requirements in your organisation
- Make sure you are not falling foul of the law or exposing the organisation to unnecessary risks
- Networking opportunity to share ideas and experiences with other professionals

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

Matthew Clayton
matthew.clayton@willans.co.uk

Company/commercial

Paul Symes-Thompson
paul.symes-thompson@willans.co.uk

Litigation & dispute resolution

Nick Cox
nick.cox@willans.co.uk

Paul Gordon
paul.gordon@willans.co.uk

Rural business, agriculture & estates

Frank Smith
frank.smith@willans.co.uk

Charity law

Margaret Austen
margaret.austen@willans.co.uk

Residential property

Bridget Redmond
bridget.redmond@willans.co.uk

Divorce & family law

James Grigg
james.grigg@willans.co.uk

Wills, probate & trusts

Ruth Baker
ruth.baker@willans.co.uk

Personal injury law

Nick Richardson
nick.richardson@willans.co.uk

Property & construction

Nigel Whittaker
nigel.whittaker@willans.co.uk

Laurence Lucas
laurence.lucas@willans.co.uk

Susie Wynne
susie.wynne@willans.co.uk

Jonathan Mills
jonathan.mills@willans.co.uk

Contact details

Willans LLP | solicitors, 28 Imperial Square, Cheltenham, Gloucestershire GL50 1RH
01242 514000 law@willans.co.uk www.willans.co.uk

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