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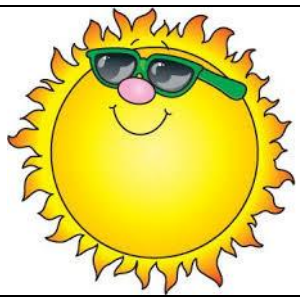
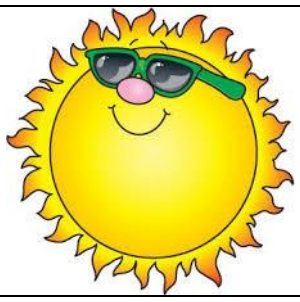


HR BULLETIN

SUMMER 2016



To help with your summer reading this latest HR Bulletin catches up with the key employment law changes since the last issue and outlines those expected along with some key Tribunal outcomes to which you may need to take into account in the future as they could have implications for all employers.

Contents

I hope that you find this Bulletin interesting and helpful but if you have any questions or need advice on any of the issues set out in this HR Bulletin or help with reviewing your existing employment policies, procedures and contracts in the light of the changes please do not hesitate to contact me as below.

Enjoy the summer!

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1. Zero Hours Contracts

The Small Business, Enterprise and Employment Act 2015 came into force earlier in 2015 and from January 2016 those on zero hours contracts can bring a case against employers for unfair dismissal or detriment if a restriction clause was enforced against them. One of Act's measures is the banning of exclusivity clauses in zero hours contracts.

The provisions declare void / unenforceable any clause in a contract which imposes exclusivity on a worker who is employed on a zero-hours basis – this applies to all existing contracts. This means that it is no longer possible for a zero-hours contract to prevent the employee or worker from working for someone else. This ban applies not only if there is a term which seeks to prohibit the employee/worker from working elsewhere but also where there is a term which seeks to prohibit the employee/worker from doing so without the employer's consent.

The term 'zero hours contract' is defined quite broadly to include any situation in which the provision of work is uncertain, so it potentially includes all kinds of casual contract.

2. Mandatory Gender Pay Gap Reporting

The Small Business and Enterprise Act 2015 obliged the Government to adopt regulations requiring mandatory gender pay gap reporting by 25 March 2016.

The draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 require large employers to publish the numbers of male and female employees employed in four pay bands, set according to the "quartiles for the overall pay range". There has been some confusion around what employers are actually required to report. The Government Equalities Office has issued confirmation that that it is envisaged that an employer will look at the overall range of hourly rates paid to employees and create four equal pay bands, with each band consisting of one quarter of the difference between the lowest and highest hourly rates. The consultation on the draft Regulations closed on 11 March 2016 and a final version of the Regulation is expected shortly.

3. National Living Wage

In 2015, I reported on recent government announcements relating to employment law, including the introduction of the new mandatory National Living Wage. This came into effect from April 2016 and ensures everyone aged 25 and over receives a wage of at least £7.20 per hour. The rate will rise from £7.20 to £9.00 by 2020.

Extra help for small firms will come in the form of increasing the new Employment Allowance by 50 per cent to £3,000. The government says that this means a firm will be able to employ four people full time on the new National Living Wage and pay no national insurance at all.

The National Minimum Wage increases which took effect on 1 October 2016 are as follows:-

- the rate for workers aged 21 to 24: increased from £6.70 to £6.95;
- the development rate (workers aged 18 to 20) increased from £5.30 to £5.55;
- the young workers rate (workers aged 16-17) increased from £3.87 to £4.00;
- the apprenticeship rate (apprentices under 19 years old or those over 19 years old in their first year of the apprenticeship): increased from £3.30 to £3.40; and
- the accommodation offset: increased from £5.35 - £6.00.

4. Using national living wage as 'excuse' to cut pay and benefits

There are already complaints that some employers are taking measures to offset the cost of implementing the National Living Wage which may have resulted in staff having a lower wage not the improvement promised by the Government.

The popular coffee shop chain Cafe Nero have for example announced that they will no longer be giving staff a free lunch when they are on shift as part of a pay review across the company although they claim that this will only some staff.

A petition drafted by a B&Q manager, accusing the DIY retailer of slashing employee benefits in an effort to offset the costs of the national living wage (NLW), has so far attracted more than 120,000 signatures – and has led to warnings that employers could face a negative reaction if they attempt to alter terms and conditions at the same time as they are forced to raise salaries for the lowest-paid. The £7.20 an hour wage came into force on 1 April.

The petition says B&Q staff are required to accept the new terms and conditions of employment, or face losing their job.

B&Q denies that the changes to terms and conditions are as a result of the NLW, stating that a review of its pay and reward framework was launched "long before" the new wage was announced.

A B&Q spokesman said: "Our aim is to reward all of our people fairly so that employees who are doing the same job receive the same pay. That isn't the case at the moment, as some have been benefiting from allowances for a long time when others have not, and that can't continue."

In an effort to offset the increased cost of salaries, some employers have considered "reducing pay for overtime and bank holidays or to flatten their structures and reduce the number of better-paid supervisory roles".

A survey from the Federation of Small Businesses found that just over half (54%) of SMEs believe they will be negatively impacted by the 50p an hour increase in pay, and will put off hiring new staff as a result, while 41% will cut staff hours. Finally just over a quarter (26%) plan on eroding pay differentials by freezing or cutting the wages of higher-paid staff.

In addition it is reported that some employers are actively considering increasing the number of self-employed individuals or apprentices – all of whom are exempt from the NLW – in their staffing mix.

This approach could leave employers open to discrimination claims as employers may, consciously or unconsciously, look to employ younger people to avoid the higher wage costs. Also, if they operate zero hours contracts, they may elect to offer less work to those people over 25. Both of these actions would expose the employer to age discrimination claims.

Employers are therefore warned to avoid 'kneejerk moves' when introducing measures to offset increased wage costs.

5. Taxation of Termination Payments

In July 2015, the Government launched a consultation on the future of the £30K tax exemption for

payments paid to employees as compensation for loss of employment. The consultation closed in October 2015 and the response is expected in 2016.

Under the current rules, contractual payments in lieu of notice are taxable as earnings whilst non contractual elements are liable to income tax only on the amount exceeding £30K and are not liable to National Insurance Contributions.

The new proposals include removing the distinction between contractual and non-contractual payments so that all payments in connection with termination of employment would be subject to tax and National Insurance. It is proposed that the £30K tax exemption would be replaced with an exemption for employees with two years' service at a rate increasing with length of service. Further exemptions would be introduced for payments in connection with unfair or wrongful dismissal and discrimination.

6. Protective Disclosures – "Blowing the Whistle"

A protected disclosure may be made where an individual raises concerns about malpractice in an organisation. Workers who make a protected disclosure or "blow the whistle" have, in certain circumstances, a right not to be dismissed or subjected to any other detriment as a result.

In the case of Morgan v Royal Mencap Society, the EAT considered whether a complaint about an individual employee's cramped working conditions can be a protected disclosure. A worker who makes a disclosure will only be protected where they have a reasonable belief in the disclosure and the disclosure is made in the public interest. Ms Morgan brought a claim on the basis that complaints she had raised with her employer about cramped working conditions posing a risk to her health and safety were protected disclosures. An employment tribunal struck out the claims at a preliminary hearing as it considered that the Claimant would not have had a belief that the disclosure was in the public interest.

The EAT reversed the employment tribunal's strike out. The EAT found that it was reasonably arguable that the employee's complaints, even if she were the principal person affected, may have been made with a reasonable belief that they were in the wider interests of employees generally. The EAT's view was that this may be sufficient to meet the 'public interest' test.

In the earlier case of Chesterton Global Ltd v Normohamed the Employment Appeal Tribunal (EAT) found that a disclosure relating to the earnings of 100 senior managers was in the public interest. The decision in this case appears to follow the approach in Chesterton and demonstrates that it is relatively easy for an employee to demonstrate that a disclosure is made in the public interest.

A qualifying disclosure will normally be protected, for whistleblowing purposes, if made to the employer. It will also be protected if made to a 'prescribed person' in certain circumstances.

The Government has updated its list of prescribed persons to whom a protected disclosure can be made and a full list can be found on the Government website.

7. Reasonable Adjustments in Absence Management

The Court of Appeal has recently handed down judgment in the case of Griffiths v Secretary of State for Work and Pensions. This case concerns whether the duty to make reasonable adjustments applied to an absence management policy and, in particular, the trigger points used in the policy.

Ms Griffiths had 62 days absence due to post viral fatigue and she also suffered from fibromyalgia. She was disabled for the purposes of the Equality Act 2010. The employer's absence management policy stated that an employee could be issued with a warning if they were absent for more than 8 days in a 12 month period. The policy stated that the trigger point could be adjusted for disabled employees but no adjustments were made for Ms Griffiths and she was issued with a warning. Ms Griffiths claimed that her employer had failed to make reasonable adjustments.

The Employment Appeal Tribunal (EAT) found that there was no duty to make reasonable adjustments in these circumstances. The EAT stated that the policy did not place Ms Griffiths at a substantial disadvantage as she had been treated in the same way as a non - disabled employee absent for the same length of time.

The EAT's decision caused confusion as it is not consistent to that in the 2013 case of HMRC v Whitely, also heard by the EAT. In the Whitely case, the EAT found that the employer should have acknowledged medical evidence that a few days' absence three or four time per year is normal for an employee with asthma and that the employer should have discounted those periods of absence when considering absence levels .

The Court of Appeal upheld the EAT's judgment on the basis that the Department for Work and Pensions did not fail to make reasonable adjustments. However, the Court made it clear that the duty to make reasonable adjustments does apply to sickness absence policy trigger points. In light of this decision, businesses should carefully consider how to approach matters under sickness absence policies.

8. Commission and Holiday Pay

There has been a series of recent decisions concerning how holiday pay should be calculated for employees and workers who receive regular payments in addition to their basic salary. Previous Bulletins have provided guidance to businesses in light of the recent decisions that employees and workers should receive their "normal remuneration" during periods of holiday.

The case of Lock v British Gas Trading, which is considered in detail in our October 2014 edition, is concerned with whether commission payments should be taken into account for the purposes of calculating holiday pay. In May 2015, British Gas confirmed that they have lodged an appeal against an employment tribunal's decision that Mr Lock's holiday pay should have been calculated to take into account his commission payments. The EAT's decision is expected in 2016 and it is likely that the EAT will uphold the employment tribunal's decision given that this is based upon European case law.

9. Duty to Inform and Consult – Business Closures

The Court of Appeal is expected to consider when the obligation to collectively consult arises in 2016 in the case of USA v Nolan.

This long running case arose following a decision by the US Government in 2006 to close a US army base in Hampshire which resulted in 200 job losses. Ms Nolan brought a claim against the USA that it had failed to comply with its obligations to collectively consult under the Trade Union and Labour Relations (Consolidation) Act 1992. The claim was upheld by the employment tribunal and subsequently appealed.

In July 2015, the Supreme Court held that the USA was obliged to collectively consult with staff

about the closure of the base and the case was remitted back to the Court of Appeal to consider whether the USA had in fact complied with its duty to collectively consult.

It is hoped that the Court of Appeal will provide guidance about when the duty to collectively consult arises in a business closure situation. At the current time it is not clear from the case law as to whether the duty arises when an employer is contemplating making a decision that will lead to the workplace closure or whether the duty only arises once the decision has actually been made.

10. Dyslexic Employee Wins Discrimination Case

Meseret Kumulchew a barista at a Starbucks in Clapham suffered discrimination in her role after she was wrongly accused of falsifying documents. Ms Kumulchew made mistakes in her role due to her difficulties with reading and writing. Yet instead of making reasonable adjustments to Ms Kumulchew's duties as per her request, her management instead demoted her and asked her to retrain which caused her personal anguish.

The Chief Executive of the Dyslexia Association is quoted as saying "While we cannot comment on individual legal cases al organisations must make reasonable adjustments for those with disabilities, including dyslexia, under the Equality Act 2010. They should have appropriate policies in place and make sure there are measures to avoid discrimination including in the recruitment process, the work environment and colleague reactions."

So what adjustments can an employer make to help a dyslexic person? Ms Kumulchew's complaint was that she was not given adequate time or support to finish her tasks which her management could have resolved with relatively simple adjustments but chose not to. The employer could have made some small adjustments to prevent such a complaint and to assist a colleague with the condition as follows.

In writing:-

- do not use italics, underline text or write completely in capitals;
- keep lines short and increase the text size and spacing where possible;
- use bold to highlight key points;
- do not justify text.

At work:-

- keep the workplace as calm as possible e.g. ideally away from ringing telephones or busy thoroughfares;
- a second computer may help to declutter the desktop and more easily concentrate on tasks;
- recognise that they may need more time or notice to complete tasks than their colleagues.

Without the right support a person with dyslexia can suffer from low self-esteem and a loss of confidence yet such an employee with the disability may bring an unconventional and beneficial perspective to the business.

11. Apprenticeships Levy

The Government has published draft legislation to introduce the apprenticeship levy which is expected to come into force in April 2017. The levy is on UK employers to fund new apprenticeships. The levy will be charged at a rate of 0.5% of an employer's wage bill. Each

employer will receive an allowance of £15,000 to offset against their levy payment. This means that the levy will not be payable by employers with a payroll under £3 million.

Under the proposed apprenticeship levy, employers will receive a Government payment equal to 10% of their monthly apprenticeship levy contributions that will be available for them to spend on apprenticeship training.

From 6 April 2016 employers of apprentices aged under 25 years old shall be exempt from payment of secondary Class 1 (employers) National Insurance contributions on earnings up to the Upper Earnings Limit for those employees, which is currently £827.00 per week or £43,000 per year. The change effects apprenticeships falling within the relevant statutory framework for England, Wales, Scotland and Northern Ireland and evidence between the employer, apprentice and training provider is required for employers wishing to apply for the relief. Alternatively, in England and Wales, proof of government funding of the apprenticeship may be regarded as sufficient evidence of the same.

12. Disability Discrimination - 'Meaning of 'Day to Day' Activities

An individual will be disabled for employment law purposes if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to do normal day to day activities.

In this case (Banaszczyk v Booker Ltd) the Claimant, Mr Banaszczyk, was employed as a picker in a distribution centre. It was his job to select cases and to lift and move cases by hand for loading onto pallet trucks. Following a car accident Mr Banaszczyk developed a back condition. There was occupational health evidence that this back condition impaired his performance in that he was unable to meet the "pick rate". The pick rate was a target picking speed laid down by the employer. The Claimant had been found not to be disabled at a preliminary hearing. The Employment Judge accepted medical evidence regarding the Claimant's long-term back condition and considered that it did not have a substantial adverse effect on his carrying out 'normal day-to-day activities' as its impact was limited to manual lifting of items of up to 25kg at work, which the Employment Judge did not agree was a 'normal day-to-day' activity.

The Claimant appealed to the Employment Appeal Tribunal. The EAT disagreed with the Employment Judge noting that the scope of 'normal day-to-day activities' extended to warehouse work and that the substantial adverse effect was that the Claimant was by reason of his back condition significantly slower in carrying out this activity. The "pick rate" imposed by the Respondent was not the activity but it was potentially a barrier which interacted with the Claimant's disability to hinder his full participation in working life.

The EAT cautioned against regarding a work rate, such as a warehouse 'pick rate', as an impaired activity, e.g. a target of moving 210 cases per hour, but rather to look at the impairment of the activity itself, e.g. the lifting and moving of cases.

This case provides further guidance to employers and employees about the circumstances in which an employee may be regarded as disabled.

13. Fit for Work Scheme

This scheme has up to now been only available via an employee's GP or an Occupational Health Service. However Employers can now access the scheme and its services directly.

Fit for Work provides advice to employers_to help support your employees when a health condition is affecting their job. This might involve providing information on the type of adjustments which could help them stay in or return to work, or more general work related health advice.

Fit for Work provides a referral to an occupational health assessment for your employees who have been absent from work for over four weeks due to sickness. Employees will be contacted within two working days of a referral by their GP or their employer. They will receive an assessment by an occupational health professional. This assessment will usually take place over the telephone.

The assessment will seek to identify all potential obstacles preventing the employee from returning to work (including health, work and personal factors) and involve agreeing a plan designed to address each obstacle to enable a safe and sustained return to work.

The Return to Work Plan will reflect the assessment and provide advice and recommendations for interventions to help the employee return to work more quickly. Subject to the employee's consent at all stages, the Fit for Work case manager may contact you to help form the Return to Work Plan. You will subsequently be provided with the Return to Work Plan in order to inform you of the recommendations.

The decision about whether to implement any recommendations made in a Return to Work plan remains with the employer and the employee. Alternatively, a decision may be a matter for the employee's GP, depending on the nature of the recommendation.

Legislation allows you to accept the Return to Work Plan as evidence of sickness absence in exactly the same way as a GP fit note. You do not need to ask your employee to obtain further fit notes.

The contact point for employers in England and Wales is www.fitforwork.org or 0800 032 6235.

14. Working Time Regulations Amendment for Mobile Workers

The European Court of Justice, in a recent case gave the judgement that mobile workers who have no fixed place of work, and spend time travelling from home to the first and last customer should have this time considered as working time.

The Court added that because the workers are at the employer's disposal for the time of the journeys, they act under their employer's instructions and cannot use that time freely to pursue their own interest. Acas is assessing the impact of this judgement on workers and employers in Great Britain and will provide more detailed guidance when it is available.

Employers and employees should be aware that this may have an impact on breaks if the working day is extended as a result of travelling time. It is also worth checking employment contracts to see what they say about travelling time.

15. Vicariously Liable for an Employee's Physical Assault

The Supreme Court has ruled that supermarket chain Morrison's is vicariously liable for an employee's physical assault on a customer. The ruling has not changed the law but it does indicate that there is now a broader definition of an employer's accountability for their employee's actions.

Mr Amjid Khan, at the time an employee at a Morrisons petrol station in Birmingham, verball and physically assaulted Mr Ahmed Mohamud in an unprovoked attack whilst at work in 2008. Mr Mohamud stopped at the petrol station and asked Mr Khan if he could print some documents for him from a USB stick. Mr Khan responded with verbal and physical abuse before following Mr Mohamud to the forecourt. CCTV captured Mr Khan punching him to the ground before subjecting him to a "brutal attack involving punches and kicks".

Mr Mohamud claimed that the attack left him with head injuries and psychological trauma. His family argued that that the law should regard Mr Khan as "wearing the badge" of Morrisons and so "representing its brand standards". Morrisons, which had already dismissed Mr Khan and offered to pay a settlement figure, successfully disputed the claim in the lower Courts. Yet a panel of five Supreme Court justices ruled against the supermarket as it was wrong "to regard Mr Khan s having metaphorically taken off his uniform the moment he stepped out from behind the counter".

They also ruled that when Mr Khan followed Mr Mohamud to his car and told him "not to come back to the petrol station" he had been giving an order and "purporting to act about his employer's business".

Being vicariously liable means that the employer assumes responsibility for the employee at fault and a two stage test must be satisfied to establish whether this can be the case:-

- Is there a relationship capable of giving rise to vicarious liability?
- Is the connection between the employment and the wrongful act by the employee close enough that it be just and reasonable to impose liability on the employer?

The first component is relatively easy to meet as there was a clearly defined employment relationship. Focusing on the second component, the Supreme Court concluded that whilst Mr Khan's actions constituted a gross abuse of his position, it was still in connection with the business of his employment which was to serve and interact with customers.

Whilst the legal test has not changed following this case, the basis for future claims has arguably widened. The prospect of an employer being held liable for their employee's behaviour has increased.

In Cox v Ministry of Justice looked at a situation where an employee was caused a personal injury by a non-employee working with her in a prison kitchen. In determining that the claimant could recover damages from the Ministry of Justice, the Supreme Court concluded that her employer was vicariously liable because the non-employee had a relationship with them which 'akin to employment' and so very much a part of the work, business and organisation of the prison that it was right to make the employer answer for his negligence. Furthermore, the risk of the injury occurring was caused by the employer in assigning responsibility to the wrongdoer/ non-employee.

The recent caselaw is helpful in that it gives further clarification of when an employer is vicariously liable. Going forward, businesses will find it harder to argue that the aggressor was on 'a frolic of his own' to avoid liability for the violent actions of their employees.

Although it appears to leave employers vulnerable to claims where customers are assaulted by employees, or employees are assaulted or harassed by their colleagues/ co-workers this is not quite the case. The Supreme Court was mindful to limit such liability, including to circumstances

where there was a close connection between the action of the worker and the field of activities assigned to him. In reality, each case will be determined by its own facts thus enabling the law to maintain levels of protection for the victims of torts in cases where vicarious liability is argued and it is just and equitable to do so, but also protecting employers from a floodgate of claims.

16. Informal Exchange of Emails - a Variation of Terms of a Contract

In the case of C&S Associates UK Limited v Enterprise Insurance Company PLC the High Court held that an informal exchange of emails can constitute a variation of terms of a contract even where a contract term provided for variation to be in writing and signed by or on behalf of both parties.

In this case the claimant handled motor insurance claims for the defendant. The contract was terminated by the defendant on the basis of breach of contract and the claimant brought a claim for wrongful termination of the contract. The main issues in dispute related to the question of breach of contract and the variation of the contract.

The relevant contract clause stated: "Any variation of this Agreement shall not be effective unless made in writing and signed by or on behalf of each of the Parties to this Agreement.

The Court held that the requirement for a signature was satisfied by an electronic signature and that it did not require paper documents or both parties' signatures on the same document. The Court also concluded that signature blocks on emails did satisfy the terms of the clause providing that other requirements of contract formation and variation (such as intention to create legal relations) were also present.

The Court took the position that the parties did intend to be bound by the exchange of emails, even though they also intended to record the agreement in a formal contract.

17. Right to Work Checks and Prevention of Illegal Working for Overseas Nationals

The Home Office has recently published a guidance note on checking biometric residence permits (BRPs) which includes a section for employers reminding them of their responsibility to prevent illegal working; and the right to work checks which should be carried out.

The new Home Office guidance note suggests a number of further additional checks employers should carry out to determine whether or not a workers biometric residence permit is genuine. The additional checks are intended to be easily added to those already required to be undertaken by employers and does not replace them. On presentation of a biometric residence permit, if the employer carries out the additional checks it is likely to demonstrate the employers commitment to the prevention of illegal working and provide additional protection for their business. In order to benefit from the statutory defence against payment of a civil penalty for employing a person who has no right to work in the UK, employers must continue to check applicants and employees right to work in accordance with the Home Office's published guidance. If in doubt, an employer can access the Home Office BRP checking service online.

The update suggests that when an employee or potential employee presents a BRP, in addition to general checks, the employer should also:-

- **Examine the Permit** to check if it is clean and in good condition.
- **Check the Permit Number** which is displayed on the front of the permit in the top right hand corner. The number should begin with two letters followed by seven numbers. The number should not be raised.

- **Check the Holder's Image** this should always be in grey-scale. As always, employers should check the photograph to ensure that it is consistent the appearance of the individual.
- **Check the Tactile Feature (on the back of the BRP)** the back of the BRP should have a raised design, which incorporates the four national flowers of the UK. This can be seen by shining a light across the permit and/or by running a finger over the design.
- **Feel the Permit** it should be thicker than a photo card driving licence, it will make a distinctive sound when flicked and should not be folded or bent.
- **Check the Biographical Details** check that the name, date of birth and photographs are consistent with the individual present; and
- **Check the Immigration Conditions** which are shown on the front and back of the permit. Common conditions confirm the number of hours an individual is permitted to work or that they must report to the police.

18. Nicknames and Discrimination in the Workplace

An Employment Tribunal has awarded more than £63,000 to a salesperson nicknamed "Gramps" by his colleagues. The Tribunal found that Mr Dove suffered discrimination in the workplace and was ultimately dismissed because of his age.

Mr Dove was a long-serving salesperson for a jewellery manufacturer before his dismissal at age 60. The Head of sales referred to Mr Dove as "Gramps" both in person, in front of others and by email. Mr Dove did not complain about the nickname and even referred to himself by it on at least one occasion. After customers suggested that Mr Dove was "old fashioned" or "long in the tooth" some of his accounts were given to the Head of sales. Mr Dove was then dismissed.

Mr Dove successfully claimed age discrimination in the case of Dove V Brown and Newirth Ltd. The Employment Tribunal determined that Mr Dove's employer should have investigated his conduct rather than dismiss him based on the discriminatory attitudes of their customers.

The Tribunal also noted that Mr Dove's nickname highlighted how the employer tolerated ageist attitudes. A Tribunal is likely to look poorly upon a business in which some forms of discrimination are viewed less seriously than others.

This case shows how important it is to put a stop to employee nicknames whenever they run a risk of being discriminatory and it is worth noting that Employment Tribunals also frequently reject the defence that any offensive remarks were only "banter". The reasons for making a comment do not matter if another person finds the comment to be offensive or degrading. The employer must ensure that the workplace is fair (and legal) in all respects and not allow discrimination of any kind to take place.

19. Salary Sacrifice

The Government is considering restricting the range of benefits that may be offered through salary sacrifice schemes. However, salary sacrifice for enhanced employer pension contributions, childcare benefits and health-related benefits will be unaffected.

20. Employee Shareholders

A lifetime limit of £100,000 on Capital Gains Tax (CGT) relief available for employee shareholder shares has been introduced. The change applies to shares issued as consideration for entering into an employee shareholder agreement after midnight on 16 March 2016. When the shares are

disposed of, gains up to the lifetime limit will be exempt from CGT. Gains above the lifetime limit will be chargeable to CGT in the normal way.

21. No automatic right to time off for religious holidays

The Employment Tribunal has recently considered the case of Gareddu v London Underground, in which an employee had claimed that it was discriminatory for his employer to refuse him 5 consecutive weeks' annual leave during the summer for him to attend a series of religious festivals with his family in Italy.

In this case, the Tribunal decided that there was no mandatory requirement for the claimant to attend the series of festivals amounting to individual events, nor was there a close enough link between his religious beliefs as a roman catholic, and the need to attend the festivals over a consecutive 5 week period. The claimant himself conceded that his wish to attend could have been met by the holiday being taken in blocks over a similar period.

Although employees do not have an automatic right to time off for religious reason, employers should accommodate requests for annual leave to cover religious occasions where it is reasonable to do so.

In-keeping with the position taken by the Courts, employers should refuse a request only where it has a legitimate business need that can be objectively justified. Where it is not possible to grant an employee's original request, the employer should discuss the options with the employee as it may be possible to come to a compromise. For example, the employee may agree to a reduced period, or to take unpaid time off.

Employers should be mindful of whether their policies, criteria or practices relating to holiday entitlement may be detrimental to staff requiring flexibility in order to engage in their religious practices as this might amount to indirect discrimination.

22. Pensions Auto-enrolment

Are you one of the over one million small businesses who need to deal with pension auto-enrolment as you reach your staging date in 2017?

If you have not yet had a reminder from the Pensions Regulator you probably will very soon. However you are advised to start to go through the process and act now before the product providers reach capacity overload.

Ideally you need to have your arrangements in place at least six months before your staging date and preferably longer. Some scheme will not accept you otherwise!

Auto-enrolment may be more complicated than you think – it is not a one-off issue and will affect your business every month and every year from now onwards. You need therefore to get professional help and advice.

Getting it wrong may be very costly to your business. More information on your position and what you need to do is available from the Pension Regulator or direct from a specialist adviser. The Pensions Regulator will be issuing employers "a little nudge" but you need to check your staging date and get started NOW!

In the fourth quarter of 2015 3,700 companies were issued with Compliance Notices with over

1000 being charged the initial fixed penalty fine. Many were also subjected to further escalating fines costing one company in excess of £25,000.

Some small businesses are feared of the cost of seeking advice but a good adviser will be looking to help you reduce the ongoing costs of implementation of a new scheme going forwards.

The financial adviser must be FCA registered and the key thing is to choose an independent financial adviser (IFA) who will help you avoid the hidden costs of some schemes with monthly fees of up to £100.

Auto-enrolment is coming your way soon so do ensure that you what you have to do in advance of your staging date in order to consider your options and not fall foul of any non-compliance.

23. Restrictive Covenants

Many employers seek to include post termination restrictive covenants in employment contracts in order to protect their business when employees leave. However, such restrictions will only be enforced by the Courts in cases where the restriction goes no further than necessary to protect a legitimate business interest. Where a restriction is drafted too widely, it may be unenforceable as a restraint of trade.

In the case of Bartholomews Agri Food v Thornton, the High Court refused to enforce a restrictive covenant as it was considered unreasonable. The restriction in question sought to prevent the employee from working with any of the employer's customer base or working with a competitor within the company's trading area for a period of six months after the termination of his employment. The High Court refused to enforce the covenants for the following reasons:-

- at the time that the covenant was put in place, the employee was employed in a trainee role and at that time, the employee had no experience or customer base so the Court considered that the restriction was manifestly inappropriate in those circumstances - the Court stated that a covenant that was unenforceable when it was first imposed remains unenforceable regardless of whether the employee is later promoted to a role where it may be regarded as reasonable; and
- the terms of the covenant were drafted too widely and would be unreasonable even after the employee's 20 year career with the employer and the Court pointed out that the clause sought to prevent the employee from dealing with any customer of the employer even in circumstances where the employee had no prior dealings with that customer -the Court noted that the employee had had dealings with just 2% of the employer's customer base and therefore it was not appropriate or fair to restrict him from dealing with the other 98% of customers of whom he had no knowledge or influence.

This case is a useful reminder that employers should carefully consider the terms of restrictive covenants both at the time that they are imposed and during the employment relationship to ensure that they are reasonable, taking into account the employee's role and responsibilities.

In Morris-Garner v One Step, the defendants were the founding director of a company and her partner. The company had been founded in 2002, but in 2006, in secret, the defendants incorporated another company. They then resigned from their positions with the original company and agreed to non-compete and non-solicit restrictive covenants. The new company began trading in 2007 and in 2012 the original company sued for breach of the restrictive covenants.

The starting point with any restrictive covenant is that they are unenforceable as they restrain the employee's right to trade. However, if they are drafted no more widely than necessary for the purpose of protecting the employer's trade secrets and confidential information, connections with clients or stability of the workforce, they may be enforceable. The more senior the employee, the more likely are the courts to consider the covenant reasonable. The above case reminded everyone of courts' unwillingness to enforce such terms and an interesting feature of that case was that even if the restrictive covenant had been reasonable when the employee resigned and started working for a competitor, it had been totally unreasonable when agreed 18 years previously at the start of his employment as a trainee in the field. An action point from that is that the employer would be wise to review its contracts occasionally.

In Morris-Garner v One Step, the first defendant didn't even argue in the High Court that the covenant was unenforceable. Her partner did, claiming she was a mere employee – the court gave that short shrift, as it was clear that the reason for the agreement was that she was the first defendant's civil partner and later her business partner.

The reason why this case is also interesting, and useful for employers, is the remedy awarded by the court. It would have been inherently difficult to identify any particular loss suffered by the company on account of the breaches of the restrictive covenants, so the court awarded what is called (after the principal case on the matter) "Wrotham Park damages": the amount which the company might reasonably have demanded for releasing the defendants from the restrictive covenants before they began in competition. Wrotham Park damages had been seen as a highly exceptional remedy. This case has blown away that exceptionality requirement.

Employers should take care with restrictive covenant, especially in the drafting. But as this case shows, employers need not forget about them entirely, and if breached there may be useful remedies.

24. Staff Handbook terms were incorporated into contract

It is a general principle that a contract of employment may only be varied in accordance with its terms or with the agreement of the parties.

In the case of Department of Transport v Sparks, the Claimants argued that terms set out in their staff handbook relating to absence management were contractual and could not be varied without their consent. To decide whether a proposed change will be a variation of the employment contract it is necessary to identify the contract terms.

Some terms may be incorporated into the contract from the Staff Handbook or other sources. Such terms will be incorporated if the wording of the contract of employment provides for incorporation of particular provisions and the particular term is "apt for incorporation". Previous case law has indicated that provisions that set out guidance or aspirations are unlikely to be apt for incorporation whereas clear statements that confer a right on employees may well be apt for incorporation. In the event of a dispute as to the construction or interpretation of a contract, the parties may apply to the Court for a declaration.

In this case, 7 claimants were employed by different agencies for which the Department for Transport (DfT) was responsible. Each agency had their own Staff Handbook that was based on a standard form across the whole of the DfT. The relevant provisions for absence management were fundamentally the same but there was a variation between the agencies in the number of days of absence required before a formal absence procedure could be triggered.

The Handbook was divided into two parts. Part A was expressed as forming part of the employees' contracts of employment. Part B contained guidance and was not to be incorporated. The absence management procedures appeared in Part A of the handbook.

The DfT was required to undertake consultation before it could make any changes to employees' contracts. If agreement was not reached through consultation, the DfT could make unilateral changes only if they were not detrimental to the employees.

Following unsuccessful negotiations about making changes to the absence management provisions in the handbook, the DfT informed the claimants' trade unions that it would be imposing a new standardised absence management procedure across all its agencies. Under the new procedure, a process would be triggered after five days or three occasions of absence within a rolling 12 month period. This was detrimental to some employees as fewer incidents of absence triggered the formal procedure.

The claimants applied to the High Court for a declaration. The High Court held that the provisions for absence management set out in Part A of the Handbook had been incorporated into the employees' contracts and that the DfT was not entitled to change them unilaterally. The High Court commented that the DfT had intended the whole of Part A to be contractual and while many sections were clearly meant for guidance and therefore not apt for incorporation, the provisions in relation to absence management were sufficiently clear and precise to be incorporated. The DfT appealed and the Court of Appeal dismissed the appeal. The Court commented that whether a provision in a Staff Handbook had been incorporated into individual employment contracts would always turn upon the precise terms of the particular documents in each case. The focus should be on whether the provision was apt for incorporation.

In this case, the introductory words of the Handbook had a "distinct flavour of contractual incorporation". These introductory words and the terms of the absence management provisions indicated that the provisions were designed to confer a right on employees over and above the good practice guidance in the policy section of the handbook. Accordingly the absence management provisions were incorporated into the employment contracts.

This case highlights to employers the need to ensure that employment documentation such as employment contracts and Staff Handbooks are well drafted to avoid any confusion about the terms of the employment contract. Employers would be well advised to take advice prior to making changes to employment documentation.

25. Loss of NICs employment allowances for employers who employ illegal workers

Since April 2014, nearly all employers that pay Class 1 National Insurance contributions on their employees' and directors' earnings have been entitled to an Employment Allowance. The benefit of the Employment Allowance can cause a reduction of up to £2,000 a year off an employer's National Insurance bill. However, as introduced in the Chancellors Budget of March 2016, If an employer is subject to a civil penalty for employing illegal workers they will be denied the NIC Employment Allowance for one year. These measures are expected to apply from tax year 2017 – 2018 and exclusions will come into force from 2018 to 2019.

26. Extension of Shared Parental Leave and Pay to grandparents

In October 2015, in acknowledging the role played by grandparents in the support and provision of childcare to working families, the Chancellor announced that shared parental leave and pay will be extended to working grandparents. The fine detail of the proposal is still being worked out but

the consultation on how Shared Parental Leave and Pay will be extended to working grandparents is expected to be published in May 2016 as announced in the Chancellors most recent Budget.

The consultation will also cover ways of streamlining the Shared Parental Leave and Pay system, including eligibility requirements and notification systems.

27. Ill health dismissals and the ACAS Code

In the case of Holmes v QinetiQ, for the first time the Employment Appeal Tribunal (EAT) has addressed the question of whether or not the employment tribunal's power to increase or decrease an award of compensation by up to 25% for failure to comply with the requirements of the ACAS Code of Practice on Discipline and Grievances (the ACAS Code) extends to dismissals on grounds of ill health.

The Claimant was dismissed on grounds of ill health on the basis that he was no longer capable of performing his job. He brought claims for disability discrimination and unfair dismissal.

The employer conceded that the dismissal was unfair because of a failure to obtain an up to date occupational health report prior to dismissal. The Claimant contended that the ACAS Code applied and that he was entitled to an increase in compensation of 25%.

The Employment Tribunal ruled that the ACAS Code only applies to dismissals involving culpability and that no increase should be made.

The EAT agreed with the employment tribunal that the ACAS Code did not apply. The EAT held that the ACAS Code applies to all cases where an employee's alleged act or omissions involve culpable conduct or performance on their part that requires correction or punishment. Whilst this would include misconduct and poor performance, the EAT stated that it was difficult to see how ill health dismissals fell into this category.

Whilst this case confirms that employers are not obliged to follow the provision of the ACAS Code in cases where an employee is dismissed for ill health, employers should bear in mind that the ACAS Code sets out standards of best practice which may be applicable in such cases and that employers are still required to act reasonably in such cases. Employers should also be alert to the fact that the position would be different where the ill health leads to a disciplinary issue such as a failure to comply with sickness absence procedures. The ACAS Code would apply to any related disciplinary process.

28. Prohibition on Headscarf in the Workplace

The Advocate General has given an Opinion that a Belgium company's dress code banning employees from wearing visible religious, political or philosophical symbols in the workplace, which was used to prevent a Muslim employee from wearing a headscarf, did not amount to direct discrimination.

Ms Achbita began working for G4S in 2003. Ms Achbita is a Muslim. In April 2006, she began to wear a headscarf at work despite a company rule which prohibited the wearing of any visible signs of political, philosophical or religious beliefs.

Ms Achbita was dismissed for breach of the rule and brought a claim for discrimination based on religion and belief in the Belgian Courts. The Belgian Labour Court held that there had been no discrimination. During an appeal of that decision, the Belgian Supreme Court stayed the

proceedings and referred a preliminary question to the ECJ, asking whether the headscarf ban amounted to direct discrimination in circumstances where a dress code prohibited all employees from wearing outward signals of political, philosophical and religious beliefs at work.

Advocate General Kokott gave her opinion that such a ban does not constitute direct discrimination based on religion if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace.

However, such a ban may amount to indirect discrimination. The Advocate General thought that such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer provided that the employer acted proportionately. In that connection, the Advocate General noted that the following factors should be taken into account:-

- the size and conspicuousness of the religious symbol;
- the nature of the employee's activity;
- the context in which the employee has to perform that activity; and
- the national identity of the Member State concerned.

Many commentators have been surprised by the comments of the Advocate General in this case. In particular, the Advocate General does not take account of the fact that some religions place more emphasis than others on visible symbols and a great deal of importance has been placed on the concept of "neutrality".

29. "Brexit" Possible Employment Implications?

While many businesses across Britain will be putting into place their prepared contingency plans in case of a Brexit result, some will now be trying to draw up those plans, as many businesses have been following a 'wait and see' approach. Although there are many uncertainties, it is expected that there will be a two year transition out period as Britain finalises its divorce with the EU. Trading conditions will not change straight away.

A priority for businesses will now be to begin lobbying government and Brussels for a business-friendly outcome to the country's split with the EU. Pro Brexit businesses may be celebrating the prospect of a split from EU rules and regulations, but as a Brexit becomes a reality, the landscape for UK business is expected to change significantly.

The possible impact of a Brexit on UK industries as predicted in various quarters may be as follows:-

- financial services are likely to be hit if there is an end to the existing 'passporting' rights that have allowed banks and other groups with their headquarters in London to be able to freely do business with the EU;
- the farming industry is expecting to be profoundly hit and there are concerns that many family farms will now no longer be viable;
- companies like retailers, automotive suppliers and the food and beverage sectors that rely on imports, would be hit hard and face import tariffs into the EU - however some food supplies could be sourced more cheaply from outside the EU;
- UK employers could see labour costs significantly increase, if the free movement of workers from around Europe is either reduced or scrapped.

While the country, Europe and the rest of the world comes to terms with the results of the vote, how much will change for UK businesses in the long term will greatly depend on what

arrangements Britain secures with trading partners inside and outside of the EU. Until the details of the UK's exit have been determined, the direct legal implications for UK businesses are unclear. Once there is more clarity on the impact of "Brexit", the likely implications on employment law for employers in the UK may be reported with more certainty.

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