Welcome

With April comes not only spring and all things egg-related, but some important changes to employment law rates.

Here is a reminder of the main ones:

National Minimum Wage
Workers aged 25 and over - £7.50
Aged 21 to 24 - £7.05
Aged 18 to 20 - £5.60
Aged 16 to 17 - £4.05
Apprentice rate - £3.50

Statutory maternity, paternity, adoption, and shared parental pay - £140.98 or 90% of the employee's average weekly earnings, whichever is lower.

Statutory Sick Pay - £89.35

A week's pay (for redundancy and unfair dismissal basic award calculations) - £489

Maximum compensatory award - £80,541

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Headscarf Ban Wasn't Direct Discrimination

Achbita v G4S Secure Solutions

Do you remember the case of Samira Achbita? She was the Muslim employee of G4S, dismissed after insisting on wearing a headscarf to work. Wearing the headscarf went against the company's 'neutrality' policy – in effect, no one was allowed to wear any visible sign of political, religious or philosophical belief while at work.

The Court of Justice of the European Union (CJEU) has now given its judgment. It is not direct discrimination to prohibit the wearing of a headscarf where that prohibition comes from an internal rule that does not allow workers to wear any political, philosophical or religious sign in the workplace. Ms Achbita was not treated differently; all employees were required to dress neutrally.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

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We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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But, it might be indirect discrimination. That is if the rule puts people of a particular religion or belief at a particular disadvantage. An employer may be able to justify the discriminatory treatment by showing that they are pursuing, in an appropriate and necessary way, a legitimate aim – for example, political, philosophical or religious neutrality in its relations with customers.

The CJEU gave some guidance on this:

- An employer can legitimately aim to project an image of neutrality towards its customers where the only workers involved are those who come into contact with customers.
- It is ok to ban the visible wearing of signs of political, philosophical or religious beliefs in order to ensure that a neutrality policy is properly applied if that policy is genuinely pursued consistently and systematically.

It is for the national court to establish if G4S had established a general and undifferentiated policy, and if the company's ban only covered customer-facing workers (in which case the ban would have to be strictly necessary in order to achieve the aim). It will also be important to establish whether or not G4S could have offered Ms Achbita a job that did not involve visual contact with customers, rather than dismissing her.

Headscarf Decision #2

Bougnaoui and another v Micropole SA

On the same day as Achbita, the CJEU decided another case about headscarves.

Ms Bougnaoui, a Muslim, was employed in a customer-facing role. A customer complained to the company about Ms Bougnaoui wearing her headscarf while on a site visit. She was eventually dismissed for continuing to wear it.

The CJEU considered whether, if Ms Bougnaoui had been discriminated against, that treatment could be justified by the 'genuine occupational requirement' defence. Could an employer's willingness to take account of the wishes of a customer no longer to have services delivered by a worker who wore a headscarf be considered to be genuine and determining occupational requirement?

The answer is no. Where a customer has said that they don't want to work with someone who wears a headscarf, that does not amount to an occupational requirement. A genuine occupational requirement is objective; it's about the essentials of the job and the way it is carried out. Taking account of this sort of objection from a customer introduces subjectivity. And dismissing a worker for refusing to remove her headscarf in these circumstances would be direct discrimination.

The End of the Pipeline for British Gas

Lock v British Gas

It's been a long time coming. But we have the final word on one particular aspect of holiday pay calculations: holiday pay should include the results-based commission that a worker would ordinarily earn.

We can now say that with certainty (at least until something changes) because British Gas has been refused permission to appeal that decision reached by the Court of Appeal last year. It means that workers who earn commission should now not miss out when they take annual leave.

It remains to be seen what effect Brexit might have on this.

Long-Term Absence Dismissal

O'Brien v Bolton St Catherine's Academy

Ms O'Brien was a teacher at the Academy. She took a short period of time off work after having been assaulted by a pupil. That incident and some other factors continued to affect her, culminating in absence for stress and diagnoses of anxiety, depression and post-traumatic stress disorder.

She was dismissed after being off work for more than a year. There had been no certainty about a likely return to work, and Ms O'Brien was found to have been uncooperative during the employer's attempts to establish this. And although she produced evidence on the day of her internal appeal that she was fit to return, the employer viewed this with some scepticism. It was considered to be an attempt by Ms O'Brien to get back to work before her condition was fully treated.

The tribunal found that dismissal was excessive because:

a) the Academy hadn't adduced satisfactory evidence about the adverse impact which Ms O'Brien's continuing absence was having on the running of the school; and
b) in the absence of that evidence it was reasonable to wait 'a little longer' to see if she would be able to return to work, particularly in the light of the encouraging evidence available at the appeal hearing.

The majority of the Court of Appeal upheld that decision, but described this as a 'borderline' case. An employer will not be expected to hold on forever, the Court pointed out:

"The argument 'give me a little more time and I am sure I will recover' is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis…and where the evidence relied on at the appeal hearing was only produced at the day of the hearing and was not entirely satisfactory."

It is clear that employers will be expected to thoroughly consider and respond to all evidence that emerges during the absence management process, including at the appeal stage. This might mean commissioning fresh medical evidence, or at least getting occupational health input. Also, remember that good evidence of the adverse effect that a person's absence is having on your organisation will be important in justifying a decision to dismiss.

Principal Purpose for TUPE

Tees Esk & Wear Valleys NHS Foundation Trust v (1) Harland & others (2) Danshell Healthcare Ltd

This case was about the application of TUPE and, in particular, whether there was a service provision change (SPC) so as to transfer employees from the original provider to the new provider. For this to happen there needed to be, immediately before the SPC, an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client.

The client in this case was an individual, known as 'CE', who needed extensive nursing care. The contract for this care was originally provided by the Trust. The employees were part of an organised grouping looking after CE, but as CE's condition improved, fewer people were needed. The team was retained, and it kept its identity, but the Claimants in this case were rostered to provide care for other service users.

That was the position when Danshell took over the contract. Danshell agreed to employ seven of the employees, but most of them went on to resign or be made redundant. Unfair dismissal claims followed.

During a preliminary hearing, the tribunal found that there was a change in the provision of the service (care for CE) from the Trust to Danshell. It also held that there was an organised grouping of employees who had been put together to provide that service, and that group maintained its identity. However, the principal purpose of the grouping had been diluted; the employees didn't just work for CE, but for others too. So, there was not a service provision change.

Had the tribunal got the 'principal purpose' point wrong? Should it have looked at the reason the group was put together in the first place, rather than at the actual work the employees were doing around the time the new service provider took over?

No, said the Employment Appeal Tribunal. It was right for the tribunal to have focused on the situation immediately before Danshell took over the contract. Although 'principal purpose' doesn't have to mean 'the only purpose', the tribunal was entitled to find that the dominant purpose of the organised grouping was, at the time Danshell took over, the provision of care to a range of service users and not just CE.

When Notice of Termination Takes Effect

Newcastle Upon Tyne NHS Foundation Trust v Haywood

Ms Heywood was notified that she was at risk of redundancy. During the consultation process, the fact that she would be on annual leave was brought up – she was due to be away from work between 19 April and 3 May.

The employer wrote to Ms Haywood on 20 April, confirming her redundancy. In fact, it wrote three letters to her on that date:

- The first was sent by recorded delivery. It was collected on Ms Haywood's behalf from the sorting office on 26 April, and she read it when she got back from Egypt on 27 April.
- The second was sent by regular mail.
- The third was attached to an email sent to Ms Haywood's husband. He read it on 27 April.

The question was: when did the notice of termination take effect? This mattered because of Ms Haywood's age. She turned 50 on 20 July. If her contractual 12 weeks' notice expired before then, her pension entitlement would have been lower then if it expired after that date. The key date was 26 April. Had notice of termination taken effect by that date?

No, said the High Court. Notice of termination took effect when Ms Haywood read the letter on 27 April. She was therefore entitled to the higher pension figure.

The majority of the Court of Appeal agreed. Where the contract doesn't say when notice of termination takes effect, the key date is the date on which the notice is actually communicated to, as opposed to being posted to or received by, the employee. Notably, sending the letter to Ms Haywood's husband's email address didn't amount to giving notice of termination. Ms Haywood hadn't given permission for that email address to be used, and that wasn't altered by the fact that she had used that email address to communicate with her employer a few days earlier.

So, notice of termination of employment in this context only takes effect and sets the clock ticking once the employee has read it. An employer who posts a letter to an employee's home might not know when that event happens because even if the letter has been delivered, it cannot be assumed that the employee will have personally received it. Checking that an employee will be at home during a particular timeframe may be one way around this, but even that will not give complete certainty that the message has got through. Giving the notice personally is probably the surest way.

And Finally...

Wise Words

A University has been in the news for reportedly 'banning' the use of certain words. Cardiff Metropolitan has faced criticism from some who perceive this to be a restriction on freedom of speech.

But the University has explained that this is about encouraging the use of inclusive language, and that its Code of Practice on this (which suggests using 'disabled people' instead of 'the disabled', and gender-neutral terms like 'businessperson' and 'chairperson', for example) 'makes no demands, bans nothing and carries no sanctions'. It is to do with promoting fairness and equality by raising awareness about the effects of potentially discriminatory vocabulary, the University says.

To put this in its wider context, it makes sense for all organisations to have an ear to the ground. Listen to the language that is being used around you and think about how best to deal with any issues as part of your responsibility to manage an increasingly diverse workplace. We know from the pages and pages of employment tribunal decisions that words can cause offence, and their use can be discriminatory. People say the wrong things, they use outdated expressions – sometimes without realising. And there is no doubt that equality and harmony are far easier to achieve if there is a shared understanding of what is and is not acceptable.

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