

CHILTERN HR

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NEWSLETTER



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1. **Biased grievance procedure could be a breach of trust and confidence**

The Employment Appeal Tribunal has ruled that a failure to provide an impartial grievance appeal procedure may amount to a breach of the implied term of trust and confidence.

What does this mean?

In this case both the grievance and a subsequent appeal were handled by the same regional managing director. The Employment Appeal Tribunal said that failure to allow appeal of a grievance decision to a different manager may itself amount to breach of the implied term of trust and confidence but it will depend on the facts of a particular case. It noted that the right to an impartial appeal is an important feature of the Acas Code and commented that it was 'not easy to see' why the employer in this case, Aldi, was not able to provide an impartial hearing by a manager not previously involved. The matter has been remitted to the tribunal who will have to decide whether on the facts of this particular case the failure to provide an impartial grievance appeal procedure amounted to a breach of the implied term of trust and confidence.

What should employers do?

Wherever possible, employers should ensure that appeals of grievance decisions are heard by a person who was not involved in the original decision.

Reference: Blackburn v Aldi Stores Limited

2. **Guidance for employers who require criminal records checks**

The Disclosure and Barring Service has published guidance for employers following the introduction of a filtering system under which, certain old and minor cautions and convictions are no longer subject to disclosure.

The guidance

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239498/Filtering_guidance_v1_5.pdf explains the changes in the law which were introduced in May.

It also recommends that job application forms be amended so that employers ask the right questions and employees give a legally accurate answer. It encourages employers to include the following wording in their standard application forms:

“The amendments to the Exceptions Order 1975 (2013) provide that certain spent convictions and cautions are ‘protected’ and are not subject to disclosure to employers, and cannot be taken into account.”

Guidance and criteria on the filtering of these cautions and convictions can be found on the Disclosure and Barring Service website <https://www.gov.uk/government/news/disclosure-and-barring-service-filtering> .

The Ministry of Justice suggests that employers use the following question as a template for their own processes when they are asking about previous criminal offences:

‘Do you have any convictions, cautions, reprimands or final warnings that are not ‘protected’ as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in 2013)’.

3. Changes to the Immigration Rules

The Government has announced a number of changes to the Immigration Rules, which will come into effect on 1 October.

What does this mean?

The changes include the removal of the English language requirement for intra-company transferees, changes to make it easier for graduate entrepreneurs to switch into Tier 2, waiving share ownership restrictions for some senior staff and allowing some students to work as interns under the Tier 5 Government Authorised Exchange scheme.

Full details of the changes can be found here

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2013/hc628.pdf?view=Binary>

4. Proposed changes to TUPE

The Government has announced that changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006, which were planned for October, are now expected to come into force in January 2014.

Full details of what is planned will be available when the Government lays the new regulations before Parliament, which is expected to be in December.

5. Refusal of alternative work upon being made redundant

The Court of Appeal has confirmed the correct test to use when assessing whether a redundant employee was reasonable in refusing an alternative job.

What does this mean?

The correct test for assessing whether such a refusal was reasonable or not depends on factors personal to the employee and should be assessed subjectively from the employee’s point of view at the time of refusal.

A person’s desire if possible, to take advantage of redundancy rights does not necessarily defeat their claim. An employee may be conscious of the benefits of a redundancy payment but still give adequate consideration to a job offer.

What should employers do?

Employers wishing to withhold redundancy pay on the basis that an employee has turned down an offer of alternative work should take specific legal advice before doing so.

Case reference: Devon Primary Care Trust v Readman

6. Repeal of third-party harassment provisions

On 1 October the provisions in section 40 of the Equality Act 2010 which govern third-party harassment will be repealed.

What does this mean?

This means that there will no longer be a separate head of liability for employers where their employees are harassed by third parties except for contraventions before 1 October.

However, employees may still be able to bring a claim under the general harassment provisions of the Equality Act, a claim for constructive dismissal, a claim for negligence or a claim under the Protection from Harassment Act 1997.

7. Employer did not discriminate against Christian worker who was asked to keep his views to himself

The Employment Appeal Tribunal has upheld a tribunal's decision to dismiss a Christian employee's claims after he was instructed to keep his personal and religious views to himself and not impose them on others.

What does this mean?

An employer who asks a member of staff of a particular religion to keep their religious views to themselves does not discriminate against that member of staff as long as the same restrictions would be applied to those of other religions as well as non-believers.

What should employers do?

If an employer wishes to restrict how staff express their religious views it should make clear that this would apply equally to the views of those of other religions or no religion.

Case reference: Drew v Walsall Healthcare NHS Trust

8. Gangmasters licensing

Regulations excluding certain organisations from the requirement to hold a gangmasters licence come into force on 1 October.

What does this mean?

The following are expected **not to need** a licence after 1 October:

- Recognised Apprenticeship Training Agencies supplying workers enrolled in apprenticeships operated according to a defined frame work (not a blanket exemption for everyone supplying apprentices);

- Businesses which have an exclusive right to manage and harvest shellfish on a particular stretch of coastline, which will also cover the use by such businesses of labour for the processing and packaging of such shellfish. Supply of labour to gather wild shellfish from coastal areas will still have to be licensed;
- Land agents whose principal interest is in land management rather than the supply of labour, although anyone supplying workers or services via a land agent will still need to hold a valid licence where appropriate;
- Charitable and civil society organisations using volunteers;
- Public and quasi-public bodies who deliver return to work schemes for the unemployed on behalf of Government or its agencies;
- Those who supply and use workers to undertake commercial, amenity and conservation forestry work;
- Farmers who enter into arrangements with a third party to raise crops and livestock where ownership of the crops and livestock remains with the third party.

What should employers do?

Employers operating in affected sectors, particularly agriculture, shellfish gathering and associated processing and packaging should take specific legal advice if in any doubt whether they require a gangmaster's licence.

Reference: The Gangmasters Licensing (Exclusions) Regulations 2013

9. Fee remissions in courts and tribunals

On 7 October a new standardised fee remissions system for courts and tribunals will come into force, which will apply to fees paid, or applications for remissions received, on or after 7 October.

What does this mean?

Eligibility for remission, or part remission, of a fee will be based on two tests, a disposable capital test and a gross monthly income test. The gross monthly income test applies a series of thresholds and takes into account the income of the person's partner if they are a couple and the number of dependent children they have.

10. An employment contract may be governed by the laws of the country other than the one where the employee works

The European Court of Justice has ruled that, in the absence of a governing law clause in an employment contract, it is open to a national court to decide that the contract was governed by the laws of a country other than the one in which the employee worked.

What does this mean?

A national court can decide that the applicable law is that of a country other than the one in which the employee works if the contract is more closely associated with that other country.

The fact that one country's laws may be more favourable to an employee does not mean that the laws of that country should automatically be applied.

What should employers do?

Employers who carry out business in more than one country should ensure that their contracts of employment specify the governing law and take specific legal advice about the legal status of, and payment and other arrangements for, employees who work across borders.

Case reference: Schlecker v Boedeker