CHILTERN HR

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NEWSLETTER

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1. Approved English Apprenticeships

On 26 May legislation came into force aimed at simplifying the legislative framework governing apprenticeships in England.

The legislation introduces an 'approved English apprenticeship', which replaces apprenticeships under the Apprenticeships, Skills, Children and Learning Act 2009 in England (but not in Wales).

Approved English apprenticeships will take place under an 'approved English apprenticeship agreement' or will be an 'alternative English apprenticeship'. Each type will have to satisfy certain conditions which will be specified in regulations to be published by the Secretary of State.

The agreements will have to:

- provide for the individual to work as an apprentice in a sector for which the Secretary of State has published an approved apprenticeship standard;
- Provide for the apprentice to receive training in order to assist the apprentice to achieve the approved apprenticeship standard in the work done under the agreement.
- Satisfy any other conditions specified by the Secretary of State in regulations.

An approved English apprenticeship will be completed once the apprentice has achieved the 'approved apprenticeship standard'. The standards will set a level of skill, knowledge and competency, against which an apprentice will be assessed. Such standards will be created by the Secretary of State, although employers and their representatives will be able to make proposals to the Secretary of State as to the content of a standard.

There will be different standards for different sectors of work but all will include English and mathematics requirements. All new apprenticeships will have to last for at least 12 months.

The standards will be developed over a period of time and the aim is that from the academic year 2017/18 all new apprenticeships will be based on the new standards.

Reference: The Deregulation Act 2015

2. Meaning of 'Establishment' for collective redundancy purposes

The European Court of Justice has ruled that 'establishment' for collective redundancy purposes, means a local unit or entity to which the redundant workers are assigned to carry out their duties.

What does this mean?

It is not necessary to aggregate the number of dismissals in all of the employer's establishments in order to determine whether the threshold for collective redundancy consultation is met. It is also not essential that the unit in question has its own management which can independently affect collective redundancies.

It will be for our national courts and tribunals to determine what a local unit or entity is on the facts of a particular case.

What should employers do?

Employers should always take legal advice when embarking on redundancies.

3. Time spent attending meetings by union representatives

The Employment Appeal Tribunal has held that time spent by union representatives when attending meetings in connection with their union duties will constitute 'working time', under the Working Time Regulations, if the worker is working *and* at the employer's disposal *and* carrying out their employer's activities or duties.

What does this mean?

Being at their 'employer's disposal' does not require workers to be under the employer's specific control and direction in terms of the carrying out of their activities or duties at those meetings but allows for a broader approach. Where an employer has required an employee to be in a specific place and to hold him/herself out as ready to work for the employer's benefit (which might include attending at trade union or health and safety meetings; allowing for a broad understanding of 'benefit') that might be sufficient.

There is no requirement that the activity or duties are solely those for which workers are employed under their contracts of employment. If engaged in activities that are (in the broader sense) for the benefit of the employer, which arise from the employment relationship, and are done with the employer's knowledge, at and in an approved time and manner, that could be sufficient.

What should employers do?

Whether time spent attending union meetings or health and safety meetings counts as working time will depend on the facts of a particular case and, therefore, employers who propose treating such time as non-working time should take legal advice to ensure that they comply with the 48-hour limit on the average working week, the rules on night-work, and the rules on daily and weekly rest breaks and compensatory rest.

4. Employer was entitled to deduct one working day's pay for a one-day strike

The Court of Appeal has held that an employer was entitled to deduct one working day's pay when its teaching staff went on a one-day strike.

What does this mean?

The default position when calculating how much to deduct from an employee's wages who has been on strike is to calculate it as a daily rate of accrual of 1/365 (based on the number of calendar days in a year). However, in this case the employer was entitled to use a calculation of 1/260 because the employees' terms of employment were inconsistent with such an approach.

Their contracts of employment specified their working days to be Monday to Friday (which meant they were contracted to work 5 days a week for 52 weeks a year, a total of 260 working days a year), even though they carried out additional tasks such as marking and preparing lessons in their own time, such as evenings and weekends.

What should employers do?

Employers should take legal advice before making deductions from wages.

5. Employee was fairly dismissed for disobeying an instruction

The Employment Appeal Tribunal has held that an employee was fairly dismissed for disobeying an instruction not to contact the Information Commissioner's Office (ICO) for a second time without approval and that he was not dismissed for whistleblowing.

What does this mean?

Whilst the employee had made a qualifying disclosure, it was not a protected disclosure because the employee's belief in the truth of an allegation relating to a possible breach of data protection law was not reasonable. He had 'jumped the gun' by not taking steps to establish whether the allegation was true.
The employee had argued that the prohibition on contacting the ICO was lawful under the Human Rights Act (the right to freedom of expression) but the Employment Appeal Tribunal declined to determine the issue as he had not raised this argument with the tribunal. It did, however, say that it would have found that the instruction was not unlawful as the prohibition was only for a short duration, while the employer conducted its own internal investigation, and was only a prohibition on contacting the ICO without the consent of his manager.

What should employers do?

Employers should not take this case as a green light allowing them to restrict their employees from contacting external authorities because the restriction in this case was very specific and limited and because the employee in this case did not have the protection of whistleblowing legislation as the disclosure he made was not a protected one. Instead employers should encourage employees to report matters internally.

6. Guidance on handling the issue of disfigurement

The charity, Changing Faces, has published guidance for employers and prospective employers on how to handle the issue of facial disfigurement.

The guidance https://www.changingfaces.org.uk/downloads/recruitmentguidanceforemployers050515.pdf covers facial scars, marks and conditions which affect a person's appearance. It aims to help employers provide a 'fair and equal recruitment process when an applicant has a scar, mark or condition which affects their appearance', outlines legal considerations and provides examples of good practice.

7. TUPE and the duty to make reasonable adjustments

The Employment Appeal Tribunal has said that a disabled employee who objected to the transfer of her employment (as a result of which she was never actually transferred) because she felt that she would be unable to cope with working the increased hours demanded by the potential transferee was not made an 'offer of employment' by the potential transferee and for this reason was not a job applicant who had been discriminated against.

What does this mean?

The underlying premise of TUPE is that an employee's contract of employment continues with the transferee exactly as it has with the transferor. For this reason a transferring employee cannot be regarded as an 'applicant' for the purposes of the Equality Act 2010 (as there is an existing contract of employment) and a transferee cannot be considered to have made 'an offer of employment'.

What should employers do?

Employees should bear in mind that in such a case the employee could have pursued a claim for automatically unfair dismissal by reason of the connection to TUPE or a claim for constructive dismissal. Alternatively, she could have chosen not to object to the transfer and then subsequently brought a discrimination claim against the transferee.