CHILTERN HR

SEPTEMBER 2014 NEWSLETTER

110 Butterfield, Great Marlings
Luton ▪ Bedfordshire ▪ LU2 8DL

T: (01582) 439 795
F: (01582) 439 796
E: philip.ivinson@chilternsolicitors.co.uk
www.chilternsolicitors.co.uk

1. Workers on call away from their place of work were working

The Scottish Employment Appeal Tribunal has held that workers on call do not need to be at the workplace to be 'working'.

What does this mean?

The time spent on call amounted to working time because the employees were obliged to be present and remain in a specific radius of an area determined by their employer and respond within a specific time.

What should employers do?

When determining whether time spent on call is working time or a rest period employers should bear in mind that the distinction between rest and work is whether the place at which a worker is required to be present is or is not determined by the employer. This is because where a worker is obliged to be away from home, or even remain at or within a very close distance from home, that worker's time is much less their own.

2. CFO is prevented from working for competitor for 12 months

The High Court has granted an injunction preventing a company's former Chief Financial Officer from working for a competitor for 12 months.

What does this mean?

The Court decided to grant an injunction because if the CFO worked for the competitor during his 12 month notice period the company would suffer damage for which money compensation would not be adequate.

What should employers do?

Applications for injunctions should not be embarked on lightly as the process is costly and carries significant risks.

3. Employee remained employed during notice period even though he was not paid

The High Court has ruled that an employee who ceased to be paid after he walked out of his job without giving notice remained an employee during the notice period.

What does this mean?

When an employee leaves their job without giving proper notice stating that they will never return, the employer can keep the contract of employment alive, so as to be able to enforce the employee's obligation not to work for anyone else, while simultaneously refusing to pay the employee any wages on the basis that the employee is no longer ready and willing to work for the employer.

What should employers do?

If an employee walks out of their job and refuses to work their notice period if the employer wishes to prevent the employee from working elsewhere during the notice period the employer should make it clear in writing that it considers the employee to remain within its employment during the notice period.

The employer may also wish to consider applying to the court for a declaration that the employee is still employed by them as well as an injunction preventing the employee from working elsewhere during his notice period and, during any subsequent period covered by post termination restrictive covenants, although specific legal advice should be obtained before embarking on this course of action. It is worth noting that in this case the Court was not prepared to grant an injunction preventing the employee from doing any work of any kind during his notice period but it did agree to an order preventing him from working for a competitor for a period of time in order to protect the employer's legitimate interests.

4. Employer discriminated against disabled employee by requiring him to attend an interview

The Employment Appeal Tribunal has ruled that a requirement to attend an interview can discriminate against a disabled employee.

What does this mean?

Where, as in this case, an employee is unable to attend interviews due to a disability the employer should make reasonable adjustments by dispensing with the need for such an interview. However, appointment to the post is not automatically required.

What should employers do?

An employer in this position should consider the employee's suitability by assessing the employee in some other way such as by holding an interview at his home, by requiring him to provide information, by conducting a less formal interview process or by consulting with his managers for an assessment of his abilities.

5. Employee did not suffer age discrimination

The Employment Appeal Tribunal has held that an employee at risk of redundancy was not discriminated against when her employer refused to let her change her mind from taking voluntary redundancy to redeployment following its decision to lower its voluntary early retirement age from 55 to 50 (the employee was 49 and hoped that the redeployment process would take her to the age of 50, that she wouldn't be offered another job and that she could then opt for voluntary early retirement).

What does this mean?

The employee had not suffered less favourable treatment because her comparators could lawfully have chosen voluntary early retirement whereas she, at her projected date of leaving employment, could not. The employee could not lawfully have been offered voluntary early retirement at her age as there was a statutory prohibition against it (the Finance Act 2004 prevents employees below the age of 50 being given the option of early retirement).

What should employers do?

Employers carrying out a redundancy exercise should take specific legal advice throughout the process.

6. Relocation of employees did not entitle them to claim unfair dismissal

The Employment Appeal Tribunal has held that a change in working location following a TUPE transfer was not a substantial change to the employees' material detriment.

What does this mean?

On the facts of this particular case the change in location was not a substantial change to the employees' material detriment. This was because the transfer to the new employer's depot placed no greater burden on the employees than a transfer to their old employer's other depots which was permitted by a mobility clause contained in their contracts, the employees' jobs were preserved at a location that was more convenient to them than five alternative locations they could have been required to move to under the terms of their contracts, and the fact that the additional commuting time of between 30 minutes and one hour per day was not substantial.

What should employers do?

Employers who wish to relocate staff should check what rights they have under their employees' contracts of employment and if the staff have been inherited as a result of a TUPE transfer legal advice should be obtained before seeking to change their place of work.

7. Illegal worker was entitled to bring discrimination claim

The Supreme Court has held that an employee who had been working illegally in the UK had the right to bring a discrimination claim.

What does this mean?

The illegality and the discrimination were not so inextricably linked as to defeat the claim because the immigration offences the individual had committed simply provided the setting

or context in which the discrimination was committed. Furthermore strong public policy considerations and the UK's international obligations to protect the victims of human trafficking meant that the claim should be allowed to proceed.

What should employers do?

Employers should always take specific legal advice when faced with a discrimination claim.

8. Report on employment practices in the cleaning sector has been published

The Equality and Human Rights Commission has published a report on employment practices in the non-domestic cleaning sector.

The Equality and Human Rights Commission have identified a number of concerns relating to employment practices in the sector and the report contains recommendations for the key bodies in the sector.

A full copy of the report 'Coming Clean: the experience of cleaning operatives' can be found here http://www.equalityhumanrights.com/publication/research-report-95-coming-clean-experience-cleaning-operatives .