CHILTERN HR

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1. Christian worker did not suffer discrimination

The Employment Appeal Tribunal has held that a Christian who did not wish to work on a Sunday was not discriminated against.

What does this mean?

If a Christian worker has a deep and sincere belief that Sunday is a day for worship and not work it is potentially discriminatory to require them to work Sundays. The fact that other Christians may not object to working Sundays is irrelevant. What matters is whether the employee in question has a sincere belief which is held by some Christians.

However, in this case it was held that the requirement that the employee work Sundays was justified. This was because she was employed as a care assistant at a children's home where the children had serious disabilities and complex care needs arising from challenging behaviour, medical needs, feeding difficulties and similar problems and because her contract of employment required her to undertake duties outside normal working hours as required by the shift rota including weekends.

What should employers do?

If a Christian employee objects to working on Sundays because they believe that Sunday is a day for worship and not work, as an employer you should consider whether there are any alternative ways of covering their Sunday shifts in the first instance.

Reference: Mba v Mayor and Burgess of the London Borough of Merton

2. Employee did not suffer religious discrimination

The Employment Appeal Tribunal has held that an employee who had behaved inappropriately and unprofessionally in the way she manifested her religious beliefs in the workplace was not discriminated against because of her religion.

What does this mean?

The employee did not suffer religious discrimination because the way in which she was treated was not because of her religion, but rather because of the way in which she manifested or shared it. She had manifested her religion in a way which was inappropriate and which upset members of staff.

What should employers do?

There is no clear dividing line between holding and manifesting a religious belief and, therefore, employers faced with similar issues should take specific legal advice.

Reference: Grace v Places for Children

3. Employers should not rely solely on assessments by Occupational Health

The Court of Appeal has held that an employer was wrong to blindly adopt an occupational health opinion that one of its employees was not disabled.

What does this mean?

Although an employer should correctly seek assistance and guidance from Occupational Health or other medical expertise, it is for the employer to make a factual judgment as to whether or not an employee is disabled and an employer should not simply 'rubber stamp' an external opinion.

What should employers do?

When seeking advice from external clinicians you should not ask general questions about whether an employee is disabled for the purposes of discrimination legislation. Instead, you should ask specific practical questions, directed to the particular circumstances of the employee's putative disability. The answers to these questions will help you to assess whether the criteria for disability are satisfied.

Reference: Gallop v Newport City Council

4. 'Subcontractor' was a 'worker'

The Employment Appeal Tribunal has held that a person who was unequivocally described in a written contract as being in business on his own account was in fact a 'worker'.

What does this mean?

Even if a contract clearly describes someone as being self-employed and it appears to be watertight that does not preclude a tribunal from ruling that they are a worker.

In this case the contract stated that the individual was entitled to provide a substitute. However, in reality that was not the case because he had been personally selected through a selection exercise and interview to undertake the work and, despite what the contract said, it was abundantly clear that he could not substitute himself and was expected to carry out the work personally.

The parties also acted very much as if there was an employer / employee relationship and the individual was expected to carry out management instructions within fixed working hours. He did not bring any equipment with him or take any business risk. All he did was provide his own labour and skills.

What should employers do?

Employers who are in doubt as to the employment status of an individual or who wish to avoid an individual being classed as a worker should take specific legal advice.

Reference: Boss Projects LLP v Bragg

5. Dismissal for unproven allegations was unfair

The Employment Appeal Tribunal has held the dismissal of a school caretaker for historical unproven sex abuse allegations was unfair.

What does this mean?

An employer's decision to dismiss purely on the basis of an unproven allegation of abuse may be fair but should not be inevitable. It is necessary to consider whether there is a sufficient reason for dismissal and a bare accusation, even of something serious, can not by itself amount to some other substantial reason for dismissing an employee.

What should employers do?

Where an employer learns of unsubstantiated allegations of abuse relating to an employee, it must not take an uncritical view of the information disclosed to them. It should carry out its own enquiries to test the information which has been disclosed. It should also follow a fair dismissal procedure even if it believes there has been a breakdown in trust and confidence.

Where children or vulnerable adults may be at risk it is important to remember that whilst the employer's duty is first and foremost to those children or vulnerable adults, the employer still has a responsibility to its employee.

Reference: Z v A

6. Shared parental leave

The Government has outlined how a new shared parental leave system, which it plans to introduce in April 2015, will work.

Under the plans eligible working parents will be able to choose to be at home together or to work at different times and share the care of their child.

Under the proposals:

- mothers who give binding notice to opt into shared parental leave prior to giving birth will have the right to revoke the notice up to 6 weeks following birth;
- employees will be required to give a non-binding indication of when they expect to take their allocated leave when they initially notify their employers of their intention to take shared parental leave. They will also be expected to give at least 8 weeks' notice of any leave they will actually be taking;
- there will be a limit on the number of times a parent can notify the employer to take a period of shared parental leave. The number of notifications will be capped at 3 (the original notification and 2 further notifications or changes);
- there will be a cut-off point for taking shared parental leave at 52 weeks following birth or adoption;
- each parent will be able to have up to 20 'keeping in touch' days to support them in returning to work. Parents will be able to use these days to return to work from shared parental leave on a part-time basis for a limited time;
- employees will have the right to return to the same job following a period of maternity, patterning, adoption or shared parental leave that totals 26 weeks or less in aggregate even if the leave is taken in discontinuous blocks. After that they will have the right to return to the same job, or if that is not reasonably practicable, a similar job;
- the notice periods for leave and pay for a parent taking paternity leave will be aligned.

7. Agency Workers Regulations

The Employment Appeal Tribunal has held that the Agency Workers Regulations 2010 do not apply to agency workers placed with an end user indefinitely.

What does this mean?

Agency workers who are placed with an end user indefinitely will not be entitled to the same basic working and employment conditions as if they had been recruited by the end user directly as this entitlement only applies to temporary agency workers. 'Temporary' means not permanent and a contract which is indefinite is a permanent contract whereas a temporary contract is one which will be terminable upon a condition being satisfied, for example where the agency worker is provided to cover a period of maternity leave.

What should employers do?

Unless the decision in this case is successfully appealed or the Regulations amended employers will be able to use indefinite assignments as a means of preventing agency workers from falling within the scope of the Regulations. Employers who engage agency staff under open-ended arrangements would be wise to ensure that the open-ended nature of the arrangement is recorded in writing before seeking to deprive such staff of any entitlements provided for by the Regulations.

Reference: Moran v Ideal Cleaning Services Limited and another

8. Care sector abuse of NMW

HMRC's investigations have revealed that more than 2,400 workers in the care sector were paid less than the National Minimum Wage in the last two years.

The workers in question are in line for nearly £340,000 in back pay as a result of the investigations and their employers are facing penalties over £110,000 for breaking the law. The employers may also be publicly named and shamed.

HMRC found that the main reasons offered by care sector employers for not paying the NMW included making illegal deductions such as uniform costs, not paying for time spent training or travelling between care jobs, charges for living accommodation, incorrect hourly pay rates and incorrect use of apprentice rates.

What should employers do?

Employers should keep full records of the precise hours worked by their staff, ensure that deductions from pay do not result in workers receiving less than the NMW, and be aware of the amount of the accommodation offset and ensure that this is factored into workers' pay where accommodation is provided.

9. Employer status of a Church of England minister

The Employment Appeal Tribunal has considered whether an ordained Church of England minister was working under a contract of employment, or was alternatively a 'worker'.

What does this mean?

Whilst the Employment Appeal Tribunal did not make a decision as to the status of the minister (that is for a fresh tribunal to determine) it said that it is important in such cases to undertake a full analysis of all the relevant documents and circumstances of the particular individual and his particular church, including the rules and practices of the Church, the manner of his appointment and the particular arrangements made with him in his post to determine if a contractual relationship could be established.

It should be noted that in this case the minister worked prior to the introduction of the Ecclesiastical Offices (Terms of Service) Regulations 2009 and that Church of England clergy no longer need to establish employment status to be able to enforce a number of 'employment rights', including unfair dismissal on capability grounds.

What should employers do?

The employment status of an individual can be difficult to determine, not just in cases involving ministers of a religion, and employers who are in doubt as the status of a person should take specific legal advice.

Reference: Sharpe v Worcester Diocesan Board of Finance Limited and another

10. Financial support under the Access to Work scheme has been extended

The Access to Work scheme provides advice to disabled people and their employers as well as financial support towards the extra costs faced by disabled people at work, for example to cover the cost of support workers, specialist aids and equipment. Up until recently the scheme has only offered support to disabled people who engage in work experience placements that have been organised through Jobcentre Plus. However, the requirement that the placement be organised through Jobcentre Plus has now been removed and £2 million has been set aside to help disabled people take up work placements.

Further details about the Access to Work scheme can be found here https://www.gov.uk/access-to-work/overview