July 2014

Employment Law Newsletter

Produced by Employment Law Essentials

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1. The law on flexible working has changed

On 30 June the law on requests for flexible working changed.

All employees, not just carers and parents, now have the right to request flexible working as long as they have at least 26 weeks service and haven't made a request within the last 12 months.

The statutory procedure which set out how requests should be handled has now been replaced with a requirement to deal with the application in a reasonable manner and within a decision period of three months of the application (or longer if both the employer and employee agrees).

The new legislation is supplemented by an ACAS statutory code of practice which can be found here http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf.

ACAS has also published good practice guidance on handling requests in a reasonable manner to work flexibly which can be found here http://www.acas.org.uk/media/pdf/g/h/Handling-requests-to-work-flexibly-in-a-reasonable-manner-an-Acas-guide.pdf .

The old rules will continue to apply to any applications made before 30 June.

2. No duty to make adjustments for mother of disabled child

The Court of Appeal has held that employers are not required to make reasonable adjustments for non-disabled employees associated with disabled people.

What does this mean?

Employers are only required to make reasonable adjustments for disabled employees and job applicants. Employers are not obliged to make adjustments for non-disabled employees who are in some way associated with a disabled person.

What should employers do?

Whilst employers do not have to make adjustments to accommodate, for example, an employee's disabled child it would be good practice for the employer to do what it can to help. Employers should remember that the employee may have the right to request flexible working and a female employee responsible for an ill child may be able to claim indirect sex discrimination.

Reference: Hainsworth v Ministry of Defence

3. Loss of status amounted to harassment

The Employment Appeal Tribunal has held that changes which led to a meaningful job becoming a menial one violated a disabled employee's dignity and, therefore, amounted to harassment.

What does this mean?

The transformation of a job, even when it is done unwittingly, from a meaningful to a menial one is likely to constitute unwanted conduct which has the effect of violating the employee's dignity and of creating a demeaning environment and, therefore, amount to unlawful harassment.

What should employers do?

If it becomes necessary to make changes to a person's job because, for example, they are no longer fit to carry out certain aspects of the job, or because it is necessary to assign duties to other staff during a period of long term sickness absence, care should be taken to avoid a slide in the employee's role.

Reference: Betsi Cadwaladr University Health Board v Hughes and others

4. Estates of deceased workers are entitled to payment in lieu of untaken holiday

The European Court of Justice has held that a deceased worker retains the right to pay in lieu of accrued untaken statutory holiday and that payment does not depend on an interested party making an application.

What does this mean?

The death of a worker does not remove their right to a payment in lieu of untaken statutory holiday and, therefore, a payment should be made to the worker's estate in respect of any accrued untaken statutory holiday.

What should employers do?

Upon the death of a worker the employer should seek to establish the identity of the personal representative(s) responsible for administrating the worker's estate and then pay them any amounts due in respect of accrued untaken statutory holiday.

Case reference: Bollacke v K + K Klaas & Kock B.V. and Co KG

5. Unfair constructive dismissal and affirmation of contracts

The Employment Appeal Tribunal has recently given judgments in two separate cases on the question as to when a contract is affirmed in cases involving unfair constructive dismissal.

In the first case it held that an employee who gave much more notice than was contractually required for his own financial gain had affirmed his contract and, therefore, could not claim constructive dismissal. The Employment Appeal Tribunal also clarified that

it is possible for an employee to affirm their contract even after they have resigned in response to a repudiatory breach of contract.

In the second case it held that a delay in resigning in and of itself did not amount to an affirmation of a breach of contract.

What does this mean?

In unfair constructive dismissal cases timing is usually very important. However, it is not to be taken in isolation. The question is whether the employee has demonstrated that they have made a choice, which they will do by conduct. They will do so, generally, by continuing to work in the job or by communications which show that they intend the contract to continue. If an employee is off sick and not actively working it is, therefore, harder to infer affirmation of contract.

What should employers do?

In the first of these cases the Employment Appeal Tribunal stressed that the question of whether a contract has been affirmed or terminated following an employer's fundamental breach of contract is fact sensitive. For this reason employers should always take legal advice in such instances.

Reference: Cockram v Air Products Plc and Chindove v William Morrisons Supermarket Plc

6. ACAS guidance on TUPE

ACAS has published new guidance to help employers handle business transfers. The new guidance explains when TUPE applies and includes advice on getting the process right and the information and consultation requirements.

ACAS recommends that employers consult as extensively as possible, engage with trade unions, ensure that contract information is up to date and reflects reality and set up an employee forum and management team responsible for handling the transfer.

A full copy of the guidance can be found here

http://www.acas.org.uk/index.aspx?articleid=1655.

7. Compulsory equal pay audits are to be introduced

Draft legislation has been published requiring tribunals to order employers who have been found in breach of equal pay law to carry out equal pay audits. The legislation is expected to come into force on 1 October and will only apply to equal pay claims presented on or after that date.

The draft regulations provide exemptions for micro-businesses, new businesses and certain employers who have carried out equal pay audits in the three years prior to the breach identified.

An audit will involve the publication of relevant gender pay information, identifying any differences in pay between men and women and the reasons for those differences, include the reasons for any potential equal pay breach identified by the audit, and set out the employer's plan to avoid breaches occurring or continuing.

Reference: Draft Equality Act 2010 (Equal Pay Audits) Regulations 2014

8. The Government has announced further employment law reforms

On 25 June the Government announced further employment law reforms. These, if approved by Parliament, will:

- Ban exclusivity clauses in zero hour contracts enabling zero hours workers to work for more than one employer;
- Increase the penalties imposed on employers who fail to pay the National Minimum Wage so that a penalty will be payable on a per worker basis;
- Reform whistle-blowing procedures in order to achieve a consistent standard of best practice for handling disclosures and provide greater reassurance to the whistle-blower that action is being taken by the prescribed person;
- Create stronger financial consequences for non-payment of employment tribunal awards;
- Reduce the delays in employment tribunals caused by frequent and short notice postponements, and deal with costs arising from short notice postponements;
- Allow exit payments to be recovered from public sector employees that leave and re-join the same part of the public sector within a year.

Reference: The Small Business, Enterprise and Employment Bill 2014