HR and employment law update

Tuesday 11th June 2019
Housekeeping

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Good Work Plan

Stuart Craig, Partner
The Good Work Plan - Background

- "Good work: the Taylor Review of Modern Working Practices" was published on 11 July 2017
- Listed recommendations to improve working life and employment rights.
- Emphasis on vulnerable workers, including agency workers, casual workers and zero-hours workers in the growing "gig economy".
Government response and consultations

• The Government published its response, Good work: a response to the Taylor Review of modern working practices, on 7 February 2018

• The government published four consultations:
  • Employment Status Consultation
  • Agency Workers Consultation
  • Enforcement of employment rights consultation
  • Transparency in the UK labour market consultation

• Itemised Payslips – 6 April 2019
The Good Work Plan

- “the biggest package of workplace reforms for over 20 years”
- Three main themes:
  - fair and decent work;
  - clarity for employers and workers; and
  - fairer enforcement.
- Many of the timescales are not yet known.
Right to request a more stable contract

- To deal with problem of “one sided flexibility”
- A right for all workers to request a more predictable and stable contract
- After 26 weeks’ service
- Similar to flexible working request
- Timescale – unknown.
Continuity of employment

- Currently, a break of one week will break continuity of service.
- “a week which does not count in computing the length of a period of continuous employment breaks continuity of employment” section 210(4) Employment Rights Act 1996
- The government plans to extend this to four weeks, allowing more employees to gain access to employment rights with a minimum service requirement
- Timescale – unknown
Right to written statement of terms

- This right is currently only available to employees
- A written statement of terms must be given to all workers on or before the first day of employment, rather than within two months of employment starting.
- Timescale – 6 April 2020
Holiday Pay

• The *Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (SI 2018/1378)*

• Amendment to regulation 16 of the Working Time Regulations 1998

• Increase the reference period for determining an average week's pay from 12 weeks to 52 weeks.

• Timescale - 6 April 2020
Agency Work – Abolishing the Swedish Derogation

- The *Agency Workers Regulations 2010 (SI 2010/93)* after 12-week qualifying period, AW is entitled to the same "basic working and employment conditions" that they would have been entitled to had they been recruited directly by the hirer (including pay parity).

- Exemption – pay between assignments contract (*regulations 10 and 11*, AWR 2010).

- The draft *Agency Workers (Amendment) Regulations 2019* published.

- Swedish derogation is due to be abolished on 6 April 2020.

- If you have PBA contracts, you will need to plan ahead.
Agency Workers – Key Facts Page

• All employment businesses will be required to provide agency workers with a Key Facts Page

• Information to be included:
  • type of contract;
  • the minimum expected rate of pay;
  • how they will be paid and by whom (for example, by an intermediary or umbrella company) and any deductions or fees that will be taken

• Timescale – unknown
Information and Consultation

- The draft *Employment Rights (Miscellaneous Amendments) Regulations 2019*

- Lower the threshold required for a request to set up information and consultation arrangements from 10% to 2% of employees.

- This is still subject to the existing minimum of 15 employees.
questions and answers
Case law update

James English, Associate
Ibrahim v HCA International Limited (1)

- Mr Ibrahim (C) was a translator at a private hospital
- Rumours circulated that he was breaching patient confidentiality
- C said that he wanted to clear his name and restore his reputation
- He was subsequently dismissed

**Employment Tribunal**
- C brought a claim of being subjected to a detriment on the grounds of making a public disclosure (‘whistleblowing’).
- The Tribunal held that:
  - The ‘disclosure’ did not show a breach of a legal obligation.
  - C did not believe that his disclosure was in the public interest.
  - C appealed to the EAT.
Ibrahim v HCA International Limited (2)

Employment Appeal Tribunal

- The EAT upheld part of C’s appeal.
- It held that, although he had not been specific, his disclosure related to defamatory comments.
- ‘Breach of a legal obligation’ was wide enough to cover tortious duties, such as defamation.
- However, the EAT dismissed his appeal on the ‘public interest’ issue.
- This was a private dispute, and C was concerned about rumours about him at work, and the effect of those rumours on him.
Royal Mail Group Limited v Efobi (1)

The EAT in Efobi decided that the burden of proof in discrimination claims was not on the Claimant at first. This was overturned by the Court of Appeal in Ayodele v Citylink (2017). Efobi then came to the Court of Appeal.

- Mr Efobi (C) worked for the Royal Mail as a postman but hoped to secure an IT role. He made 33 applications for internal roles, none of which were successful.
- His applications and CV were generic, and he submitted details that he was not required to (as an internal applicant).

**Employment Tribunal/Employment Appeal Tribunal**

- C brought various claims of race discrimination.
- The Royal Mail provided evidence that the other candidates were better qualified.
Royal Mail Group Limited v Efobi (2)

• The Royal Mail did not provide any evidence from the actual recruiters or managers involved, or on the race or ethnicity of the successful candidates.
• The Tribunal held that C had the initial burden of proof.
• The Tribunal dismissed his claims:
  • There was insufficient evidence about the comparators (esp. race).
  • C had not proven facts about the decision-maker’s knowledge.
• The EAT held that the burden of proof was not on the Claimant.

Court of Appeal

• The Court of Appeal restored the traditional view that the burden of proof is initially on the Claimant.
• C could rely upon evidence adduced by the Royal Mail. However, he had not sought more evidence to support his case.
Linklaters LLP v Mellish

• Mr Mellish (M) was a former director of the Claimant law firm (L).
• He was dismissed on notice with an ex gratia payment.
• Shortly afterwards, he told L that he intended to give interviews about the culture of the firm, its struggle with women in the workplace, and 3 specific cases.
• L applied for a High Court injunction to protect the identities of the staff members involved.

High Court

• The High Court held that M’s contractual duty of confidentiality, and the employees’ right to respect for their private lives, overrode M’s freedom of expression.
• It was not in the public interest for the duty of confidentiality to be breached, so the injunction was granted.
Kuteh v Dartford & Gravesham NHS Trust (1)

- Ms Kuteh (C), a Band 5 Junior Sister in ITU was a committed Christian.
- She was told not to initiate discussions on religion with patients.
- C was then dismissed for failure to follow a reasonable management instruction, inappropriate conduct, and breaching the NMC Code (para.20.7).

Employment Tribunal and Employment Appeal Tribunal

- C brought a claim of unfair dismissal (but not religion or belief discrimination).
- The ET dismissed the claim. It considered Art.9 of the ECHR.
- There was a distinction between “inappropriately proselytising beliefs” and the manifesting those beliefs.
- The EAT upheld that decision. C appealed to the Court of Appeal.
Kuteh v Dartford & Gravesham NHS Trust (2)

Court of Appeal

- The Court of Appeal upheld the decision.
- Art.9 includes the freedom to manifest one’s religion, including “teaching”.
- Proselytism can fall within that, improper proselytism would not.
- The inappropriate promotion of a belief is not protected.
- C’s conduct had been clearly inappropriate.
- C had been dismissed following a fair procedure.
- The decision fell within the range of reasonable responses.
Gan Menachem Hendon Limited v De Groen (1)

This case reinforces the decision of Lee v Ashers Baking Co Ltd (2018), the ‘Gay Cake’ case, this time in an employment context.

**Lee v Ashers** (Supreme Court, 2018)
- The SC held that the bakery’s refusal to produce a cake with the message, ‘Support gay marriage’ was not direct discrimination on the grounds of sexual orientation.
- The bakery would have refused to supply the same cake to a heterosexual customer, but would have supplied a cake without that message to any customer.
- Support for gay marriage was a political belief. Requiring the bakery to produce a cake with a message they disagreed with breached their freedom of expression and freedom of expression and belief.
Gan Menachem Hendon Limited v De Groen (2)

- Ms de Groen (G) was a teacher at an orthodox Jewish nursery.
- She was dismissed after it became known that she was cohabiting with her boyfriend.
- G brought claims of discrimination on the grounds of sex, and religion and belief.

Employment Tribunal

- The Tribunal upheld all claims. It held that G had been dismissed because she did not share the nursery’s beliefs on cohabitation.

Employment Appeal Tribunal

- The claims in relation to religion and belief were dismissed.
- The claims in relation to sex were upheld.
Gan Menachem Hendon Limited v De Groen (3)

• There could be no discrimination on the basis of the nursery’s own religion and belief.
  • The alleged discriminator’s motive is irrelevant.
  • The discriminator would act in the same way to any other comparator.
• It was possible to have a claimant and respondent with the same religious beliefs or religion, if they disagreed about a particular point.
questions and answers
Employment of non-EEA workers in the Healthcare sector and the EU settlement scheme

Gillian Burns, Associate
### Key HR considerations

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Employing Non-EEA Citizens: Tier 2 (General)

• Getting a sponsor license
  • The process
  • Key personnel
  • Reporting obligations

• Recruiting in to a role
  • Identify the vacancy and check the skill level
  • Identify the SOC Code and check whether the vacancy is on the SoL
  • Check the minimum salary (new entrant / experienced)
Employing Non-EEA Citizens in the Health Sector (1)

• The health sector’s labour shortage
  • NHS England and the NHS Long Term Plan (£20.5 billion investment over 5 years)
  • Includes increase in nurse undergraduate places and clinical placements, investment in nursing apprenticeships by 50%,
  • Includes a focus on international recruitment,
• Many health-related occupations have already featured on SoL, which means that:
  • Resident Labour Market Test (“RLMT”) is not required (excluding nurses);
  • Salary threshold required for settlement in the UK after 5 years does not apply;
Employing Non-EEA Citizens in the Health Sector (2)

- Priority, if the limit of new entrants under Tier 2 (General) (20,700), is reached
- Nurses and doctors recently removed from the Tier 2 (General) cap altogether
- Lower application fees
- Nurses and doctors recently removed from the Tier 2 (General) cap for new entrants altogether
Employing Non-EEA Citizens in the Health Sector (3)

- MAC’s Full Review of the SoL – published 29.05.2019
- Recommends the following occupations be added to the SoL

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EmploYing Non-EEA Citizens in the Health Sector (4)

- Recommends removal of “healthcare professionals not elsewhere classified” (2219)

- Next Steps
  - UKVI are considering recommendations of MAC
  - Likely to be accepted and an updated SoL implemented in the near future
Employing EU Citizens: Focus on the EU Settlement Scheme

Employer toolkit


- Key points:
  - Current right to work checks apply until the end of the implementation period on 31 December 2020
  - EU citizens already living in the UK, and EU citizens arriving before 31 December 2020 will be able to remain here indefinitely post-Brexit
  - EU citizens applying for the EU Settlement Scheme do not have to pay a fee
  - There is no legal obligation to signpost the EU Settlement Scheme to EU citizen employees
questions and answers
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questions and answers