

Welcome to the May issue of our newsletter. Below, you will see just some of the hot topics that could be having an impact on your business - now or in the near future.

If you wish to discuss any of the matters referred to in this newsletter, please contact us on: 020 3159 5160, or at enquiries@goldenleaver.co.uk

Bullying and harassment

Most employers are likely, at some stage, to be faced with a complaint of bullying by one of their staff. Such cases must always be taken seriously and properly investigated, however, the recent case of *Rayment v MoD* confirmed that even where successful, claims do not necessarily translate into large cash awards.

Ms Rayment made a number of allegations of harassment and bullying against her employer and in dismissing the less serious of these, the court stated that the focus should be on whether the conduct was "oppressive and

unacceptable", a highly subjective and content-specific test. In this case, the Judge found faults on both sides and awarded the Claimant damages of £7,000, a Pyrrhic victory given that she had turned down a pre-trial offer of £60,000 plus £125,000 in costs.

Allegations of bullying need to be treated properly but for an employee to achieve significant levels of damages, there needs to be evidence of more than just 'office banter' and/or generally an infringement of rights protected by anti-discrimination law.

Wearing of religious symbols – not religious discrimination

The court has confirmed that a British Airways' request for an employee to remove or conceal a jewellery cross, in line with its uniform policy, did not constitute indirect religious discrimination but was instead a personal expression of the employee's faith.

In giving its judgement, the court commented that if an individual employee was found to be discriminated against in this way, employers would face the near impossible burden of accommodating any number of views as to what an individual's faith requires them to do.

The problem for employers is that it is not always obvious whether an individual's opinion amounts to a personal manifestation of their faith or a religious requirement that should be recognised. While employers must always consider situations such as these very carefully, the effect of this case is that there is unlikely to be a flood of religious discrimination claims on this subject.

The employee in the case has sought permission to appeal to the supreme court so this situation may still change in the future.

Agency workers and discrimination

Although agency workers do not enjoy the same statutory rights as employees, such as claims for redundancy payments and unfair dismissal, it has long been thought that they did enjoy the same protection from discrimination as their employee colleagues.

This assumption however has been questioned by the Court of Appeal in the recent case of *Muschett v HM Prison Service (HMPS)*. Because agency workers are

typically not 'employed' either by the agency or end user, they were found to lack the employment relationship upon which to base a claim.

Our view is that both agencies and end users should continue to guard against discrimination within the workplace since the application of this case is fairly limited to its facts.

Unilateral variation of employment contracts may be allowed

Generally speaking, an employer is unable to vary an employee's contract of employment without consent and, even where the contract contains clauses which allow the employer to do just that, it has not been clear how effective such clauses are, particularly where the employee suffers a detriment as a result of the change.

A recent case against Asda now suggests that an employer can rely on such clauses to change contracts without the employee's prior consent. Although Asda had consulted with employees regarding the change, the court

decided that where the clause is clear and unambiguous, such consultation may not be necessary. In the Asda case, the employees suffered no detriment and where they might otherwise have done so, consultation could protect against a breach of the implied term of trust and confidence.

Although employers can take some comfort from this decision, our view remains that the surest way of achieving a change to an employment contract is to link that change to an alteration in benefits such as annual wage rises or increases in holiday entitlement.

Right to legal representation during disciplinary process

When carrying out a disciplinary meeting, an employee is entitled to bring a colleague or a trade union representative to the meeting but is not, generally speaking, permitted to bring their lawyer. Recent cases have, however, identified situations where it will be appropriate to allow an employee to bring their lawyer to a disciplinary meeting, in particular where the outcome of the procedure will affect an individual's ability to practise their career.

These cases relate to teachers and health professionals accused of misconduct that would have seen them struck off their professional registers but would also apply to FSA regulated individuals.

It is therefore important that employers permit legal representation at disciplinary hearings for those whose future employability in that particular job/profession is at stake.

Age discrimination and internal records

There have been a number of recent age discrimination cases which explore when age discrimination can be justified. In a German case, discrimination was justified in preventing fire-fighters from applying for certain posts if over the age of 30 and this shows that age discrimination is not just relevant to older employees.

In a recent English case, a 42 year old banker who was made redundant succeeded in his claim for unfair dismissal

and age discrimination when he was able to refer to an internal memo which suggested that any replacement for him should fit a "younger entrepreneurial profile".

This case also provides a clear reminder to employers that internal memos and emails are not privileged documents and, when facing court or tribunal proceedings, are required to be disclosed, whether or not they are helpful.

Who is affected in a transferring business

The general rule under TUPE is that when the assets of a business are sold, not only do employees transfer with those assets, but 'affected employees', whether of the transferor or transferee, must be consulted. Where only part of a business is transferring, a key question is therefore who is an affected employee and who is not.

It has been argued that the definition should include employees whose future career prospects are diminished due to the reduced possibility of promotion into the part of the business that is transferring. However, the courts have now helpfully determined that 'affected employees' are:

"those who will be or may be transferred, those whose jobs are in jeopardy by reason of the proposed transfer, and those who have internal job applications pending at the time of transfer. The definition does not extend to everyone in the workforce who might apply in the future for a vacancy in the part transferred".

This gives helpful guidance to both transferors and transferees on the extent of their obligations and who they must seek to consult with.

Employee liable for underpaid PAYE

The employer is responsible for accounting for income tax to HMRC and it is therefore normally the employer who is responsible for under or overpayments of PAYE.

However, in a recent case involving a company that had gone into liquidation, the employee was held liable for underpaid PAYE when unable to demonstrate that he had provided the correct tax documentation to his employer.

While employees should ensure that their employers are operating PAYE correctly, in particular, by ensuring that the employer and HMRC have the correct documentation, the employer should check the integrity of their PAYE systems on a regular basis given that the employee had argued that HMRC should recover the tax from the

Minimum Wage 2010

New rates for the National Minimum Wage (NMW) have been announced and are set to rise from October 2010, regardless of the General Election results. The new rates are:

- £5.93 per hour for low paid workers aged 21* and over (a 2.2% increase on the current £5.80 rate);
- £4.92 per hour for 18-20 year olds (a 1.9% increase on the current £4.83 rate); and

- £3.64 per hour for 16-17 year olds (a 2% increase on the current £3.57 rate).

*From 1st October 2010 those aged 21 qualify for the full adult rate of NMW, currently, and until then, the adult rate is payable only to those aged 22 or above.

The Election

Labour have introduced a huge amount of new employment legislation since coming to power in 1997. While the Conservatives traditionally favour returning power to employers, their plans for legislation do appear to be more interventionist than might otherwise be expected. Meanwhile, the recent surge in popularity of the Liberal Democrats and the increased likelihood of a

hung parliament, mean that their employment policies are facing closer scrutiny.

Following the election, Golden Leaver LLP will put together a breakdown of the successful parties' proposals for employment law and its likely impact on employers.

And finally...

A reminder that the new "Fit Note" has now replaced doctors' sick notes. Although the sick note has been replaced the basic law will remain unchanged: as before, from the eighth day of sickness absence, employees can be required to provide evidence about their sickness to support a claim for statutory sick pay.

The government hopes that the change will save the economy £240 million over the next ten years and it will be interesting to see whether the government's expectations on this are achieved.

A primary issue for employers will be the extent to which they have to accommodate suggestions made by a GP in order to comply with the duty to make reasonable adjustments, although where it is not possible for the employer to make the changes required to bring the employee back to work, the employee will have to remain on sick leave.

Disclaimer

These notes are intended only as a summary of developments and not as a definitive statement of the law. Advice should always be taken in individual circumstances.