

# Employment Law Update

March 2016

nplaw

Norfolk Public Law

[www.nplaw.co.uk](http://www.nplaw.co.uk)

## Holiday pay

The Employment appeal tribunal in *Lock v British Gas* has confirmed that the Working Time Regulations require commission payments to be included in the calculation of holiday pay. It will be interesting to see whether British Gas takes the matter to the Court of Appeal.



## Gender Pay Reporting

Draft regulations have just been published which require any organisation that has 250 or more employees to report how they pay staff by pay. It should be noted that with this information, it is possible that Equal pay challenges may be made. With that in mind, it is essential that HR professionals analyse the results for discrepancies and at the same time check that any data that is used to set pay scales is based on up to date information and not based on outdated preconceptions as they are two of the main reasons why equal pay claims have succeeded in the past. It is expected that the Regulations will come into force on the 1<sup>st</sup> October 2016.



## Apprentice Levy

The government has published draft legislation which will mean that **all** employers will have to pay a levy if they recruit apprentices. The levy will be set at 0.5% of an employer's pay bill. However, all employers will then receive an annual allowance of £15,000 to set-off against the levy, in effect making the levy payable only to the extent that the employer's pay bill exceeds £3 million per year. It is anticipated that this will take effect on 6<sup>th</sup> April 2017.

## Tax treatment – injury to feelings are taxable

It had been thought that any payment of injury to feelings due to a discriminatory **dismissal** was not subject to tax. The Tax tribunal has confirmed that this is not the case and distinguished this from personal injury. The current law allows up to £30,000 to be paid tax free for loss of employment. This decision means that when assessing this threshold, it will be necessary to factor in the amount for injury to feelings. By contrast, payment for injury to feelings during employment remains tax free. If HR professionals encounter a situation which involves a mixture of discriminatory treatment during employment and on dismissal, it will be necessary to clarify the amount of injury to feelings for each part to enable correct tax calculations to be done.

## Dyslexia- Starbucks lose disability claim

A supervisor at a branch of Starbucks suffered from dyslexia and was a disabled person under the Equality Act 2010. Her responsibilities included monitoring temperature control of fridges and water. She was subsequently given fewer duties and was told that she had to retrain. This left her feeling suicidal. She was successful at the Employment Tribunal on several fronts. Firstly, the employer had not made reasonable adjustments as it had not made attempts to support her at work even though they knew of her condition. Secondly, it found that on the facts that she had been subject to discrimination when they accused her of falsifying records. This case emphasises the need for proper assessment of anyone with dyslexia so that the right help can be given and that staff need proper training on equality issues. The British Dyslexia Association <http://www.bdadyslexia.org.uk/> offers useful guidance on reasonable adjustments.



*Whilst every effort has been made to ensure that the content of this newsletter is up-to-date and accurate, no warranty is given to that effect and nplaw does not assume responsibility for its accuracy and correctness. The newsletter summarises latest legal developments but is no substitute for specific legal advice after consideration of all material facts and circumstances.*

## Right to privacy or not !?

A recent European Court of Human Rights ruling concerned an employee's use of Yahoo messenger. The employee had set up the account at the employer's request in order to handle work related messages. The Court ruled that the right to privacy was engaged in relation to the employee's personal activities at work. This meant that for any employer action interfering with this right had to be justified and proportionate. On the facts, it was lawful for an employer to dismiss an employee using the evidence from the employee's personal use of their Yahoo messenger account as this would enable it to check whether any workplace rules had been breached. This decision should not be



seen as an open invitation to employers to snoop on staff. Whether such activity is lawful will be dependant on the extent to which private use is prohibited, whether appropriate advance warnings have been given, the scope of any monitoring and ultimately whether this was reasonable. If this had been a UK case, then it would have been necessary to consider the Information Commissioner's Code of Practice on Employment which provides guidance on monitoring.

## Dismissal for outside work conduct

It has been widely reported that Adam Johnson, an England footballer, was dismissed by his employer, Sunderland football club, for admitting a criminal charge relating to unlawful activity with a child.

On the wider question of whether an employee can be dismissed for a criminal offence outside of work, consideration needs to be given to the effect that the charge or conviction has on their suitability to do their job, whether they work with vulnerable adults and children, the reputational risk to the employer and whether trust and confidence has gone between staff, management and customers.

## Trade Union Detriment

Workers are protected against being subjected to a detriment if the sole or main purpose of an employer's act (or failure to act) is to prevent or deter them from taking part in the activities of an independent trade union. The Claimant was a leading light in the WEU (Workers of England Union) which was not a union recognised by his employer, the North Essex Partnership NHS Trust. Some of his fellow employees, who were also officials of Unison, bullied him because he was in the WEU. The Employee won his claim against the Trust because it had not taken effect as detriment and the Court of Appeal ruled that it was reasonably foreseeable that this would deter him from his trade union activities. It did not accept the Trust's argument that it wanted to remain "neutral" in matters relating to inter-union disputes. Consequently, in light of this ruling, it is essential that any complaints are investigated appropriately even if matters appear more of an internal union "row".

## "Legal Highs"

"Legal highs" are substances that have effects that are similar to illegal drugs but are not currently illegal. There is legislation going through Parliament to deal with this. ACAS in the meantime has published guidance on how to deal with this issue [www.acas.org.uk](http://www.acas.org.uk).



It recommends that they are dealt with in a similar way to alcohol, i.e. a drug which is not illegal but is still usually covered in workplace policies. It states that Employers should focus on the effects that the legal highs have on employees in respect of their behaviours and ability to work, rather than the drugs themselves and that Employers should also encourage suspected users to seek help for their problems and educate staff and line managers on the signs of legal high use.

## In the news .....

We recently obtained an award of £2000 for one of our clients. We are also updating our website and will let you know when the new one is operational.

If you have any queries relating to this newsletter or wish to seek employment law advice or discuss training needs, please contact: [andrew.brett@norfolk.gov.uk](mailto:andrew.brett@norfolk.gov.uk),  
01603 223101



Please follow us on Twitter: @NplawNorfolk