Employment Law Update

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Holiday/Working Time– Travel time for those based at home

The European Court has recently ruled that where an individual is based at home and travels for their role ('a mobile worker'), that their working time starts at the moment that they commence their journey to their first appointment as opposed to when they arrive there. Consequently, we recommend that HR check to see whether they have any staff who are based at home, and factor in this judgment when calculating any working hours and national minimum wage and/or holiday pay calculations.

TUPE- permanently incapacitated employee was not assigned

The EAT recently ruled that an employee who was permanently absent (on the facts he was receiving PHI) from work for 4 years meant that he was not assigned for the purposes of a TUPE transfer. The judge provided guidance to help an employee determine which employees should be as being regarded as assigned. (1) The employee must have more than an administrative or historical connection (2) there must be some level of participation in the activities that are to be transferred (3) If temporarily absent, there must be an expectation that the employee will carry out the work in the future (4) All the factual circumstances must be considered with no one factor outweighing another (5) Permanent inability should be distinguished from temporary inability due to ill-health.

Holiday pay

A recent case has indicated that if an employee is unable to take their holiday leave due to ill health then they will be able to carry it over for a further period of 18 months from the start of the next holiday year.

Living Wage

The Government has announced that from April 2016 the introduction of a requirement that Employers pay staff aged 25 and over £7.20/hour and that this will rise to £9/hr from 2020. It is essential that organisations look at the implications of this for all their staff.

Government Consultations- Employment changes in the pipeline

The Government is currently consulting on issues relating to Low Pay, Apprenticeships, Employment Tribunal fees, Closing the Gender gap in pay and use of IR35 companies. We will let you know when matters become more concrete.

Sickness

NICE (National Institute for Health Care Excellence) has just published new guidance on how to deal with sickness and well being(www.nice.org.uk). Given that NICE was introduced by the Government, we would anticipate that these will be relevant to the fairness of any dismissal/action taken by an employer at any future employment tribunal proceedings.

Carers (National Minimum Wage)

A test case has commenced where it is being argued that all travel to and from work appointments for care workers should count as working time under the National Minimum Wage.

Unfair Dismissal – Employer's discretion

A recent Court of Appeal decision emphasised that although employers do have a reasonable amount of discretion when deciding whether to dismiss, it is not so wide to be unlimited. Relevant factors could be how new a policy was, whether training had been provided, how the employer treated similar incidents and the employee's own experience and expertise.

Whilst every effort has been made to ensure that the content of this update 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 update summarises latest legal developments but is no substitute for specific legal advice after consideration of all material facts and circumstances.

Dress Code not discriminatory

A nursery successfully defended a discrimination claim brought by an employee where it had asked her to wear a shorter jilbab for reasons related to health and safety. Crucial to the defence was the fact that the issue had been discussed at interview, the reasons for it were based on real health and safety concerns and that the dress code required was seen as being proportionate to them.

Low threshold for Causation in Discrimination Arising from a Disability

Under section 15(1) of the Equality Act 2010 , "discrimination arising from disability" occurs where A treats B unfavourably because of something arising in consequence of B's disability and where this occurs, A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The issue of whether an employer has caused any treatment means that a tribunal has to analyse the employer's actions and can include determining whether to uphold a claim if matters are remotely connected and whether it should uphold the claim if it is only partly connected to an employee's disability. The Employment Appeal tribunal (EAT) has emphasised that causation is a low threshold and that a Claimant will be able to show that something has arisen in consequence of their disability provided that the unfavourable treatment had a significant influence for the employer's actions. The EAT emphasised that it doesn't have to be the main cause or even the sole cause for the unfavourable treatment and that the employer's intentions were irrelevant for determining causation.

Indirect Discrimination guidance

The Court of Appeal has emphasised the need for Claimants to not only show that the pool of employees that they are within suffer a group disadvantage but that they must in any event show that they were personally disadvantaged. It added that it was important to consider the reason for any less favourable treatment and whether it related to a protected characteristic. This makes sense given that if these factors were present, it is likely to place the burden of proof on the employer to provide further explanation that showed that treatment was not discriminatory.

No implied term to declare own misconduct

The Employment appeal tribunal has confirmed that as a general rule there is no implied duty on employees to declare their own misconduct. This would not be the case for senior employees who owe fiduciary duties. However an employee will have to make a declaration if this was a requirement under an employer's policy or under relevant professional rules.

Role of HR in a disciplinary hearing

The Employment Appeal tribunal recently warned that HR should be careful that it does not exceed the proper remit of its role. HR officers must not lobby for a dismissal or any other disciplinary sanction as this would make any subsequent dismissal unfair. In terms of the role of an HR officer, this should be limited to advising a dismissing officer on the law, the employer's procedures, clarifying any points that arise at the hearing and ensuring that all matters have been properly addressed.

New ACAS guidance on discrimination

ACAS has published new guidance (www.acas.org.uk) that is aimed at assisting the resolution of disputes that have arisen out of discrimination.

In the news

If you have any queries relating to this update or wish to seek employment law advice or discuss training needs, please contact:

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