Employment Law Newsletter

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Government/Parliamentary reviews of Employment rights

A parliamentary select committee is conducting a review into the 'world of work' which will include analysing whether the definition of worker is clearly defined, examining agency workers' rights, looking at the balance of rights between casual workers and their employer, zero hours, flexible working and how the self-employed are treated. There is also a separate enquiry looking at the implications on women's rights following Brexit. Please note that both of these are additional to the Government's own announcement last month that there will be a review of employment rights.

Working time – important ruling on rest breaks

It was confirmed in a recent decision of the Employment Appeal Tribunal that an employer must ensure that staff have the opportunity to take their daily rest breaks and that even in a situation where an employee had never asked for one and hence had technically never been refused a break, this did not prevent this claim succeeding. On the facts the individual worked 8.5 hrs without a break. HR and managers should check that staff do take their breaks.

Disability Discrimination- long term sickness- dismissal guidance.

If an employer applies an attendance policy to a disabled person which results in either a warning or a dismissal, it will have to justify its position against a claim for discrimination arising out of their disability. In a recent case, the employer had a 3 stage unsatisfactory attendance procedure which it applied to a member of staff on long term sick. The individual was unable to comply with the requirements of the policy and hence at each stage was issued with an improvement notice containing back to work dates. The key learning point is that the policy and its application has to be justified **not just generally but also each action it had taken throughout the whole process**. In reality, this is likely to mean that it is permissible to have an aim of good staff attendance but that each stage must be a proportionate response to the facts and that some additional allowance will have to be made to the particular disability. If no allowance is made, that will make it harder but not impossible for an employer to defend such a claim. Obviously, the other relevant factor is whether reasonable adjustments have been made or not.

Breastfeeding at work- rotas

All managers will be aware of the need to assist mothers on their return to work following a maternity absence. A recent case has highlighted that employers must take particular care if they refuse to change work patterns to support this. On the facts, an employee requested that she work no longer than 8 hour shifts and gave medical letters in support stating that this would assist with breastfeeding arrangements as this would allow them to better manage their time to do this and due to the fact that there was an increased risk of mastitis if this was denied. The employee claimed indirect sex discrimination and the employer had a variety of justifications which included meeting customer requirements. The learning point though is that the employer lost this case as it could not show how **in practice** this would happen and hence it lost the case. If the employer does not have the evidence to back up its assertions then they are likely to lose similar cases where working conditions puts a maternity returner at a disadvantage.

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.

Disabled employees – is pay a reasonable adjustment ?

A recent case has highlighted the issue of whether an employer has to make a reasonable adjustment of continuing to pay an employee at a higher rate based on a job that they physically are no longer capable of doing when they are transferred to a lower ranking job because of their disability. This ruling suggests that this may even be the case if this was caused by downgrading a post as a result of a restructure. The Employee had to change jobs due to a back condition and his pay remained the same. Then, following a reorganisation, his new role was downgraded and he did not accept the salary reduction and hence his employment ended. The Employment Appeal Tribunal found that the employer was required to consider whether or not to consider as a reasonable adjustment of paying this higher rate of pay to this employee on a permanent basis. It refused to overrule the tribunal decision that this was required although it cautioned that every case depended on its own set of facts. Consequently, HR and managers to look very carefully at whether it is possible to reduce pay in these circumstances. It will be interesting to see whether this case is appealed as it does go against the trend on pay as a reasonable adjustment.

VAT – joint employment relationships

The tax code contains provisions which states that if an employer provides staff to another one, there is a VAT charge due. This provision has become of increasing significance with the various models of local authority cooperation and also where Local Authorities use companies that they own to do the work. One way to avoid this VAT charge is to create a joint employment relationship. A recent tax case has shed some light on this issue.

It will be very useful evidence if the particular employees can show that they have the right contractual documentation reflecting joint employment, that in practice this is reflected mutual collaboration as opposed to providing one member of staff under a service level agreement and that the agreement between the parties reflected this. Every case will hinge on the particular facts and it is essential that parties document matters properly in their contracts/agreements and that the arrangement in practice demonstrates the involvement of both parties in the joint employment.

Employers to pay damages for staff unauthorised use of personal data

Many local authority staff have access to significant amounts of data on Council databases. All staff should only access these databases or use their contacts in other organisations to access other data for legitimate work related purposes. Staff need to be warned that in a recent case two employers were collectively ordered to pay £9,000 because their staff made unauthorised use of personal data, breached the right to privacy and rights relating to misuse of confidential information by investigating matters. Employers need to train staff so that they know what is personal data and what is legitimate processing and the consequences of breaching the law to both themselves and their employer.

Fluency in the English Language

All staff who work in the public sector in a customer facing role have to be able to speak English at an appropriate level of fluency. A new Code supplementing this has just been released (www.gov.uk) and we recommend that you check what roles might be affected by this duty, whether all staff meet the requisite standard and if any don't, matters are handled sensitively with training and support.

Merry Christmas and a Happy New Year to you All

Please note we are monitoring BREXIT developments

Contact details 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, 01603 223101**

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