

Employment Tribunal fees declared illegal

The big news is that the Supreme Court has ruled that employment tribunal fees are unlawful. The reasons for its decision include the fact that it denied employees effective access to justice as the fees had not been set at a level that everyone could afford, which meant that it breached European law. It observed that many claims were not high in financial value in comparison to the cost of the fees and Lady Hale also felt that it indirectly discriminated against women as it placed women at a greater disadvantage than men given that they were more likely in practice to incur the cost of sex discrimination claims.



This means that employees will no longer have to pay the issue and hearing fees and we would consequently expect significantly more employment tribunal litigation. The Government has already announced that it will refund all of the fees that have been paid which amounts to approximately £30 million.

There remains an outstanding issue about settlements made during the fees regime. If there is a separate clause referring to payment of the issue fee e.g. to the Trade Union, it may be possible to seek reimbursement. However, if any deal was done on the basis of one overall figure to settle all claims, then it will be a lot harder to prove that the employer was paying for the issue fees and hence was entitled to a refund. The other practical difficulties are whether this is possible for deals made in full and final settlement and whether an employer would actually want to reopen litigation that had been settled.

There is also a possibility that the Government may be sued by individuals who are unable to afford these fees and consequently lost the chance to bring their claim in the Tribunal.

Paid leave for Bereaved parents

The Government has announced proposals which would provide paid leave for bereaved parents. It is embarking on consultation and we would expect legislation to implement this in 2018.

Whistleblowing - public interest test

The Court of Appeal has set out its guidance on whether a worker's disclosure is in the public interest.

Although the legislation was amended to emphasise that an individual's contract of employment issues should not be ones which qualify as a protective disclosure, the Court stated that the relevant factors to be considered were:

- The number of people affected (though sheer numbers alone will not normally be enough)
- The type of interest concerned (is it important or trivial?)
- The nature of the wrongdoing (was it deliberate or inadvertent?)
- The identity of the employer (how prominent an organisation is it?)

On the facts, a disclosure was protected because it had a wider ramification in that it was alleged that accounts had been significantly manipulated to the tune of £2-3million involving a well-known company which made it in the public interest rather the fact employees had an interest in their bonuses being correctly calculated.

Cyberbullying

Acas has just issued a new guide on how employers should handle cyberbullying. www.acas.org.uk. This is another development in social media and employers might want to think about extending their bullying policies to cover such posts on the internet etc. as most policies usually only apply to incidents at work.

Disability discrimination - multiple choice questions

An employer was guilty of disability discrimination against a potential employee who had Asperger's by insisting that he was assessed under a multiple choice test. On the facts, it was wrong not to make an alternative method of assessment given the difficulties that a candidate with Asperger's would have with this test.



Gross misconduct does not automatically lead to a fair dismissal

A recent case flagged up that it won't necessarily be a fair dismissal even if an employee commits gross misconduct. An employee had 42 years' service with an unblemished record. He committed gross misconduct by losing his temper and grabbing a fellow employee around the collar. Initially it was dealt with informally by the manager but HR felt that it needed to be dealt with formally as under its policies the employer regarded this behaviour as gross misconduct. At the hearing the employer stated it had a zero tolerance of bullying. The Employment Appeal Tribunal upheld a tribunal decision that this was an unfair dismissal. The reasons were connected to insufficient weight being placed on his good service, the fact that it wasn't true that zero tolerance policy applied and that the handbook stated physical violence was normally a dismissal offence and that the employer hadn't operated its discretion in this case.

Strike calculation of deductions

The Supreme Court has determined that a day's pay should be calculated as 1/365th of salary (rather than 1/260th).

Fire Risk Assessment - a reminder

Under the Regulatory Reform (Fire Safety) Order 2005, an employer must produce a fire risk assessment on its premises. It must include a comprehensive review of how fires could potentially start, who would be endangered, the fire precautions currently in place and a plan to handle a fire if one starts.



The fire risk assessment must also be communicated to everyone it affects and reviewed at regular intervals. This is important as there are potential fines, insurance and criminal issues that may be affected by any non-compliance.

Disclosure and Barring

We suspect that the current DBS scheme will have to be amended again as a recent case has emphasised that it is not proportionate for those with multiple convictions. Changes were introduced in 2013 which aimed to assist individuals who had committed minor offences as a child but who had, as adults' led a criminal free life by not having them revealed by a DBS search.

Consultation on the value of injury to feelings award

The President of the Employment Appeal Tribunal have set out a consultation in relation to the value of injury to feelings which can be awarded in discrimination claims. The proposed new bands are as follows:

Lower band: £1,000-8,000,

Middle Band: £8,000-25,000, and

Upper Band: £25,000 to £42,000.

It will be interesting to see what changes to employment law will arise out the Taylor Report into Modern Day Working Practices

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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