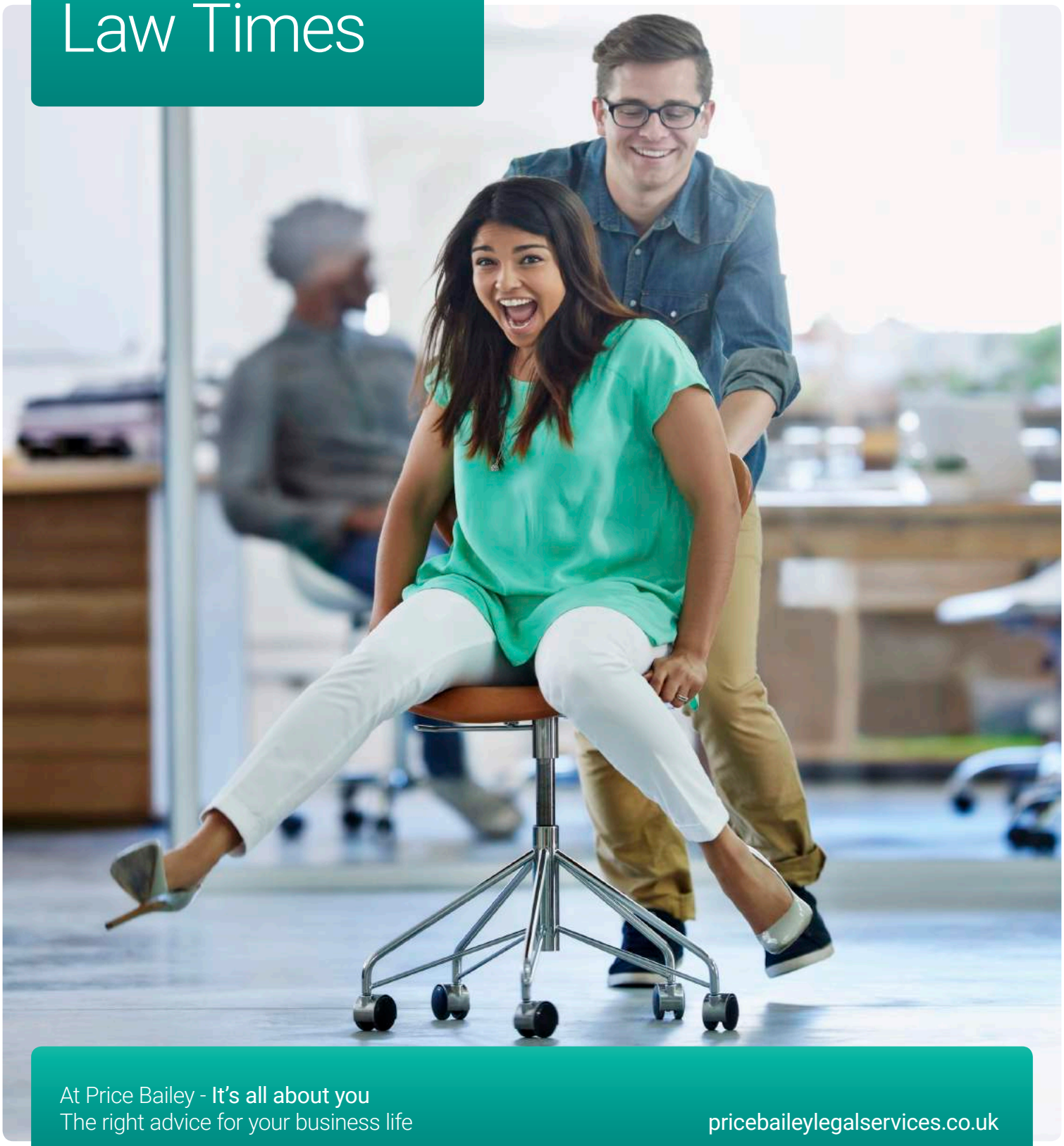
Price Bailey
LEGAL SERVICES

Summer 2016

Employment Law Times



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The right advice for your business life

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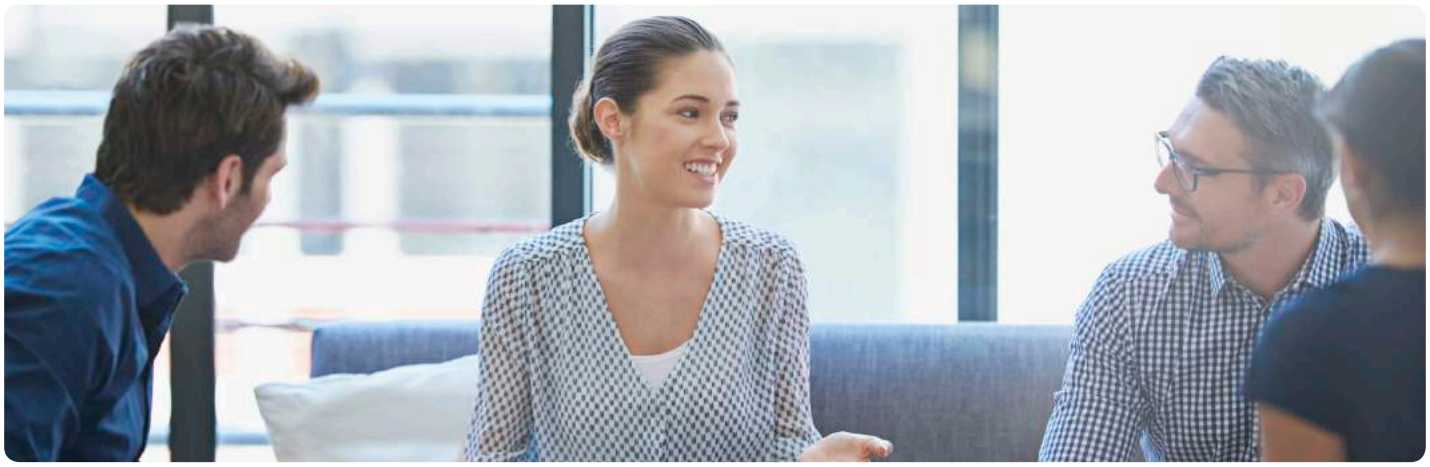
Welcome to the Summer quarterly employment law update



Much has happened since our Spring e-bulletin, not least the vote to leave the European Union and the appointment of a new Prime Minister! Many of us may feel like we are entering a period of uncertainty for businesses and organisations whist the post-exit arrangements are negotiated but in the meantime we must carry on with business as usual!

Contents:

We can assist you in both the preparation of the topics within this newsletter and in delivering training.

Anna Harvey & Victoria Pratley
Senior Employment Lawyers, Price Bailey Legal Services

Wellbeing in the workplace

If you have any questions regarding this subject please contact **Anna Harvey or Victoria Pratley,** Senior Employment Lawyers.

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While we come to touch on Brexit in more detail later in this update, we would like to draw attention to some positive news since our last issue.

As you may be aware from previous issues, at Price Bailey Legal Services our aim to inspire wellbeing in the workplace.

Not only do we regularly speak to clients about what this means to them, we went a step further and on 1 July we hosted a workplace wellbeing event at the Møller Centre in Cambridge titled "Better Businesses = Better Financial Results".

The theme of the event was to explore the interaction of organisational wellbeing and individual employee wellbeing and how focusing on them, in equal measures, can positively influence the financial results of a business.

Professor Dame Carol Black, FRCP FMedSci, was the keynote speaker for the event. Dame Carol is Principal of Newham College Cambridge and Expert Adviser on Health and Work to NHS England and Public Health England.

Dame Carol recognises that although large organisations are well on their way to creating wellbeing strategies and allocating financial budgets, the SME sector is lagging behind; seeing wellbeing strategies as 'soft and fluffy' and the next fad. Some are introducing daily fruit bowls or cycle to work schemes which, although a step in the right direction, simply isn't enough.

Dame Carol made it clear to all of us that in order to improve performance and wellbeing of employees, we must create 'good workplaces'. Good workplaces have a number of key features, all of which we recognise as crucial for the success of our clients:

- Visible senior leadership
- Board-level or equivalent engaged in improving workplace wellbeing
- Accountable, trained managers
- Empowerment of staff
- Promotion of employee engagement
- Attention to both mental and physical health improvements
- Regular and effective measurement and evaluation to ensure continuous improvement

Professor Dame Carol Black, FRCP FMedSci, speaking at the event.

Workshop, on how we work with clients, to explore how improving workplace wellbeing.

Hannah Roman, People Services Manager at ARM Ltd (a Cambridge based FTSE 100 company with £1 billion of income and over 4,000 employees worldwide) talked of wellbeing initiatives that they have introduced in the UK, originally without a budget, and stressed how small changes, which are not costly, can make a real difference to the workforce.

The event concluded with a short workshop, which gave a taster of how we work with clients, to explore how improving workplace wellbeing and increasing employee engagement ultimately has a significant effect on productivity and profitability.

The event was featured in the Cambridge News, click here to follow the link.

We hope you enjoy this edition, and if there is anything you would like to discuss, please do not hestiate to get in touch.

Vikki and Anna

Hannah Roman, People Services Manager at ARM Ltd speaking at the event.

The event was so well received, we are intending to repeat the content in our other offices. If you are interested in attending, please email your interest to ashley.huggonson@pricebailey.co.uk and we will email you once the date and location has been finalised.

The implications of Brexit on employment law - everything's a bit uncertain at the moment, isn't it?

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For many workers uncertainty and insecurity has been a theme for some time. Four and a half million people in England and Wales are in some form of insecure work. That's according to the Citizens Advice analysis of figures produced by the Office of National Statistics. Variable shift patterns, temporary contracts, zero hour and agency contracts are at the heart of this.

Citizens Advice has found that when it comes to job searches, a steady, reliable income is as important to people as the amount of take-home pay on offer. A stable job and regular pay is believed to lead to greater productivity and loyalty towards employers.

What will Brexit mean to this? We don't know, of course. Time will tell what the effects, good or bad, will be on workers' feelings of security and on their ability to manage their finances and plan for the future. But until then, the speculation, the analysis, and the uncertainty, will roll on.

The referendum result has left many questioning what is going to happen to the UK over the coming months. In particular, business owners who employ foreign workers may be particularly concerned about how future changes may have an impact on their business moving forwards.

What about our employment laws? Will we see changes there too? It is highly unlikely that any UK government will fully repeal existing employment laws which implement EU minimum requirements. This is because most of the European legislation reflects good employee protection and are more likely to be considered fundamental rights. For example, the right for employers not to discriminate against staff on the grounds of a protected characteristic (eg. race, gender and age).

Importantly, the UK government has made it clear that they will continue to seek to trade with the EU, and therefore, the UK will need to demonstrate that it has minimum employment protections in place in order to make it a viable trading

partner for other European member states.

At Price Bailey we are able to offer clients global mobility services, providing essential advice on all international matters from legal issues to tax issues. If you have employees based in European offices, intend to relocate employees in Europe, or are bringing employees to the UK from a different country, please contact us.

Immigration provisions come into force

Immigration has been one of the key issues during the referendum debate, and although the UK will make preparations to leave the EU, we can assume that for the foreseeable future, transitional rules will ensure that any EU citizens already in the UK will continue to have the unrestricted right to live and work in the UK, and the same should be true for UK citizens living and working in other European counties.

For now though, this month sees some of the employment-related parts of the existing Immigration Act begin to apply. The main points to be aware of are that from 12 July:

- it will be a criminal offence for a person to work when he or she reasonably believes that their immigration status prevents them from doing so
- employers of illegal workers could be convicted if they had reasonable cause to believe that the employee's immigration status was a bar to them working

The latter point extends the previous offence of knowingly employing an illegal migrant. A maximum prison sentence of five years could be imposed, and a fine. In some circumstances, the business could be closed down for up to 48 hours.

So check, on an ongoing basis, that your workers have the right to work in the UK, and keep good records. Make sure, too, that those within your business who are involved in recruiting people to work for you know what's expected of them, and that they understand the severity of getting this wrong.

Data Protection

Prosecuted for taking personal information

The temptation for departing employees to take one or two pieces of useful information with them is sometimes too much.

One ex-employee has found out to his detriment that the Information Commissioner's Office doesn't take kindly to this. He was prosecuted for emailing details of 957 clients to his personal email address as he was leaving to start working for a rival company. The documents contained personal information, which included customers' contact details, purchase history, and commercially sensitive information. A guilty plea followed, and a fine, costs and victim surcharge imposed.

While there may be little an employer can do to prevent these sorts of breaches happening (the offence, by the way, was unlawfully obtaining data), the possibility of a conviction – in addition to civil remedies – could be all the deterrent that is needed.

Victory for victims in modern slavery case

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A chicken-laying company has become the first British business to be found liable to compesate victims of human trafficking.

Six men from Lithuania had claimed that they were severely exploited. That included being denied sleep and toilet breaks and living and working in inhumane and degrading conditions. The company has been ordered to pay compensation for, among other things, unlawfully withholding wages and depriving the men of facilities to wash, rest, eat and drink. The level of that compensation is yet to be decided.

The men worked on farms, which supplied eggs to businesses that sell to supermarkets. It's a warning to employers that modern slavery in supply chains is a very real possibility.

If you haven't yet got to grips with your obligations to eradicate modern slavery - which includes servitude, forced or compulsory labour and human trafficking from your business or supply chain, do it now. Even if you are not one of the £36m+ turnover businesses that has to publish an annual statement on this, your place in their supply chain could be in jeopardy if you don't also ensure that your own suppliers, and even your suppliers' suppliers, aren't engaged in some form of modern slavery.

Restrictive covenants judged as at 'Day One'
Bartholomews Agri Food v Thornton

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Do you keep employees' restrictive covenants under review?

As business needs and other circumstances change, you could find that covenants become unenforceable.

But in Bartholomews Agri Food v Thornton, the High Court held that a restrictive covenant that wasn't enforceable to begin with didn't become enforceable when the employee was promoted to a role that would justify a restriction along those lines. In other words, enforceability is judged as at the time the contract is signed.

For Mr Thornton, that time was at an early stage in his career when he was a trainee agronomist. In his contract was a clause that read:

"Employees shall not, for a period of six months immediately following the termination of their employment be engaged on work, supplying goods or services of a similar nature which compete with the Company to the Company's customers, with a trade competitor within the Company's trading area, (which is West and East Sussex, Kent, Hampshire, Wiltshire and Dorset) or on their own account without prior approval from the Company. In this unlikely event, the employee's full benefits will be paid during this period."

An inappropriate restriction to place on a trainee agronomist and unenforceable, said the High Court. Even though, by the time Bartholomews wanted to rely on the clause, Mr Thornton was a full-fledged agronomist that didn't convert the clause into a reasonable, enforceable one. Aside from the fact that the clause was still too widely drafted to work, it was unenforceable at the beginning and it remained unenforceable, regardless of Mr Thornton's promotion.

A stark warning, then, that not only do you need to get your covenants right to begin with, but you should review them periodically as employees rise through the ranks.

Acas Code doesn't apply to ill health
Holmes v Qinetiq

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The Acas Code of Practice on Disciplinary and Grievance procedures applies to situations involving misconduct and poor performance. But what about ill health?

The Employment Appeal Tribunal (EAT) has confirmed that in cases of genuine ill health, employers don't need to follow the Code. This, in turn, means that tribunals aren't allowed to impose a penalty of up to 25% of any tribunal award because of a failure to follow the Acas Code – since the Code doesn't apply in the first place.

Mr Holmes was a security guard who had been dismissed for no longer being able to do his job because of his poor health. This was held to be unfair, but the tribunal didn't award an uplift in compensation for the employer's failure to comply with the Acas Code. Quite right, said the EAT. This wasn't a disciplinary case. Mr Holmes wasn't to blame for his inability to do his job. Culpable conduct is key to the Code applying and, therefore, to the possibility of increased compensation.

Things might not always be this clear-cut. What begins as genuine ill health could become misconduct or culpable poor performance, or vice versa. The real risk here for employers is in not keeping a close eye on the issues as they develop. But this case provides some helpful clarification that in genuine ill health cases where there's no disciplinary or culpable conduct element (i.e. something that calls for correction or punishment), the Code won't apply – although a fair dismissal in those circumstances is obviously preferable to arguing over compensation and the procedures are often good to assist with managing such situations.

Transferring to a new service provider
Amaryllis v McLeod

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When a new provider takes over a service, employees of the original service provider may transfer over under TUPE.

But only those who, immediately before the transfer, were part of an organised grouping of employees with the principal purpose of carrying out the particular activities for the particular client qualify.

The employees in this case worked for Millbrook, which had a contract to renovate and supply furniture to the Ministry of Defence (MOD). When that contract was lost to Amaryllis, the Millbrook employees weren't taken on.

Had they transferred under TUPE? Yes, all bar one, said the tribunal. The department had been set up to fulfil the renovations contract and that fact remained, despite work being also carried out for others. The department hadn't changed from being one that mainly serviced the MOD contract to one that mainly serviced the needs of all customers, the major one of which happened to be the MOD. And the activities were fundamentally the same.

That was overturned on appeal. It's not enough to say 'here's a department and it does this renovation work – and it's mainly for the MOD'. At the relevant time (which means immediately before the transfer, as opposed to historically) had the department been organised for the principal purpose of carrying out the activities for that client? The tribunal had focused too much on what had happened in the past when it ought to have assessed the situation as it stood just before Amaryllis took over the MOD contract.

In transfer situations, there will always be questions about whether or not the new service provider will inherit some or all of the existing provider's employees. This case has highlighted that some sort of deliberate effort to organise a team (an 'organised grouping') to carry out certain work for a certain client is crucial to TUPE applying and to employees transferring. And whether that's the case or not must be judged just before the point at which the new service provider takes over. Important things to consider, whichever side of the transfer you're on.

Discrimination Cases

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Headscarf ban not direct discrimination
Samira Achbita v G4S Secure Solutions NV

Ms Achbita was a Muslim employee who began wearing a headscarf to work. The company had a rule banning the wearing of anything that was a visible sign of political, philosophical or religious beliefs (a 'neutrality ban'). She firmly intended to wear her headscarf and was eventually dismissed.

During the course of her case, the European Court of Justice was asked to decide if a prohibition on a female Muslim employee wearing a headscarf is not direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at work.

We don't yet have the judgment but we have the Advocate General's opinion, which is usually (but not necessarily) a good indication of the way the decision will go. No direct discrimination, the Advocate General has said. That's provided the ban isn't founded on stereotypes or prejudices against a particular religion or religious beliefs generally.

It could be indirect discrimination, however. That said, an employer may be able to justify the discrimination in order to enforce religious and ideological neutrality. Whether that would be proportionate - another hurdle to clear - would depend on factors including the conspicuousness of the clothing or symbol, and the nature of the employee's job.

The key message here is consistency of treatment, and having restrictions and requirements that are necessary and applicable across the board – not just to certain categories of workers.

Disciplinary wasn't discrimination
Wasteney v East London NHS Foundation Trust

Ms Wasteney was a Christian worker employed by the NHS Trust.

She was alleged to have 'groomed' a junior Muslim colleague by, among other things, praying with her and laying her hands on her.

The colleague said that she had begun to feel ill as a result of Ms Wasteney's abuse of her managerial position. There was an investigation and Ms Wasteney was given a final written warning (reduced to a first written warning on appeal). Professional boundaries had been blurred. But Ms Wasteney then brought a tribunal claim, alleging discrimination and harassment because of/related to her religion or belief.

Her claim hinged on the reason she was disciplined. If it had been for manifesting a religious belief in consensual interactions with a colleague, then that would have been within her rights, and therefore religious discrimination to discipline her for it. But it wasn't; she had been disciplined for her unwanted and unwelcome behaviour towards a colleague. That was something different altogether, particularly when taking into account Ms Wasteney's more senior position. Her claim failed at the tribunal and at the Employment Appeal Tribunal.

There was also a human rights angle. Had Ms Wasteney's right to freedom of thought, conscience and religion been breached? No. That right doesn't give people 'a complete and unfettered right to discuss or act on [their] religious beliefs at work irrespective of the views of others or [their] employer', the tribunal said.

So the way in which religion or belief is manifested is all-important to whether disciplinary action is appropriate or not. It's something that takes a careful analysis.

We can assist you in both the preparation of these policies and in delivering training.

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Tax Corner

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Welcome to this quarter's Tax Corner provided by Price Bailey's tax specialist.

The benefits of simplification

Over two years ago in January 2014 the Office of Tax Simplification (OTS) published a review of employee Benefits in Kind (BiK) and expenses. A consultation document entitled 'Employee Benefits and Expenses- Trivial Benefits exemption' and subsequent draft legislation was published later that year.

It then passed through the parliamentary process but it was not until 6 April 2016 however that the legislation took effect.

So what's changed?

Prior to 6 April 2016 employers had to annually submit to HMRC forms P11D to report all benefits in kind and expenses provided to employees. Employers could however apply to HMRC to obtain an agreement that a BiK should be excluded from the reporting obligations, on the grounds that the benefit was trivial and this was somewhat burdensome.

Furthermore, employees were charged Income Tax on all BiKs, so whilst an employer might have been feeling good about that generous gesture of a bottle of wine he made to an employee the employee would be subject to paying Income Tax on the equivalent cash value of the wine.

The good news

From the 6 April 2016 a new 'Trivial Benefits in Kind Exemption' (Bik) has been introduced. The key point of this exemption being that an employer is now able to make such generous gestures to their employees without an extra administrative burden or an additional tax charge on their employee.

There are of course conditions to the exemptions, so we won't suddenly be seeing an increase in extravagant gifts between employer and employee:

1. The benefit must be no more than £50 (or an average of £50 if the benefit is provided to more than one employee and it is unrealistic to work out the exact

2. The benefit cannot be cash or a cash voucher (although gift vouchers are allowed)

3. There must be no entitlement to the benefit as part of the employment contract and it must not be provided in recognition of the employee's work performance/ duties

So in essence, as long as the benefit is provided as a freely given gift, for example on a birthday, at Christmas or on the birth of a new baby, has a value below £50 and is related to goodwill or employee welfare rather than performance or in connection with a work duty, the benefit is exempt.

Furthermore, there is no cap on the number of qualifying trivial BiKs that an employer can give unless the employer is what is known as a close company. Generally this a typical SME which is controlled by a relatively small group of people. Where that is the case the directors and certain others (plus their family) are restricted to receiving £300 per tax year of BiKs. This is aimed at stopping the new exemption being abused as a way of extracting value tax free.

....But watch out

Should a BiK have a value of say £51, the entire amount is taxable on the employee, not just the £1 in excess of the £50 limit!

This article was written by **Richard Grimster**, Senior Manager.

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Doing away with forms P11D?

On a related note, the annual reporting commitments associated with taxable benefits and expenses can also be simplified by 'payrolling' them.

As stated above it has previously been the case that employers have had to submit to HMRC forms P11D to report benefits provided to employees – typically this might include a company car. That benefit would then be reflected in the employee's PAYE code.

However, from 6 April 2016 this can all be avoided if the employer opts to 'payroll' the benefits. The employer must register with HMRC to do this prior to the start of a tax year. After registering to payroll a particular benefit, employee tax codes will be changed and the value of the benefit will be included on the payroll as 'extra pay'. As such there will be no further requirement to submit P11Ds in relation to the benefit. Most benefits can be payrolled with an exception of vouchers/credit tokens, living accommodation and loans.

The cash equivalent value of the benefit needs to be determined, which may be done via your own payroll system or else HMRC have an online calculator or advice. The cash equivalent value is then proportioned equally between each pay day to give the taxable amount of the benefit.

For example:

Mr X has a salary of £24,000 per annum. He is paid monthly and has a company car with a cash equivalent value of £6,000.

The monthly taxable pay is £24,000/12 = £2,000
The monthly taxable amount of the car is £6,000/12 = £500
Total taxable pay each month is therefore £2,000 + 500 = £2,500
This total pay and taxable amount of the benefit is recorded on the payroll, and then PAYE tax will be calculated on the benefit inclusive pay.

Aside from dispensing with doing forms P11D it should mean the tax on benefits is more accurately collected in 'real time' avoiding the employee incurring large under or over payments of tax where benefits are not properly reflected in their PAYE codes.

One minor piece of paperwork

The employer must of course inform his employees of the payrolled benefits. This should be done by letter at the end of each tax year and needs to include details of what benefits were payrolled, the cash equivalent of the benefit and separate details of any benefits that were not payrolled.

....But be aware

Payrolling benefits does not mitigate the requirement to complete form P11D(b) in relation to Class 1A NICs. These contributions should be worked out using the cash equivalent of the benefits

If you need advice on employment law or HR, Price Bailey Legal Services is a specialist firm within our group. We're regulated by the Solicitors Regulation Authority (SRA), but we're not a traditional law firm.

Anna Harvey & Victoria Pratley
Senior Employment Lawyers

If you would like to discuss any matters included in this edition of your Employment Law Times then please contact our senior lawyers Anna Harvey or Victoria Pratley.

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If you have any questions or queries, please give us a call and we will be happy to discuss your requirements.

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