EMPLOYMENT LAW TIMES | WINTER 2016

SUPPORTING AND EMPOWERING EMPLOYERS

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The latest news and case studies in employment law

Price Bailey
LEGAL SERVICES

Welcome to the quarterly newsletter for employers

Welcome to February's quarterly e-bulletin!

The start of the year is the perfect time to reflect on your success in 2015 and work out how this year will be even better.

Reviewing workplace wellbeing and increasing the engagement of the team around you in our view should be the starting point as the success of your business ultimately hangs on your people.

If your work force is already engaged, why take that for granted? How about proactively engaging with that positivity this coming year and improve engagement, productivity and efficiency even further?

Employee surveys can be a great tool for gathering information about your team but if no action is subsequently taken, they could be more damaging than productive. The interpretation, analysis and subsequent action points coming from that data will be key to moving your organisation forward.

Increasing employee engagement does not need to be a huge task, being more open and transparent about what you, as an employer, offer your team by way of their statutory rights could be the first step.

It does not have to be about offering employee share schemes, incentive packages and open annual leave, although that could be the ultimate goal!

Other ideas could be:

- Being open about what happens if an employee or an employee's partner is pregnant or they are looking to adopt.
- Being transparent with your team about their statutory right to request to work flexibly.

Such little steps can bring more engagement to your team and you could reap the rewards by retaining key members of the team and improving commitment, efficiency and productivity.

In summary, whether it's tackling day to day management issues, ironing out operational problems, or making the big strategic business decisions, go for it. It's what the beginning of a new year is all about.

Our team at Price Bailey Legal Services can assist you in considering these options in addition to helping you with day to day employment law and HR queries.

How about having an "Employment Healthcheck" to see if your documentation, procedures and processes are fit for purpose for the coming year?

Please click here for the Employee Engagement Survey

As we work closely with our colleagues in Price Bailey, we can also offer the benefit of relevant tax advice or specific advice concerning employee benefits and share schemes so our clients really do get the value of a joined up approach.

Why not call Vikki or Anna to discuss.

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Different disciplinary treatment could be justified

MBNA v Jones

Two employees became involved in some sort of kneeing, face-licking, punchy, text message-threatening exchange that began at their employer's 20th anniversary bash at the races.

What started as fun or banter, as onlookers saw it, escalated and led to one of the men losing his job.

The long and short of it was that he was dismissed for punching the other in the face. The other employee, who had sent threatening texts once the men had left the event, was given a final written warning. Two employees, same episode, different treatment. Was the dismissal of the first fair?

No, said the tribunal. Both employees had committed acts of gross misconduct and there was unfair disparity of treatment.

The Employment Appeal Tribunal overturned that decision. The dismissed employee had punched the other in the face at a work event at which staff had been told about the standards of behaviour that would be expected of them. The other employee had later threatened to do something that he didn't carry out. The more lenient treatment of the second didn't make dismissal of the first unfair; that decision wasn't wrong or outside the band of reasonable responses. The two men were disciplined for different things.

So, even though consistency is really important in disciplinary situations, it can be ok to treat employees caught up in one incident differently, but tread cautiously. You need to be very clear about who did what, and about the sanction that's appropriate to their actions. Keep good notes of the thought processes you have followed in reaching your decisions.

If your January was similarly interjected by a disciplinary or two after the festivities, you clearly are not alone. The perils of alcohol-fueled Christmas parties are well-documented, and their aftermath often leaves employees with more than just a red face and a tarnished reputation. The point is, whether you have had problems or not, reviewing your policies and auditing your procedures is always a positive and worthwhile task.

If problems did arise over the festive season or throughout 2015 then reviewing your anti-harassment and bullying policy, equal opportunities policy, disciplinary and grievance capability procedures could be a good idea.

Now could be a good time to ask whether:

- Your organisation makes it clear about its stance towards alcohol at events, particularly if the business is laying on a free bar.
- Do employees with company cars need to drive after evening social events and, if so, how far are you responsible for them if they drink and drive?
- Are managers still responsible for their team even at "social" events?

Zero hours guidance

Does your business rely to some extent on casual labour? If so, you may well be using zero hours contracts.

They can be really useful, flexible ways of covering things like staff illness, seasonal work, projects and 'on-call' duties.

But you won't have failed to notice that zero hours contracts have been in for some criticism recently. A huge bone of contention has been around exclusivity clauses; terms within these agreements that stopped workers topping up their (fluctuating) earnings by working elsewhere. Now that these clauses have been banned, zero hours contracts have clawed back some popularity. But are you comfortable about when and how to use them?

This guide from the Department for Business, Innovation & Skills should help:

https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers.

It has some really clear pointers about appropriate and inappropriate use. It's also good on best practice and on alternative arrangements that you could put in place.

And, while we're on the subject, the Government has published draft regulations (the 'Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015') which could thwart employers who ignore the ban on exclusivity clauses.

Yes, these clauses will be unenforceable and, yes, employees could choose to take no notice of them. But the regulations will offer certain specific protections for people working under zero hours contracts:

- The dismissal of an employee (however long they have been employed) will be unfair if the reason, or main reason, is that they didn't comply with an exclusivity clause; and
- The right for workers to not suffer a detriment because of failure to comply with an exclusivity clause.

The sleepworking conundrum

Shannon v Rampersad (T/A Clifton House Residential Home)

Is a worker working when they're on-call but not working?

Mr Shannon was an on-call night care assistant. It meant that he had to be present in the care home (which, significantly, was also his home) throughout the night to help the designated night care assistant. In reality, help was rarely needed.

Did all those nighttime hours constitute working hours, even though he slept during them? The tribunal held that he was only working when he was called on to help the care worker. As he was already being paid the National Minimum Wage for those times, he lost this aspect of his claim. The Employment Appeal Tribunal upheld that decision.

It's important to remember, that just because a worker is at their place of work, it doesn't mean that they are 'working'. The usual rule is that if someone is available at or near work to do salaried work and is required to be available for work, then those are working hours. But, as this case has highlighted, it's different where the worker is spending time at home. Then they'll only be working when they are "awake for the purpose of working".

It can be a difficult legal area to navigate and, as it's so fact-specific, there's plenty of scope for argument.

Who transfers as a result of a TUPE transfer?

Inex Home Improvements Ltd v Hodgkins

Where an organisation is to take over the delivery of a service, workers who currently do that work sometimes transfer over to that new service provider.

It's a fundamental rule of TUPE. However, only workers who are assigned to an "organised grouping of employees" make the move. And that was the key point in this case.

Mr Hodgkins was employed by Inex. Work was subcontracted to Inex in tranches by a company called Thomas Vale. There was a pause in the work supplied and Inex laid Mr Hodgkins and some of his colleagues off under the terms of a construction industry national agreement. It was a temporary stoppage and Inex continued to employ them.

When Thomas Vale issued its next batch of work (which was pretty much the same work as Inex had previously completed), it went to a different subcontractor. Had Mr Hodgkins and colleagues transferred to that new subcontractor?

The tribunal held not; they weren't an organised grouping working on Thomas Vale's contract immediately before the service passed to the new subcontractor. The Employment Appeal Tribunal took a different view, however. Just because there has been a temporary absence from work, or work has stopped, that doesn't mean that there can't be an organised grouping of employees who had been involved in the relevant activities. They don't have to have been engaged in those activities immediately before the transfer.

Preparing for a wage hike

Is your business ready to cope with introduction of the National Living Wage in April 2016?

The press is reporting the views of some that recruitment will be scaled back, workforces reshaped, and prices put up to cover the extra 50p per hour that will need to be paid to lower-earning workers.

Increasing basic pay to £7.20 for workers aged 25 and over may not be something that affects you or your business significantly or at all. But even if that's so, it could well affect those you're doing business with; suppliers, for example, who may have to look at their commercial options.

Wherever you stand in all of this, it's sensible to address your mind to the potential consequences. And bear in mind, too, that the living wage is set to go up to £9 per hour by 2020, so you might want to factor that into your planning.

Transgender guidance

A new guide has been published to help employers deal properly with transgender staff. It's all about creating a more inclusive culture.

As well as helping employers recruit and retain transgender staff, the guide sheds light on the day-to-day management of transgender issues.

One of the really interesting sections is about handling situations in which an existing employee embarks on a transition. Employers may not know immediately how best to support that employee, including how to communicate what's happening. Nor will employers necessarily have the right systems and policies in place to deal with the sorts of situations that may crop up.

It's a guide that is well worth every employer reading.

https://www.gov.uk/government/publications/recruiting-and-retaining-transgender-staff-a-guide-for-employers

Variety of information regarding disability discrimination:

Attendance policy didn't need adjusting

Griffiths v Secretary of State for Work and Pensions

The duty to make reasonable adjustments engages once an employer knows (or should reasonably be expected to know) that an employee is disabled. But as this case has shown, there are limits on what an employer will be expected to do.

Ms Griffiths was disabled. Her 66 days of absence (62 of which were because of her disability) triggered a written warning under her employer's attendance policy. She claimed disability discrimination.

Her view was that the DWP ought to have held off from issuing the warning. Its procedure should have been modified to allow her more days off work than a non-disabled person, and periods of sickness absence related to her disability should have been disregarded. These would have been reasonable adjustments, she argued.

The Court of Appeal said no. The employer's provision, criterion or practice (the requirement to work at a certain level to avoid getting warnings and possibly being dismissed) didn't put Ms Griffiths at a substantial disadvantage. The same sanctions applied to her non-disabled colleagues. On the facts of this case, it wasn't reasonable to expect the employer to alter its policy.

The same outcome may not apply in other cases; it really does come down to the specifics of each situation. The Court of Appeal confirmed that the duty to make reasonable adjustments can apply to sanctions under an absence management policy, even where that policy treats disabled and non-disabled employees equally.

Kitchen possible?

If you watched the TV documentary Kitchen Impossible, you are bound to have been left with more than just an impression of the pressures involved in the catering industry.

The series followed a group of disabled people learning the ropes under the guidance of Michel Roux Jr. and it exposed many of the everyday challenges that face those with disabilities, not least when it comes to employment.

And this is timely, the Government is in the midst of trying to halve the employment gap between disabled and non-disabled people and wants businesses to provide more opportunities to those who might otherwise be left out of the marketplace.

This is against the backdrop of some employers' nervousness around learning disabilities, as a survey by Mencap and Inclusive Employers has revealed. Concern about interaction between customers and staff was highlighted, as well as concern among 23% of the 60 or so UK businesses surveyed that not all colleagues would feel happy about working with someone with a learning disability.

While some of these statistics may make for uncomfortable reading, one of the themes that emerges is more positivity among those organisations that have employed people with learning disabilities.

There will be some way to go before there is wholesale change both in attitudes and in the statistics. But as knowledge and awareness grows, it's hoped that more employers will embrace the benefits of a workplace that is open to all.

The long road to ill-health dismissal

Monmouthshire Council v Harris

It's a question that crops up frequently: for how long does an employee need to be off work before their employer can terminate their contract?

Concern for an employee's welfare is one thing. But there are operational challenges around covering that person's work, keeping their job open, and making changes to their role or working environment that could help them return.

It's rarely an easy situation to manage and it can be difficult to judge when the time has come to safely bring employment to an end. Of course this will vary from situation to situation.

One of the main points to come out of Monmouthshire County Council v Harris is that, when looking at a decision to dismiss a sick employee, a key question is: could the employer have reasonably been expected to wait any longer? (This is alongside the question of whether there was adequate consultation with the employee and whether the employer obtained and had proper regard to up-to-date medical advice).

Relevant considerations in this context include:

- Was it fair to dismiss, given any background failings by the employer?
- Was it fair to dismiss, given the pressures faced by the employer at the time and going forward?
- Could the employer have been expected to allow more time?
- Was dismissal within the range of reasonable responses?

The EAT allowed the employer's appeal; the tribunal had taken the wrong approach in finding in favour of Ms Harris.

Competitive interview leads to disability discrimination

Waddingham v NHS Business Services Authority

During a redundancy process, Mr Waddingham was diagnosed with cancer.

This meant that he was disabled for employment law purposes, imposing additional obligations on his employer – including the duty to make reasonable adjustments.

He was interviewed for a new role within the NHS. But he didn't hit the required 75% competency level and so wasn't appointed. He claimed disability discrimination, and won; he had been put at a substantial disadvantage.

The tribunal held that it would have been reasonable for the employer to have assessed Mr Waddingham – a long-serving NHS employee - differently, by looking at his employment history and at notes of his appraisals.

The 75% threshold didn't need to be lowered, but the employer ought to have approached the assessment in another way. This should have included taking account of the effects Mr Waddingham's cancer treatment would have on his performance at interview; his pain-relief drugs affected his concentration and caused fatigue.

One interesting point made by the tribunal was around the positive spin Mr Waddingham put on his situation. He was keen to press ahead with the interview, for instance. There's nothing to say that an employer faced with similar facts couldn't go along with that, rather than put the process on hold. But it wouldn't be good enough to do so blindly – in other words, without properly considering all of the circumstances.

Guest slot: Tax Corner

Richard Grimster

Changes on the horizon, of Capital importance!

HMRC have recently won an upper tier tribunal appeal which overruled the decision of the first tier tribunal in a tax case regarding whether a 'golden handshake' type payment was employment income on the particular facts of that case.

The tribunal [UKUT 0666] for HMRC vs Smith & Williamson Corporate Services Limited and Patrick Smiley was seeking to determine whether an amount paid to Mr Smiley as 'goodwill' for bringing clients from his previous investment banking firm to S&W was indeed made by reason of his employment and therefore not a capital receipt in his hands.

So what?

There is nothing spectacular about this ruling in HMRC's favour indeed many professionals were surprised at the first tier decision! What is interesting, however, is the current trend in UK taxation for the Government to look into transactions with much more suspicion to determine whether they are genuinely capital in nature.

For example, the recent consultation document and draft legislation released in December 2015 indicates the Government is going to make it explicit that a distribution from a liquidation by an insolvency practitioner is not necessarily of a capital nature. The government will protect the Treasury from what it sees as abuses of the system through targeted anti-avoidance rules (TAARs) and in particular the transactions in securities rules in this instance (TIS).

Why now?

It has been a constant theme of taxation for many years to seek to undertake transactions in such a way that the taxation effect is minimised - often this is by utilising capital gains tax rates (10-28%) rather than suffering income taxes (20-45%).

HMRC explain in this document that they consider many people are structuring transactions so as to achieve the lower rate of tax, by 'money boxing' cash in their company e.g. entering into solvent liquidation processes to extract the funds, often at the 10% Entrepreneurs' Relief rate of tax on capital gains rather than the dividend rates, and then 'phoenixing' the same business in a another guise.

Does this impact me?

It is clear that the proposed changes will impact a smaller number of industries where this sort of structuring is prevalent. Equally there are tax schemes where the anti-abuse and anti-avoidance type rules are absolutely required to combat structured arrangements.

Our major concern is the indirect impact on others where there are genuine commercial reasons for undertaking a transaction a certain way, far from any tax scheme. There is now an element of doubt and increased tax risk if the tax result is beneficial to any party involved.

What is clear is that professional advice should always be sought well in advance of any transaction, in order to get the best outcome and in good time to achieve any tax clearances required from HMRC.

Concluding thoughts will follow on Price Bailey's website together with Price Bailey's response to the consultation document in February 2016.

Until then, if you would like to speak with one of Price Bailey's tax consultants about any of the above please do not hesitate to call Richard Grimster on +44(0)1223 565 035 or email **richard.grimster@pricebailey.co.uk**.

Delivering Practical Advice

Victoria Pratley

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Why choose Price Bailey Legal Services LLP?

Regulated by a professional body: We are heavily regulated, differentiating ourselves from unregulated HR consultants. Your advice is delivered by qualified lawyers who are regulated by the Solicitors Regulation Authority (SRA). Therefore we deliver legal and commercial advice with the assurance to clients that

Experienced: We are experts in delivering employment law and HR advice to a variety of clients in different industries and sectors from all sizes and backgrounds. We understand how different types of companies operate and can advise accordingly.

Professional, personable and accessible: Providing peace of mind that employers can pick up the phone and talk to us and knowing they are receiving the right advice.

Flexible payment: We can design the right costs package to suit your business needs from a monthly retainer to 'pay as you go'.

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Commercial focus: We provide tailored advice in every situation by navigating clients through the law, balancing this against the legal risk to their business.

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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Contact us

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