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April 2014

Employment Focus

Changes to family friendly employment laws

Flexible working requests – 30 June 2014
The right to request flexible working is to be extended to all employees with 26 weeks' continuous employment, not just those with children under 17 (or 18 for parents of disabled children) and carers.

The current statutory procedure through which employers consider flexible working requests will be replaced with a duty on employers to deal with requests in a reasonable manner within a reasonable period of time. Acas has published a draft Code and guidance on flexible working to help employers prepare for the changes in the law.

Time off to attend ante-natal appointments – 1 October 2014
Employees and agency workers will, from 1 October 2014, gain a new right to take time off to attend up to two ante-natal appointments.

The right is for those in what is called a 'qualifying relationship' to take unpaid time off work to attend up to two ante-natal appointments, for a maximum period of six and a half hours for each appointment. There is no qualifying service needed – this is a day 1 right.

Those in a 'qualifying relationship' are the pregnant woman's husband, civil partner or partner, the father or parent of the pregnant woman's child, and intended parents in a surrogacy situation who meet specified conditions.

An employer can require an employee or agency worker to make a declaration stating:

- that he or she has a qualifying relationship with a pregnant woman or her expected child;
- that he or she is taking the time off to attend the ante natal appointment;
- that the appointment is made on the advice of a registered medical practitioner, midwife or nurse; and
- the date and time of the appointment.

Rights for individuals adopting – 1 October 2014
Provision is also to be made for paid and unpaid time off work for adopters to attend meetings in advance of a child being placed with them for adoption. The maximum amount of time off for each appointment is six and a half hours. Single adopters may attend up to five appointments and are entitled to pay at their hourly rate. Joint adopters may elect for one person to attend up to five paid appointments, while the other may attend up to two unpaid appointments.

If an employer unreasonably refuses time off to attend adoption appointments (either paid or unpaid), or fails to pay the employee, the employee may bring a tribunal claim. Their remedy is compensation amounting to twice their hourly salary for each hour for which they would have been absent.

Ruth Everitt

Also in this issue

Lack of faith in the prison's pay structure

Mr Naeem worked as a prison chaplain of the Muslim faith. He commenced employment with the prison service in October 2004 following the prison service allowing Muslim Chaplains in 2002. Prior to 2002 the Prison Service only employed Christian chaplains.

The pay system for chaplains is based on their length of service. In light of this, Christian chaplains were more likely than Muslim chaplains to be towards the top of the pay scale as they had been employed longer or more importantly, they had the ability to be employed longer. Mr Naeem took exception to this and felt that he was being discriminated against, indirectly, on the grounds that he is of Muslim faith. Mr Naeem therefore brought a claim for indirect religious discrimination stating that he had been disadvantaged as a Muslim chaplain by the application of the length-of-service criterion.

The claim was ultimately decided by the EAT who concluded that the length-of-service criterion which was directly linked to the Prison Service's pay system did not indirectly discriminate against Mr Naeem on grounds of religion or race. The conclusion was that the Mr Naeem, who commenced employment in 2004, had been treated in exactly the same way as any other chaplain, of whatever religion or race, who was appointed at the same time as him and therefore his claim did not succeed.

The decision suggests that where people with certain protected characteristics (sex, disability, age etc.) gain access to careers that have previously been unavailable, they will not be able to challenge any length-of-service related benefits.

Ed Jenneson

Financial penalties for employers

Financial penalties will be applicable to cases presented on or after the 6 April 2014. Employment Tribunals will have the authority to order an employer who loses in the Employment Tribunal to pay a penalty or fine to the Secretary of State, if the Tribunal considers that the employer's breach of the rights to which the claim relates has one or more aggravating features. What amounts to an aggravating feature is yet to be determined. No doubt, case law will dictate. The guidance however, suggests that unreasonable behaviour on the part of the employer or malice or indeed negligence may constitute "aggravating behaviour".

The value of such a penalty will be 50% of any financial award, with a minimum threshold of £100 and a maximum cap of £5,000 which will be reduced by 50% if paid within 21 days.

The Tribunal should exercise a discretion in relation to the award of such a penalty, taking account of the employer's ability to pay, the size of the employer, the duration of the breach complained of and the behaviour of both the employer and employee.

Donna Ingleby

Save the date
Thursday, 26 June 2014
12pm – 2pm
at Rollits Hull Office

Managing sickness absence

A free workshop aimed at giving practical guidance to employers to assist them with the management of sickness absence.

Visit rollits.com for more details

Cost award overturned

In the recent case of *Kapoor v Barnhill Community High School Governing Body* the Employment Appeal Tribunal ("EAT") overturned a decision by the Employment Tribunal ("ET") that costs should be awarded in favour of a successful Respondent because the ET considered that the simple fact that the Claimant had lied meant that she had conducted proceedings unreasonably.

The Claimant was employed as an Exam Invigilator and she brought claims of race discrimination, victimisation and harassment against the School. Following a five day hearing, the ET dismissed the Claimant's claims. The ET found that the Claimant's evidence was not worthy of belief and that it should not trust anything that she said unless it was supported by convincing evidence. In addition, it formed a view that the Claimant had falsified documents.

The ET considered an application for costs made by the School. The School argued that costs should be awarded on two grounds, firstly, that the Claimant's case was misconceived and secondly, that the Claimant's conduct of the proceedings had been unreasonable. In deciding whether the Claimant had acted unreasonably the ET held that "without more, to conduct a case by not telling the truth is to conduct a case unreasonably, it is as simple as that". The ET made a costs award in favour of the School against the Claimant of £8,900. The Claimant appealed against the costs award to the EAT.

The EAT found that there had been an error of law in the approach taken by the ET. It commented that case law dictated that a Tribunal exercising its discretion to award costs must have regard to the nature, gravity and effect of the unreasonable conduct, and look at the whole picture of what had happened in the case. The EAT held that the ET's Judgment had not had regard to all of the necessary matters and it had wrongly directed itself that, without more, to conduct a case by lying was to conduct a case unreasonably.

The EAT held that whilst the ET had made strong findings in relation to the Claimant's credibility, such factors would only be relevant if the ET approached the exercise of its discretion correctly by considering the case as a whole. The EAT found that the Tribunal had failed to consider other factors such as whether the lies had made a material impact on its actual findings and that the School had failed in attempts prior to the final hearing to have the matter thrown out.

The EAT concluded that the appeal would be allowed and the case should be sent back to the same Tribunal in order for the issue of costs to be considered using the correct principles.

This case is a stark reminder that the simple fact that a Claimant is found to be dishonest does not mean that a costs award will follow. Costs awards remain extremely rare in the Employment Tribunal and are the exception and not the general rule.

Ed Heppel

National minimum wage update

Increases

The government has announced the following increases to the national minimum wage, which will take effect from 1 October 2014.

The new rates are as follows:

- The standard adult rate (for workers aged 21 and over) will rise by 3% to £6.50 an hour (up 19p from £6.31).
- The youth development rate (for workers aged between 18 and 20) will rise by 2% to £5.13 an hour (up 10p from £5.03).
- The young workers rate (for workers aged under 18 but above the compulsory school age who are not apprentices) will rise by 2% to £3.79 an hour (up 7p from £3.72).
- The rate for apprentices will rise by 2% to £2.73 an hour (up 5p from £2.68).

Penalties

Following the introduction of the National Minimum Wage (Variation of Financial Penalty) Regulations 2014 on 7 March 2014 employers will face penalties of up to £20,000, being an increase from 50% to 100% of the unpaid wages owed to workers. Previously employers were required to pay the unpaid wages plus a financial penalty of up to £5,000.

The government also proposes to bring in legislation at the earliest opportunity so that the maximum £20,000 penalty can apply to each underpaid worker.

Ruth Everitt

ACAS early conciliation

ACAS early conciliation will be effective as of 6 April 2014. Transitional provisions apply between 6 April 2014 and 5 May 2014 however, thereafter, early conciliation is mandatory.

The intention of early conciliation is to assist in making the Tribunal system more efficient.

The introduction of early conciliation represents a further significant reform in the Employment Tribunal system. Early conciliation is part of a package of measures which include introduction of fees in the Employment Tribunal (July 2013) and forthcoming financial penalties in addition to any compensation awarded upon employers who lose a claim.

It is anticipated that early conciliation coupled with the introduction of fees may make employees more willing to settle claims for lower amounts and therefore save the issue fee. The counter argument is that employers may be more inclined to wait and see whether a Claimant is in fact sufficiently serious and willing to incur the fee. Only time will tell.

In the meantime, early conciliation will require a prospective Claimant to contact ACAS before they can proceed and present a claim in the Employment Tribunal.

It is intended that except for some very limited exceptions all Claimants should comply with the requirement for early conciliation and that early conciliation will be handled by an Early Conciliation Support Officer (ECSO).

The exceptions to the Rule which enable the Claimant to present a claim without complying with early conciliation include:

1. where the Claimant is presenting a claim on the same form as other Claimants, or joining a claim which has already been presented to an Employment Tribunal by another Claimant, and where the prospective Claimant can therefore rely on the fact that another Claimant has complied with the requirement for early conciliation and has a certificate from ACAS;

2. the claim appears on the same claim form as proceedings which do not require early conciliation;

3. the prospective Respondent has already contacted ACAS in relation to the dispute; or

4. An unfair dismissal claim is accompanied by an interim relief application.

Where early conciliation is applicable a four step procedure applies.

The Claimant must send "prescribed information" in the "prescribed manner" to ACAS. This is step one. It essentially involves a form filling exercise. The prospective Claimant must present a completed EC form to ACAS online or by post or alternatively could telephone ACAS and enable the ACAS officer to complete the detail.

The early conciliation form requires basic information only, namely the prospective parties names and addresses.

Once the form is completed the ACAS officer is under a duty to make reasonable attempts to contact a prospective Claimant (step two). If the Claimant consents ACAS must then make a reasonable attempt to contact a prospective Respondent. If ACAS is unable to contact either then it will conclude that settlement is not possible and issue an EC certificate. What amounts to reasonable attempts to contact either a prospective Claimant or Respondent will be a matter for discussion and be at the discretion of the ACAS officer.

Once contact is established then step three of the process requires that the conciliation officer seeks to promote settlement. Such attempts will take place over a period of one calendar month. This period can be extended by the ACAS officer if he or she believes that there is a reasonable prospect of achieving a settlement within an additional fourteen day period.

If, during the conciliation period the ACAS officer concludes that settlement of the dispute is not possible or upon the completion of the conciliation period, ACAS will issue an EC certificate with a unique reference number. The outcome of conciliation is the fourth step in the process. The certificate will be dated and will specify the date upon which ACAS received the early conciliation form. The parties with whom ACAS has had contact will be sent a copy of the certificate by email in which case it is deemed received on the day sent or by post in which case it is deemed to be received on the date it would be delivered in the ordinary course of the post, (two days).

The effect of early conciliation is that it stops the clock for the purpose of calculating an Employment Tribunal time limit. The period starting the day after the Claimant contacts ACAS and ending upon the day they receive an early conciliation

certificate will be ignored for the purpose of calculating the Employment Tribunal time limit.

A claim can only be issued in the Employment Tribunal where the claim includes evidence in the form of a unique reference number that the Claimant has satisfied the early conciliation requirement. Effectively if there is no unique reference number there is no entitlement to bring a claim.

Donna Ingleby

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact Donna Ingleby on 01482 337314.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law stated is as at 16 April 2014.

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