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Employment Law BULLETIN

Welcome to our January employment law bulletin.

In this issue we remind you of new employment laws coming into force soon. First, the amendments made to the TUPE Regulations 2006 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment) Regulations 2014 will come into force on 31st January 2014.

From 6th April 2014 Equality Act Discrimination Questionnaires will no longer exist and, in the employment tribunals, financial penalties may be imposed on losing employers.

Significantly, reforms within the employment tribunal system take one further step as ACAS early conciliation will come into force, also, on 6th April 2014. After that time, claims may not be made by individuals to the employment tribunal directly in the first instance. All complaints will have to be submitted to ACAS for early conciliation to take place.

The Scottish Inner House has provided some useful guidance on how to deal with long term health dismissals. We report on the BIS consultation on zero-hours contracts.

And our client briefing this month is on the subject of avoiding pitfalls when giving references.

May I also remind you of our forthcoming events:
Click any event title for further details.

The new TUPE Regulations
- Breakfast Seminar, 4th February 2014

Handling Disciplinary Cases
- HR Workshop, 4th March 2014

and in conjunction with ACAS in the North East:

Click on any of the headings below to read more

1 : New Employment Laws: Dates for your diary

2 : Long-term ill-health dismissals

3 : Zero-hours contract consultation

4 : Breakfast Seminar: Case updates

5 : Client Briefing: Providing a reference

Wherever you see the BAILII logo simply click on it to view more detail about a case

1: New Employment Laws: Dates for your diary

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A number of new employment laws will come into force before the summer.

TUPE

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 were laid before Parliament on 10 January 2014 and will come into force on 31st January 2014.

New laws coming into force on 6th April 2014

A number of measures will be introduced on 6th April 2014, one of the two traditional dates in the calendar year for new legislation.

Often, a tribunal claim under the Equality Act is preceded by the service of a *Discrimination Questionnaire.* From 6th April 2014 these will be abolished and section 138 of the Equality Act 2010 repealed. The Government has considered that a non-legislative approach, to be set out in ACAS guidance for the future, would be more appropriate. The arguments for repeal include the fact that employers see no value in them, that collating the information for them is onerous and that ACAS should be used instead. But opponents of the abolition point out that often it is difficult for a claimant to acquire information about possible discriminatory behaviour and that without questionnaires, individuals might have no alternative but to initiate formal proceedings in order to seek disclosure of documents from the employer in the tribunal system.

Mandatory pre-claim ACAS conciliation will be introduced. In the future, all potential claims before an employment tribunal will have to be lodged with ACAS first, using a simplified complaint form, after which pre-claim conciliation will occur before a formal employment tribunal claim can be lodged.

Financial penalties for losing employers will be imposed by employment tribunals from 6th April 2014. Tribunals will have the power to impose a financial penalty on employers who lose at the employment tribunal of 50% of any financial award, with a minimum

threshold of £100 and a maximum cap of £5,000. The penalty will be reduced by 50% if paid within 21 days.

A new scheme for requesting *flexible working* will be brought in under the Children and Families Bill 2013. This will extend flexible working rights to all employees with 26 weeks service rather than just those employees who qualify as parents or carers. Employers will also no longer be required to follow the statutory procedure for regarding flexible working requests but must instead, consider all requests "reasonably".

Statutory sick pay record keeping obligations will be abolished allowing employers to keep records in a flexible manner more suited to their organisation.

Workplace sickness absence

In the Spring, the Government will introduce a health and work assessment and advisory service which will provide a state funded assessment by occupational health professionals for employees who are off sick for 4 weeks or more. It will also provide case management for employees with complex needs to facilitate their return to work.

2: Long-term ill-health dismissals

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In *BS v Dundee City Council*, the Scottish Inner House has provided some useful reminders of the issues employers should consider when dealing with cases of long-term sickness absence. In this case, an employee had been off work for 272 days with stress and depression, with a series of formulaic sick notes for 8 weeks at a time, until the employer ultimately decided to dismiss the employee on ground of capability. In considering the decisions of the employment tribunal and the EAT, the Inner House reviewed the case law requirements for ill-health dismissals, in particular the principles that:

1. In cases of long-term sickness, the primary question to be decided is whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer. In considering the question, a balancing exercise should be undertaken and the following factors may be considered:

- The availability of temporary cover (including its cost).
- The fact that the employee had exhausted his sick pay.
- The administrative and OH costs that might be incurred.
- The size of the employer's organisation.

2. There is a need to consult the employee and take his views into account. This factor can work for or against the employee, depending on their expressed willingness and ability to return to work. There was a caution that what an employee says about their health (particularly psychiatric or psychological) may not be wholly reliable. However, where the medical evidence and the employee's views conflict, the employer should take account of the employee's statements.

3. There is a need to ascertain the medical position, but this does not require the

employer to pursue a detailed medical examination, and it was emphasised that it was not the function of employers to act as a 'medical appeal tribunal'. The obligation is only to take 'such steps as are sensible according to the circumstances'. They have simply to ensure the correct question is asked and answered.

There was also discussion of the relevance of the employee's long service, and it was noted that in ill-health cases, length of service should be considered only to the extent that it yields inferences that the employee is likely to return to work as soon as they can.

3: Zero-hours contract consultation

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Following the media attention given to 'zero-hours contracts' over the past year, the government has launched a consultation on the use of these contracts. The consultation document acknowledges that these can be very helpful to employers, particularly in terms of flexibility, and related advantages in expanding the business without the commitment of taking on full-time staff, or retaining employees while there may not be the possibility of keeping them for fixed hours. From an employee's point of view, there can be advantages of greater choice, and a way of staying in the jobs market (students and those nearing retirement are particularly mentioned).

There are concerns, however, that zero hours contracts can leave employees vulnerable. The two concerns specifically addressed by the consultation are:

Exclusivity clauses – the contract may prevent the worker from working for any other employer, even though there is no obligation for the employer to offer any work. Although in certain circumstances this may be justifiable, in other cases there may be no clear reason why such a clause should be included. The suggestions for dealing with exclusivity clauses are:

1. Legislation to ban exclusivity clauses in certain contracts

2. Government guidance on the fair use of exclusivity clauses

3. An employer-led code of practice on exclusivity clauses, with possible government endorsement

4. Relying on workers' existing common law rights.

Transparency – some workers and employers may not be clear about their rights and obligations under a zero hours contract, and some employees may not be fully aware that they are on a zero hours contract at all. There may also be uncertainty about the effect on benefit entitlement. Some suggested options to improve transparency are:

1. Improving the content and accessibility of information and guidance on employment rights and benefits for zero hours workers

2. Encouraging an employer-led code of practice on the fair use of zero-hours contracts (whether or not government endorsed)

3. Producing model clauses for zero hours contracts. The contract could include a 'key facts' section to help workers understand its terms.

The consultation invites open comment on any of these options. It closes on 13 March 2014. The document may be accessed here.

4: Breakfast Seminar: Case updates

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Since our December 2013 Employment Breakfast seminar, the appeals in two of the cases mentioned at that event have now been decided. *Mba v The Mayor and Burgesses of London Borough of Merton* related to a discrimination claim from a Christian residential care worker at a children's home required to work some Sundays on a shift rota. The EAT found there was no indirect discrimination as employer's action was a proportionate means of achieving a legitimate aim, namely ensuring an appropriate balance of gender and seniority on each shift, cost effectiveness, fair treatment of all staff, and continuity of care for children. The Court of Appeal upheld this decision, although there was differing reasoning from the three judges regarding group disadvantage, justification and proportionality.

In *Gallop v Newport City Council*, the EAT found the employer was entitled to rely on advice from an occupational health professional that an employee was not disabled (despite suffering from work-related 'stress-related illness'), and the employer therefore lacked knowledge of the disability and the duty to make reasonable adjustments did not apply. The Court of Appeal has overturned this, stating that the employer must remember that it, and not a medical adviser, must make the final factual judgment as to whether an employee is or is not disabled. Where the medical report states the employee is disabled, the employer will ordinarily respect this. On the other hand, where a medical adviser states an employee is not disabled, the employer cannot simply 'rubber stamp' the medical opinion, and must consider for itself the questions of whether the employee has a physical or mental impairment, whether that impairment has a substantial and long-term adverse effect, and whether it affects his ability to carry out his normal day-to-day duties. In particular, it is suggested that where the employer seeks medical advice regarding an employee, they should not simply ask in general terms whether the employee is a disabled person, but pose specific practical questions.

5: Client Briefing: Providing a reference

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This client briefing sets out the key issues an organisation should consider before providing a reference for an employee or former employee.

Types of reference

An organisation is most likely to be asked to provide a reference for a prospective employer, although it could be asked to give one in other circumstances (for example, a financial reference for a mortgage application). References can be given on behalf of the organisation as a corporate reference or in a personal capacity.

Corporate references

The organisation will be legally responsible for the contents of a corporate reference because it is provided on its behalf. An organisation should implement a policy stating:

- Which employees or level of management can give a corporate reference
- What format the reference should be in (oral or written)
- What information the reference can include

Personal references

A personal reference can refer to work undertaken for the organisation, but it must not be given on behalf of the organisation. There is always a danger that a personal reference is taken to be a corporate reference, so care must be taken to ensure that it is not provided on headed notepaper and does not include the referee's job title.

Providing a reference

Generally there is no legal obligation on an organisation to provide a reference for an employee or former employee and therefore the organisation is entitled to refuse to provide one. However the organisation's policy on references must be consistent or it could lead to allegations of discrimination. There are some limited exemptions to this rule as set out below.

Discrimination

The organisation must ensure that on refusal to provide a reference is not discriminatory. An organisation is not allowed to discriminate on the basis of any of the 9 protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Having a clear policy in place about the circumstances in which references will be given will help in defending any allegations of discriminatory treatment.

Victimisation

A refusal to provide a reference may lead to a claim of victimisation if an employee or former employee has:

- Previously brought discrimination proceedings against the organisation
- Given evidence or information in discrimination proceedings against the organisation
- Made an allegation of discrimination against the organisation (for example under the organisation's grievance procedure)

Settlement agreements

Settlement agreements often include a term stating that, if requested, a reference will be provided in an agreed form, usually annexed to the agreement. Make sure the organisation adheres to the agreed wording in these situations and that any oral reference provided does not go further than or deviate from the agreed wording. To avoid problems, ensure the standard wording in settlement agreements includes a phrase:

"Subject to any further information coming to our attention which we consider should be included in the reference, we agree to provide a reference in the following terms"

What information should be included in a reference?

The organisation owes a duty of care to both the subject and the recipient of any

reference it provides. The organisation must, therefore, take care to ensure the information it contains is true, accurate and fair. An organisation is not obliged to provide any detail in the reference or for it to be comprehensive.

A reference could simply provide brief of factual details of the start and finish dates of employment and the roles performed and no more. However the organisation should include a statement in this type of reference that it is company policy only to provide factual details, so it does not reflect badly on the employee in question.

- If the organisation decides to provide a more comprehensive reference, a disclaimer should be included. Any disclaimer the organisation includes must be reasonable.
- A more detailed reference may include information on:
    - Performance in the job
    - Disciplinary records
    - Honesty
    - Time keeping
    - Absence record
    - Reason for leaving

Duty owed to the subject of the reference

Discrimination

The organisation must not provide a discriminatory reference. An organisation should take particular care when making comments about performance, attendance or sickness absence where there is a risk that these comments may be discriminatory on the grounds of disability. A reference must also avoid victimising the subject (for example if they have previously complaint of discrimination).

Defamation

The organisation must be able to justify and support any comments made in reference and show that it honestly holds the views made in the reference to be true.

An organisation cannot be successfully sued for defamation for the contents of a reference (even if its contents are untrue) provided the organisation believe the information in the reference was correct at the time it was provided and the contents were provided without malice.

Malicious falsehood

An organisation could be sued for malicious falsehood if an individual can show that a reference the organisation gave contained untrue words that were published maliciously (that is, the person who wrote the reference knew the words were untrue or did not care whether they were true or not).

Negligent statement

The organisation could be sued for negligence if it provides an inaccurate reference.

Breach of contract

An organisation could be sued for breach of contract if it does not give a reference when

the organisation has previously agreed to provide one (for example in a contract of employment or in a settlement agreement).

Duty owed to the recipient of the reference

Negligent statement

An organisation will usually be asked by a perspective employer for the information about an ex-employee because it has specialist knowledge of that employee. If the organisation provides an inaccurate reference that the perspective employer relies on it could be sued for negligence.

Deceit

If an organisation knowingly includes false information with the intention that the recipient will rely on it, the organisation could be sued by the recipient for deceit.

Data protection

An organisation must be careful when providing information in a reference about an employees' sick record or reasons for periods of absence because information about health is regarded as sensitive personal data.

It should be possible to provide information about how many days absence from work an employee has during the last year without revealing any sensitive personal data.

If an organisation is asked to provide information on the reasons for an employee's absence, it should exercise caution and seek consent from the employee. The organisation should show the employee a draft response and seek their full approval before disclosing it.

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