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Employment law newsletter

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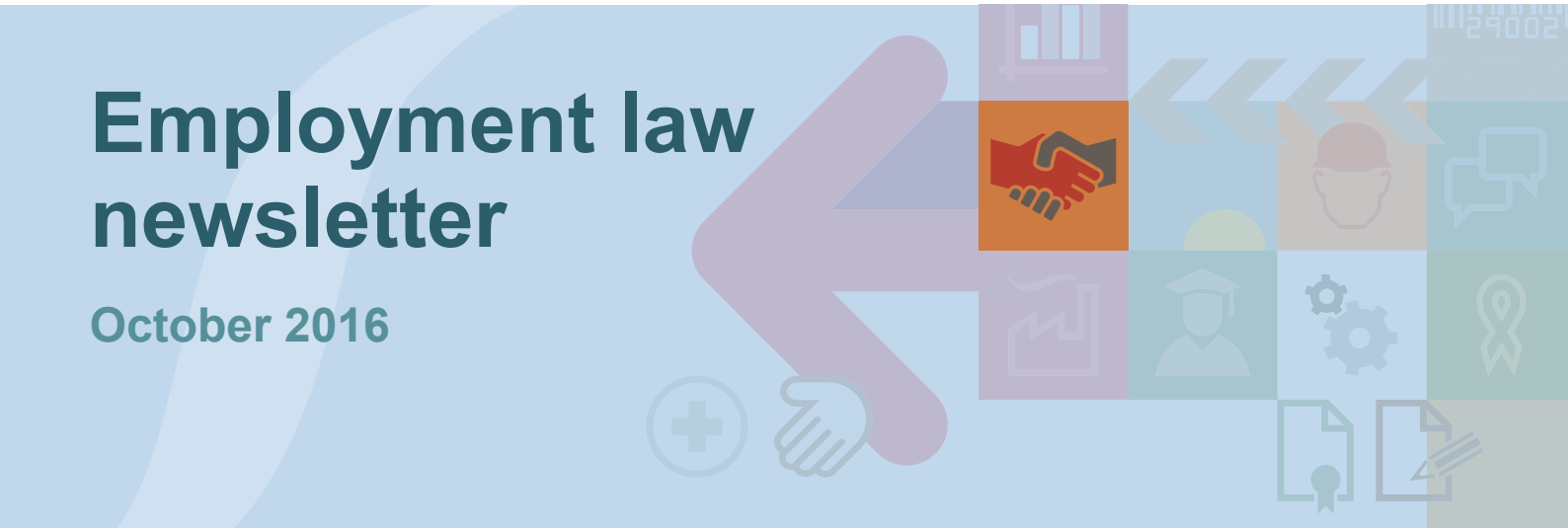

1. Employer was required to protect disabled employee's pay

The Employment Appeal Tribunal (EAT) has held that protecting a disabled employee's pay can be a reasonable adjustment.

Background

Mr Powell worked as an engineer maintaining his company's ATM cash machines. However, he suffered from back pain and became unable to do jobs involving heavy lifting or confined spaces. It was accepted that Mr Powell was disabled under the Equality Act 2010.

Mr Powell's employer created a new role of 'key runner' supporting ATM engineers working in Central London. The role involved driving from the depot to various locations to deliver materials to engineers which enabled the engineers to travel on public transport. Mr Powell undertook this new role while remaining on his existing engineer's salary.

The employer subsequently sought to reduce Mr Powell's pay by 10% to reflect the fact that the role did not require engineering skills and, when he refused to accept the reduction in pay, he was dismissed.

What does this mean?

The EAT held that the employer in this case was required as a reasonable adjustment to employ Mr Powell as a key runner at his original rate of pay.

It is settled law that the reasonable adjustments duty may require an employer to treat an employee more favourably than others. The EAT in this case held that there is no reason in principle why pay protection cannot be a reasonable adjustment as part of a package of measures to help an employee get back to, or stay in, work. However, whether it will be reasonable for an employer to have to take such a step will depend on the particular circumstances of the case and the financial considerations should be weighed in the balance.

In this case, Mr Powell had been paid at the higher rate of pay for nearly a year and had been led to believe that the arrangement would be long term. The employer was a company with substantial resources and could easily afford to pay the higher rate.

The employer's argument that paying Mr Powell the higher rate was likely to cause discontent from other employees was dismissed by the EAT. The impact on other employees of an adjustment is not normally a factor that should be taken into account when determining reasonableness, although wider implications on an organisation or a workforce as a whole can be taken into account.

What should employers do?

It is important to recognise that this case simply states that protecting a disabled employee's pay when they are redeployed to another role should not be discounted. The actual reasonableness of the adjustment will be assessed on a case-by-case basis.

Although pay protection was held to be a reasonable adjustment in this case, the EAT did acknowledge

that it will not be an 'everyday event' for an employer to provide long term pay protection. The financial situation of the employer will be taken into account. In addition, an adjustment may cease to be reasonable, for example, if the need for the job disappears or the economic situation of the business declines.

Case reference: G4S Cash Solutions (UK) Limited v Powell

2. ACAS guidance for managers

ACAS has published new guidance on managing people which can be found here.

The guidance explains the role of a manager, their responsibilities and what is expected of them. It also contains guidance on leading and communicating with teams, handling day-to-day tasks such as managing workloads and prioritising tasks, developing staff, holding appraisals and conducting an investigation.

3. ACAS updates dress code guidance

ACAS has updated its dress code guidance which can be found here: http://www.acas.org.uk/index.aspx?articleid=4953.

Research shows that employers risk losing talented young employees due to concerns about employing people with visible tattoos. The guidance advises employers who wish to ask their workers to remove piercings or cover tattoos while at work to have a written dress code or appearance code which should be communicated to all staff so they understand what standards are expected from them.

The updated guidance also follows the recent widely reported case of a temporary worker who was sent home without pay for refusing to wear high heels at work. ACAS advises that any dress code should not be stricter, or lead to a detriment, for one gender over the other. Since wearing high heels can cause physical pain and even harm, it may, therefore, lead to a successful claim of direct discrimination on grounds of sex.

4. ACAS guidance for young people who are new to work

ACAS has published guidance aimed at young people who are new to work explaining their rights and responsibilities at work which can be found here: http://www.acas.org.uk/index.aspx?articleid=5818.

The guidance sets out their basic legal rights, including their right to be paid the National Minimum Wage. It also explains what zero hour contracts are, which is a top issue for young workers as the proportion of 16-24 year olds on zero hour contracts is three times higher than for other age groups.

The guidance also explains the importance of arriving to work on time, following dress codes, following the correct procedure when taking time off work and warns new starters to take care when talking about work on social media.

5. Nursing home fined £15,000 for failing to keep personal information secure

The Information Commissioner's Office has fined a nursing home £15,000 for failing to keep the personal information they hold secure.

The breach took place when a member of staff took home an unencrypted work laptop, which was stolen during a burglary. The laptop contained sensitive personal information relating to 46 staff, including reasons for sickness absence and information about disciplinary matters. It also contained sensitive personal information about 29 residents, including their dates of birth, mental and physical health and 'do not resuscitate' status.

An investigation by the Information Commissioner's Office found that the nursing home had failed to implement any policies regarding the use of encryption, home working and the storage of mobile devices. It had also failed to provide enough data security training.

The Information Commissioner's Office decided that £15,000 was an appropriate remedy for the size of the business in this case, although it said that a larger organisation could expect to receive a much larger fine in such circumstances. The Information Commissioner's Office has the power to impose a monetary penalty of up to £500,000.

6. Restaurant directors banned after employing illegal workers

The directors of six restaurants have been disqualified from being company directors. Home Office Immigration Enforcement had found the restaurants to be employing illegal workers and, in 2013 and 2014, fined them between £5,000 and £40,000 each. The businesses were all subsequently put into liquidation to avoid paying the fines they had received.

Following separate investigations by the Insolvency Service, the nine directors of the restaurants in question have been banned from being company directors or being involved in the management of companies or limited liability partnerships for between six and eight years.

7. No service provision change where new contractor takes over service for own commercial purposes

The Employment Appeal Tribunal (EAT) has held that there was no service provision change where a new contractor took over a service for its own commercial purposes.

Background

In this case, a local council subsidised a community interest company owned by a charity to provide a bus service from a council owned car park to the city centre. Another company started up a similar bus service for the same route but for its own commercial purposes without any subsidy from the council. It provided its own buses and drivers.

A group of bus drivers argued that their employment had transferred under TUPE to the new operator after it took over the route and the council terminated its contract with the community interest company.

What does this mean?

The EAT held that in this case there had been no service provision change and therefore the bus drivers' employment had not transferred to the new operator.

This was because it is essential that the client before the service change remains the same afterwards. In this case, the new operator was not carrying out its activities on behalf of a client but was carrying out the activities on its own behalf and the council was nothing more than an interested bystander. For this reason, there was no service provision change and TUPE did not apply.

What should employers do?

It is easy to see why the drivers in this case might have thought that the new operator was simply continuing the bus service and therefore TUPE should apply. It is therefore a useful reminder of the fact that it is essential that the client before the service change remains the same afterwards for TUPE to apply.

Given the increasing pressure on councils to cut costs, we may see more council run and subsidised services turning into commercial ventures and leaving employees without any right to automatically transfer to the new provider of services.

Case reference: C T Plus (Yorkshire) CIC v Stagecoach

8. ACAS early conciliation certificate can cover future events

The Employment Appeal Tribunal (EAT) has held that an ACAS early conciliation certificate obtained by a prospective claimant can cover future events.

Background

In this case, the prospective claimant obtained an ACAS early conciliation certificate in relation to an allegation that her employer had unlawfully failed to make reasonable adjustments to accommodate her disability. She then subsequently resigned and claimed constructive unfair dismissal.

What does this mean?

The EAT held that the claim of constructive unfair dismissal had been validly accepted by the Tribunal even though the claimant had resigned after she obtained her early conciliation certificate.

The resignation was in response to the failure to make reasonable adjustments. The EAT therefore held that where there is a connection between the factual matters complained about in a claim form and the matters that were in dispute at the time of the early conciliation process it may not be necessary to start the early conciliation process again when a

fresh claim arises.

What should employers do?

This case emphasises that the mandatory obligation on a prospective claimant with regard to early conciliation does not necessarily require the referral of individual causes of action or specific claims to ACAS. Future claims can therefore arise out of the same facts without the need to go back to ACAS for a further early conciliation certificate.

However, the EAT cautioned that this decision does not mean that an early conciliation certificate gives a claimant a 'free pass' to bring proceedings about any unrelated matter. It will be a question of fact and degree in every case to determine whether the eventual claim is related to any matter in respect of which the individual has provided the required information to ACAS under the early conciliation process.

Case reference: Compass Group UK & Ireland Limited v Morgan

Find out more

Please contact us to find out more.

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