CHILTERN HR

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NEWSLETTER

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1. Ban on exclusivity clauses in zero hours contracts

Regulations banning exclusivity clauses in zero hours contracts came into force on 26 May. This means that employers can no longer restrict zero hours workers from working for other businesses. Any terms in zero hours contracts which prohibit workers from working for another employer or from doing so without their employer's consent will be unenforceable.

2. Tougher penalties for employers who flout the National Minimum Wage

Regulations amending the maximum penalty for breach of the national minimum wage to £20,000 in respect of each underpaid worker came into force on 26 May.

This means that for pay reference periods starting on or after 26 May the maximum penalty of £20,000 will apply to each underpaid worker, rather than each notice of underpayment.

3. Time spent travelling to and from home may amount to ‘working time’

‘Working Time’ can include time spent travelling to and from home for workers who have no fixed work base, in the opinion of an Advocate General.

What does this mean?

In the Advocate General’s opinion where workers are not assigned to a fixed place of work, the time spent travelling from their home to their first assignment, and from their last assignment back to their home, constitutes ‘working time’ for the purposes of the Working Time Directive. This, the Advocate General said, was because this time satisfied the three criteria of time where the worker is at work, at the employer's disposal, and carrying out his activity or duties, and should therefore be regarded as working time rather than a rest break.

The European Court of Justice has yet to make its decision in this case. It is not obliged to follow the Advocate General’s opinion, although in practice it generally does.

What should employers do?

Employers who employ staff who are not assigned to a fixed place of work and who currently do not pay their workers for the first journey of the day (from home to the first assignment), or the last journey of the day (from the last assignment to home) as working time should consider reviewing their practices.

4. Calculating holiday pay

Acas has published guidance on how to calculate holiday pay

http://www.acas.org.uk/index.aspx?articleid=4109&utm_medium=email&utm_campaign=June+NTL+2015&utm_content=June+NTL+2015+Version+A+CID_fea3cfc6612762ab4e4b15e6c179ce6f&utm_source=Acas%20National%20Email%20Marketing%20Live&utm_term=Calculating%20holiday%20pay.

The guidance covers situations where workers work overtime, are paid commission, and are paid for work-related travel. It also explains the different rules which apply depending on the work patterns involved, the rules relating to holiday pay and sickness and payment in lieu of holidays.

5. Dress policy was not discriminatory

The Employment Appeal Tribunal has held that a nursery did not discriminate against a job applicant when it made clear at interview that its dress policy meant that any garment worn should not present a tripping hazard.

What does this mean?

The requirement that any garment worn should not present a tripping hazard was not a provision, criterion or practice which indirectly discriminated against Muslim women who wore full-length jilbabs. They could still wear jilbabs, so long as they did not present a tripping hazard.

The Employment Appeal Tribunal went on to say that had the requirement to wear a garment which did not present a tripping hazard been discriminatory it would have been justified.

What should employers do?

When designing a dress code, employers should consider whether a potentially indirectly discriminatory dress code can be objectively justified.

6. Sikh exemption from wearing safety helmets is to be extended

On 1 October the exemption of turban-wearing Sikhs from requirements as to the wearing of safety helmets on construction sites will be extended to all workplaces. This will mean that turban-wearing Sikhs will be exempt from legal requirements to wear a safety helmet in most workplaces, either as workers or visitors. Some limited exceptions where employers will be able to require Sikhs to wear safety helmets will still apply, mainly involving the armed forces and emergency response situations.

Employers will still have to assess the risk to workers and make available any protective equipment, including head protection, considered to be necessary following the risk assessment. However, the decision not to wear appropriate head protection in accordance with the exemption will be one for the turban-wearing Sikh individual. If the individual chooses not to wear a safety helmet the employer's liability for any injury, loss or damage will be limited to the extent that the injury, loss or damage would have been sustained by the Sikh had he been wearing a safety helmet.

Attempting to impose a requirement on a turban-wearing Sikh to wear a safety helmet at a workplace will amount to discrimination against the Sikh individual under the Equality Act 2010. It would not be considered to be a proportionate means of achieving a legitimate aim such to avoid indirectly discriminating against the Sikh individual.

7. ICE request was invalid

The Employment Appeal Tribunal has held that an 'undertaking' for the purposes of the Information and Consultation of Employees Regulations 2004 is a legal entity capable of being the employer of employees serving it under a contract of employment.

What does this mean?

Under the Regulations, which apply to undertakings whose principal place of business is in Great Britain and who have at least 50 employees in the UK, negotiations for an agreement in respect of information and consultation of employees can be initiated by a written request by at least 10% of the employees (subject to a minimum of 15 and a maximum of 2,500).

In this case the request was made by 13% of a team of workers which amounted to 0.3% of the total workforce.

The Employment Appeal Tribunal said that the request was invalid because an 'undertaking' is a legal entity capable of being the employer of employees serving it under a contract of employment, and there was no principled basis for suggesting from within the Regulations that the undertaking should be construed as merely a division or department of that single employer.

What should employers do?

Employers who receive a request under the Regulations should take legal advice as to how to proceed.

8. Maximum protective award has been upheld where employer failed to consult

The Employment Appeal Tribunal has upheld a tribunal's decision to make a 90 day protective award (the maximum award available) where an employer failed to carry out a redundancy consultation.

What does this mean?

Where there is a risk of redundancies employers are required to carry out a consultation with their employees unless there are special circumstances rendering it not reasonably practicable to consult. Failure to do so can result in a protective award being made. In this case a 90 day protective award was made, the effect of which was that the employer had to pay 90 days remuneration to each of the employees.

A desire to bring employees' contracts to an end quickly so as to avoid paying them for an addition term did not amount to special circumstances. Neither did the fact that the employer was unaware of its obligation to consult as they were reckless in failing to take legal advice. Furthermore, circumstances which may hypothetically have existed, but which were not in fact taken into account by an employer when considering the duty to collectively consult, were not capable of constituting 'special circumstances'.

What should employers do?

Employers should take specific legal advice when redundancies are proposed.

9. Employee was not under a duty to disclose allegations of misconduct

The Employment Appeal Tribunal has held that an employee who worked as a tutor at a college was not under an implied duty to disclose allegations of sexual misconduct made against him whilst working for another employer in the absence of an express contractual term.

What does this mean?

The implied duty of fidelity does not extend to requiring an employee to disclose his own misconduct to his employer.

What should employers do?

Employers in particular, those businesses involve working with children or vulnerable adults, and in particular those who employ part-time or atypical workers who may have more than one job, are advised to ensure that their employees' contracts of employment contain an express provision requiring employees to disclose any misconduct on their part.

10. Dismissal of employee for making false allegations was fair

The Employment Appeal Tribunal has held that an employee who made serious allegations of mistreatment by colleagues on racial or religious grounds, which were false, was not unfairly dismissed.

What does this mean?

On the facts of this case the dismissal had been for a fair reason, namely misconduct, a fair and reasonable investigatory procedure had been adopted, and the sanction of dismissal had been within the range of reasonable responses.

The fact that one of his colleagues who had made similarly unfounded allegations had been treated differently, the Employment Appeal Tribunal said was doomed to fail because the circumstances of the two cases were wholly different. The comparator had made one single unjustified allegation of race discrimination which he fulsomely retracted and apologised for at the first opportunity. Whereas the employee had made persistent and numerous allegations against multiple staff at all levels of seniority and had not retracted or apologised at any time prior to his dismissal.

What should employers do?

Before dismissing an employee or taking steps short of dismissal employers should follow their policies and procedures and take specific legal advice.