MAYER·BROWN

UK Employment Round-Up

July 2016

Our monthly review of key cases and new law affecting employers

Brexit: How will UK employment law be affected?

As there are almost daily developments relating to Brexit, it is difficult at this stage to predict with any certainty how Brexit will impact on employment law. At the time of writing, Theresa May, now Prime Minister, has appointed a new Brexit department. Early indications are that the UK may formally trigger its departure from the EU at the start of next year but it remains to be seen exactly when the formal Brexit negotiations will get underway. However, there are some key employment issues which may be in the spotlight.

Although a large amount of UK employment legislation is derived from EU laws, including rights and protections relating to discrimination, working hours, holidays, atypical workers and family friendly leave, these are unlikely to disappear overnight. Depending on the terms of our withdrawal from the EU, the UK may be required to abide by EU employment laws post-Brexit. Even if the UK has the opportunity to repeal particular legislation, it would be surprising if the above employment laws were unpicked in their entirety, particularly where they have become an established and fundamental part of the employment law landscape. Some areas may, however, be up for discussion and we may see some of the less popular legislation amended or repealed:

- *Working time* - The UK's opposition to the 48 hour working week is well known, so this might be a contender for abolition. There may also be some scope to reverse key holiday cases (e.g. accruing holiday during long-term sick leave). Recent ECJ rulings that a 'week's pay' includes overtime and commission may also be revisited.
- *TUPE* - The current TUPE Regulations, which protect employees in connection with business transfers and service provision changes, may be subject to a degree of change. For example, we may see the removal of the restriction on harmonising terms and conditions post-transfer. We think parties to outsourcing arrangements may want to insert clauses expressly dealing with what will happen if there is a significant change in this area of the law during the lifetime of the contract.
- *Discrimination* - The UK has had established discrimination laws for a number of protected characteristics prior to the EU and it is unlikely they would be removed. However, we may see renewed calls for a cap on discrimination compensation.

The View From Mayer Brown

MAYER·BROWN UK Employment Law

Click here to view all episodes and platforms.

Episode 98

Whether adverse treatment based on an employee's migrant status was prohibited discrimination; the circumstances in which a Tribunal can award an uplift on damages; and where a company's decision to treat someone as a Bad Leaver will turn on the wording of the Board Minutes.

Episode 97

Litigation involving equal pay claims against a private sector employer; the ambit of the ACAS early conciliation procedure; and the Advocate General's opinion on a dress code banning clothing associated with a religion or belief.

UK Employment Law: for HR and in-house lawyers

LinkedIn

Join the discussion on LinkedIn

Our LinkedIn group is an excellent source of up-to-date employment law knowledge. We'd like to encourage you to post your own relevant discussions and contribute your own comments on the discussion page.

- *Collective redundancy consultation* - This could be watered down or scrapped completely but is unlikely to be prioritised.
- *Agency workers* - The regulations protecting agency workers, which have generally been unpopular, may be repealed.

Employers will also need to monitor the impact of Brexit on immigration and mobility laws. At this stage, British citizens are free to work in other EU countries, and citizens of EU countries are equally free to work in the UK. The referendum vote does not, of itself, restrict workers' freedom of movement across Europe immediately. This will, however, be subject to the negotiation of the terms of withdrawal and, potentially, new agreements between Britain and individual member states. The Leave campaign indicated its preference for a points-based work permit system.

In the meantime, employers are advised to:

- *Reassure the workforce* – Given the media coverage of Brexit and the uncertainties ahead, many workers may be unsure about their future. As the exit process is expected to take at least two years, employers may wish to take the opportunity to acknowledge the uncertainty and timescale but also provide some reassurance to their workforce that there will be no immediate changes to employment and immigration law following the result of the referendum. While employers are unable to make promises given the uncertainty caused by Brexit, a measured communication to the workforce may be valuable.
- *Remind staff of dignity at work policies* – There have been reports of an increase in racial abuse following the vote to leave the EU. Employers may therefore wish to circulate a reminder of their diversity and dignity at work policies and confirm that any discrimination and/or harassment (e.g. on the grounds of race, nationality and/or national origin) will not be tolerated.
- *Audit immigration status of workforce* – It may be advisable for employers to take initial steps to map out the current demographic of the workforce. This will enable employers to assess how many UK workers are working in the EU and how many EU nationals are working in the UK, and understand the potential implications of a change in immigration requirements.
- *Track developments* – A legal challenge has been mounted over the UK leaving the EU without the authorisation of Parliament. This is due to be heard by the High Court in October. More information is expected over the coming months as the strategy for Brexit develops. Employers are advised to monitor developments to assess the impact on their businesses.

For a high-level overview of the employment issues arising from Brexit, please watch Chris Fisher's recent video and listen to our audio recording covering employment and mobility issues following Brexit in more detail, available here (part of Mayer Brown's Global Financial Markets Initiative teleconference series – Brexit: Special Weekly Updates). For more information about the wider impact of Brexit on particular transactions and industries, please review Mayer Brown's Brexit resources here.

30 seconds with...

Christopher Fisher

Partner
E: cfisher@mayerbrown.com
T: +44 20 3130 3724

How long have you been at Mayer Brown?

A little over 15 years.

What is the best thing about your job?

The constant variety and challenge of finding solutions to issues which are not always legal questions.

What job would you be doing if you weren't a lawyer?

A professional golfer (assuming talent and the ability to earn prize money are not requirements).

What three things would you take to a desert island?

A sand iron, a golf ball and a copy of "Bunker Play" by Gary Player.

Where are you next going on holiday?

Florida, USA – our mission is to find a rollercoaster that will actually frighten my 11 year-old daughter, who seems to have had her fear glands removed.

What talent/skill do you have that not many people know about?

I played guitar (briefly, and badly) in a rock band. An early comment from my wife (to be) was: "that was really good; were you all playing the same song?" She wasn't invited to rehearsals after that.

Reasonable adjustments and expectation that employee work long hours

Facts The Claimant was a high performing analyst who had worked long hours before a cycling accident led to him sustaining significant injuries, including dizziness, fatigue, headaches and difficulties with concentrating and working late in the evenings. The employer was aware of the Claimant's symptoms.

After returning to work, the Claimant worked no more than eight hours a day but, after six months, he started to work longer hours, which progressed to requests being made of him and then to an assumption he would be working one or two later nights during the week. The Claimant contended he was put under pressure to work late. Following an argument with one of the owners of the business, the Claimant resigned and claimed disability discrimination, alleging that the employer had failed to make reasonable adjustments in relation to the requirement to work long hours, and also claimed constructive unfair dismissal. The case reached the EAT.

The EAT confirmed that there was an expectation that the Claimant work late once or twice a week. The Tribunal had taken an overly technical approach as the Claimant had asserted that it was a 'requirement' that he work late and this was not borne out by the facts. Having found that there was an expectation, this was sufficient in these circumstances to amount to a provision criterion or practice (PCP). The disability discrimination claim was remitted to the Tribunal to determine the nature and effect the disadvantage suffered by the Claimant as a result of the PCP of working late hours and the question of any reasonable adjustments. In relation to the constructive unfair dismissal claim, the EAT pointed out that the test is whether *one* of the reasons for the Claimant's resignation is the repudiatory conduct of the employer. It does not have to be the primary reason or the only reason. There was no real doubt that the Claimant's resignation was, at least in part, due to the employer's breach of contract.

Impact This case provides two helpful reminders for employers. First, that a 'requirement' can be interpreted reasonably widely and an expectation of particular behaviour in the workplace could constitute a PCP in relation to a disabled employee, potentially obliging the employer to make reasonable adjustments. Secondly, it is a reminder of a point which is often overlooked by employers: employees can claim constructive dismissal if the employer's breach of contract is only one reason amongst others for an employee's resignation.

Carreras v United First Partnership Research [2016] UKEAT/0266/15

Events

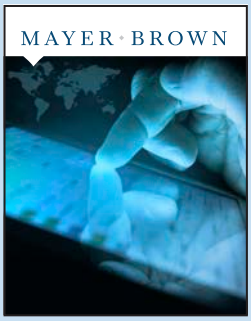
Our current upcoming events are below, all to be held at our offices. Invites are usually sent out one to two months in advance.

28 September 2016
Breakfast Briefing: Team Moves

Team moves and restrictive covenants, including the use of forensic searches.

30 November 2016
Seminar: Sickness and Disability

Global Tools & Resources



Click here to view our range of global tools and resources which highlight topical workplace issues across multiple jurisdictions , including our global guides, traffic lights and app.

Working Time Regulations and injury to feelings compensation

Facts The Claimant brought a claim in the Employment Tribunal under the Working Time Regulations 1998 (the Regulations), in relation to her entitlement to a 20 minute unpaid rest break when working more than six hours per day. The claim was successful but the key question was what compensation would be payable?

Under the Regulations, where a claim is well-founded, the Tribunal should make a declaration to that effect and may make an award of compensation which is just and equitable in all the circumstances. However, this needs to take into account the employer's default, and any loss sustained by the worker which is attributable to the failure to apply the rest break. The Tribunal awarded the Claimant £1,220, but did not award compensation for injury to feelings.

Although the Regulations do not provide that an individual is entitled to claim compensation for injury to feelings, the Claimant asserted that she had the right to this compensation and pointed out that the Regulations do not preclude such an award.

The EAT disagreed and dismissed the Claimant's appeal. It decided that injury to feelings was not a permissible head of damages under the Regulations. Injury to feelings cases are generally restricted to the anti-discrimination laws. The EAT said that claims for breach of the Regulations for failure to allow the statutory mandated rest breaks are akin to breach of contract claims. If rest breaks are refused on discriminatory grounds, a discrimination claim could be brought and such a claim could attract compensation for injury to feelings. However, this did not apply here.

Impact This is a helpful decision which clarifies the scope of the Regulations and confirms there is no scope for compensation for injury to feelings. Had this case gone the other way, we may well have seen an increase in cases going to the Tribunal on this point. However, this is a valuable reminder that Tribunals, when awarding compensation, can take into account the employer's default, and any loss sustained by the worker which is attributable to the failure to apply the rest break, which could still give rise to potentially substantial awards.

Gomes v Higher Level Care Ltd [2016] UKEAT/0017/16

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

Christopher Fisher
Partner, London
E: cfisher@mayerbrown.com
T: +44 20 3130 3724

Louise Fernandes-Owen
Global Professional Support Lawyer, London
E: lfernandes-owen@mayerbrown.com
T: +44 20 3130 3630

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