

February 2019 Employment Law Bulletin

Welcome to our Employment Law Bulletin for February 2019.

This month's bulletin includes a couple of noteworthy cases about employment status, proposals to enhance employment rights in redundancy situations for employees before and after maternity leave, alarming statistics about GDPR, difficulties with a Company's redundancy procedure, and clarification from the Court of Appeal about the burden of proof in discrimination claims.

--

Employment status

Two recent Tribunal decisions have highlighted the continuing difficulties businesses face when employing individuals as employees, workers or self-employed individuals.

The first case concerns former Great British Olympic cyclist Jess Varnish, who argued that she was an employee or in the alternative a worker. If the Employment Tribunal accepted Ms Varnish's argument, she would have been permitted to pursue claims of wrongful dismissal, whistleblowing and sex discrimination against British Cycling and UK Sport. However the Tribunal disagreed with Ms Varnish, noting that she did not work in exchange for a wage, nor did either organisation provide any work for Ms Varnish. The true purpose of the relationship with British Cycling and UK Sport was for Ms Varnish's professional development as a high performing athlete to enable her to win medals at international competitions. The judgment will come as a relief to many organisations that engage individuals through sponsorship programmes, in particular UK Sport which sponsors over 1,000 athletes per year.

The second case concerned Ms Chatfeild-Roberts, a full-time live-in carer, which the Employment Appeal Tribunal decided was an employee, despite Ms Chatfeild-Roberts being paid gross, being responsible for her own tax affairs, as well as having the right to have someone substitute for her when she was unable to work, such as holiday or jury service.

These cases emphasise the importance of getting it right when engaging individuals, as there is no simple checklist which will determine someone's employment status. A number of factors will be relevant, hence why many cases, including the above, appear to contradict each other. Due to the emergence of the gig economy and more individuals being engaged on an ad hoc basis, determining employment status will remain an issue for businesses.

Could mothers receive enhanced redundancy protections?

One of the biggest employment law myths is the ability to make a mother redundant whilst she is on maternity leave. Whilst businesses can make those on maternity leave redundant, the process is not a simple one. For example, when considering suitable alternative positions within the business, those on maternity leave must be given priority over and above other "at risk" employees.

The Government have launched a consultation about the possibility to extend this right to mothers in the six months following their return from maternity leave, as well as the possibility of extending this protection for expected mothers once they have notified their employer about their pregnancy.

There is also the possibility of increasing the time limit for pregnancy and maternity discrimination claims from three to six months, as well as the possibility of reviewing time limits for other discrimination, harassment and victimisation claims. Although this has not

been mentioned in the Government's consultation, but is likely to be raised during the consultation process when other issues such as #MeToo may be raised.

--

Are your employees breaching GDPR?

When your employees send an email, do they take a moment to check the email address is correct? One of the biggest causes of a GDPR breach is mistyped email addresses, which could have repercussions if attachments with sensitive data are sent to the wrong person.

A recent survey by Probrand has revealed that rather worryingly 64% of workers have recently sent emails and attachments to incorrect email accounts, with 84% of workers considering that sending emails to the wrong person did not amount to a breach of GDPR.

The ICO has revealed, unsurprisingly, that there has been a significant increase in the number of data breaches since GDPR was introduced last year. A significant number of issues can be easily resolved by having a robust policy and procedure in place, especially in relation to emails. Not only would an effective policy remind your employees how to handle personal data, but also a practical procedure to follow in the event of a potential breach.

Due to the potential fines for breach and non-compliance (up to €20 million or 4% of annual global turnover, whichever is higher), it is vital that employers fully understand the implications of GDPR by having effective Privacy Standards and Privacy Notices in place for their business, as well as for their employees, workers and contractors.

Ladbrokes Coral criticised for disclosing its redundancy plans

One of the UK's largest betting companies has had their restructure and redundancy plans exposed in a leak, which shows that a number of letters were circulated to "at risk" employees, stating that up to approximately 30% of the Company's betting shops would be closed within the next couple of years.

What has caused alarm amongst Trade Unions and legal commentators is the disclosure of how Ladbrokes Coral are proposing to implement a ranking system to decide who is made redundant, namely 30% of the score being based on the number of customers an employee can persuade to sign up to a new online betting account. In an age where betting is increasingly frowned upon, there is a moral and ethical question as to whether the use of such criterion is reasonable. In addition, it could be argued that those who work in busier shops have an unfair competitive advantage over their colleagues.

At a time when many businesses are implementing restructures, it is vital that your business considers the process and procedure before starting any restructure, not only to ensure it is implemented lawfully, but to limit your exposure to a claim in the Employment Tribunal. In particular, ensure any redundancy selection criteria is transparent, objective and non-discriminatory.

--

Burden of proof in discrimination cases shifts back to Claimants

The Court of Appeal had to consider a preliminary issue in a recent case about the burden of proof in discrimination claims, in which Mr Efobi argued that Royal Mail had directly discriminated him during the recruitment process. However Mr Efobi's arguments were not supported by any evidence. For the last couple of years, there has been some uncertainty about whether the initial burden of proof rested with the Claimant or the Respondent.

In a pro-employer decision, the Court of Appeal agreed with Royal Mail, stating that in order for a Claimant to bring a discrimination claim, it is for the Claimant to show that discrimination had taken place. In particular mere allegations without any evidence will be insufficient.

Therefore if your business is faced with allegations of discrimination and the matter reaches the Employment Tribunal, you would be within your rights to challenge whether or not the Claimant has discharged the initial burden of proof, and if the Claimant cannot provide sufficient evidence, their claim could be struck out.

Employment Workshops at mfg Solicitors

The dates for our Employment Workshops throughout 2019 have been released!

- 11th April 2019 – Dignity in the Workplace
- 20th June 2019 – The Welfare of your Workforce
- 26th September 2019 – Disciplinary Management in Practice
- 21st November 2019 – Protecting your Business

All of our Employment Workshops are £15 per person and take place from 9am until 12pm when a light lunch will be served.

The Employment Workshops take place at our Kidderminster office at Adam House, Birmingham Road, Kidderminster, DY10 2SH.

To register, please email our Marketing Manager at ellizabeth.armstrong@mfgsolicitors.com.

Contact mfg Solicitors

The Employment team at mfg Solicitors are specialists with a significant amount of experience assisting clients with their employment and HR issues, ensuring that the advice to businesses is commercial, practical and relevant to their individual requirements.

If you have any employment or HR issue, please do not hesitate to contact Sally Morris on 01905 610410 or at sally.morris@mfgsolicitors.com.