

## March 2019 Employment Law Bulletin

Welcome to our Employment Law Bulletin for March 2019.

As Brexit continues to dominate the news and our day-to-day lives, employment law continues to evolve, as it is one of the fastest moving areas of the law in the UK. Therefore the legal rights and obligations of individuals and businesses are forever changing through new regulations and case law.

This month's bulletin includes our review of recent employment cases, including cases about a discriminatory email, a misconduct suspension and an unfair dismissal due to a business sale. In addition, we look forward to April 2019 when new statutory rates and caps come into force, as well as a recently launched consultation process about confidentiality restrictions.


### Email sent to a woman on maternity leave could amount to discrimination

Under the Equality Act 2010, it is discriminatory for employers to treat women unfavourably when women are exercising their statutory right to maternity leave. The Employment Appeal Tribunal has recently considered this right in the case of *South West Yorkshire NHS v Jackson*.

The Claimant was on maternity leave when her employer commenced a redundancy exercise. During the redundancy process, the employer sent an email to the affected employees. However, the Claimant did not receive this email as she was on maternity leave and therefore was not accessing her work emails. Although the Claimant admitted that this did not cause her any substantial harm, she nevertheless argued that it amounted to unfavourable treatment, contrary to the Equality Act 2010.

The Employment Appeal Tribunal agreed with the Claimant, stating there could be unfavourable treatment. In order to ascertain whether there was unfavourable treatment, the Tribunal had to consider why the employer only sent the email to the Claimant's work email address, and why they did not consider alternative methods of communication. The case has been remitted to the Employment Tribunal for further discussions on this factual point.

Case law about discrimination can take many employers by surprise. Whilst many forms of discrimination are easy to identify and avoid, others forms of discrimination are less easy to identify, such as inadvertently sending an email. As discrimination rights apply from the recruitment process, it is paramount that any process followed by your organisation follows best practice in order to limit the potential exposure to a discrimination claim. It could be argued that had the employer in this case sent the email to the Claimant's personal email address, they may have successfully defended the case.



## **Employment Tribunal awards and statutory payments increase from April 2019**

From 1<sup>st</sup> April 2019, the National Living Wage will increase from £7.83 to £8.21, and in turn the National Minimum Wage will rise to £7.70 for workers aged 21 to 24, £6.15 for those aged 18 to 20, and £4.35 for the under 18s. The rate for apprentices will increase to £3.90.

In addition, from 6<sup>th</sup> April 2019, the statutory cap for a week's pay for Tribunal awards and statutory payments will increase from £508 to £525. Therefore, the maximum amount an employee could be entitled to for statutory redundancy increases to £15,750, as well as the maximum compensatory award for unfair dismissal claims to £86,444. Therefore the maximum award for a successful unfair dismissal claim (basic and compensatory award) exceeds £100,000 for the first time, namely £102,194.

These changes represent some of the biggest increases to statutory rates in recent years. Therefore businesses must ensure their payroll systems and processes are updated to ensure everyone is paid the correct rate; otherwise employers could face financial penalties of up to £20,000 per underpaid worker, together with the underpayment. In addition, directors could be named and shamed by HMRC, as well as being disqualified.

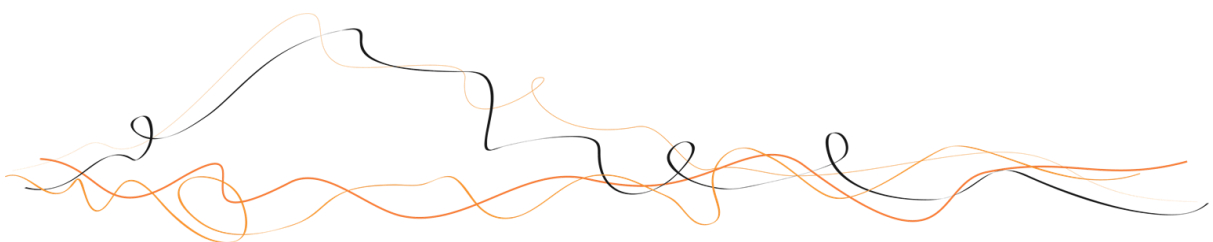
## **Government consultation launched about confidentiality clauses**

Last year, following the #MeToo movement, the Women and Equalities Select Committee called upon the Government to take action in relation to the controversial use of non-disclosure agreements so that women were not prevented from disclosing allegations of sexual harassment. As a result, the Government has launched a consultation on the possibility of introducing measures to prevent the misuse of confidentiality restrictions.

Whilst confidentiality restrictions are common place in Contracts of Employment and Settlement Agreements to protect trade secrets, there is concern that these clauses are being abused by employers, although it is not clear about the scale of the alleged abuse.

The Government is proposing to bring forward legislation to ensure confidentiality clauses do not prevent individuals from making disclosures to the police, as well as potentially GPs and counsellors. In addition, the Government is looking to ban unethically confidentiality clauses, so that the emphasis shifts from stating what is restricted to what can be disclosed.

These proposals are significant, as any changes will result in substantial changes to the way businesses set out their confidentiality restrictions. It could be argued the proposals do not go far enough, as the Select Committee were proposing to make unethical and inappropriate confidentiality restrictions a criminal offence. Therefore it will be interesting to see what action, if any, the Government will take when the consultation concludes on 29<sup>th</sup> April 2019.



### **When is it reasonable to suspend an employee?**

Mutual trust and confidence is one of the implied terms in a Contract of Employment. If an employer breaches this implied term, it could entitle an employee to resign and bring a claim of constructive dismissal. The Court of Appeal has recently considered this issue in the case of *London Borough of Lambeth v Agoreyo*, a case which provides a useful reminder of the risks associated with a suspension, regardless of whether or not the individual is guilty of the alleged misconduct.

On 14<sup>th</sup> December 2012, the Respondent suspended the Claimant pending an investigation into allegations that the Claimant had on three occasions used unreasonable force towards children aged 5 and 6 years old. The Claimant resigned in protest and challenged the lawfulness of the decision to suspend, stating that it amounted to a breach of the implied term of mutual trust and confidence. Although the Claimant agreed there should be an investigation, she disagreed the suspension was reasonable or necessary.

The Court of Appeal held that suspending an employee without reasonable and proper cause could constitute a breach of the implied term of mutual trust and confidence. However, this question can only be answered by considering the facts of the case. The Court held that the Respondent did have reasonable and proper cause to suspend the Claimant, and that the decision was not a knee jerk reaction to the allegations of wrongdoing against the Claimant. Moreover the decision to suspend did not destroy or damage the relationship of trust and confidence between the Claimant and the Respondent.

As an employer, you may have to investigate allegations of misconduct, which if sufficiently serious, to the extent that you may have to consider suspending the individual from your business, you must consider whether it is reasonable to do so in the circumstances, as suspension should only be used as a last resort.

### **Employee unfairly dismissed in TUPE transfer**

When buying or selling a business, the terms and conditions of employment for employees, as well as their continuity of employment are highly likely to be protected under TUPE. The recent case of *Hare Wines v Kaur* do not make any meaningful changes to the law surrounding dismissals in TUPE transfers, but it does provide a useful example of the issues a business could face in a TUPE scenario.

Mrs Kaur worked with H&W Wholesale Ltd, which transferred to Hare Wines on 9<sup>th</sup> December 2014. Mrs Kaur's employment was also terminated on the day of the transfer and she subsequently brought a claim of automatic unfair dismissal due to a TUPE transfer. Hare Wines alleged Mrs Kaur objected to the transfer because she had a challenging relationship

with a fellow member of staff. However, the Tribunal dismissed this explanation, finding instead that the true reason for the dismissal was due to personal reasons. The Tribunal found that Hare Wines did not want Mrs Kaur working with this fellow member of staff because it was Hare Wines themselves who considered that there was an issue with the working relationship and wanted to give preferential treatment to the fellow member of staff because she was being appointed as a director of Hare Wines. Subsequent appeals by Hare Wines to the Employment Appeal Tribunal and Court of Appeal were unsuccessful.

Individuals bringing a claim for automatic unfair dismissals arising from a TUPE transfer are successful if they can show the sole or principal reason for the dismissal is because of a TUPE transfer. Therefore the Tribunal will explore events that took place prior to the transfer. Unless a business can show an individual's dismissal is for an economic, technical or organisational reason, dismissals are highly likely to be automatically unfair. As such, it is paramount that you obtain legal before contemplating any acquisition or disposal.

### **Employment Workshops at mfg Solicitors**

Our next Employment Workshop is on Thursday 11<sup>th</sup> April 2019, entitled "Dignity in the Workplace". The Workshop will look at bullying and harassment, as well as the implications for both the individuals involved and the employer.

The Employment Workshop is £15 per person and takes place at our Kidderminster office at Adam House, Birmingham Road, Kidderminster, DY10 2SH from 9am until 12pm when a light lunch will be served.

To register, please email our Marketing Manager at [ellizabeth.armstrong@mfgsolicitors.com](mailto: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](mailto:sally.morris@mfgsolicitors.com).

