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Bite-size law from Clifton Ingram

Welcome to Clifton Ingram's Employment E-Bulletin

The Government recently published a list of 359 organisations that failed to pay the National Minimum or National Living Wage. Naming and shaming non-compliant employers is part of a push towards ensuring that UK workers are paid their full entitlement. The publicity, as well as the fines that are imposed, sends a very strong message: understand the rules and apply them properly.

Download our handy one page information sheet on the current wage bands, statutory pay etc **here**

Also new:

Mandatory Gender Pay Gap Reporting
Employers with more than 250 employees as at 5 April 2017 will have to begin reporting on their gender pay gap.

Apprenticeship levy
Employers with an annual pay bill of at least £3 million will have to pay a levy of 0.5% of their payroll costs.

Immigration Skills Charge
Most employers that employ migrants in skilled areas will have to pay £1,000 per migrant employee, per year. Small or charitable organisations pay the reduced amount of £364. The idea is to encourage businesses to train British staff to fill jobs, rather than take on migrant workers. Certain exemptions will apply in order to help retain those who are considered vital to growing the British economy.

For more information on these, or any other Employment law topics, please contact Alison Gair or Robert Cherry.

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Headscarf Ban Wasn't Direct Discrimination
Achbita v G4S Secure Solutions

Do you remember the case of Samira Achbita? She was the Muslim employee of G4S, dismissed after insisting on wearing a headscarf to work. Wearing the headscarf went against the company's 'neutrality' policy – in effect, no one was allowed to

wear any visible sign of political, religious or philosophical belief while at work.

The Court of Justice of the European Union (CJEU) has now given its judgment. It is not direct discrimination to prohibit the wearing of a headscarf where that prohibition comes from an internal rule that does not allow workers to wear any political, philosophical or religious sign in the workplace. Ms Achbita was not treated differently; all employees were required to dress neutrally.

But, it might be indirect discrimination. That is, if the rule puts people of a particular religion or belief at a particular disadvantage. An employer may be able to justify the discriminatory treatment by showing that they are pursuing, in an appropriate and necessary way, a legitimate aim – for example, political, philosophical or religious neutrality in its relations with customers.

It is for the national court to establish if G4S had established a general and undifferentiated policy, and if the company's ban only covered customer-facing workers (in which case the ban would have to be strictly necessary in order to achieve the aim). It will also be important to establish whether or not G4S could have offered Ms Achbita a job that did not involve visual contact with customers, rather than dismissing her.

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Headscarf Decision #2
Bougnaoui and another v Micropole SA

On the same day as Achbita, the CJEU decided another case about headscarves.

Ms Bougnaoui, a Muslim, was employed in a customer-facing role. A customer complained to the company about Ms Bougnaoui wearing her headscarf while on a site visit. She was eventually dismissed for continuing to wear it.

The CJEU considered whether, if Ms Bougnaoui had been discriminated against, that treatment could be justified by the 'genuine occupational requirement' defence. Could an employer's willingness to take account of the wishes of a customer to no longer have services delivered by a worker who wore a headscarf, be considered to be genuine and determining occupational requirement?

The answer is no. Where a customer has said that they don't want to work with someone who wears a headscarf, that does not amount to an occupational requirement. A genuine occupational requirement is objective. It's about the essentials of the job and the way it is carried out. Taking account of this sort of objection from a customer introduces subjectivity. And dismissing a worker for refusing to remove her headscarf in these circumstances would be direct discrimination.

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The End of the Pipeline for British Gas
Lock v British Gas

It's been a long time coming. But we have the final word on one particular aspect of holiday pay calculations: holiday pay should include the results-based commission that a worker would ordinarily earn.
We can now say this with certainty (at least until something changes!) because British Gas has been

refused permission to appeal that decision which was reached by the Court of Appeal last year.

It means that workers who earn commission should now not miss out when they take annual leave.

It remains to be seen what effect Brexit might have on this.

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Long-Term Absence Dismissal
O'Brien v Bolton St Catherine's Academy

Ms O'Brien was a teacher at the Academy. She took a short period of time off work after having been assaulted by a pupil.

That incident and some other factors continued to affect her, culminating in absence for stress and diagnoses of anxiety, depression and post-traumatic stress disorder.

She was dismissed after being off work for more than a year. There had been no certainty about a likely return to work, and Ms O'Brien was found to have been uncooperative during the employer's attempts to establish this. Although she produced evidence on the day of her internal appeal that she was fit to return, the employer viewed this with some scepticism. It was considered to be an attempt by Ms O'Brien to get back to work before her condition was fully treated.

The tribunal found that dismissal was excessive because:

- the Academy hadn't adduced satisfactory evidence about the adverse impact which Ms O'Brien's continuing absence was having on the running of the school; and
- in the absence of that evidence, it was reasonable to wait 'a little longer' to see if she would be able to return to work, particularly in the light of the encouraging evidence available at the appeal hearing.

The majority of the Court of Appeal upheld that decision, but described this as a 'borderline' case. An employer will not be expected to hold on forever.

It is clear that employers will be expected to thoroughly consider and respond to all evidence that emerges during the absence management process, including at the appeal stage. This might mean commissioning fresh medical evidence, or at least getting occupational health input. Also, remember that good evidence of the adverse effect that a person's absence is having on your organisation will be important in justifying a decision to dismiss.

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Expired Warnings Taken into Account
Stratford v Auto Trail VR Ltd

There is a reason why the warnings given to employees expire after a set period of time. It's to wipe the slate clean.

But, as this case shows, expired warnings aren't always irrelevant to future disciplinary decisions.

Mr Stratford had a chequered history with his employer. His disciplinary record listed 17 items, but there were no live warnings at the time he was eventually dismissed for carrying his mobile phone while on the shop floor – something strictly prohibited by company rules. The company took the view that although the phone incident didn't amount to gross misconduct, it was the

18th time that some formal steps (this time a final written warning) had had to be taken. The employer believed that this pattern would simply continue, and it terminated Mr Stratford's employment.

Fair dismissal, the tribunal said. The company was entitled to take account of Mr Stratford's disciplinary record and of his general attitude to discipline. A line had to be drawn.

The Employment Appeal Tribunal agreed. It can be ok to take account of an employee's record. But whether that's reasonable or not will depend on the circumstances of the case. In Mr Stratford's, the history of misconduct, together with a prediction of future problems, was a legitimate consideration.

Although this case isn't the green light to factor expired warnings into future disciplinary decisions, it may well help you deal with employees who find themselves in trouble time and time again. Have a clear policy on how you will deal with repeat offenders; that's important. And, above all, be sure that your decisions are those that a reasonable employer would make.

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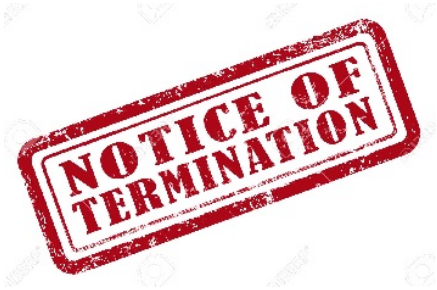
When Notice of Termination Takes Effect
Newcastle Upon Tyne NHS Foundation Trust v Haywood



Ms Heywood was notified that she was at risk of redundancy. During the consultation process, the fact that she would be on annual leave was brought up – she was due to be away from work between 19 April and 3 May.

The employer wrote to Ms Haywood on 20 April, confirming her redundancy.

In fact, it wrote three letters to her on that date

- The first was sent by recorded delivery. It was collected on Ms Haywood's behalf from the sorting office on 26 April, and she read it when she got back from Egypt on 27 April.
- The second was sent by regular mail.
- The third was attached to an email sent to Ms Haywood's husband. He read it on 27 April.

The question was: when did the notice of termination take effect? This mattered because of Ms Haywood's age. She turned 50 on 20 July. If her contractual 12 weeks' notice expired before then, her pension entitlement would have been lower then if it expired after that date. The key date was 26 April. Had notice of termination taken effect by that date?

No, said the High Court. Notice of termination took effect when Ms Haywood read the letter on 27 April. She was therefore entitled to the higher pension figure.

The majority of the Court of Appeal agreed. Where the contract doesn't say when notice of termination takes effect, the key date is the date on which the notice is actually communicated to, as opposed to being posted to or received by, the employee. Notably, sending the letter to Ms Haywood's husband's email address didn't amount to giving notice of termination. Ms Haywood hadn't given permission for that email address to be used, and that wasn't altered by the fact that she had used that email address to communicate with her employer a few days earlier.

So, notice of termination of employment in this context only takes effect and sets the clock ticking once the employee has read it. An employer who posts a letter to an employee's home might not know when that event happens because even if the letter has been delivered, it

cannot be assumed that the employee will have personally received it. Checking that an employee will be at home during a particular timeframe may be one way around this, but even that will not give complete certainty that the message has got through. Giving the notice personally is probably the surest way.

And Finally...
Wise Words

A University has been in the news for reportedly 'banning' the use of certain words. Cardiff Metropolitan has faced criticism from some who perceive this to be a restriction on freedom of speech.

But the University has explained that this is about encouraging the use of inclusive language, and that its Code of Practice on this (which suggests using 'disabled people' instead of 'the disabled', and gender-neutral terms like 'businessperson' and 'chairperson', for example) '*makes no demands, bans nothing and carries no sanctions*'.

It is to do with promoting fairness and equality by raising awareness about the effects of potentially discriminatory vocabulary, the University says.

To put this in its wider context, it makes sense for all organisations to have an ear to the ground. Listen to the language that is being used around you and think about how best to deal with any issues as part of your responsibility to manage an increasingly diverse workplace. We know from the pages and pages of employment tribunal decisions that words can cause offence, and their use can be discriminatory. People say the wrong things, they use outdated expressions – sometimes without realising. And there is no doubt that equality and harmony are far easier to achieve if there is a shared understanding of what is and is not acceptable.

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