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Welcome to Clifton Ingram's Employment E-Bulletin

As always, April brought some changes with it. To remind you:

National Living Wage
The big one was the introduction of the National Living Wage (NLW) from 1 April 2016. It entitles workers aged 25 and over to a minimum wage of £7.20 per hour. That's 50p more than the existing National Minimum Wage (NMW), which will continue to apply to under-25s.

Take note of these rates. Strict penalties apply where employers haven't paid the amounts they should have. Expect a fine of 200% of the underpayment of the NLW or NMW (reduced if you pay up quickly), up to a maximum of £20,000 per worker. There's also the possibility of director disqualification.

No Class 1 NICS for apprentices...
... who are under the age of 25, on a statutory apprenticeship and who are earning less than £827 per week (£43,000 a year). From 6 April, employer's National Insurance contributions are not payable in respect of those apprentices. It's part of the Government's push to create more opportunities for people to access high quality apprenticeships, and to support youth employment.

Rates rise
From 6 April:

- a week's pay, used to calculate unfair dismissal basic awards and statutory redundancy payments, increased from £475 to **£479**
- the unfair dismissal maximum award also increased to **£78,962** (previously £78,335).

But there was no change to maternity, paternity, adoption, shared parental leave and sick pay limits.

Penalties for non-payment
If you don't pay up following a tribunal award against you, you could find yourself having to pay the Government

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another 50% of the unpaid amount, up to a maximum of £5,000. The same applies to non-payment of settlement sums agreed via Acas.

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- Modern slavery - reporting for large businesses
- Unfit for work - dealing with dishonest claims
- Monitoring employees' messages
- Employer vicarious liability
- Dyslexia at work
- UK PLC fined for bribery

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

Modern Slavery

From the end of March, big companies – those with an annual turnover of £36 million or more – have been required to file information on modern slavery.

They'll have to publish an annual statement that sets out what they've done in their last financial year to make sure that slavery and human trafficking isn't happening (a) in any part of their business, and (b) in their supply chains.

It's this second category that could affect smaller businesses. If you're not in the £36m category, you could still be a player in those businesses' supply chains – or, indeed, in their suppliers' supply chains. You should keep information about what you're doing to make sure that slavery and trafficking isn't happening in your organisation. Those you supply will need this in order to comply with their legal obligations to provide modern slavery statements. And they'll probably thank you for being on the ball.

Some employers will see this as a formality, but it's something that needs to be taken very seriously. And remember that it's not just the slavery issue itself that you'll need to think about. You'll be handling and passing on information – data – and so will need to make sure you are Data Protection Act compliant. Take time now to put some plans and systems in place and get to grips with exactly what the new rules will mean for you.

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Letter to sick employee led to trouble

Private Medicine Intermediaries v Hodkinson

Dealing with employees who are on sick leave presents a host of potential pitfalls for employers. In this case, getting things wrong resulted in constructive dismissal.

Ms Hodkinson was disabled; she had thyroid dysfunction and cardiac arrhythmia. She went on sick leave with what she said was depression and anxiety caused by bullying and intimidation by managers in the business.

While she was off work, the employer wrote to her. The letter proposed a meeting. It also set out some areas of concern that the employer wanted to discuss with her. These were not serious or pressing issues.

Ms Hodkinson resigned, claiming that the employer had breached the implied term of trust and confidence and that she considered herself to have been unfairly constructively dismissed. She also claimed, alongside some other disability-related claims, that the correspondence amounted to harassment.

The Employment Appeal Tribunal (EAT) upheld the tribunal's constructive dismissal finding. The employee was ill, and the letter did not need to be sent. But this did not amount to harassment. It had not been established that the employer's action in sending the letter related to her disability, or that it created an intimidating, hostile, degrading, humiliating or offensive environment for her.

This shouldn't stop you from communicating with employees who are on sick leave. In fact, it's important to stay in touch. But make sure that you judge each communication carefully. If something can wait, hold off until the employee is better.

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Exaggerated injury, fair dismissal
Metroline West Ltd v Ajaj

The Employment Appeal Tribunal (EAT) has made it clear that a worker who dishonestly claims to be unfit for work, breaches the trust and confidence that an employee and employer must share.

Mr Ajaj, a bus driver, said he slipped and fell at work, injuring himself to the extent that he was unable to do his job. Surveillance evidence showed that he was more mobile than he said he was. A gross misconduct dismissal followed.

Unfair dismissal, held the tribunal. Even though Mr Ajaj had exaggerated his inability to walk, there was no evidence that he had exaggerated his inability to do his job. But the Employment Appeal Tribunal (EAT) overturned that decision. Whether or not someone is fit to do their job goes to capability, not conduct. Mr Ajaj had exaggerated the effects of his injury. That was culpable and misleading. Dismissal for gross misconduct was the obvious sanction, and certainly a reasonable one. So Metroline's decision to dismiss Mr Ajaj was fair.

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Monitoring employees' messages
Barbulescu v Romania

Mr Barbulescu was dismissed for breaching his employer's rules on the personal use of the internet at work. On his work-related Yahoo account were found to be messages to his brother and fiancée about his health and sex life.

Was it right for the employer to have accessed those messages and for them to have been used in the disciplinary and subsequent court proceedings? Mr Barbulescu argued that there had been a breach of his right to respect for private life and correspondence.

The case went to the European Court of Human Rights which found against Mr Barbulescu. Although workers have a reasonable expectation of privacy at work, this isn't absolute. The employer had a total ban on the private use of work equipment, and this was an important fact. It had accessed Mr Barbulescu's Yahoo account (set up for work purposes) believing that it contained business-related messages only, and for the purpose of checking that Mr Barbulescu was fulfilling his work duties. This was a proportionate interference with his rights.

The employer hadn't accessed other data and documents stored on the computer, and the monitoring was therefore limited in scope and was proportionate.

So, far from living up to some of the headlines it generated, this case really came down to basic rules about monitoring and data protection. Yes, employers are entitled to check that their employees are fulfilling their working duties, but only if done properly and it's proportionate. Making clear what your position is on private communications at work is the first step. Then it's about having a clear monitoring policy that's communicated and carried through.

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Employer liability extended

Mohamud v Morrisons Supermarket
Cox v Ministry of Justice

Two important Supreme Court cases have been decided on the issue of vicarious liability. The effect is that employers may now be liable for the acts of employees (and others) in more situations than before.

In the Mohamud case, a claim was brought against Morrisons by a customer who had been assaulted by one of its employees on the forecourt of a Morrisons' petrol station.

The employer was held to be liable for the actions. There was a close enough connection between the employee's actions and their employment. It was the employee's job to attend to customers, and Morrisons was liable for his abuse of his position.

Cox v Ministry of Justice put a different slant on liability again. A prisoner, working in the prison kitchen, injured a catering manager by dropping a heavy bag of rice on her. The Ministry of Justice was liable, even though there was no contract of employment between it and the inmate. It was significant that the prisoner was an integral part of the Ministry of Justice's business. Also that he was placed by the prison service in a position where there was a risk that he might commit a variety of negligent acts.

The key thing for employers to take from the widened scope of vicarious liability is to make sure that you take all reasonable steps to stop incidents happening. Policies and training are a useful indicator of your commitment to this.

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Dyslexia at work

Two stories with dyslexia as their focus; two completely different angles.

The first was about a dyslexic member of staff at Starbucks who had mistakenly entered the wrong information into a duty roster. She was accused of falsifying the documents, was demoted and told to retrain.

She won her disability discrimination case.

According to reports, Starbucks had not seemed to properly understand equality issues, and it should have made reasonable adjustments to take account of the dyslexia.

Also in the news was an advert for a job that was open only to people with dyslexia. "*We are simply looking for the best innovative thinkers and they are usually dyslexics*", the marketing firm's founder is reported to have said.

Controversial, maybe, but favouring someone who has a disability isn't prohibited by the Equality Act. And the ad is an interesting take on dyslexia; one that really shouts about its positive aspects.

Employers should take note and make sure that they can recognise the characteristics. According to the British Dyslexia Association, about one in 10 people have dyslexia, and not all have been formally diagnosed. It can mean that dyslexic employees are not properly understood, not treated fairly, and their strengths are not fully played to at work.

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Fine for bribery

A PLC is reported to have become the first UK company to be convicted for failing to prevent bribery. The penalty? The business was ordered to pay £2.25m.

It goes to show that the Bribery Act is alive and kicking. If you haven't already got in place good policies and procedures designed to prevent breaches, now's the time. And make sure that they extend to all parts of your business, including those that are based outside the UK.

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