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Welcome to Clifton Ingram's Employment E-Bulletin

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October Changes

October (along with April) is always a busy month for employment law. It's when changes take effect. These include, from 1 October 2015:

- An increase in the National Minimum Wage from £6.50 to £6.70 per hour for those aged 21 and over. For workers aged between 18 and 20, it increased to £5.30 and for those aged between 16 and 17 it's now £3.87. The apprentice rate is £3.30.

- A ban on smoking in cars in England, following the ban's introduction in Wales. Smoking in any private vehicle is now prohibited if there are child (under 18) passengers. It's worth looking at your policies on smoking and company cars in light of this change.

- Sikh workers who wear turbans are now exempt from wearing safety helmets in all workplaces and not just on construction sites, as was the previous rule. There are only a few situations in which this exemption won't apply.

For more information please contact Alison Gair

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Facebook Comments Can Be Used In Dismissals Years Later

The recent case of British Waterways Board v Smith once again highlights the rise of social media issues at work and the complexities surrounding them.

Mr Smith had worked for British Waterways for over 8 years. He was found to have posted various derogatory comments on Facebook about his supervisors. He had also claimed, two years previously, that he had been drinking alcohol while on standby duty.

He was dismissed for gross misconduct.

However, the Employment Tribunal held that it was an unfair dismissal, as the dismissal itself was outside the band of reasonable responses. The employer hadn't factored in mitigation, including length of service. The comments had been made quite a while earlier, the employer had known about some of the comments for some time and, in the years since, Mr Smith had shown that he could be trusted. There hadn't been any more Facebook comments about drinking while on standby, and no issues had been raised by his supervisors.

The Employment Appeal Tribunal disagreed, holding that the dismissal was fair. The Tribunal had substituted its own views for those of the employer. The Facebook entries had been made, there had been a reasonable investigation, the employer had lost confidence in Mr Smith, and there was a fair procedure. The only proper conclusion could be that the dismissal was fair.

So, a lesson for employers and employees alike that social media comments linger and can potentially be a fair basis for dismissal years down the line. The important thing is to get the investigation, procedure and conclusions spot on. And to have a social media policy that makes clear to employees what is and is not acceptable.

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Working time for mobile workers

Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco

In July we reported that mobile workers' first and last journeys of the day could be set to count as working time after an opinion to that effect came out of Europe.

This has now been confirmed in a decision by the Court of Justice of the European Union.

It means that workers who don't have a fixed office (sales staff who travel between customers, for example) are 'working', for the purposes of the Working Time Directive, when they drive from home to their first appointment of the day and from their last appointment home. The Court decided that these are not 'rest periods', as the employer in this case had claimed. It's working time.

The task for employers will now be to ensure that workers aren't 'working' too much and exceeding limits set by the Working Time Regulations. You may need to think about introducing contractual changes, altering shift patterns or factoring in additional rest breaks. It's a complicated area, particularly for businesses in the construction, care, security and catering sectors, and it's worth talking to us to discuss the impact on your business and how you'll need to adapt.

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Scope of HR role in disciplinaries

Ramphal v Department for Transport

Mr Ramphal was suspected of misconduct relating to his expenses and use of hire cars. The manager who was appointed to carry out the investigation and disciplinary was inexperienced and turned to HR for help. So far, so good.

But the problems for the employer began when the HR officer's input went further than just advising on the law, procedure and sanctions.

In this case, HR appeared to have given advice on issues around Mr Ramphal's credibility and culpability. A step too far?

Yes, held the Employment Appeal Tribunal (EAT). Drafts of the manager's report had become more critical of Mr Ramphal following communications with HR who seemed to have influenced the manager's views. The manager had initially concluded that Mr Ramphal was guilty of misconduct and should receive a final written warning. But that was later changed to gross misconduct and dismissal, seemingly at the behest of HR.

While it's fine for a dismissing or investigating officer to ask for guidance, that guidance should be limited to law and procedure and to making sure that everything has been addressed and that there's clarity.

An employee in Mr Ramphal's position is entitled to expect that the investigating officer will make their own decision, without being lobbied by others, held the EAT. They should also be given notice of changes to the case against them so that they can address them properly.

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Equal treatment of agency workers

Coles v Ministry of Defence

Agency workers have certain rights to equality of treatment at work. One of these is the right to be told about vacant positions that become available in the organisation they're working in. It's to give those temporary workers the same opportunity as direct workers to find permanent employment.

But how much security does this actually give agency workers? Where directly employed employees face possible redundancy, is it acceptable for an employer to give those members of staff priority when appointing people to roles that agency workers have been filling? Yes, according to a recent case.

The Ministry of Defence (MoD) had gone through a big restructure, with 530 direct employees having been placed in a redeployment pool. The job that Mr Coles was doing, as an agency worker, was advertised to staff. Priority was to be given to internal candidates in the redeployment pool, which excluded Mr Coles. He didn't apply for 'his' role, and a permanent employee was appointed.

Mr Coles argued that there had been a breach of the Agency Workers Regulations because he had been denied the opportunity of applying for the position he had temporarily been occupying.

The Employment Appeal Tribunal (EAT) held that there was no breach. Agency workers like Mr Coles have the right to be told about vacant posts, but that's as far as it goes. They don't have the right to preferential treatment over existing permanent staff. The MoD had not breached Mr Coles' rights by giving preference to those of its employees that were in a redeployment pool.

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Sick employees and TUPE

BT Managed Services v Edwards

The issue in this case was about who does and who doesn't transfer. In particular, is a long-term sick employee who isn't working "assigned immediately before the transfer" so that their employment transfers under TUPE?

Mr Edwards was considered to be permanently sick.

There were no prospects of him returning to work but BT had kept his employment going so that he could benefit from a PHI scheme and, once that had come to an end, similar payments from BT.

There was a service provision change. The new service provider went on to claim that Mr Edwards had not transferred to become its employee. The tribunal agreed. It held that Mr Edwards was not assigned to the organised grouping because he did not contribute to its economic activity.

The Employment Appeal Tribunal upheld that decision. Mr Edwards wasn't participating (and wasn't expected to participate) in the activities carried out by the group. An employee who had no connection with the economic activity of the grouping and would never have one in the future could not be regarded as being assigned to that grouping. Mere administrative connection isn't enough; there needs to be some participation in the group's economic activity.

Treat this decision with some caution, whether you are the transferor or transferee. It doesn't mean that no long-term sick employees will transfer under TUPE. Think about the prospect of the employee returning to work. Think, too, about their contribution to economic activity. Both are crucial factors in determining whether or not they'll transfer.

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