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Bite-size law from Clifton Ingram

Welcome to Clifton Ingram's Employment E-Bulletin

Love it or loathe it, the intensity of this summer's spell of sunshine and high temperatures took many by surprise.

And let's assume that summer is not over. Are you set up to handle yet more hot days, sunny rays, and a distracted workforce? Employers are expected to be 'reasonable'. That might simply mean adjusting the air con or installing a set of fans. It might also mean relaxing your dress code to make workers feel more comfortable – something that needs careful thought so as to avoid problems around health and safety, your professional image, and discrimination.

It's safe to say that the heat won't last for very long. So, while it does, you'll probably find that staff will appreciate a dash of empathy. And that doesn't need to be at the expense of taking a firm approach where workers step out of line. The key is to be clear about what is expected, and about what the consequences of rule breaches might be.

In this issue:

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

Government Review into Employment Practices

The results of a long-awaited Government review into employment practices were released earlier this week in

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'Good Work: The Taylor Review of Modern Working Practices'.

The review does not recommend a wholesale change in the law but it does propose various tweaks to it in order to achieve its vision of a "good quality work for all".

As you are probably aware, currently there are three different categories when it comes to employment status – employee, self-employed and the hybrid category of worker. The Report's headline recommendation is that the "worker" category be renamed "dependent contractor" to better distinguish workers from those who are truly self-employed. A typical example of a dependent contractor is a so called "gig economy" worker. Suggestions include:

- Giving dependent contractors the right to a written statement of terms of engagement in the same way that employees have the right to a written contract of employment. This right would be from day one for both categories (currently employers have two calendar months in which to issue a contract to an employee) and it is also suggested that the statement should include a description of the individual's statutory employment rights
- There should also be a stand-alone right to compensation if the engager/employer has not provided the written statement of terms
- Treating dependent contractors as "employed" for the purposes of tax status

Away from the gig economy, there were other suggestions in the Report that are relevant to employees, for example:

- Increasing the rate of the National Minimum Wage for hours that are not guaranteed by the engager/employer and the preservation of continuity of employment where any gap in employment is less than one month (rather than the current one week)
- Consider allowing flexible working requests to cover temporary as well as permanent changes to contracts
- Allowing for holiday pay to be paid on a rolled up basis (provided there are safeguards to ensure that individuals did not simply work 52 weeks per year as a result)
- Giving zero hours workers the right to request guaranteed hours after 12 months
- Giving HMRC enforcement powers in relation to holiday pay and sick pay as well as National Minimum Wage issues
- Reforming the Statutory Sick Pay regime so that SSP is a basic employment right and so that it accrues from day one and is based on length of service (like holiday entitlement)
- Improving the way in which an individual's return to work after long-term sickness absence is managed, with employers doing more to support those able to return above and beyond the current obligation to make reasonable adjustments
- Giving individuals a right to return to work following long term sickness absence so that they do not lose their job or see their long-term career damaged through sickness absence (similar to the current right to return about maternity leave)

It will be interesting to see how the proposals are implemented in forthcoming legislation and whether the "dependent contractor" category will simplify or complicate further what is already a difficult issue for some employers.

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Are 'On-Call' Workers Working?
Focus Care Agency v Roberts

Certain industries, perhaps most notably the care industry, rely on workers being on-call; sometimes even sleeping at work so that they're on site and available to help if needed. The perennial question, for employment law purposes, is whether these workers are 'working' – and entitled to the rights that go with that (not least the National Minimum Wage) - for the entire time, and not just when they are awake and attending to duties.

That issue presented itself to the Employment Appeal Tribunal in Focus Care Agency v Roberts, one of three cases heard together. Sadly, it didn't lead to a definitive answer on whether or not workers who sleep-in are entitled to the National Minimum Wage. But here are some of the factors that the EAT said should be taken into account in these cases:

- Why the worker must be present during the times they're sleeping. Is it a regulatory or contractual requirement to have someone there at those times?
- The extent to which the worker's activities are restricted by their having to be there and at their employer's disposal. What happens if the worker goes off-site; would they be disciplined?
- How much responsibility the worker takes on. Is it, for instance, to be on-site in order to help deal with an emergency, or is it to personally care for a disabled person in their home (in which case there may be a greater level of personal responsibility involved in the duties)?
- How much responsibility the worker holds in the case of an emergency. Are they the person who takes the decision to act, or are they assisting another worker whose responsibility it is to intervene?

None of these factors is, by itself, conclusive. This calls for an examination of the facts and an overall assessment of whether being at work means 'working'.

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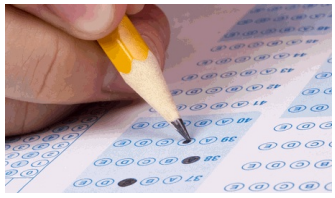
Psychometric Testing was Discriminatory
The Government Legal Service v Brookes



Psychometric testing has long been a way of assessing the aptitude of job applicants. But this tick-box test, marked by computers, doesn't necessarily provide a level playing field.

Ms Brookes has Asperger's Syndrome. She applied for a job as a trainee lawyer in the Government Legal Services (GLS). The first stage of the recruitment process was a multiple-choice test, known as a Situational Judgment Test (SJT).

Ms Brookes asked if she could respond by giving short narrative written answers. (The tribunal went on to find that, as a person with Asperger's, she lacked social imagination and would have difficulties in imaginative and counter-factual reasoning in hypothetical scenarios.) GLS refused.

Ms Brookes took the test but didn't do well enough to move on to the next stage of the recruitment process.

The Employment Appeal Tribunal upheld the tribunal's decision that she had been indirectly discriminated against. The 'provision, criterion or practice' (PCP) that all applicants in the trainee recruitment scheme take and pass the online SJT put people such as Ms Brookes at a disadvantage compared to those who didn't have Asperger's. That discrimination could not be

justified. While the PCP served a legitimate aim (to test fundamental competencies), the means of achieving that aim were not proportionate.

It was also found that GLS had failed in its duty to make reasonable adjustments. Ms Brookes had been treated unfavourably because of something arising in consequence of her disability.

The big message here is to build some flexibility into your recruitment process to deal with people who may be disadvantaged by your 'standard' procedure. Even if the medical evidence on this isn't conclusive, the safest course would be to implement some other way of evaluating the applicants' capabilities. That applies even if no other person with that disability has asked for the adjustment; different people may be affected in different ways.

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The Right to be Accompanied
Gnahoua v Abellio London Ltd

Employees have the right to be accompanied by a colleague, or a trade union representative or official at a disciplinary hearing.

An employer who breaches this could face a tribunal claim and the possibility of having to pay compensation of up to two weeks' pay.

Abellio had not allowed Mr Gnahoua to be accompanied at his appeal hearing by his chosen companion – one of two brothers from the PTSC Union. The company had a policy that neither individual was allowed to take part in disciplinary or grievance hearings because of their association with dishonesty and with threatening behaviour towards members of staff. Abellio told Mr Gnahoua that he could be accompanied by another member of the PTSC Union, but that did not happen.

Although Abellio had denied Mr Gnahoua the right to be accompanied, it was acknowledged that the company had good reason to refuse to go along with the employee's choice of companion. And as Mr Gnahoua had not suffered any loss or detriment, he was awarded nominal compensation of just £2.

Employers should not see this as giving the green light to object to an employee's choice of companion. The tribunal pointed out the general rule that employers should not choose the companion on an employee's behalf, or veto an employee's choice. But, Abellio's stance on this was not criticised; its objection was on strong grounds.

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Damages for Redundant Apprentice
Kinnear v Marley Eternit Ltd t/a Marley Contract Services

Mr Kinnear was taken on by Marley under a four-year apprenticeship during which he was trained in roofing.

A downturn in workload led to his dismissal for redundancy despite his contract having 122 weeks left to run. He could not find another company to take him on, and so was not able to finish his apprenticeship.

Mr Kinnear won his claim for damages on the basis that the employer had brought his fixed-term contract to an end early. He was awarded £25,000 - the maximum that the tribunal could award. It took into account:

- the likelihood that he would not be able to complete his apprenticeship because of his age and because of the downturn in the economy. Also relevant was the fact that his apprenticeship had been tailored to the sort of products that Marley used;
- the difference between what he should have earned to the end of his apprenticeship (£24,217) and any income that mitigated that loss;
- his likely future loss, which will be affected by the fact that he does not have the roofing qualification that was at the heart of his apprenticeship. He will be disadvantaged in the labour market.

If you are an employer of apprentices, take note: these contracts are no less significant than other workplace arrangements. Ending a fixed-term apprenticeship agreement early can be expensive.

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Employers Need to Step Up Their Brexit Plans

As the great unraveling of Britain's ties with the EU begins, it seems that employers are not prepared for a post-Brexit drop in migration levels.

A survey commissioned by the think-tank, Resolution Foundation, has found that of the 503 business decision-makers interviewed (all of whom employ EU/EEA workers), almost half have unrealistic expectations of what the immigration regime will be like once the UK has exited the EU.

Seventeen per cent think that the current system of freedom of movement for EU/EEA nationals to the UK will be unchanged. Thirty per cent expect that the system will be maintained for those who have a job offer; they'll still have the chance to move freely throughout the EU.

Almost half of those surveyed said they don't expect the number of EU nationals in their workforce to change over the next 12 months. Twenty four per cent said they expect to employ more migrant workers. That's against the backdrop of the Government's plans to reduce net migration to tens of thousands (and a reported fall from 335,000 on the eve of the referendum to 248,000 at the end of 2016).

It seems clear that, although there remains plenty of uncertainty around what Brexit will actually mean, employers – particularly those that rely heavily on migrant workers – should be looking at contingency planning.

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Employees' Duty to Reveal Intention to Compete
MPT Group Ltd v Peel

Mr Peel and Mr Birtwistle were the Technical Manager and the Technical Sales Manager respectively at MPT Group (MPT). They resigned.

Almost immediately after their six-month restrictive covenants expired, they and some others incorporated a company called MattressTek Limited – a business that would be in direct competition with MPT.

MPT brought a High Court claim based on a number of allegations, including that the men had breached their contracts by failing to answer questions truthfully about their future intentions. One had said that he wanted to work freelance; the other said he'd been offered other work. Both had denied any intention of going into partnership together.

Did that lack of candour breach their duty of good faith? Were these employees under a duty to disclose their true intentions?

It seems not. The High Court said that it would be reluctant to hold that a departing employee is under a contractual obligation to explain his own confidential plans to set up in lawful competition. The law will step in to prevent unfair competition, or to protect confidential information, or to hold employees to restrictive covenants (as long as they are reasonable). But employees are otherwise free to make their own way in the world. The Court was 'far from satisfied that these employees were under a duty to disclose their true intentions to MPT'.

It's a decision that might have been different had the employees been company directors, for example. The fiduciary duties owed by the most senior individuals within a company could often include disclosing an intention to compete.

Expectations Relevant to Covenant Enforceability
Egon Zehnder Ltd v Mary Caroline Tillman

A restrictive covenant is only as useful as it is enforceable. Where there is disagreement over the validity of this type of clause, it is often left to the courts to decide whether or not an employee should be prevented from doing certain things – working with clients, or competing with their former employer, for example - after their employment has ended.

In Ms Tillman's case, the question was whether a non-compete clause in her contract was valid. To be valid, these types of clauses need to be no wider than necessary in order to protect the employer's legitimate business interests.

She had joined Egon Zehnder ('Egon') as a consultant on a higher-than-normal salary and it had been expected that she would rise quickly through the ranks – which she did. But despite her significant promotions, she hadn't signed new contracts. She remained on the contract she had entered into when her employment began, and that contract contained a restrictive covenant preventing her from working for a competitor of Egon's for six months after termination.

After resigning, Ms Hillman told Egon that she intended taking up a new job with a competitor before her six-month restraint period was up. Egon applied for an injunction to enforce the non-compete covenant. But was that clause enforceable?

Yes, was the High Court's answer. The clause was reasonable when Ms Hillman joined Egon as a consultant and signed the contract (which is the appropriate time at which to judge reasonableness), even though very many other consultants didn't have the same sort of restraint in their contracts. It was relevant that, from the outset, Ms Tillman was expected to be

promoted pretty quickly. Given her experience, she had more client engagement, and made much more of a contribution to strategic matters, than would have been expected of a consultant. She became steeped in client affairs more often and to a deeper extent, and that level of engagement was in anticipation of her promotion. Her particular circumstances meant that the non-compete clause was reasonable and enforceable.

The key message is that a restrictive covenant must, at the time the contract is entered into, be tightly suited to the employee's role and to the employer's protectable interests. And it seems that evidence of an expectation of likely promotion – and of how that expectation manifested itself - may well help an employer's enforceability arguments. But it's important to keep these clauses under review and to update them where necessary as people progress through the business.

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And Finally...
Sickies – A Thing Of the Past?

If you're a fan of the Peter Kay show, Car Share, you'll have seen the perfect sickie in the making. John's car share buddy, Kayleigh, calls into work.

She feigns a stomach bug with great aplomb, while John looks on. It's all part of her plan to lure John, who happens to be the assistant manager in the store where they both work, to the safari park for the day.

The chance of that precise scenario happening in real life may be slim, and even slimmer these days, since it appears that fewer workers are taking sickies. According to the Office for National Statistics, when records began in 1993 7.2 days were lost per worker. In 2016 that figure fell to 4.3 days.

It seems that more of us will soldier on, rather than sink under the duvet, when we feel unwell. The Aviva Working Lives Report 2017 has revealed that 69% of employees surveyed said that they'd gone into work when they should have been off sick. Forty-one per cent said that if they take time off sick, the work just piles up. Twenty-three per cent said that they had taken a day off sick when they weren't unwell.

No employer wants workers pulling sickies. But do you really want people in work when they're not up to it? It's not just about the spread of germs (although the domino effect of workers being struck down is always unwelcome). Someone who's not firing on all cylinders can be a liability. Perhaps above all, a worker who really is unwell should feel able to stay at home to recover.

There's definitely a balance to be struck. But, contrary to what some employers may believe, a culture of 'presenteeism' isn't all it's cracked up to be.

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