Reading Office: 0118 957 3425

Wokingham Office: 0118 978 0099

info@cliftoningram.co.uk

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Bite-size law from Clifton Ingram

Welcome to Clifton Ingram's Employment E-Bulletin

The unmistakable hints of Christmas that are appearing in shops are signaling that 2017 is nearing its close.

With next year just around the corner, employers are being urged to make preparations for one major shake-up that will take effect in May 2018. The General Data Protection Regulation (GDPR) looks set to change the way organisations handle personal data – whether by processing, storing or disposing of that data. It's an overhaul of our existing laws and something that businesses of all sizes should be getting to grips with now.

The GDPR will introduce some enhanced versions of individuals' rights already in play under the Data Protection Act 1998, and there will be some new provisions too. The Information Commissioner's Office (ICO) has advised that now is a good time to check your company procedures to make sure, amongst other things, that your systems would help you locate and delete relevant personal data if asked to do so.
Getting a good understanding of what the GDPR will mean for your business and for your employees is the essential first step, and one that should be taken without delay. Reviewing and updating your systems, policies, contracts, notices, and consents, will ensure that you are ready for the changes when they take effect

In this issue:

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

Fees no more

Our Employment Team

Alison Gair

Head of Employment

T: 0118 912 0257

View Profile

Robert Cherry

Senior Associate

Tel: 0118 912 0264

View Profile

R (on the application of Unison) v Lord Chancellor

A four-year challenge to the introduction of Tribunal fees has ended in victory for UNISON and, the union says, for employees everywhere.

As it stands, people will no longer have to pay Tribunal fees to bring and pursue cases in the Employment Tribunal and Employment Appeal Tribunal. Those who have already paid stand to be refunded. This follows the ruling by the Supreme Court that the Government's introduction of fees in 2013 was unlawful.

The Government has just announced the first details of the refund scheme. As well as having their original fee refunded, successful applicants will be paid interest at the rate of 0.5% running from the date on which they originally paid the fee up to the date of the refund.

What does this mean for employers? Quite possibly that you are now more likely to face a Tribunal claim than you were when fees were payable (but that's not to say that every claim will be legitimate and will succeed). Something else to be aware of is the possibility that individuals who can show that they didn't bring a claim because of the fee requirement, or that they had a claim rejected because they hadn't paid the fee, may be given a second chance.

It's an evolving picture, and one that will become clearer in the months ahead.

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Is voluntary overtime part of 'normal pay'?
Dudley Metropolitan Borough Council v Willetts and others

Holiday pay calculations continue to cause difficulties for employers, with uncertainty still existing over the question of which elements of workers' pay should and should not be taken into account.

In the case of Mr Willetts and some of his colleagues, an Employment Tribunal decided that overtime that was purely voluntary, as opposed to being a contractual right or duty, should be included in the holiday pay calculation because it formed part of 'normal remuneration'. That was notwithstanding the employer's argument that voluntary overtime lacked the necessary intrinsic link to the performance of the contractual tasks and so should be excluded.

The EAT upheld the Tribunal's decision. Each case will depend on its facts, but the overriding point is that workers are entitled to be paid at least their 'normal or average remuneration', otherwise they may be deterred from taking leave. Overtime - whether compulsory, non-guaranteed, or voluntary - counts as remuneration. To qualify as 'normal', the payment must have been paid over a sufficient period of time; items that are usually paid and are regular across time are more likely to count than unusual or exceptional payments.

The EAT went on to consider whether there has to be an intrinsic link between the payment and the performance of tasks required under the contract. The EAT said it's not essential but it can be a decisive factor. If such a link were needed, there was one in this case anyway: if there had been no employment contract, there would have been no voluntary overtime. And in working voluntary overtime, the workers were performing tasks required of them under their contracts.

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Monitoring communications
Barbulescu v Romania

Back in 2016, the European Court of Human Rights (ECtHR) held that a worker in Romania who had been dismissed for his personal use of the internet at work had not been dismissed unfairly because of the employer's monitoring of his internet usage.

Mr Barbulescu had sent messages to his brother and fiancée via his work-related Yahoo account. He later argued that, by monitoring his use of the internet and by using his Yahoo messages in disciplinary proceedings, his employer had breached his right to respect for private life and correspondence.

The ECtHR found that the employer had acted lawfully; there had been a proportionate interference with Mr Barbulescu's right to privacy. However, that decision has now been reversed by the Grand Chamber of the ECtHR, which is its final appeal court. It has decided that Mr Barbulescu's right to privacy had been infringed.

The biggest point for employers to take from this case is that it can still be okay to monitor staff, but employees should know about the monitoring that you might carry out. In this case, Mr Barbulescu knew about his employer's ban on the personal use of work equipment. However, he hadn't been told about the type and extent of the monitoring that might take place, or that his employer might access the actual content of his messages.

What seems clear is that an employer should continue to take a cautious and rigorous approach where privacy rights are concerned. This should involve considering very carefully when, why and how monitoring should take place and ensuring that any such monitoring is justified. Workers must know where they stand on this, and the extent to which their privacy may be lawfully interfered with.

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Half the pay for half the work? British Airways v Pinaud

People who work part-time are protected from being treated less favourably than their comparable full-time colleagues. The question in Ms Pinaud's case was whether working more than 50% of full-time hours but not being paid more than 50% of a full-time salary was less favourable treatment.

Ms Pinaud's part-time working pattern, described as a 50% contract, was 14 days on and 14 days off. Over the course of a year, she was required to be available for 130 days. Compare that with the full-time position, which required workers to be available for 243 days in a year.

Ms Pinaud's claim was based on the fact that half of 243 is 121.5, and not 130. She was therefore required to be available on proportionately more days than full-time workers, and she was being paid 50% salary for about 53% of the work.

The Employment Tribunal held that this was less favourable treatment. Although the employer had a legitimate objective – essentially, to provide a workable shift pattern - the less favourable treatment was not a necessary or appropriate means of achieving that. The treatment wasn't justified. Had the employer renamed the part-time contract a '53% contract' and paid Ms Pinaud 53% of a full-time worker's salary, the less favourable treatment would have been removed. That would have been an alternative, non-discriminatory way of achieving the employer's legitimate aim.

The EAT agreed with some of that. It upheld the decision that Ms Pinaud had been treated less favourably on the grounds that she was a part-time worker. However, the Tribunal should not have discounted the statistical evidence about the actual hours worked by Ms Pinaud and by her full-time comparators when it came to the question of justification.

The EAT added that a simple increase in salary for a part-time worker like Ms Pinaud would not necessarily be an alternative way of achieving an employer's legitimate aim; it might be out of proportion to the impact of the disparate treatment on the part-time worker. So simply upping the salary of someone in Ms Pinaud's position will not automatically fix the problem. All of the facts need to be considered.

A fresh Tribunal will now assess whether or not the less favourable treatment was justified.

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Location, location, location
Aziz v The Freemantle Trust

Ms Aziz was a care worker who had relocated to the Trust's Dell Field Court site. Issues arose between her and two other workers, and this triggered a period of difficulties, complaints, suspensions, absences and grievances.

The situation was deemed to be dysfunctional, and the Trust decided that Ms Aziz should be moved to another site. She was given three weeks' notice and confirmation that she would be paid her additional travel expenses in line with the employer's relocation policy.

But Ms Aziz didn't take up what she said was her employer's offer to move to a different location. This led to her dismissal for unauthorised absence, failure to engage with the Trust and, ultimately, a fundamental breakdown in trust and confidence.

In respect of her unfair dismissal claim, the Tribunal found for her employer who, it said, had a clear business need for Ms Aziz to relocate. But on appeal, she argued that there was no proper basis for the employer requiring her to relocate. The question for the EAT was: had there been a lawful exercise of a mobility clause in Ms Aziz's contract?

The contract included this wording:

".....It is, therefore, a condition of your employment that should the need of Freemantle's business require it, you will change your place of work or base office for the performance of your duties."

Ms Aziz argued said that that should be seen in light of the Trust's relocation policy which applied to the closure of an establishment, a rebuilding operation, a relocation of services or a new service development – none of which arose here – and covered things like relocation expenses, and consultation.

However, the EAT held that the policy didn't limit the scope of the mobility clause. The employer had, in response to a genuine business need, been entitled to require Ms Aziz to relocate under the terms of her contract. The Tribunal had correctly scrutinised the employer's approach before reaching the conclusion that dismissal for refusing to obey that instruction was fair.

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And finally....
OMG! Emoji!

You know those buttons at places like airports and service stations that customers can press to show that they feel happy, unhappy, or indifferent about the service they have received? Well, it seems that Sports Direct has implemented something similar to discover how staff feel about the working conditions at one of its warehouses.

The organisation has come in for some criticism in recent times, and this idea is reported to be one of a number of measures put in place in response. According to the Guardian, workers are asked to use a touchpad to select a 'happy' or a 'sad' emoji. Sad emojis trigger an invitation to discuss the problem.

We are all for open channels of communication between employers and employees, and if this sort of system is well thought out and it works for organisations and for individuals then that can only be a good thing for ongoing relations.

The benefits of employee engagement are well documented. Those who feel that they are a valued part of an organisation tend to repay their employer in loyalty, productivity and, ultimately, profitability. Situations can be improved; problems tackled. While meaningful

consultation and a willingness to act on employee feedback will require an investment on an employer's part, the potential benefits of this are there for the taking.

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Opening Hours: 9:00am - 5:30pm | Monday - Friday

Wokingham Office

22-24 Broad Street
Wokingham
Berkshire
RG40 1BA
T: +44 (0)118 978 0099
info@cliftoningram.co.uk
cliftoningram.co.uk

Reading Office

County House
17 Friar Street
Reading
Berkshire RG1 1DB
T: +44 (0)118 957 3425