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EMPLOYMENT LAW UPDATE



BATES WELLS & BRAITHWAITE

IN BRIEF

Employers are advised to ensure that there is no room for misinterpretation on the status of contractors, as courts can overlook written documentation to determine an individual's status, warns **Sarah Bull**. Page 3

Sarah Bull and **Elaine Carey** go head-to-head on the issue of fees for claims in the Employment Tribunal, which are due to be introduced next year. Page 4

Auto-enrolment is on its way, with the largest employers required to auto-enrol eligible jobholders into a pension from October 1st. **Denise Owusu-Ansah** outlines the steps for employers. Page 7

Any employer facing an Employment Tribunal will benefit from our Top 10 Tips for Respondents in Tribunal claims.

Victoria Cook draws on our years of experience in successfully defending cases on behalf of employers. Page 10

Employers not complying with the requirements of right-to-work checks face fines of up to £10,000 per employee found working without permission by UK Border Agency.

Tom Ketteley advises a review of your organisation's procedures to ensure compliance. Page 12

Responses to Freedom of Information requests that include employee information require particular care, says

Melanie Carter. Page 14

In this edition of our employment law update, we introduce a new feature – Tribunal watch – in which we look at a recent Tribunal case of particular interest to our clients. **Lucy McLynn** covers a recent case concerning whistleblowing. Page 16

And finally **Alice Wright** provides our regular roundup of recent cases, and a commentary on their potential wider significance. Page 18

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Front cover: London Millennium Footbridge

COMMENTS

Please contact us with any comments or suggestions.

Previous updates are available at:
www.bwbllp.com/Updates

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CONSULTANT OR EMPLOYEE?

Employers are advised to ensure that there is no room for misinterpretation on the status of contractors if they could be considered as employees.

Courts are frequently asked to consider whether or not a relationship between a contractor and the hiring organisation is a sham arrangement. Usually this comes about because an individual, having entered into a contract as a self-employed contractor, subsequently wishes to argue that they are, in reality, an employee with statutory rights, such as the right to holiday pay and the right not to be unfairly dismissed.

Case law makes it clear that even if your written documentation sets out a relationship of self-employed contractor, if it does not reflect the reality of the relationship in practice, then it is likely to be viewed as merely an attempt to avoid liability under employment legislation.

Previously it was thought that the written documentation could only be overlooked where the parties intended to mislead. This is no longer the case. In the case of *Protectacoat* the Court of Appeal held that it is for the courts to determine the true legal relationship. Written documentation will usually provide the answer unless it is alleged that the documentation does not describe the true relationship, in which case a court will look at the parties' conduct.

In the recent case of *Autoclenz Limited v Belcher & Others* the Supreme Court held that a group of car valeters were employees. This was the case even though the written agreements they had signed stated they could allow substitutes and that there was no obligation for them to provide work. The Tribunal found that in

fact the valeters were expected to turn up for work unless they had given appropriate notice and they had not been aware of the right of substitution.

You should:

- ensure that contracts with contractors are robust and contain appropriate indemnities;
- be aware that if the reality of the relationship differs from the written documentation, the contract may be challenged;
- review long-term consultancy arrangements on a bi-annual basis to ensure that the nature of the relationship has not changed since the contract was signed.

This article appeared in the August edition of *Construction Magazine*.
<http://viewer.zmags.com/publication/03aacbe8>

Sarah Bull warns that the courts can determine the nature of the legal relationship between contractors and hiring organisations



Sarah Bull

Senior Associate

Sarah worked for the Recruitment & Employment Confederation before joining BWB and continues to specialise in recruitment agency and agency worker matters.

TRIBUNAL FEES – THE BIG DEBATE

From Summer 2013, any individual wishing to bring a claim in the Employment Tribunal should typically expect to pay a fee of £250 for issuing the claim and a subsequent hearing fee of £950. Opinion on the introduction of these fees has been significantly divided.

Sarah Bull and Elaine Carey go head-to-head on the subject



Sarah Bull

Senior Associate

Sarah has a particular expertise in employment status matters, including drafting and reviewing documentation for agency workers, consultants, home workers and bank staff and advises UK and international clients on employment matters.

“If the claimant has a genuinely meritorious claim, then a fee of £250 is unlikely to act as a deterrent”

Sarah Bull argues that the Tribunal system should be more closely aligned with the Civil Court system of fee payments.

Unmeritorious claims abound in the Employment Tribunal. The Tribunal system is overwhelmed by the number of claims it receives: the average waiting time for listing of a hearing is increasing and in some Employment Tribunals it is unlikely that any matter (even a short 1-2 day hearing) would be heard within 12 months of submission of the claim. No meritorious claim should have to wait that long to be heard, and no victorious claimant should have to wait that long for compensation.

Why has a payment system been introduced?

There are two main causes of the overburdening of the Tribunals: the lack of payment required in order to submit a claim, and the lack of a cost regime such as exists in the civil courts rewarding the winning party to the case. There have been good reasons for having a free system relating to accessibility. However the system is in need of reform and the challenge is to arrive at a fair solution. The notion that Employment Tribunals are non-legalistic has long been a myth. Whilst this may have been the case, and certainly was the intention, when the Tribunal system was set up in the 1960s, since that date employment legislation has increased exponentially.

What are the key benefits?

The introduction of a fee will encourage individuals to seek legal advice before submitting a claim (whether that be through ACAS, free legal advice at a legal

advice centre, an initial free meeting with a solicitor, or on a paid basis). If the claimant has a genuinely meritorious claim then a fee of £250 for issuing a claim is unlikely to act as a deterrent. However, many claims are brought because the claimant feels that a respondent has behaved improperly, and whilst there may be a moral wrong to be argued, unfortunately this rarely translates to a recognisable legal action and it benefits no one (not least the claimant whose claim will fail) for these claims to be pursued. Taking advice at an early stage should prevent many of these claims being instituted. The Government has previously trialled other means of lowering the number of claims going to Tribunal. Most recently the statutory dismissal and grievance procedures acted to prevent claimants submitting claims without first trying to resolve their claims via the employer’s internal grievance procedure. The procedures were a failure and the relevant legislation was repealed. This latest attempt at reform must, accordingly, take a different approach.

What adverse impact could result?

The Government has sought to lessen any disproportionate impact on claimants with very limited means by extending the civil court remission system, which allows full or partial remission of fees on certain grounds, for example receipt of benefits. It is also likely that those individuals who are members of unions or who have legal insurance (perhaps through their home insurance) will see fees covered by those entities.

A review of the remissions system will be undertaken this year and this will allow for adjustments to be made.

“The plan to introduce fees overlooks the significant challenges that claimants already face when taking proceedings, especially those who have received little or no salary for some time”



Elaine Carey

Solicitor

Elaine joined BWB in 2011 and works with predominantly employer clients on the range of employment matters.

Elaine Carey believes that fees won't deter vexatious claimants and will have a disproportionate impact on lower paid individuals with genuine claims.

How significantly will fees impact upon claimants?

The tribunal system is designed to provide access to justice without the costs or formalities commonly found in the civil courts. Contrary to this aim, the introduction of fees will have the greatest impact upon lower paid earners, who tend to have the most immediate need for an accessible tribunal system.

The fees proposed are surprisingly high and there is very little scope for refunds. The issuing of employment proceedings is already a daunting prospect for many claimants and the added consideration of fees will most certainly deter claims. Even those individuals who stand a strong chance of success at tribunal will be wary of bringing a complaint, especially where they are unemployed and have received little income for some time.

Will fees discourage vexatious and weak claims?

Following the introduction of fees, individuals will be inclined to seek increased legal advice before bringing a claim, which will result in additional costs. Some may argue that claimants receiving further advice can only be a good thing, but this argument assumes that most claims are either weak or vexatious. The reality is that vexatious litigants will still bring complaints regardless of the fees required to be paid and it is genuine claimants who are unable to cover the new costs who will be hit the hardest.

Won't the remissions system address any concerns about lower paid earners?

Those with limited means will receive assistance through a remissions system. It is proposed that the system currently used by HM Courts and Tribunals in civil proceedings will be adopted; however, this is unlikely to work well in practice.

Whilst this system may function reasonably well in civil proceedings, the proposal fails to recognise the key differences between civil and employment cases.

For example, taking account of the three-month time limit for claims in the Employment Tribunal, as opposed to the six-year time limit in civil proceedings, any system that is modelled on the civil court framework is likely to prove tricky,

especially where a claimant has difficulty in obtaining the documentary evidence required to be considered for remission.

Will fees encourage settlements, bringing an end to prolonged litigation?

The introduction of fees will in fact encourage the late settlement of claims. Employers may wait until the second hearing fee has been paid before entering into realistic negotiations with a claimant, in anticipation of an employee withdrawing their claim once they have found they cannot afford the second fee required by the Tribunal. By this point in the proceedings, an employer will have a clear idea of whether an employee intends to progress their claim all the way to hearing. The employer's ability to 'play the system' certainly does not support the ideology of access to justice.

In summary, the plan to introduce fees overlooks the significant challenges that claimants already face when taking proceedings, especially those who have received little or no salary for some time. Whilst the Government has explained that the purpose of the fees is to lower costs that are ultimately borne by taxpayers, the fees will disproportionately prejudice those with protected characteristics and lower incomes.

PRACTICAL EMPLOYMENT TRAINING SERVICES: MOCK EMPLOYMENT TRIBUNAL



The Employment department can provide a mock employment tribunal for your staff – either at our offices, or your workplace.

The mock employment tribunal is a very realistic simulation of tribunal proceedings – conducted by members of the Employment department who regularly appear in the employment tribunal.

It gives delegates a unique insight into how employment tribunals work, how they approach claims and what it takes to persuade them to find for the employer. Delegates can participate fully in the proceedings – based on either sample cases we can provide, or specific issues for your company.

The mock employment tribunals also serve as a unique training exercise for managers, highlighting the importance of managing their staff properly and effectively and the issues to be aware of.

Who should attend a BWB mock tribunal?

Anyone who will be attending an employment tribunal; or any manager who makes decisions in respect of staff that they may later have to explain to an employment tribunal.

What are the benefits of attending a mock tribunal?

By the end of the mock tribunal delegates will understand the importance of procedure and reasoned decision making; managers will understand why they must follow proper procedures, and properly manage staff.

The session is fully interactive and encourages delegates to question their own decision-making and to understand how a tribunal might challenge their approach.

How is the mock tribunal structured?

We will provide pleadings, witness statements and any other relevant documents to delegates so that they can follow the proceedings in full.

Witnesses will give evidence and will then be cross-examined by BWB advocates and questioned by the delegates.

After the evidence there will be submissions, then a detailed discussion of the issues and finally a vote on the outcome. Delegates and Employment lawyers will then discuss what has been learnt and its importance. Delegates will be able to question the witnesses and help decide the outcome and any remedy.

Arrangements

We can provide a mock tribunal for your staff at our offices or at a location of your choice. The sessions are for a minimum of around 20 delegates with an ideal maximum of 75 delegates. You can select the topic of the tribunal from a pre-existing list, including capability, misconduct and discrimination, or we can tailor the session for your organisation.

The cost of the event will depend on the topic and location.

Delegate Feedback

“I was absolutely bowled over! It was so interesting and useful and professionally staged – it was far more productive than I had ever imagined it would be”

“It was interactive, so we all had the opportunity to ask questions”

“Very realistic and re-highlighted how complicated these situations can be”

“They also clearly stressed that it is YOUR responsibility as a manager to take charge of a situation and professionally manage your employees”

**For further information please contact
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AUTO-ENROLMENT PENSIONS

Auto-enrolment is coming... are you prepared? From 1st October 2012, employers will be required to automatically enrol eligible jobholders in a suitable pension scheme, but many employers remain uncertain about how the changes will affect them.

What is auto-enrolment?

Auto-enrolment is part of a Government initiative to increase private retirement savings, following concerns that many workers are not providing adequately for their own retirement. Under the auto-enrolment legislation, introduced by the Pensions Act 2008, all employers are required to automatically enrol all 'eligible jobholders' into a pension scheme that meets certain minimum requirements.

Do I have to auto-enrol all jobholders?

No. Not all jobholders need to be auto-enrolled. To be eligible for auto-enrolment, a jobholder must:

- be a worker;
- be at least aged 22 but below the state pension age;
- have earnings that are equal to, or exceed, the earnings trigger (currently £8,105 gross per year) in a pay reference period; and
- not already be an active member of his employer's qualifying scheme at the date he becomes eligible for auto-enrolment.

Do I still have to provide for other workers?

You will not have to auto-enrol a worker who is not eligible. However, you must still take steps to provide for 'non-eligible jobholders' and 'entitled workers'.

Non-eligible jobholders will be entitled to opt into their employer's qualifying pension scheme and receive mandatory contributions.

Entitled workers must be given information about their right to join a pension scheme, but their employer can choose what type of scheme to offer. This is similar to the existing right to access a stakeholder pension scheme. Their employer is not under a statutory duty to make contributions to the pension scheme.

Employers may need to take advice on who will fall under the definition of a 'worker', which may include IT contractors and a whole host of other people who are not employees, but have a contract with the employer to undertake work.

Can I use an existing pension scheme?

Employers can use an existing occupational or personal pension scheme, but only if certain 'quality' conditions are met. The conditions vary depending on the type of scheme used. Employers should seek advice on whether their existing scheme satisfies the relevant quality requirements.

What if I do not have an existing pension scheme?

If an employer does not currently offer any scheme or its current scheme does not meet the conditions, they will either have to:

Denise Owusu-Ansah looks at some of the frequently-asked questions and the steps employers may need to take to get ready for auto-enrolment



Denise Owusu-Ansah

Solicitor

Denise trained with BWB and has been working in the Employment department since qualifying, advising employers on a wide range of employment issues.

- enrol eligible jobholders in the National Employment Savings Trust (NEST), the Government's new occupational defined contribution scheme; or
- amend their current scheme rules to ensure the pension is suitable for auto-enrolment, which may require prior consultation with staff.

When will auto-enrolment apply to my business?

Employers have been given a 'staging date' according to the number of workers in their PAYE scheme on 1 April 2012. There are various staging dates – starting from October 2012 for employers with more than 120,000 employees and progressing roughly month-by-month from that point. The dates for employers with fewer than 250 employees begin in 2014 and all employers will be required to comply with the legislation by 2018. The Pensions Regulator will write to employers 12 months and 3 months before their staging date to advise them of their responsibilities and obligations.

Can I bring forward my staging date?

Yes. Employers are permitted to bring forward their staging date by notifying the Pensions Regulator and obtaining the agreement of the relevant pension scheme trustees.

When must I auto-enrol an eligible jobholder?

For most existing jobholders the auto-enrolment date will be the employer's

staging date or the beginning of the first pay period after which the jobholder becomes eligible.

Employers can defer the date on which a jobholder is auto-enrolled by up to 3 months. This may be helpful to deal with situations such as short-term seasonal workers or a qualification period under an existing pension scheme. Eligible jobholders can choose to opt-in to the pension scheme during the 3 month period and will be entitled to full contributions from their employer.

Can eligible jobholders opt-out of auto-enrolment?

Yes. Automatically enrolled job-holders have the right to opt-out of auto-enrolment. If a jobholder opts-out during a specified 1 month period, they must be treated as though they had never been a member of the qualifying scheme and any contributions they automatically made refunded.

Can eligible jobholders who have opted-out of the pension scheme opt back in?

Yes. Jobholders who have opted-out will be able to change their minds and join the pension scheme at a later date by giving their employer written notice. However, they will only be able to do this once in a 12-month period. Jobholders who have opted-out will be automatically re-enrolled every 3 years.

Action points for employers

Employers will need to assess the implications and costs of auto-enrolment on their business. Employers will need to ensure that their administrative system can adequately monitor workers for changes in their category due to age, income or worker status and ensure that the right information is sent to workers on time.

Employers should therefore look to take the following steps as soon as possible:

- identify which workers are eligible for auto-enrolment;
- decide which pension scheme to use – an existing scheme, a new scheme or a NEST;
- if an existing scheme is to be used, review the rules of the scheme to ensure the pension is suitable and, if necessary, amend the rules (e.g. eligibility criteria or contribution levels) to meet the requirements;
- budget for any increase in payroll costs;
- put in place systems to satisfy the auto-enrolment obligations, including how best to communicate the new regime to jobholders – including opting-out/opting-in procedures and re-enrolment.



This month Thérèse Rankin joins our Employment team as a solicitor.

After studying History and French at Bristol University, and the Graduate Diploma in Law at the College of Law in London, Thérèse completed her training contract with Mills & Reeve LLP and qualified into Employment Law. Thérèse joins our team as a newly-qualified solicitor.

Thérèse has experience in advising predominantly employer clients in relation to a broad range of employment law issues, HR issues and Employment Tribunal claims. Her recent work has included advising on changes to terms and conditions of employment, preparing contentious cases involving redundancy, whistleblowing, discrimination and unfair dismissal for hearing, negotiating settlements and drafting compromise agreements.

10 TOP TIPS FOR SUCCESSFULLY DEFENDING TRIBUNAL CLAIMS

To the uninitiated, the Employment Tribunal can seem baffling and the prospect of facing a Tribunal claim can strike fear into the heart of even the calmest of employers.

Victoria Cook draws on our experience of successfully defending cases on behalf of respondents to provide our top 10 tips for employers facing a Tribunal hearing



Victoria Cook
Associate

Victoria advises predominantly employer clients on a broad range of employment law and HR issues and regularly runs successful defences to Employment Tribunal claims.

The best approach for employers to take is a systematic, cool-headed one – something which becomes easier to adopt with experience. Here are our top 10 tips to bear in mind in the run up to a Tribunal Hearing:

1. Remember the Paper Trail. This forms the foundation of all Tribunal cases and is relied upon to support each party's verbal evidence and version of events. Ensure all key conversations, meetings and decisions are clearly documented. Avoid making derogatory comments about the opposition or writing on original documents, as these will have to be shared with the Tribunal and the opposing party. Remember, the paper trail is a work in progress and should be maintained throughout the case.

2. Be aware of time limits and timelines including:

- the response to the claim – this must be submitted to the relevant Tribunal office using a prescribed form ET3 within 28 days;
- subject access requests – must be responded to within 40 days; and
- replies to discrimination questionnaires – should be provided within 8 weeks of receiving them. Respondents are not obliged to answer every question, but a Tribunal may make an inference from an evasive or missing response.

3. Know the theory about the case and understand the key areas and difficult points of a claim. A clued up Respondent should know what they want to show the Tribunal and what they want the Tribunal to conclude. They should be aware of how the issues in the case are to be addressed in the respondent's case and respond accordingly, in addition to understanding the value of the claim.

4. Consider tactical admissions:

A cooperative Respondent comes across as a cooperative employer. The natural inclination when faced with an accusation such as discrimination is to deny it ever occurred. However, if an event that could be construed as discrimination actually took place for valid reasons, it is of far greater benefit to the respondent to admit the occurrence and to explain their reasoning behind it than to pretend it never happened. Where the event was clearly unfair, admitting the discrimination and proposing an appropriate remedy may be viewed by the Tribunal as remorseful (and potentially forward thinking).

5. Make use of Interlocutory hearings and applications.

Be prepared for the Case Management Discussion by narrowing the issues in the claim and asking pertinent questions. Additionally, make the most of any opportunity for a Pre-Hearing Review, by applying for an appropriate order. This might include a deposit order for the Claimant to pay a sum into the Tribunal in respect of a part of a claim that has little reasonable prospect of success or an order to strike out part or all of a claim.

6. Mitigation. Consider the evidence provided by the Claimant and whether they have adequately 'mitigated their loss'. Where an employee has left their job and is claiming loss of earnings as a result, it may help a Respondent to be able to show that the Claimant could have sought alternative employment elsewhere and minimised their losses. Respondents should consider searching for job advertisements and submitting these as counter evidence to the Tribunal.

7. Revisit documents and understand them. This goes beyond just the correspondence and associated paper trail. Look at contracts, policies and organograms that help to paint the picture of the background to the claim and get to grips with their contents and implications.

8. Prepare a witness strategy.

Respondents should choose carefully who will speak on their behalf and what the running order of witnesses should be. A respondent must have a witness who is able to clearly explain the structure and function of its organisation and the nature of its employer/employee relationships.

Further, a witness should:

- know their statement and the documents referred to in the statement;
- give a straightforward answer to the question asked and not attempt to second guess where a question is going;
- never argue with the questioner; and
- direct their answers to the Tribunal Panel.

9. Know the bundle (of documents related to the hearing) and get familiar with it ahead of the hearing. The Respondent and their witnesses should be able to locate documents contained within the bundle and have knowledge of the relevant dates.

10. Deal with the issues of the case. The Respondent should get to grips with the difficult points in the case and should be able to explain problematic documents and be prepared to make admissions or concessions if necessary for the case. Above all, the best possible strategy for eventual success at Tribunal is for the respondent to understand its own argument and any problematic points arising within it.

Practical Employment Training Services

We provide advice on all aspects of employment law including discrimination, performance management, sickness absence, dealing with disciplinaries and grievances, redundancy, restructuring and TUPE. In addition to our technical expertise, we also appreciate the wider practical implications that employers need to take into account when making business decisions that affect staff. We are therefore able to offer training on all areas of employment law and management skills from both a legal and a practical perspective. In this way, we can help our clients to avoid or minimise staffing problems and we can also enable our clients to deal with any employment issues that arise. We offer both 'off-the-shelf' and bespoke training depending on clients' particular requirements.



IMMIGRATION: RIGHT TO WORK CHECKS

Employers need reminding about the requirements for checking that their employees have the right to work in the UK.

Tom Ketteley from our Immigration Department outlines the key issues for employers to be aware of



Tom Ketteley
Solicitor

Tom advises on a wide range of immigration matters and routinely conducts immigration audits of commercial organisations and charities.

BWB's Immigration Department regularly carries out immigration audits and mock UKBA compliance visits for employers wishing to have their right-to-work checking systems externally audited.

Should you be presented with an immigration document that you are not familiar with BWB's Immigration Department offers a review service to provide peace of mind that the document demonstrates a right to work in the UK.

It is with alarming regularity that, when conducting immigration audits, we come across employers still not getting it right when it comes to performing right-to-work checks. Taking copies of the right documents at the appropriate time allows employers to raise a statutory defence against the imposition of a civil penalty by the UK Border Agency for employing a person with no permission, or in breach of their permission, to work in the UK. With civil penalties running to up to £10,000 per employee identified as working illegally it is worth getting this area of compliance right!

The policy rationale behind requiring employers to check certain documents is to make it harder for people with no right to work in the UK to unlawfully gain or keep employment. Specified documents must be checked and, if these reveal an ongoing right to work, such as in the case of British citizens, EEA nationals or those with Indefinite Leave to Remain then a copy should be taken, dated and filed away. If the documents reveal that a prospective employee has a time-limited right to remain in the UK or has restrictions on their right to work then, in addition to taking and dating copies, further checks every 12 months will be required to maintain the statutory defence.

Conducting the relevant check is not difficult. Nevertheless, it is common for employers to get it wrong – employers often fail to establish the statutory defence because the checks were carried out too late. No matter how inconvenient, the check must be carried out before employment commences. Practice varies,

but where interviews are conducted on all new hires it would be appropriate to introduce the right-to-work check as part of the interview process. In organisations where interviewing is not routinely deployed then a blanket policy of prospective staff coming in and completing the right-to-work checks before their start date should be implemented. Conducting the right-to-work check on their first day, during the induction process or once they are at their desks is too late!

The UK Border Agency publishes extensive guidance for employers on preventing illegal working, setting out exactly how employers should carry out right-to-work checks on potential employees. The guidance was overhauled earlier this year and is now clearer on how Biometric Residence Permits should be checked. UKBA sets out a three-step process for ensuring the checks completed will raise the statutory defence and even provides a checklist to photocopy and keep with the copies of documents taken.

The UK Border Agency is likely to be ramping up enforcement activity following chastisement by the Home Affairs Select Committee over the summer for failing to act on intelligence received from the general public about immigration violations. The Home Affairs Select Committee report revealed that 25,600 allegations about possible illegal immigrants and other immigration violations were received from the public between 9 December 2011 and 29 March 2012, but that less than 4% of intelligence reports resulted in

enforcement activity. This translates to upwards of 900 intelligence-led enforcement visits. However, with rapped knuckles, UK Border Agency is on the offensive across the country and employers should be braced for more visits by UK Border Agency officers.

It is worth keeping in mind that a person is working illegally not only if he or she has no permission to work in the UK, but also if he or she is working in breach of the conditions attached to their permission to remain in the UK. Employers must be particularly vigilant about ensuring an employee does not inadvertently breach his or her conditions. The two most common breaches of conditions we come across are where work permit holders or Tier 2 (General) migrants no longer work in the role permission was given for and where students with Tier 4 (General) permission work in excess of the number of hours of work allowed.

Taking time to review how your organisation carries out right-to-work checks on employees will ensure that a statutory defence against employing illegal workers can be established for each employee and, where necessary, maintained. With UK Border Agency enforcement activity increasing around the country following the damning Home Affairs Select Committee report, the number of employers caught out by having performed sloppy checks will undoubtedly rise. It is worth making sure your organisation is aware of the updated UK Border Agency guidance on preventing illegal working and checking whether UK Border Agency best practice is followed.

COMMON BREACHES OF IMMIGRATION CONDITIONS

1. Work permit holder/Tier 2 (General)

Work permit holders and employees sponsored through Tier 2 (General) have permission to work in a particular job role and will breach their conditions if they commence work in a different position (whether due to promotion, organisational change or restructuring) without first obtaining permission from the UKBA. In some cases Technical Change of Employment applications or sponsor notes on the Sponsor Management system may be filed, but in other circumstances a new application for further leave to remain will be required.

2. Students with Tier 4 (General) permission

Students with Tier 4 (General) permission will be subject to a limit on their employment of either 10 or 20 hours per week during term time and employers should ensure, particularly where working patterns are flexible, that term-time limits are respected and that their employees are not holding down any other part-time employment that could take them over the limit.

“With civil penalties running to up to £10,000 per employee identified as working illegally it is worth getting this area of compliance right!”

FREEDOM OF INFORMATION REQUESTS

The Freedom of Information Act 2000 allows anyone to make a request for information held by a public authority. Where this includes employees' personal information, authorities need to take particular care.

Melanie Carter looks at recent cases with particular relevance for employers



Melanie Carter

Partner & Head of Public & Regulatory Law
Melanie has worked for over 20 years as a public law specialist. She has worked in both the public sector and in the private sector and is ranked as a leader in the field by both Chambers UK and Legal 500 directories. 'An expert level of knowledge... very experienced, excellent and practical' – Legal 500

“A ‘line by line’ analysis is almost always required to avoid potentially inappropriate disclosure”

The Freedom of Information Act 2000 (FOIA) provides access to information held by public authorities. Anyone can make a request for information, which may often include details of the authorities' former, current or prospective employees.

A 'public authority' covers a wide range of organisations, including government bodies, police authorities and public educational and health entities. Under s.10 of the FOIA the authority is required to comply with a request within 20 working days.

Requests for employment details can cover a wide array of information such as names of staff, salaries, contracts and compromise agreements. There are a number of exemptions that, in certain circumstances, allow the authority to resist requests.

The most pertinent exemption for employers is likely to be under s.40, which in effect provides that information need not be disclosed if the subject of that data would have reasonably expected his or her personal data to be kept private. The availability of this exemption will depend on a number of factors, such as whether the information concerns employees' professional or private lives. If it is the latter, there is a much greater chance that the data will be exempt under s.40.

Further, the more senior an employee the greater chance that some of his or her data may need to be disclosed (e.g. the salary band they fall in, sums paid under a compromise agreement).

There have been a number of recent cases illustrating how the FOIA has operated in an employment context when a request includes personal data:

- *Trago Mills (South Devon) Ltd v Information Commissioner*

The First Tier Tribunal (Information Rights) (which deals with FOIA appeals) considered whether the public authority was required to release details of an ex-employee's contract and severance package. The Tribunal held that even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential and so such information was held to be exempt.

- *Greenwood v Information Commissioner*

The Tribunal took a nuanced approach with regard to a request concerning the authority's register of interests. Registers of interest are records of employees' interests, such as shareholdings or business interests, which could potentially give rise to a conflict of interest. In the case of more junior employees, their names and job titles and the department

in which they worked were deemed to be subject to disclosure, but not work which they undertook. For senior employees however, the Tribunal decided that it would be fair to release the details of their employment because seniority generated a greater need for transparency.

- *Bolton v Information Commissioner & East Riding Yorkshire Council*

The applicant requested disclosure of information concerning the appointment of a new CEO. The information included application forms submitted by candidates and information relating to the authority's decision-making process. The Tribunal held that the application forms had properly been withheld under s.40, as they contained information that was 'deeply personal'. The Tribunal however criticised the authority for taking an overly broad assessment of whether the information amounted to personal data. The authority ought to have dealt with such mixed information by redacting the personal data and disclosing the impersonal data.

These cases demonstrate that care must be taken to analyse the information in a detailed manner and not assume that all of it is necessarily subject to disclosure or exempt. A 'line by line' analysis is almost always required to avoid potentially inappropriate disclosure and/or difficulties with the Information Commissioner if the requester makes a complaint.

We also produce regular updates in other areas of law. If you would like to subscribe to any of our other departmental updates, please email marketingdepartment@bwbllp.com



FIND OUT MORE

We have extensive experience of advising on Freedom of Information requests. For more information, please contact Melanie Carter at m.carter@bwbllp.com

TRIBUNAL WATCH

In this new feature we will discuss a recent (anonymised) Tribunal case in which we have acted for one of the parties, highlighting factors which led to the Tribunal's conclusions, and any learning points to be taken from the case.

Lucy McLynn looks at a recent case alleging detriment due to whistleblowing



Lucy McLynn

Partner

Lucy is a leader in the field of employment law and is highly recommended for her work by both the Legal 500 and Chambers UK directories. Chambers UK says she is 'commended for her advocacy skills and her "balanced, measured advice"'.

A "Public Interest" Disclosure?

In the case of *M v H*, the Nottingham Employment Tribunal found that a public interest disclosure had been made by an employee in surprising circumstances. The Claimant's claims, however, that she had been subjected to detriment and automatically unfair constructive dismissal as a result of her disclosure failed.

The facts

M worked as a team leader for a care provider (H) working with vulnerable adults in a supported living house. She went on maternity leave at the end of July 2010. Shortly afterwards one of the service users made an allegation against two of her fellow care workers. Her employer carried out a safeguarding investigation, in the course of which two other care workers, S and J, made statements which supported the service user's complaint. M, who was not questioned during the investigation because she was on maternity leave, was subsequently shown these statements by one of the colleagues about whom the allegations had been made (it was agreed by both parties that this had been inappropriate) and informed her line manager that she felt that S and J had told untruths about the employees who were the subject of the investigation. Her line manager, who had not been involved in the investigation, said that M would need to raise this with the investigating officer. M did not do so. M posted a comment on Facebook about two of her friends being stitched up and that "*lady karma will ensure that those who have done wrong get theirs*". S and J assumed that these comments were about them,

and their relationship with M outside of work cooled as a consequence.

Subsequently, the same service user made an allegation about M which was investigated by the Local Authority's safeguarding team in conjunction with her employer. M was cleared of any wrongdoing. M told her companion at the investigation meeting (one of her employer's managers) about her concerns that untruths had been told in the previous investigation in the statements from S and J. He advised her not to raise this in the current investigation as it was an historic matter and not relevant to the allegation she was facing.

Subsequently the employer had a discussion with M about moving to a different workplace within the company on her return from maternity leave. This was in part because M had expressed the view that she no longer wished to work with S and J, and also because of the difficulty of her returning to work with a service user who had made an unfounded allegation against her. M also asked about part-time hours but did not make a formal flexible working request. No conclusion was reached either about the hours or the venue of her return to work when she handed in her resignation to go to a new job.

M then raised a grievance, and subsequently brought Employment Tribunal proceedings alleging whistleblowing detriment – in particular being ostracised by S and J, being subject to an investigation herself, and it being suggested that she should move workplace. She also claimed automatically unfair constructive dismissal.

“This case is interesting for demonstrating quite how widely the Tribunal can interpret ‘public interest’ for the purposes of determining if someone has whistle blown”

The Tribunal's conclusions

The Tribunal found that M's allegation to her employer about S and J lying in the internal investigation into alleged misconduct of two other colleagues was a protected disclosure under the Public Interest Disclosure Act. She had a reasonable belief in their wrongdoing and made the allegation in good faith. Employees making false statements to their employer would be acting in breach of a legal obligation – their duty under their contract is to be truthful in an enquiry initiated by their employer. This disclosure was made initially to her manager, and was repeated to her companion at the later investigation meeting. The Tribunal found, however, that M suffered no detriment as a result of making this disclosure. The reason for her relationship deteriorating with S and J was because of the comment she had made on Facebook. S and J were in fact, unaware that M had made a disclosure about them to management. The subsequent investigation into the allegation against M was by reason of there being a complaint against her by a service user, which was unconnected to her whistleblowing. Similarly, the consideration of the possibility of an alternative workplace arose from a breakdown in relationships that had nothing to do with any disclosure M had made. Nor was M constructively dismissed. The approach of both managers in responding to her disclosures had been appropriate, and her subsequent grievance (after she had resigned) was dealt with appropriately by HR. The Tribunal's view was that M chose to leave H's employment to go to another job which suited her in terms of hours of work.

Learning Points

This case is interesting for demonstrating quite how widely the Tribunal can interpret the concept of a “protected disclosure” for the purposes of determining if someone has whistleblown. It is not readily apparent that a worker who alleges that fellow employees have lied in an internal investigation would be making a disclosure of breach of a legal obligation, and would therefore have the protection of the Public Interest Disclosure Act. It is well known that there is no requirement that any disclosure should actually be in the ‘public interest’ to attract this protection (and specific legislative change to this effect is currently being proposed under the Enterprise and Regulatory Reform Bill). What is surprising in this case, however, is how broadly the Tribunal was prepared to interpret the breach of a legal obligation – incorporating breach of an implied term of ‘truthfulness’ in employees’ contracts of employment. (Undoubtedly this is an important facet of the employment relationship, but not a term which has commonly been legally held to be implied). Unless and until legislative amendment is passed, it therefore seems that it would be wise for employers always to consider the possibility of a worker who has made any kind of disclosure of information about a concern being a whistleblower. This is, of course, particularly relevant for an employee who does not have the requisite length of service to have protection from ordinary unfair dismissal, but who would be able to claim automatically unfair dismissal if they could argue that they were dismissed for making a protected disclosure.

Evidently causation will always be a very important issue in cases about whistleblowing detriment and dismissal, and it was helpful in this case that M's conversations with management had not been shared with S and J, and therefore no link could be made about that disclosure and the deterioration in the relationships between them. The mere fact that M had whistleblown did not make future treatment of her unlawful when there were clearly documented separate reasons for that treatment. The fact that M's grievance was very fully investigated once she submitted it (even though she had already resigned) had good evidential value in showing that the employer took concerns from its employees seriously, rather than seeking to make life unpleasant for or to remove those who raised concerns.

FIND OUT MORE

Our specialist employment solicitors are happy to work with you to resolve any workplace issues, through practical, solution-focused advice. We are highly experienced at negotiating positive outcomes for both employer and employee. Please contact your usual advisor for more information.



Alice Wright

Paralegal

Alice is a Paralegal in the Employment Department where she assists with a range of casework

Mitigation of Loss

F&G Cleaners Ltd v Saddington (EAT)

Facts

The Respondent – the new employer after a TUPE transfer – refused to accept that the Claimants were employees and offered them work on a self-employed basis on lower earnings. The Claimants refused the offer and brought proceedings for unfair dismissal.

Decision

The EAT upheld the Tribunal's decision that the Claimants had been automatically unfairly dismissed because the principal reason for the dismissal was the TUPE transfer. The EAT also agreed that the Claimants had not failed to mitigate their losses by refusing to accept the offer of re-engagement in the same role on a self-employed basis.

Commentary

In this instance the dismissal took place at the point when the employees rejected the offers of self-employment. The duty to mitigate had not yet arisen at the time the offers were made as the employees were yet to be treated as dismissed under TUPE. There is no duty to mitigate losses before an employee is dismissed and therefore, the refusal of the self-employment could not be deemed a failure to mitigate their losses.

Each case will depend on its facts, but there is no general principle that an alternative offer from a former employer must be accepted or that it would be unreasonable to reject that offer.

Constructive Dismissal – underpayment of wages

Roberts v The Governing Body of Whitecross School (EAT)

Facts

The Claimant was off work due to stress and depression, but was only paid half pay as opposed to full contractual sick pay. The Respondent decided to only pay half pay based on its mistaken interpretation of the Collective Agreement covering sick pay as covering only physical and not mental injury. This was despite the Claimant and his trade union representative suggesting this interpretation was contrary to the Agreement.

At first instance the Claimant won a claim for unpaid wages, but not constructive dismissal, as the failure to pay full sick pay was not deemed to be a fundamental breach of contract.

Decision

The EAT overturned the original decision, finding that a fundamental breach had occurred, as the School had fully intended not to pay the full wages relying on its interpretation of the Agreement.

Commentary

The EAT did not follow previous case law that suggested a genuine mistaken belief as to the terms of a contract may not constitute repudiation, although it considered that a reduction in pay as a result of a simple mistake rather than a settled intention to pay reduced sick pay would perhaps not constitute a fundamental breach.

Work for your benefit scheme

R (On Behalf of Reilly & Wilson) v Department for Work and Pensions

Facts

Individuals in receipt of Jobseekers Allowance and participants of two schemes to help them back to work were required to work unpaid. Failure to do so could result in the loss of their benefit entitlements. Reilly – a graduate who was required to work in Poundland for a fortnight – and Wilson – a former HGV driver required to work for a community delivery service for 26 weeks – challenged the requirements to work unpaid on the basis that they breached Article 4 ECHR prohibiting slavery, servitude and forced labour.

Decision

The High Court held that the requirement did not contravene the participants' human rights, and did not amount to a breach of Article 4.

Commentary

Mr Justice Foskett's reasoning was that, irrespective of views on the merit of a scheme where individuals 'work for their benefits', the situation was too far removed from contemporary views on slavery for a comparison to be found. This did not, however, mean that there had been no breach of Jobseekers Allowance Regulations, and the Department for Work and Pensions was criticised for its lack of clarity.

Casual workers and mutuality of obligation*Drake v Ipsos Mori UK Ltd***Facts**

The Claimant, a market researcher, worked for the Respondent on an 'assignment by assignment' basis. He claimed that each assignment was a contract of employment and that there was an umbrella contract linking the assignments, thus giving him sufficient continuity of service for an unfair dismissal claim. The Respondent maintained that the Claimant was a worker, and that the option to refuse work that was offered meant there was no contract.

The Employment Tribunal agreed with the Respondent, holding that there was no 'mutuality of obligation' either during each assignment or between assignments. The Claimant appealed.

Decision

The EAT held that whilst work by the Claimant was underway, there was sufficient mutuality of obligation for a contractual relationship between the parties and that the various assignments did amount to a series of successive contracts. The EAT remitted the case to the Tribunal to determine if this was sufficient to allow the Claimant to claim unfair dismissal.

Commentary

Although dictated in this case by the facts, the decision highlights that casual workers may provide their services under a contract of employment even though their work is ad hoc. Employers should ensure that they are clear on the employment status of their casual workers which may ultimately be assessed on the reality of the relationship rather than the written documentation that exists between the parties.

Constructive dismissal: can you cure or prevent a breach?*Assamoi v Spirit Pub Company***Facts**

The Claimant had a chequered relationship with his employer. The Claimant's line manager accused the Claimant and his colleagues of being absent without leave and suspended them pending an investigation. The Claimant was in fact on authorised leave. The investigating managers realised their error and confirmed that no action would be taken. The Claimant then raised a grievance about his treatment by his immediate manager and the "spurious disciplinary charges" despite this already having been acted upon by senior management. The Claimant resigned and claimed constructive dismissal.

Decision

The Claimant could not rely on the immediate manager's behaviour as evidence of a breach of the implied term of trust and confidence. The line manager's behaviour was poor but not "likely to destroy or seriously damage" the relationship. The actions of the senior manager had prevented the situation from developing into one that would constitute such a breach and so there was no constructive dismissal.

Commentary

It is correct that if an actual breach has occurred it cannot be remedied after the event. However, this is not the same as preventing an escalation of events which would lead to breach occurring in the first place.

Umbrella contracts*Pulse Healthcare v Carewatch Care***Facts**

The carers were employed by Carewatch Care, which was contracted to a Primary Care Trust to perform services. The contract was tendered and won by Pulse Healthcare. The carers claimed they had TUPE rights, but it first had to be established that they were employees and had the necessary continuous service. They had a zero hours contract, which stated there was no obligation to provide work, and the carers were seemingly entitled to work for another employer.

Decision

It was held that the contract did not truly represent the arrangements between the parties. The importance of the work involved was such that in reality they were obliged to carry it out. The carers were found to have global contracts of employment with full continuity of service.

Commentary

The Judge refused to accept the argument that each task was a discreet individual contract, but this was decided largely on the facts of the case. The challenging and significant nature of the care being provided to the individual service user was such that it was not possible to believe that the employer was prepared to rely on a precarious, ad hoc arrangement.

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Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact the Marketing Department at marketingdepartment@bwblp.com

The information contained in this bulletin is necessarily of a general nature. Specific advice should be sought for specific situations.



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