



EMPLOYMENT NEWS HEADLINES

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GOVERNMENT ANNOUNCES DELAY TO GENDER PAY GAP REPORTING REGULATIONS

In the first issue of Maxlaw Global Employment news earlier this year, we reported on the Government plans to introduce the Gender Pay Gap Reporting regulations which were due to come into force on 1 October 2016. These are applicable for the private and voluntary sectors at this stage, however, the Government Equalities Office has announced that implementation will be delayed. They are now expected to come into force in April 2017 with the first organisations within scope (i.e., with 250 employees or more) required to publish reports by April 2018.

SHOULD VOLUNTARY OVERTIME BE INCLUDED IN HOLIDAY PAY CALCULATIONS? – BRETTLE V DUDLEY MBC

Although this is a first instance ruling the decision is logical and reflects other similar rulings. The Employment Tribunal in *Brettle v Dudley MBC* found that where overtime, although worked on a voluntary basis, is regular enough to warrant it being considered “normal”, this overtime pay should be included in the statutory holiday pay calculation under the EU Directive. In *Brettle* the Tribunal found that one week overtime in each month was sufficiently regular, whereas, overtime worked very rarely would not fall under this definition. The assessment of what is considered “normal” will need to be made by employers on a case-by-case basis.

Note, this requirement does not apply to the UK additional 1.6 weeks provided for under the Working Time Regulations, regulation 13A. It only applies to the first 4 weeks of statutory holiday entitlement.

THE ROLE OF HR IN INTERNAL INVESTIGATIONS – DRONSFIELD V UNIVERSITY OF READING

The case of *Dronsfeld v University of Reading (EAT)* reconfirms the role of Human Resources in internal disciplinary investigations and reasserts the position in *Ramphal v Department of Transport* that the role of HR should be limited to the questions of law, procedure and process rather than questions of culpability.

In the case of *Dronsfeld v University of Reading*, Dr Dronsfeld’s, an assistant professor at the university, conduct relating to an inappropriate relationship with a student whom he was supervising was investigated. It was investigated by another professor assigned to the matter who was supported by an HR partner. The investigating professor, following his investigations, produced a report that included statements which were favourable to Dr Dronsfeld. Following discussion with the HR partner, these statements were removed or substantially revised and Dr Dronsfeld was dismissed. At first instance, Dr Dronsfeld’s dismissal was found to be fair based on the final conclusion of the report

which was considered by the Tribunal to be genuine and unbiased. The EAT, however, remitted the case back for a rehearing stating that the HR partner's role should have been one of a supporting role and should not have influenced the final outcome.

In order to avoid this sort of result, it is critical to ensure that the work of any investigation is wholly that of the investigating officer and not HR whose role should be limited to support only. That is not to say that reports cannot be amended, however, employers should consider this under legal privilege which has its own considerations. In this instance, it is always better and advisable to seek legal guidance before making the final decision.

IS SALARY LEVEL A REASONABLE ADJUSTMENT FOR THE PURPOSE OF DISABILITY? G4S LTD V POWELL

The case of *G4S Cash Solutions (UK) Limited v Powell* is interesting and raises some important issues for employers to consider when making "reasonable adjustments" for disabled employees as a part of their employer obligations.

Mr Powell was an ATM engineer maintaining cash machines for G4S since 1997 before he became disabled due to ongoing lower back problems. By 2012 he was no longer able to perform the engineer's role. G4S created a new role for him as a "key runner" delivering keys to various sites, which was a more junior role, but retained him on his engineer's salary. A year later, the key runner role was made permanent but at a 10% reduced salary. Mr Powell refused the salary reduction and was consequently dismissed in October 2013 on medical grounds.

At first instance the Tribunal found that there was no contractual variation in Mr Powell's terms of employment as this required consent from Mr Powell whereas 'an adjustment' could be effective without consent. The EAT disagreed, it stated that an employer could not propose an adjustment which was incompatible with the terms of the contract of employment without the employee's consent and there had been a contractual variation.

It found Mr Powell's dismissal to be unfair and that he had been discriminated against for a number of reasons:

- Pay protection in this instance was a reasonable adjustment which G4S had failed to protect;
- G4S had not provided a good enough reason as to why pay protection could not be a reasonable adjustment. Their explanation that it would create discontent amongst other employees was rejected by the EAT;
- G4S had kept Mr Powell in the role of "key runner" on his engineer pay level for a year and at no point had informed him this was temporary and subject to change;
- G4S was well resourced enough for maintaining the pay level as a reasonable adjustment on an indefinite basis in this particular case.

G4S's appeal was, therefore, dismissed.

Points for employers to be aware of following this judgement are:

- that any reasonable adjustment that involves a change in the terms of the employment contract such as a change in pay or a change in duties will still require the employee's consent;
- it is important when making reasonable adjustments for employers to be clear with the employee if the arrangement is temporary or permanent;
- employers should be clear and upfront about the adjustments that are being made and why;
- if the adjustments are temporary, the employer should be clear what happens after the temporary period comes to an end and what, if anything, will need to be agreed;

- pay protection at a previous salary for a lesser role may in some cases be a relevant reasonable adjustment, although factors such as company resources, level of pay, role function and policy implications will need to be considered in each case. The EAT were clear that this sort of adjustment will not be an “everyday event” and in some cases may cease to be reasonable where the employer’s economic circumstances, for example, change.

THE LATEST ON CRIMINAL RECORDS CHECKS BY EMPLOYERS

In recent times there has been much in the press about poor recruitment processes enabling those with criminal backgrounds to secure employment positions where they should not have. The current scandal in football has put this issue back on the front page. An employer may request a criminal records check processed through the Disclosure and Barring Service (DBS) as part of its recruitment process.

Access to the DBS checking service is only available to registered employers who are entitled by law to ask an individual to reveal their full criminal history (other than protected cautions and convictions), including spent convictions - also known as asking ‘an exempted question’.

An exempted question applies when the individual will be working in specific occupations, for certain licenses and specified positions, for example, with vulnerable groups. These are covered by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975.

The minimum age at which someone can be asked to apply for a criminal record check is 16 years old. The DBS is to assist employers in making safer recruitment decisions. However a check is just one part of thorough recruitment procedure. When a check has been processed by the DBS and completed, the applicant will receive a DBS certificate.

However, employers should note that this may not be the complete picture. The DBS cannot access criminal records held overseas and, therefore, it may not provide a complete view of an applicant’s criminal record if they have ever lived outside the UK.

Employers can read about how to get a [criminal record check for overseas applicants](#) here, on the Home Office website.

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