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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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Brexit

Everyone is writing about the implications of Brexit for their particular subject area – and I'm no exception. The fact that none of us really know what Brexit will mean in practice doesn't deter us from expressing a view. Nor does the fact that it will be literally years before our predictions are proved to be either right or wrong.

The default position in terms of our leaving the EU is that the process takes two years from the date on which the Government chooses to 'trigger' Article 50 of the EU Treaty by formally notifying our European partners that we are leaving. However the negotiations that follow that notification may result in a longer period of transition – or even a shorter period (though that seems unlikely). As yet we do not know what our future trading relationship will be with the EU and what restrictions that relationship will place on issues like employment law.

If, for example, we agreed something akin to the arrangement that the EU has with the European Free Trade Association (Norway, Iceland, Lichtenstein and, to an extent, Switzerland) then the price of continued free trade with the EU would almost certainly be compliance with EU employment law. So it is perfectly possible that nothing in employment law terms will change as a result of Brexit – at least not in the short or medium term.

For now at least we continue to be full members of the EU. That means that all EU citizens continue to have the right to live and work here. There is little formal reassurance that employers can give to EU nationals about their future position. While it seems inconceivable that the status of those who are already settled here will be placed under any threat, the situation is unlikely to be formalised until there is a deal in place – and that could take years. In the meantime recruitment practices should continue unchanged.

If an EU national applies for a job, it could be race discrimination to treat their application less favourably because of any uncertainty about their future right to work here.

Over the coming years, politicians are likely to spend their time grappling with the big strategic issues like access to the single market and the free movement of people. But here is one practical issue that, small in the overall scale of things, may cause a significant headache for HR in local government: holiday pay.

I have spent far too much of my career talking about the calculation of holiday pay. It is simply not an issue that should be legally complex or contentious. And yet here we are. As I write, we are awaiting the decision of the Court of Appeal in *Lock v British Gas* which is about the need for employers to make up any lost commission after an employee has taken annual leave. That may not sound like it is of much relevance to local government, but the implications of the case for the calculation of holiday pay generally are much wider.

The key issue is whether the Working Time Regulations can be interpreted in such a way as to comply with the European Court's interpretation of the Working Time Directive.

The Court has held that commission needs to be reflected in holiday pay[1] – but the literal interpretation of the Regulations would say the opposite. Can the UK courts simply pretend that the Regulations in fact say what the European Court has ruled they should say – or should the courts leave it to Parliament to amend the Regulations to comply with the Directive?

This is such a crucial question that it is more than a little surprising that it hasn't come up in such a pure form before. The fact is, the Courts have been ignoring the literal meaning of the Working Time Regulations for years now. Think of the carrying over of holiday pay for those who are on long-term sick leave – the Regulations say that you simply can't do that, but the European Court ruled otherwise and the courts and Tribunals were happy to 'interpret' the Regulations to achieve the right result. The same is true of the inclusion of regular overtime in holiday pay. The Regulations are entirely clear that overtime should not be included – but in the Bear Scotland[2] case the EAT simply ignored that fact and gave effect to the requirements of the Directive instead.

I think most employment lawyers expect the Court of Appeal in Lock to reach the same conclusion and interpret the Regulations in order to achieve the result required by the Directive. If they don't – and instead rule that UK law is sovereign and only Parliament can change it – then that will cause quite a stir. Leaving aside the irony of the courts saying such a thing after the Brexit vote (horses and stable doors come to mind) the Government would then face the prospect of tens of thousands of employees from across the country suing them for the holiday pay that they would have received had the Government implemented the Directive properly. That's why the Government is represented in the Lock case and is arguing for the Directive to be given primacy over the Regulations. It doesn't want to be left holding the bill.

But the key point here is that for all of these years, while we have been trying to keep up with the changes to the rights to paid annual leave as a result of decisions from the European Court of Justice, the Regulations have stayed pretty much the same. The Government has never simply accepted that they don't meet the requirements of the Directive and amended them so that they do. Instead the courts have ignored the literal meaning of the Regulations and applied the law as the European Court has said it must be. If the Lock case takes an unexpected turn, that will leave the rules on the calculation of holiday pay in some chaos. But a similar problem is, in any event, looming as a result of Brexit.

Once we leave the European Union our courts will no longer have to interpret UK law so that it complies with the Directive it was designed to implement. How will the UK courts view their earlier decisions that were reached on the basis that they had to apply EU law? Where will that leave the law on annual leave? Will we still have to include overtime? Will those on long-term sick leave still be able to carry their leave over into the next year? It's a depressing prospect, but it could be that the case law will have to start again from scratch.

Keep in Touch

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[1] LOCK v. BRITISH GAS TRADING LTD - [2014] IRLR 648

[2] BEAR SCOTLAND LTD and others v. FULTON and others; HERTEL (UK) LTD v. WOODS and others; AMEC GROUP LTD v. LAW and others - [2015] IRLR 15

HR HOWLERS

Brexit and the Impact at work

In light of the current turmoil of emotions and divided views on the decision to exit the European Union a number of employers are reported as having written to all their employees reinforcing the principles of Equality and 'Dignity at Work' policies to ensure that any behaviours of misconduct or unfair treatment does not occur in response to the Brexit vote.

Reports of recorded police incidents of insulting and racist behaviour have increased to almost 6,000 since June 23rd and employers will need to be mindful of the risks of harassment either within the workplace or by their employees alleged to have occurred out of work time. In particular, employers should be more alert to the risk of inappropriate behaviour towards any of their employees from harassment on the grounds of nationality from colleagues and or third parties, such as customers. Since the referendum, EU and non EU nationals have reported a rise in xenophobic attitudes, for example, being asked when they are planning to "go home" or how long they have been in the UK.

Employers also need to take steps to protect older workers from harassment on the grounds of age. The analysis of the referendum vote revealed a gap in the voting patterns of young and old. It is easy to imagine how arguments about the Brexit vote might break out in the workplace and descend into age-related insults on both sides with the young dismissed as "naïve" and the old described as "out of touch."

It is also advisable to monitor the tone of discussions and behaviours connected with the Brexit vote, to avoid allegations of bullying or harassment associated with the worker's voting choice.

What is really going on in people's minds? It's hard to really know, let alone understand, but whilst all local authorities will be fulfilling their statutory duties to promote equality, we cannot ignore that prejudice continues to exist at many levels. In that context, we have to recognise the impact of unconscious bias and prejudice, which has the potential to lie within us all.

How do we recognise what this is and how it may manifest itself? How do we ensure that we can instill good practice and intelligence about this in our workforce? Have you seen people deliver excellent customer service to one person, but the bare minimum to others? Why do the same old faces seem to be in line for promotion, when others don't get a second thought?

HR and talent management professionals must ask the question; "To what extent is our organisational culture and business results being affected by unconscious bias?" This is hard to measure but understanding its characteristics helps employers to understand why it happens, what the effects are and what can be done about it.

Awareness training is the first step to unravelling unconscious bias because it allows employees to recognise that everyone possesses them and to identify their own biases.

Employers can make a positive contribution to your workplaces by rooting out and minimising the unconscious biases that can undermine diversity efforts. By undertaking awareness training and putting processes and structures in place that identify unconscious biases, employers can make positive steps in minimising these biases that can impact every aspect of an organisation.

If you are interested in **Unconscious Bias Interventions**; contact: Monica Puri
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