Darren Newman
Twitter - @DazNewman

West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

E-Update 70 – March 2017

Online ET Decisions

It used to be that if you wanted to read up on recent Employment Tribunal decisions you had to undergo something of an ordeal. First you had to go to Bury St Edmunds, which is a lovely place but by a strange topographical quirk is largely inaccessible from anywhere else in the country.

You then had to go to the Employment Tribunal offices and ask to be taken to the public reading room. You could use a database to find a particular case, but that would only give you a reference number leading you to a cardboard box packed with 250 Tribunal decisions. You would then have to flick through those until you found the one you wanted and then photocopy it. It was a very pleasant way for an employment law researcher to pass a few hours, but it meant that only the most interesting and important decisions ever saw the light of day.

No more. This year the Government has actually implemented a longstanding promise to make all Employment Tribunal decisions freely available online, in a searchable database. This is tremendous news for those of us who rely on this raw material to tell us what is going on in the world of employment law, but it presents particular challenges for the parties to a dispute – both employers and employees. Employees may worry that a potential employer will look for any Tribunal cases involving them before deciding whether or not to offer them a job. But employers will also have to get to grips with what it means for them when their potentially rather dirty laundry is aired in such a very public manner.

Any large employer is likely to have some tribunal claims that go all the way to a final decision. I spoke to one local authority recently who had lost an unfair dismissal claim with the Tribunal making a number of rather pointed criticisms of the managers involved. The winning employee had boasted of his success to a number of former colleagues and a link to the full decision was being widely shared among the workforce, causing considerable upset and embarrassment to the managers concerned. In the past the employee would have received a paper copy of the decision, but sharing that with colleagues would involve a laborious copying process. An internet link, however, can be included in a tweet or a facebook post with no trouble whatsoever and be enjoyed by hundreds of people within minutes.

There really isn't much that an employer can do about this. A Tribunal will of course protect the anonymity of children and other vulnerable people, but will not avoid mentioning names simply to save an employer's embarrassment. Employment Tribunal hearings are public and their decisions are public records. I don't see that you can forbid employees from reading them or sharing them with colleagues.

Indeed a successful claimant is perfectly entitled to shout his or her success from the rooftops.

If a case settles, of course, then that is a different matter. Settlement agreements routinely include confidentiality clauses preventing the employee from discussing any aspects of the case with others. Such clauses may be difficult to enforce, but they certainly help to keep the lid on a case that you would rather keep quiet. They should be used with care, however. They can't be used to prevent an employee from repeating allegations that qualify for whistleblowing protection - and public bodies are likely to be criticised if the perception is created that they are subjecting former staff to 'gagging clauses'.

In the absence of a settlement however, it is still not inevitable that the full details of a case will be made public. Not all employment tribunal cases get a full write up. In fact, in most cases the Tribunal gives its reasons orally at the end of a hearing and the written judgment is just a couple of paragraphs long - summarising the outcome but not going into any of the detail of the claim or the evidence. There are actually only two circumstances in which full written reasons are produced by the Tribunal. The first is where the case ends and the Tribunal reserves its decision – that is, it tells the parties that the outcome will be notified to them by post. If the decision is given in writing then full written reasons for the decision must also be given. So it might be a good idea to make sure that the evidence in a case is dealt with promptly and the Tribunal has time to give its reasons at the end of a hearing if you want to avoid a detailed decision being published.

The other circumstance in which full reasons are produced is when one of the parties asks for them. Once the oral reasons are given each side has 14 days to request full written reasons – which are needed if you are contemplating appeal.

As an advocate, my habit was always to ask for full written reasons if I lost - if for no other reason than to make the Tribunal that had found against me do some extra work. Even if an appeal seemed unlikely there was the possibility that a legal error would creep into the written reasons and, perhaps more importantly, a detailed document setting out why the Tribunal reached its decision could help a client to understand what went wrong and what lessons could be drawn from the experience.

Now though, I think I would be far less ready to ask a Tribunal to produce full written reasons. Why force the Tribunal to create a document that will then be published online and available for anyone to see? The trouble is, you can't stop the other side from asking for full reasons and can't object if they do.

For employers with a high profile the publication of Tribunal decisions adds an interesting dimension to the question of whether to settle a case or fight it. Very often local authority employers have tried to avoid comment on the individual circumstances of cases, but that may cease to be tenable if those circumstances are freely available online. A more considered strategy may be needed to provide context and balance to the opinions expressed by an employment judge.

Keep in Touch

Twitter - @DazNewman
Blog – darrennewman.wordpress.com