



# Employment Law Bulletin Issue 30

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## *Guest Spot*

The Guest Spot is now open to the other departments at Blandy & Blandy who have been invited to provide a short article (outside the world of employment law) which may be of interest to you. This month is the second part of Blandy’s Family department’s article on parental responsibility.

## Recent cases

### Gay employee loses claim of sexual orientation discrimination

In the recent case of *Grant v HM Land Registry* [2011] EWCA Civ 769 the Court of Appeal has held that a gay employee who had come out to his colleagues was not successful in his claim of direct sexual orientation discrimination or harassment when he complained of his manager's treatment towards him.

Mr Grant worked for the Land Registry, initially in the Lytham office where, after some time, he disclosed his sexuality to his colleagues. On promotion he moved to the Coventry branch. Mr Grant wanted to tell his new colleagues that he was gay in his own time, but his new line manager, Ms Kay, disclosed it before he was able to.

A number of instances of Ms Kay's disclosure were referred to during the hearing including her telling a single female colleague, "Don't go fluttering your eyelashes at him, he's gay", enquiring after Mr Grant's male partner at a work dinner in front of others by asking "How is your partner, Chris? How is he?" and making a "limp wrist" gesture at him.

The Court considered the fact that Mr Grant had already come out in Lytham as a "highly significant factor". Mr Grant had not required or requested his Lytham colleagues to keep his sexuality a secret. Therefore, those employees working in Lytham could have innocently revealed Mr Grant's sexuality when talking to a colleague in Coventry and so, any subsequent gossip in Coventry, whilst potentially upsetting and unwanted, could not be properly described as creating an intimidating, hostile, degrading, humiliating or offensive environment for him, i.e. the statutory test for harassment was not met.

Further, the Court was satisfied that Ms Kay did not intend to harass Mr Grant and the conversations were not intrinsically discriminatory. The Court was conscious not to allow "trivial acts causing minor upsets to be caught by the concept of harassment".

The Court acknowledged that it was important that gay people should be able to disclose their sexuality to chosen people in confidence. Breaching this confidence could amount to a claim for breach of Article 8 of the European Convention on Human Rights (for a public employer) as well as a sexual orientation discrimination claim.

For situations where an employee has willingly made known their sexual orientation, this case will provide some degree of protection for employers against possible discrimination claims where colleagues have been discussing or

even highlighting that employee's sexuality. It appears to reign in the potentially far reaching implications of sexual orientation discrimination and harassment and arguably, to limit the scope to situations where the employee does not wish for their sexual orientation to be widely known. However, employers must still exercise vigilance in these situations. Employers who allow "office gossip" about the sexuality of employees (even those who are open about it) to go unchecked still risk claims of discrimination or harassment as each case will be considered on its own merits and on the impact which the conduct has had on the individual. It will also surely be of relevance if the employee has requested that the persons told keep the information confidential. Employers should ensure a clear equal opportunities policy is in place and that training on it is provided for the managers who will be "on the ground" and facing these kind of scenarios in the workplace.

If you require further advice on this area please contact Rebecca Hill on 0118 951 6833 or at [rebecca.hill@blandy.co.uk](mailto:rebecca.hill@blandy.co.uk)

## *Termination Payments and the meaning of ex gratia*

The Employment Appeal Tribunal ('EAT') has highlighted the importance of the correct wording of termination payments when writing to an employee following a dismissal. In the case of *Publicis Consultants UK Ltd v O'Farrell* UKEAT/0430/10 the employee had a contractual notice period of three months but was dismissed for redundancy with only four days' notice. There was no contractual right for her employer to pay in lieu of notice. As a result, the company wrote to her, confirming her dismissal and making various payments, including "an ex gratia payment equivalent to three months' salary".

Perhaps somewhat boldly, the employee then brought a claim for breach of contract, arguing that the payment was truly "ex gratia" and therefore, she was still owed a payment of her three months' notice. Her employer argued that the ex gratia payment was inclusive of her notice pay. However, the Employment Tribunal and the EAT held that the wording "ex gratia" in the termination letter implied that the payment was a gift, rather than a contractual payment relating to the employee's notice. This was due to the fact that the "ordinary language" in the letter did not suggest that the company was obliged to make the payment. The employee was therefore entitled to damages for unpaid notice pay.



It is plain that the intention of the employer here was to pay the employee for her notice period, which should have avoided any breach of contract claim, but this decision certainly emphasises that the written expression of a termination payment is fundamental; it will need to be clear cut and will be construed in the favour of the employee if there is any ambiguity.

Drafting letters terminating an employee's employment always require great care and following this case, it will also be more important to review the specific expression of any termination payments made. Leaving the wording open ended or ambiguous will run the risk of effectively paying the employee twice. The term "ex gratia" should therefore be reserved for genuine compensation payments made, for example, under a compromise agreement.

If you require further advice on this area please contact Laura Binnie on 0118 951 6855 or at [laura.binnie@blandy.co.uk](mailto:laura.binnie@blandy.co.uk)

## *Employment status of "self employed contractors"*

The Supreme Court has recently handed down a decision in the case of *Autoclenz Ltd v Belcher* [2011] UKSC 41 which considered the employment status of individuals described as a "self employed contractors" and who had a substitution clause in their contract.

The Claimants were car valeters who were engaged by Autoclenz on a subcontract basis and paid their own tax. The agreements in place described the valeters as "sub-contractors" and further stated that "As an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz's requirements of sub-contractors as set out in this agreement". The contract also gave the valeters the right to reject work which indicated that there was an absence of any mutuality of obligation between the parties.

However, in evidence, it was found that the reality of the situation was quite different. The valeters were in fact required to turn up for work every day and could not send a substitute in their place. They had to notify the company in advance if they were unable to attend and it therefore appeared that in practice, Autoclenz did have a fair degree of control over the individuals.

The valeters subsequently brought claims arguing that they were workers and therefore entitled to the national minimum wage and payments for annual leave entitlements. The Employment Tribunal held that they were employees whereas on appeal, the EAT determined them to be workers rather than employees.

Both the Court of Appeal and then the Supreme Court effectively reinstated the Tribunal decision, stating that the valeters were employed under a contract of employment.

As in previous cases in this area, the Supreme Court's decision reflects the importance of "looking behind" the wording of the agreement to assess the true nature of the relationship between the parties. The Supreme Court rejected the EAT'S ruling that the express written terms can only be disregarded where there is an intention to misrepresent the contract.

The key question is what the actual agreement was between the parties and in answering this question, it will be necessary to consider all of the evidence; in particular, the Supreme Court held that it will be important to look at the "actual legal obligations of the parties" (rather than the "true intentions" test).

This case provides an interesting reminder that the course of the employment relationship will be looked at, including how the parties conducted themselves and what their real expectations were. It is worth noting that the "actual agreement" must take precedence, so that even the private intentions of the parties will not trump the actual agreement that was in place. In this case, Autoclenz's written agreement simply did not reflect the nature of the relationship. Unusually, HMRC's determination of the workers as self employed for tax purposes did also not affect the Supreme Court's finding that they were employees.

In reality, it may prove difficult to spot the "true" agreement in cases such as this one, but it seems likely that a Tribunal would wish to consider all types of evidence, meaning that documents can be set aside if it is clear that, for example, it is the individuals alone who is to provide their services. The fact that the parties do not need to show any intention to deceive a third party may make it easier for organisations to unwittingly trip up (even if they genuinely believe an individual to be working as a self employed contractor) and as such, it will be useful for employers to review any such agreements and give some thought as to what is expected of the individual in reality.

If you require further advice on this area please contact Shaun Hogan on 0118 951 6807 or at [shaun.hogan@blandy.co.uk](mailto:shaun.hogan@blandy.co.uk)



## Knowledge of disability, required for the duty to make reasonable adjustments

The duty to make reasonable adjustments for a disabled employee arises when an employer knows, or could reasonably have been expected to know, that the employee has a disability and is disadvantaged as a result.

In the recent case of *Wilcox v Birmingham CAB Services Ltd* UKEAT/0293/10 the Employment Appeal Tribunal (EAT) has considered this requirement in more detail, including the circumstances when an employer “should” have made enquiries as to an employee’s medical condition.

Ms Wilcox was employed by the CAB and had her place of work changed. She agreed under protest to this change in terms, which also included a salary reduction, and due to the lower salary, said that she could not afford car parking charges. The CAB instead asked her to work nearer her home, which avoided the need to pay to park. However, Ms Wilcox then stated that she was unable to use public transport due to an anxiety problem (although she did not know whether this was a medical condition).

Following a period of sickness absence for “work related stress”, Ms Wilcox raised a grievance when the CAB commenced an attendance management procedure. She did not at first mention being anxious about travel and attempted to delay the CAB obtaining a medical report. Finally, a medical report was produced by a cognitive behavioural therapist which stated that Ms Wilcox suffered from anxiety in relation to travel and heights, recommending a short car journey to work.

After this, the CAB tried to obtain some further medical evidence from occupational health which Ms Wilcox objected to (as the position of the office was on an upper floor). The occupational health report was therefore produced on the basis of medical notes and concluded that there were no medical grounds for the lengthy absence or for alternative travel arrangements to be made. Ms Wilcox shortly afterwards resigned and claimed disability discrimination.

A joint medical report was produced by a consultant psychiatrist on the direction of the Employment Tribunal; this found that Ms Wilcox had had agoraphobia since 2005 which had a serious impact on her mobility and as a result, the CAB conceded disability. However, the Tribunal stated that the CAB did not know, and could not reasonably have been expected to know, that she suffered from a disability, until the consultant psychiatrist’s report was produced during the proceedings.

On appeal, the EAT agreed and confirmed that the test for an employer to meet in order to trigger the requirement to make reasonable adjustments is that it knows (or could have reasonably been expected to know): (1) that the employee is disabled and (2) that the employee is likely to be placed at a substantial disadvantage because of their disability. This is effectively a slightly simpler test than previous cases had suggested and the EAT in this case held that there was nothing that gave the CAB actual or constructive knowledge of Ms Wilcox's disability, prior to the joint medical report being received. Although the occupational health report took some time, this was not due the fault of the CAB and none of the medical evidence at the time suggested that Ms Wilcox was in fact disabled. Importantly, the EAT said that it was not reasonable to have expected the CAB to have sought medical advice sooner than it did and to this end, it placed some reliance on Ms Wilcox's reluctance to acknowledge that she had a psychological problem.

It certainly appeared to help the CAB in this case that Ms Wilcox was seen to be delaying matters herself and being obstructive. The EAT commented that "it was difficult to disentangle the effects of any mental health condition from the effects of unhappiness about her working conditions generally. The case is encouraging to the extent that employers will not be expected to have to "second guess" an employee's medical health and even constructive knowledge will need to be based on some medical evidence before the duty to make reasonable adjustments is triggered. However, it is clear that there is an obligation on employers to "do what is reasonably expected of them" to find out whether an employee has a disability, i.e. when they are alerted to the possibility of a disability it will be prudent to investigate further. It will not be satisfactory to sit back and assume the employee is not disabled simply because a particular condition has not been formally disclosed by the employee. Employers will still need to carefully consider whether an employee has a disability, for example by reviewing reasons for absence on sick notes and seeking further information from the employee and/or medical opinion where appropriate.

This case was decided under the Disability Discrimination Act 1995 but will apply equally under the provisions of the Equality Act 2010.

If you require further advice on this area please contact Laura Binnie on 0118 951 6855 or at [laura.binnie@blandy.co.uk](mailto:laura.binnie@blandy.co.uk)



## Power of Tribunals to make Recommendations in Discrimination cases

In discrimination cases, the Employment Tribunal has a fairly wide discretion in terms of awarding remedies; in addition to, or instead of, awarding compensation (uncapped), the Tribunal can decide to issue a Recommendation to the employer and/or issue a Declaration.

In *Lycee Francais Charles de Gaulle v Delambre*, the Employment Appeal Tribunal (EAT) upheld an age discrimination and victimisation claim against a French school. The Claimant remained employed throughout and the Tribunal therefore made several recommendations, including that the employer: (1) engages a HR professional to review their policies and procedures; (2) implements a programme of equality and diversity training throughout the organisation; and (3) informs the governing board and senior management of the Tribunal judgments.

This case is therefore an example of how a successful discrimination claim can have quite far reaching consequences for a business, beyond purely financial compensation. Although the School argued that the recommendations were too broad, their appeal was rejected and the case confirms the wide discretion that a Tribunal has in relation to making Recommendations and Declarations. Since the Equality Act 2010, the Tribunal can now issue Recommendations for the benefit of the wider workforce (rather than just for the purpose of reducing the discriminatory effect on the Claimant).

If you require any further advice on this area please contact Aidan McGuire on 0118 951 6830 or at [aidan.mcguire@blandy.co.uk](mailto:aidan.mcguire@blandy.co.uk)

# Employment Law News

## Advice on Agency Workers Regulations 2010

As previously reported, the Agency Workers Regulations 2010 (the “Regulations”) will come into force on 1 October 2011. The key aspects include:

- The Regulations apply to agency workers who find temporary work with a hirer through a temporary work agency.
- Agency workers will have the right to know of direct vacancies and to be given access to collective facilities from the start of their assignment.
- After 12 weeks, agency workers will have the right to the same basic working and employment conditions as a comparable worker (which includes pay, working hours, rest periods and breaks and annual leave).
- Claims for compensation for loss of rights can be brought against the agency and the hirer in the Employment Tribunal. An additional penalty of up to £5,000 can also be made for seeking to avoid the Regulations.

How do you protect your organisation from the risk of a claim?

- What information must be shared between the hirer and the agency and when?
- Will the ‘Swedish Derogation’ allow you to minimise the effect of the Regulations?

For further advice, please see our detailed advice note on the Regulations which is now available on our website or following this link: <http://www.blandy.co.uk/news-events/news/?newsArticleID=357>

In addition, the final guidance on the Regulations can be found here: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-905-agency-workers-regulations-guidance.pdf>

If you require any further advice on this area please contact Aidan McGuire on 0118 951 6830 or at [aidan.mcguire@blandy.co.uk](mailto:aidan.mcguire@blandy.co.uk)



## *ACAS Code of Practice - review following the first two years*

The ACAS Code of Practice on Disciplinary and Grievance Procedures (the "Code") has now been in force since April 2009 yet there have still not been many cases on the new Code.

ACAS has however conducted an evaluation of how the new Code is operating in practice. The research paper was based only on 36 interviews; the overall response was fairly positive in that the Code was felt to be accessible reasonable and an improvement on the prescriptive 3 stage process of the old statutory dispute resolution procedures which were repealed in 2009. However, the general and flexible nature of the Code meant that some were confused as to its legal status and when a Tribunal would be taking it into account. There was also some concern that some employers would take a different view to acting "fairly" and "reasonably" than others. The evaluation indicated that the Code had reduced the number of grievances (as it is no longer compulsory to raise one before lodging a claim) and those companies with internal procedures that had adopted the principles of the Code have seen an increased emphasis on early informal resolution of internal disputes, an aim which underpins the Code. However, employee representatives reported their concern that the lack of strict rules for employers within the Code weakened the employee's position.

As a reminder, the Code sets out six key elements of fairness, being that:

1. matters should be raised and dealt with promptly;
2. parties should act consistently;
3. employers should carry out the necessary investigations to establish the relevant facts;
4. employers should inform employees of the basis of the problem and allow the employee to put their case; and
5. employees should be allowed to be accompanied at any formal disciplinary or grievance meeting.
6. employers should allow an employee to appeal against any formal decision made.

If you require any further advice on this area please contact Laura Binnie on 0118 951 6855 or at [laura.binnie@blandy.co.uk](mailto:laura.binnie@blandy.co.uk)

## *Advocate General gives Opinion on the latest Holiday pay / long term sickness absence case*

In the case of *KHS AG v Schulte* C-214/10 the Advocate General has delivered her Opinion concerning the latest European case to deal with the complex issue of whether, and to what extent, workers accrue holiday during long term sickness absence.

While the Advocate General's Opinion is not binding on the European Court of Justice (ECJ), it is likely to be persuasive, and it made the following key points:

- It is not the case that workers on long term sick leave accrue the right to paid annual leave for an indefinite period (this would not necessarily achieve the Directive's health and safety aim of allowing workers to recuperate and recover from the working year).
- An expiration time of 18 months following the relevant leave year is a "guideline which member states should follow as far as possible".

The AG emphasised that the aim of a payment in lieu of accrued holiday on termination of employment is not to compensate for lost holiday rights as such, but to allow the worker a period of recuperation. It is noteworthy that a "carry over" period of six months was, in the AG's Opinion, too short and she also advised that the period of 18 months was a "minimum one" and it would be open to Member States to increase this to a more generous timescale.

If the ECJ follows the Opinion, this decision will give some much needed clarity to the issues left following the cases of *Stringer* and *Pereda*, which threw up as many questions as they answered.

If you require any further advice on this area please contact Rebecca Hill on 0118 951 6833 or at [rebecca.hill@blandy.co.uk](mailto:rebecca.hill@blandy.co.uk)



# Legislative Developments

## Bribery Act 2010

Did you know?

- The Bribery Act 2010 came into force from 1 July 2011
- Offences can expose directors/senior officers/companies/partnerships to criminal liability including unlimited fines/10 years' imprisonment
- Companies can find themselves liable for unlawful acts of "associated persons" (i.e. employees/workers/agents/suppliers etc...)
- How do you protect yourself/your organisation?
- Understand the concept of the "Adequate Procedures" defence – this is essential for companies
- Contact us now for advice/training on this wide-reaching legislation
- Visit <http://www.blandy.co.uk/news-events/news/?newsArticleID=350> for a detailed overview of the Act

For more details, and specifically if you are interested in preparing a policy on anti-bribery and corruption and/or undertaking some anti-bribery training, then please contact Sukhpal Matharoo on 0118 951 6921 or at [sukhpal.matharoo@blandy.co.uk](mailto:sukhpal.matharoo@blandy.co.uk)

## National Minimum Wage - draft regulations to disapply the accommodation offset in relation to students

The current National Minimum Wage Regulations allow employers to "offset" the provision of accommodation for workers against the national minimum wage, up to a certain limit. This clearly works in the context of a "live in" worker who effectively has the benefit of rent free accommodation. However, following a recent consultation, there are now draft regulations in place which will mean that students who work part time for their university or college where they are studying, will no longer be able to have a "discount" for their student accommodation – as this was not one of the original aims of the legislation and it prevents institutions from charging the full accommodation fees.

The new rules will apply to students undertaking higher education or full time further education courses and are expected to be in force from October 2011.

## *Guest Spot - from Blandy & Blandy's Family department*

### *Parental Responsibility Part II - Now I have it, what can I do with it?*

This is the second instalment of a two part article on this subject, which explains what you can/cannot do when you have parental responsibility (PR) for a child. The first part, which explained what PR is and how it is acquired, appeared in last month's Employment Bulletin.

Where more than one person has PR, each person with PR "...may act alone and without the other (or others) in meeting that responsibility..." except where statute expressly requires the consent of all those with PR or where the exercise of PR would be contrary to a court order. Although PR cannot be surrendered or transferred, some or all of it can be delegated to another (for example to a babysitter or a teacher on a school trip).

Where those with PR (generally two parents) cannot agree on an exercise of PR then an application to court would be necessary to determine that area of the exercise of PR. Decisions relating to the exercise of PR must always be considered in light of the principle that the child's welfare is the paramount consideration.

There is not a statutory list of all the rights, duties, powers, responsibilities and authority covered by PR, but these are some of the most common aspects of PR:

#### **Religion**

There is no legal duty on a parent to raise a child with religious instruction and a parent can refuse to allow their child to take part in religious education in school. If there is a dispute, the court will consider the impact of following a specific religion or not on the welfare of a child, without considering the specific beliefs of a religion.

#### **Education**

There is a duty on parents to ensure that a child has appropriate full time education whilst they are of compulsory school age. This is generally satisfied by sending children to a state or private school. The Courts expect parents to consult before making any significant changes to a child's schooling.



A parent with PR is entitled to receive information from their child's school regarding the child's education and most schools now provide this without difficulty where parents are separated.

### **Medical Treatment**

A parent is entitled to access medical records for their child, subject to data protection exceptions.

Consent to medical treatment is a complex area of law. Medical professionals must ensure that they have consent before providing medical treatment to a child. Consent can be obtained from a parent, the court or in appropriate cases (usually dependent on the child's age) from the child. Where there is a dispute between parents, this should be referred to the court.

### **Foreign Travel**

It is a criminal offence to take a child out of the jurisdiction without the consent of all those with PR, save that a person with a residence order in their favour can take the child out of the jurisdiction for up to one month without requiring the consent of any others with PR. Accordingly, unless a residence order is in place, the written consent of all those with PR should be obtained prior to a foreign holiday. If consent is not forthcoming, an application should be made to Court.

A parent can veto the issue of a passport to their child although a UK passport will generally be issued on the application of one parent unless an objection is lodged at one of the passport offices.

### **Change of Name**

A formal change of a child's surname requires the consent of all those with PR. Even if only one parent has PR, the courts have expressed the view that such a major change should not be made without consent or an application to the Court.

If you would like more information on parental responsibility or other issues relating to children, please contact either Claire Burton or Brenda Long on 0118 951 6808 or at [claire.burton@blandy.co.uk](mailto:claire.burton@blandy.co.uk)

As usual we hope that you find the newsletter useful and informative.

Please feel free to forward it on to colleagues and acquaintances or send us their details if they would like to receive a copy for themselves.

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Details of all our Employment law services can be found on our website at [www.blandy.co.uk/business/employment](http://www.blandy.co.uk/business/employment)

If you no longer wish to receive our monthly Employment Law Bulletin please reply to this email with 'Unsubscribe' in the subject line.

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To discuss any of the issues raised in this bulletin please contact a member of the Employment team:

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