



Employment Law Bulletin Issue 31

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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 Blandy's Company and Commercial department discusses business succession issues.

Employment Team News

Employment Law Update: The "Need to Know" developments, 18 October 2011, Davidson House, Reading

This Employment Update will involve a series of practical, interactive sessions focused on topical employment issues. Throughout the morning we will be using case studies and interactive discussion groups to enable delegates to better understand the changes and developments in employment law and how to apply the law to "real life" scenarios.

Key topics

1. A silver lining? Planning for an ageing workforce

This talk will evaluate the impact of the abolition of the default retirement age on employers. Specifically, it will focus on:

- Advice on how best to manage an ageing workforce
- Whether employers should continue to have retirement ages in contracts
- The steps employers should take to minimise the risks when retiring employees

2. Use and abuse of the internet and social networking – where to draw the line as an employer

- What are your employees doing on your time and in your name?
- Monitoring - your rights and obligations
- How does the law expect you to respond?

3. Tips for effective performance management from start to finish

- Creating the right culture and setting the required standard
- Practical steps to embrace (not fear) performance management
- Handling multiple issues – performance, sickness, disciplinary
- Keeping on track and managing diverting issues
- Damage limitation measures where all else fails

Timings

8.45am - 9.15am: Registration and light breakfast

9.15am - 12.15pm: Workshops

12.15pm: Q&A and finish

Venue

Davidson House, Forbury Square Reading RG1 5EU.

Who should attend?

The Employment Law Update is aimed at Directors, HR & Senior Managers who may, at some time, have to manage employment issues in the workforce.

Fees and Booking

Fee per delegate £55 + VAT.

Places are limited and last year's event was fully booked. To reserve your place please email full details of those who would like to attend to events@blandy.co.uk, typing 'Employment Law Update' in the subject line.

We will send out our invoice on booking. Please contact Annette Rumbold on 0118 951 6800 or email events@blandy.co.uk if you have any queries.

Recent cases

Teachers working abroad could claim unfair dismissal

The Supreme Court has found another example of an exceptional case where the employment has such an overwhelmingly close connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy a protection from unfair dismissal in the case of *Duncombe & Others v Secretary of State for Children, Schools and Families*. In its decision, the Supreme Court examined the principles already set out by the House of Lords in the landmark 2006 case of *Lawson v Serco Limited*.

Mr Duncombe was employed on a series of fixed term contracts to work in a European School in Germany. After 9 years employment and on the expiry of his final fixed term contract his employment was terminated (as was required



under a so-called “9 year rule”) and he brought Employment Tribunal claims for wrongful and unfair dismissal.

The usual employment status of teachers employed by the Secretary of State for Children, Schools and Families working in European Schools (schools set up to provide a distinctively European education principally for the children of officials and employees of the European Communities) was of issue in the cross appeal in determining whether their employment is covered by the protection against unfair dismissal conferred by Section 94 (1) of the Employment Rights Act 1996 (“ERA”).

It is an important decision for all employers based in the UK who engage staff to work abroad and highlights the need to give careful consideration to the employment law rights that any such employees might have.

In *Lawson v Serco Limited* it was held that there are 3 categories of employees who are entitled to claim unfair dismissal protection under the ERA:

1. Employees who work in Great Britain;
2. Peripatetic employees who are based in Great Britain (e.g. pilots and travelling sales staff); and
3. Ex-patriot employees in “exceptional circumstances” such that, despite their workplace being abroad, other relevant factors are sufficiently powerful to give the employment relationship a closer connection with Great Britain than any other Country’s system of law (e.g. a foreign correspondent posted abroad).

It was agreed that the teachers’ employment did not fall within either of the specific examples given in *Lawson v Serco* of people employed by British employers to work outside Great Britain who would be protected from unfair dismissal and the question was whether there are other examples of the principle.

The problem of ex-patriot employees who worked or were based abroad is complex it being considered correct to describe the cases in which Section 94(1) could exceptionally apply to employees working outside Great Britain as those where “despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer relationship with Great Britain than with the foreign country where the employee works”. Certainly this statement is framed in terms too general to be of practical help so in *Lawson v*

Serco the Court tried to identify the characteristics which such an exceptional case would ordinarily have. First, it would be very unlikely that the right would apply unless the employee was working for an employer who was based here, but many British companies carry on businesses in other countries, so something more would be needed. The something more might be that the employee was posted abroad for the purpose of a business carried on in Great Britain, such as the foreign correspondent of a British newspaper. Another example was an employee working “within what amounts for practical purposes to an extra territorial British enclave in a foreign Country”. The Court acknowledged that there might be other examples and “they would have to have equally strong connections with Great Britain and British employment law”.

In this case, the Secretary of State argued that the situation fell within neither of the cases identified as exceptional in *Lawson v Serco*; the teachers worked entirely overseas in an international establishment and this was not a strong enough connection with Great Britain and its employment law.

The Supreme Court disagreed and found that this case forms another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that they should enjoy protection from unfair dismissal. First, the employer was based in Britain, and not only based here but was the Government of the UK. Second, the employees were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Third, they were employed in international enclaves, having no particular connection with the countries in which they happened to be situated and governed by international agreements between the participating States. Fourth, it would be anomalous if a teacher who happened to be employed by the British Government to work in the European School in England were to enjoy different protection from the teachers who happened to be employed to work in the same sort of school in other countries.

The Supreme Court remitted this claim of unfair dismissal to an Employment Tribunal for it to reach a decision on the merits of the case.



What the Supreme Court's decision means for employers?

It is perhaps not surprising that the Supreme Court decided that the employee's employment had a sufficiently close connection with Great Britain to entitle them to unfair dismissal protection under the ERA. However the case does highlight the English Court's willingness to give employees who work outside of Great Britain unfair dismissal protection (and potentially other domestic rights) where their employment has a demonstrably close connection with Great Britain. We caution employers to consider carefully the legal rights that their ex-patriot employees may have both before engaging them and, in particular, when considering whether to terminate their employment.

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

The European Court rules on compulsory retirement

In previous editions of the bulletin we reported that the UK Government has abolished the default retirement age which gave employers the right to retire their employees when they reached the age of 65. The Court of Justice of the European Union ("CJEU") has now issued a judgement on the lawfulness of compulsory retirement ages and whilst it may provide employers with some room to objectively justify compulsory retirements, employers should proceed with caution.

In the case of *Fuchs v Land Hessen* the CJEU considered whether the German rule stipulating permanent civil servants must retire at 65 years was age discriminatory. In the case, the two claimants were both prosecutors in the German legal system and subject to a retirement age of 65 years, with the option to request an extension to 68 years (if in the interest of their employer). Both claimants requested to work beyond retirement and the request was rejected. The claimants argued that this rejection of their request to work beyond the retirement age was age discriminatory.

The German court asked the CJEU for guidance on what constitutes a legitimate aim under the EU Equal Treatment Directive when seeking to justify the compulsory retirement of civil servants. It also asked for guidance on what evidence must be produced to demonstrate that an otherwise discriminatory measure is appropriate and necessary.

Justification

The employer put forward five potential legitimate aims:

1. Creating a “favourable age structure” (in other words, a balance of employee ages);
2. Planning staff departures;
3. Creating opportunities for promotion;
4. Preventing legal disputes with older employees over their continued fitness for service; and
5. Achieving budgetary savings (by not replacing those retiring).

Judgment

The CJEU approved the first four of the employers potential legitimate aims but stated that the last, achieving budgetary savings, could not constitute a legitimate aim under the Directive, but could be “taken into account” when a member state decided what national measures to adopt under the Directive. The CJEU ruled that it is a legitimate aim for an employer to impose the compulsory retirement age to achieve a “balance age structure amongst their workforce, enable staff planning, encourage the recruitment and promotion of young people, and to avoid performance disputes with older workers”. The CJEU also stated that European Member States could refer to budgetary constraints when justifying retirement age if considered alongside other factors (such as social, political or democratic issues) but that budget alone should not be considered a legitimate aim.

It is certainly surprising and perhaps even controversial that the Court ruled that it was a legitimate aim for an employer to seek to prevent legal disputes with older employees over their continued fitness for work, this could open the door for employers to put forward questionable arguments about the fitness of other workers as a reason to retire them off early. However, the legal reasoning on this point is lacking in the judgment and it is hard to be confident that this aspect of the ruling can be applied more broadly.

The CJEU went on to decide that applying the retirement age to civil servants was a proportionate means of achieving the legitimate aims given that they would retire on a full pension.

Implications and practice points

Even though the default retirement age has been abolished in the UK, employers



are looking to cases such as this to see how the courts justify a compulsory retirement age since an employer can still maintain its own retirement age where it could show this is a proportionate means of achieving a legitimate aim. Employers are naturally looking to case law such as this judgment to provide this guidance.

However, do bear in mind that this particular decision addresses public sector employment in the context of specific German legislation and the Court's comments about legitimate aims when justify compulsory retirement must be read against that background. It remains unclear whether UK private sector employers can apply the CJEU's approach to justifying compulsory retirement in the context of the Equality Act 2010. Ultimately the matter needs to be considered on a case by case basis.

The CJEU was asked whether cost alone can justify discrimination. In respect of the issue of cost, there has been significant case law on this issue in the UK Courts and more litigation. For example, in the case of *Woodcock and Woodcock v Cumbria PCT* a tribunal accepted that it was justified to dismiss an employee to prevent him from getting a "windfall". This decision was based on the basis of cost alone and supports the CJEU's position on cost being an objective justification for compulsory retirement. However, in another case, *Cross v British Airways* the court decided that cost alone should not justify discrimination but could be considered with other justifications (known as the "costs plus" argument). It may be that Courts are likely to consider cost as a legitimate objective justification in windfall cases but not in others where the costs plus argument may still prevail. The CJEU seems to rely on the fact that the claimants would receive a generous pension on retirement as a factor in its decision that compulsory retirement was not a measure which would unduly prejudice the claimants. Indeed the Court commented that the pension was of a level which "cannot be regarded as unreasonable". This might not be so easy to argue in the UK nor indeed with private sector employees.

This decision may encourage employers to seek to establish employer justified retirement ages but could open the door for employers to put forward questionable arguments about the fitness of older workers as a reason to retire them off early and suggests that discrimination may be a handy way of avoiding performance management and this does not fit easily with discrimination law

Employers would be advised to tread cautiously as the facts still have to be considered carefully in each case and we recommend that until the position as to whether cost is a key consideration in deciding upon a compulsory retirement

age is clarified by the courts that employers look more widely than cost alone when seeking to justify compulsory retirement (and potentially age discriminatory) decision.

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

A worker on long term sick leave is entitled to accrue annual leave

The Employment Appeal Tribunal (“EAT”) in the case of *NHS Leeds v Larner* has held that a worker unable to take annual leave due to being on long term sick leave is entitled to accrue that leave and either take it on their return to work or be paid in lieu if their employment is terminated. The Tribunal further held that that entitlement is in no way conditional upon the employee having requested to take leave during their absence.

The subject of a worker’s right (or otherwise) to carry forward untaken holiday into the next leave year has been a hot topic over the past few years and indeed it was only last month when we reported in our bulletin on the case of *KHS v Winfreid Schulte* and the advocate general’s opinion in that case pursuant to recent European case law which has established that if a worker is unable to take annual leave because of long term sickness absence he or she accumulates the right to take that leave on returning to work (or pay in lieu if their employment is terminated) even if that return is not until the next leave year. The advocate general’s opinion in respect of this in the case of *KHS v Winfreid Schulte* was that a worker returning to work should be able to exercise the right to take untaken holiday and possibly for a finite time of “no later than eighteen months from the end of the year in respect of which the holiday entitlement has arisen” envisaging that eighteen months is an appropriate long stop period within which an entitlement to pay in lieu of holiday may be available. This opinion, not binding on the court but one which will be considered seriously by it (and indeed more often than not is followed) opens up the serious possibility that the European Court will rule that there is a limit to the period during which a worker who is absent on long term sick leave can claim entitlement to holiday rights. It is worth noting that the government’s current consultation on modern workplaces includes a proposal to allow workers on long term sick leave to carry forward up to four weeks untaken holiday (e.g. giving one year’s grace) which



would not be long enough to comply with the advocate general's opinion in the case of *KHS v Winfreid Schulte*.

There has recently been an Appeal against a decision by a Tribunal that an employee absent on sick leave for the whole of one pay year was entitled to accrued holiday pay even though she had not requested to take any paid annual leave during this period and the Appeal was dismissed thus a worker who is unable to take annual leave due to being on long term sick leave is entitled to accrue that leave.

In the case of *NHS Leeds v Larner*, Mrs Larner was absent sick for over one year and exhausted her sick pay entitlement of six months' full pay and six months' half pay. When she originally went off sick she had no holiday plans. During her absence she did not request to take annual leave at any point, despite meeting with HR and Occupational Health on frequent occasions, and was eventually dismissed due to her ill health. According to her contract, annual leave could be "carried over" to the next leave year if a request to do so was made in writing. NHS Leeds argued that, since Mrs Larner had made no request to take this annual leave, she had lost the right to carry over leave that she would otherwise have had. Had she been entitled to do this, this would have resulted in her being paid 28 days in lieu of that untaken leave.

The EAT noted that in the case of *Stringer*, it was held that leave untaken due to sickness absence would be accrued and carried over to be taken in the next year or paid in lieu if employment ended. The EAT presumed that the Claimant was not to have been well enough to exercise her "rights to enjoy a period of relaxation and leisure" so she did not have the opportunity to take her annual leave. Instead she had the right to take her leave entitlement under Regulation 13 of the Working Time Regulations 1998 carried over to the following year, and she had that right without have to make a formal request for the leave to be carried over.

It is worth noting that the EAT confirmed that the right to be paid for that annual leave crystallised on the termination of Mrs Larner's employment which occurred only a few days after the end of the pay year.

The EAT said the position might be different in the case of a fit employee who failed to make any request for leave during the whole of a holiday year when it was noted that he or she might then lose the right to take annual leave because that worker, unlike Mrs Larner, has in the words of the Court in *Pereda* "had the opportunity" to exercise the right to leave.

A belief in a "conspiracy theory" surrounding the 7/7 and 9/11 terrorist attacks is not a philosophical belief to be protected by discrimination law

The case of *Farrell v South Yorkshire Police Authority* is the latest in a series of cases exploring the boundaries of what amounts to a "philosophical belief" for discrimination purposes. In this particular case, an Employment Tribunal at a pre-hearing review was asked to consider whether an employee's belief that the 9/11 and 7/7 attacks were part of a conspiracy by a global elite which could amount to a philosophical belief for religion or belief discrimination purposes.

Mr Farrell was employed as a Principal Intelligence Analyst by the South Yorkshire Police Authority. He claimed to hold the belief in a New World Order under which a "global elite" (including the US and UK Governments along with World Financial Institutions) were seeking to "introduce a secret satanic ideology to enslave the masses and claim control of the world's resources". Mr Farrell, in keeping with his belief, believed that the UK and US Governments perpetrated the terrorist attacks of 11 September 2001 and 7 July 2005.

When producing a "strategic threat assessment", a report analysing the level of threats posed by various crimes, including terrorism, Mr Farrell set out that the 9/11 and 7/7 attacks were "false flag operations" authorised by the US and UK Governments to help persuade their populations to support foreign wars and that the UK Government's and the police's approach to counter terrorism were "utter shams". In light of the content of his report, Mr Farrell was invited to a disciplinary hearing and the South Yorkshire Police Authority took the view that Mr Farrell's expression of his views was incompatible with his employment and that his position was untenable. Mr Farrell was consequently dismissed. As a result, Mr Farrell brought Employment Tribunal claims, including a claim for religion or belief discrimination.

A Pre-Hearing Review was held to determine whether Mr Farrell's views were capable of being philosophical beliefs capable of protection under the Religion or Belief Regulations 2003.

The Court considered the case of *Grainger Plc and Others v Nicholson* which identified five criteria to be set aside for a belief to attain protection under the Regulations, being:-



1. The belief must be genuinely held;
2. It must be a belief and not an opinion or view point based on the present state of information available;
3. It must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. It must attain a certain level of cogency, seriousness, cohesion and importance; and
5. It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental right of others.

The Tribunal agreed that the employee's beliefs were honestly held, related to a weighty and substantial aspects of human life, and were compatible with human dignity. However, the Tribunal considered the beliefs to fail the test of "cogency and coherence" and accordingly could not be a philosophical belief. In respect of the level of cogency or cohesion required, the Tribunal recognised, interestingly, that it should not expect too much from a Claimant in demonstrating the coherence of his beliefs, pointing to the fact that religious beliefs, for example, are not always susceptible to rational justification or explanation. The Tribunal found it was inappropriate to objectively scrutinise the nature of the Claimant's beliefs in order to consider whether the test of cogency and coherence was met and noted that given Mr Farrell's beliefs related to matters where there is a substantial amount of evidence within the public domain (unlike, for example, a belief regarding the existence of a God) the scrutiny put on those beliefs must take into account such available evidence. Taking all of this into account and considering Mr Farrell's evidence as to the nature of his beliefs, the Tribunal found that Mr Farrell's conspiracy theory simply failed to meet any minimum standard of cogency or coherence, and in fact, applying an objective test, were "absurd". The Tribunal did not doubt the sincerity of Mr Farrell's beliefs but found them not to constitute the definition of belief within the Regulations. More cases like this are certain to follow given the scope for argument provided by factors such as "cogency and coherence" and "worthy of respect in a democratic society". Previous cases, as we have reported before in this bulletin, have found beliefs in climate change, the "higher purpose" of public service broadcasting, and anti-fox hunting beliefs to constitute philosophical beliefs under the Regulations. This current case seems to demonstrate, against the trend of previous cases indicating that the definition of a philosophical belief was perhaps wider than originally perceived, demonstrates that Tribunals will still

need to carefully consider each claim on a case by case basis. It appears that it is not a foregone conclusion that even a strong and genuinely held belief will attain protection under the Regulations, and it will be irrelevant how passionately an individual believes in their cause, if that cause is objectively incoherent.

This case is certainly a more reassuring one for employers. In any event, establishing that a belief is capable of protection is only the first step and a Tribunal then has to consider whether an employer unlawfully discriminated by reference to that belief. However, employers do still need to exercise care when taking action against someone who has a strongly held belief, or treating such people differently from other employees, as in many cases the individual concerned may meet the criteria set out in Grainger.

Remember to ensure that equal opportunities policies and staff training take into account various religions and the wide scope of beliefs held and ensure that sufficient measures are in place to prevent harassment or victimisation of employees on all protected grounds including beliefs.

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

Employment Law News

The Equality and Human Rights Commission seeking permission to intervene

The Equality and Human Rights Commission has expressed concern that “rulings already made by UK and European Courts have created a body of confusing and contradictory case law”. The Commission has announced that it is now seeking permission to intervene in four cases which Christian workers are taking to the European Court of Human Rights (agreeing with the many Christians who believe that courts and tribunals have interpreted the law too narrowly in religion and belief discrimination claims).

In previous editions of this bulletin we have reported on the various cases which the Commission proposes to intervene in:



1. *If Eweida v British Airways Plc* – BA employee, Ms Eweida lost a religious discrimination claim against BA which had barred her from wearing a cross on a necklace while at work;
2. *Chaplin v Devon & Exeter Hospitals NHS Trust* – A religious discrimination claim brought by Ms Chaplin against the NHS Trust failed after she was removed, on health and safety grounds, from frontline duties because she wore a crucifix on a necklace;
3. *Ladele v London Borough of Islington* – A religious discrimination claim brought by Ms Ladele as a local authority registrar brought against Islington after it insisted that she officiate at civil partnerships notwithstanding her wishing not to do so on religious grounds was lost;
4. *MacFarlane v Relate Avon Limited* – A religious discrimination claim brought by Mr MacFarlane, a relationship councillor, after he was dismissed from Relate for refusing, on religious grounds, to provide help and counselling to same sex couples was lost.

It is not surprising that employers and HR departments are on the side of caution but the Commission believes “they may be overly cautious in some cases and so are unnecessarily restricting peoples’ rights” and presumably clarification of this position will be to everyone’s benefit.

We will update you as soon as we know more on this.

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

Supreme Court rejects bid to challenge ruling on Sharon Shoemith sacking in the Baby P case

You are likely to recall the facts of this case in which 17 month old Baby P died as a result of abuse by his mother, her boyfriend and the boyfriend’s brother, despite numerous visits by social workers and others within the London Borough of Haringey but following which Sharon Shoemith, the then Director of Children and Young Peoples Services at the Council was removed from her post by Ed Balls, on the basis of an urgent inspection and report by the Department for Children, Schools and Families following which the Council summarily dismissed Ms Shoemith without following any proper process, they said, because of pressure from Mr Balls.

Ms Shoemith sought judicial review of the fairness of the process behind the report, her removal from office, and her dismissal. The Court of Appeal ruled that the dismissal of Ms Shoemith was procedurally unfair and on that basis, Ms Shoemith's employment did not cease when she was dismissed, with the result that she could be entitled to back pay of an amount far greater than the amount which an Employment Tribunal is able to award for unfair dismissal.

We reported in Issue 29 of this bulletin that Haringey Council and the Department for Education were seeking leave to appeal this decision but the Supreme Court has now refused applications from Haringey Council and the Department for Education for leave to appeal the decision of the Court of Appeal ruling.

Thus, the existence of an anomaly has been confirmed; being that in appropriate cases an office holder appointed by a public body has an alternative avenue of redress when dismissed, being an application for judicial review in addition to bringing any claim for unfair dismissal in the Employment Tribunal as an employee. The financial consequence of this anomaly being that whilst any unfair dismissal compensatory award made by an Employment Tribunal is subject to a statutory cap (currently £68,400) if an office holder's dismissal is rendered void on judicial review there is no statutory limit to the actual losses that can be recovered as a result. In addition, whilst an Employment Tribunal will not usually award costs the same is not true of the Court.

This leaves now open the issues of calculating Ms Shoemith's back pay entitlement, and also her ongoing Employment Tribunal claims. Ed Balls commented that this decision was of concern stating "I feel that the Appeal Court judgment will now make it very difficult for ministers to act swiftly in the public interest to use their statutory powers when children are at risk, as I did in this case. This judgment creates a serious and worrying constitutional ambiguity, which now requires urgent action from the government to resolve".

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

The traps for employers to avoid in setting dress codes

You may have read in the newspaper reports last month that a sales assistant working in the Harrods Knightsbridge store felt she was effectively forced to leave her job because she refused to abide by Harrods dress code.

All female shop assistants were required by the store's dress code to wear makeup and these makeup requirements included full makeup, blusher, full eyes, lipstick, lip liner, gloss etc. This particular employee had not worn makeup at Harrods for the previous 5 years of her employment but resigned after a recent enforcement of the dress code following a flaw by managers.

This particular employee has not yet brought a tribunal claim but nevertheless is of obvious interest to employers and employees in the retail and hospitality sectors.

You may also recall another high profile case which involved a female sales assistant who sued the Abercrombie and Fitch in Saville Row, London for unlawful discrimination when she was required to work in the storeroom and not as a sales assistant on the shop floor when she insisted on wearing a cardigan to disguise the fact that she had a prosthetic left forearm which did not fit with the shops "look policy" for front of shop assistants. The employee was successful in her claim for unlawful disability discrimination.

Employers need to take care when drafting dress codes for company handbooks as the possibilities of falling into traps in relation to this are potentially endless. Employers need to be careful to avoid sex discrimination in addition to disability discrimination (as the Abercrombie and Fitch case showed) as well as religious and race discrimination (which could be a problem when requiring Muslims to adhere to dress codes etc).

ACAS advice for employers and employees affected by riots

August was a slightly quieter month in respect of the cases being reported (the result of the summer holidays) but whilst it might have been a quiet month in the world of employment law this was not so in several of the UK's major cities. ACAS was quick to publish an advice sheet on how to handle the impact of the riots which swept the UK on staff and the work place.

The primary advice is to:

1. Keep in touch with each other – if you can't get to work, try and get in



touch with your employer to let them know. If your business has been damaged, contact your employees to discuss work arrangements;

2. Be flexible about working hours and location, perhaps using smart phones and laptops to help you keep working where possible; and
3. Be fair – as an employer, try and take into account the circumstances surrounding absence and timekeeping issues before deciding on the action you might take – in terms of leave and pay.

The ACAS advice goes on to remind employers that:

1. Employees are not automatically entitled to pay if they are unable to get to work because of travel disruption – but do check whether your business has its own contractual arrangements in respect of pay for travel delays and consider whether some or all of the employees statutory holiday entitlement might be taken (remembering to provide the minimum notice period);
2. An employer could suggest that an employee takes a day of unpaid leave if they are unable to travel to work and if this is provided for in their employment contract;
3. If an employee cannot get to work because their child's school is closed they may have the right to time off for dependants;
4. If no work is available to an employee i.e. the office is closed and they are available to work then an employer cannot refuse to pay them (or insist that they take annual leave; unless they are able to give adequate notice).

The London (South) Employment Tribunal in Croydon was closed for several days in August following damage to the building caused by rioting. Indeed, employers of many businesses which had also been damaged or destroyed in the violence were faced with uncertainty.

Frustration occurs where there is an unforeseen event which renders performance of the employment contract impossible or radically different from what the parties originally envisaged. Accordingly, where the building from which a business operates has been totally destroyed and the employer can no longer continue to trade then there is a strong argument that the employees contract of employment has been frustrated. However, this will depend on the extent of the damage and the likely length of time which the employer can no

longer continue to trade and Employment Tribunals are reluctant to find that an employment contract has been frustrated (the effect of frustration being that the contract ends automatically but there is no dismissal by the employer and consequently an employee is not entitled to notice or payment in lieu and cannot claim unfair dismissal). Therefore, employers whose businesses are only temporarily affected will be unlikely to be able to rely on the doctrine of frustration. Employers would therefore be wise in continuing to pay employees in full during any short term shut down for repairs and where this is likely to go on for some time all payment is not financially viable the business should communicate clearly and consult with its employees so that they understand the economic situation.

Whether an employer can discipline an employee for criminal conduct outside of the work place depends upon the particular facts of each case and employers should not dismiss an employee merely because they have been charged with a criminal offence outside of work. You may want to make provision within any staff handbook or employment contract that conviction of a criminal offence is considered gross misconduct as this will be helpful in giving a contractual right to discipline any employees convicted of committing a criminal offence, but again, an employer would probably only be able to justify dismissing an employee for gross misconduct if their conduct in committing the criminal offence is relevant to the employers business and the employees work (and the normal requirements of a fair procedure will still have to be followed). A balanced approach between encouraging employees to make all reasonable efforts to get to work and not requiring them to take undue risks with their safety is required in light of employers having a duty of care concerning the health and safety of their employees.

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

Legislative Developments

Agency Workers Regulations 2010

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

As you may recall, the Regulations effectively give agency workers the same basic rights as their directly recruited counter-parts, once they have 12 weeks service

(so as to disqualify the genuinely temporary worker).

Not only do the Regulations finally come into force on 1 October 2011 but they are already the subject of “tweaks” by amending regulations. A statutory instrument came into force on 1 September 2011 and this is to correct drafting errors in the Regulations. The main amendments are to:

- The meaning of “agency worker” – replacing the requirement that the agency worker has a contract with the agency which is either an employment contract or “any other contract to perform work and services personally for the agency” with a requirement for “any other contract with the agency to perform work or services personally” which means that the worker does not need to actually be working for the agency itself; and
- The statutory defence, whereby an agency will not be liable for a hirers breach of the regulations provided the agency has “obtained, or has taken reasonable steps to obtain, relevant information from the hirer” about, among other things “the basic working and employment conditions in force in the hirer”.

If you require any further advice on this area please contact Aidan McGuire on 0118 951 6830 or at aidan.mcquire@blandy.co.uk

*Guest Spot - from Blandy & Blandy's
Company Commercial department*

Business Succession

The sphere of owner managed businesses incorporates a huge variety of business activities and the manner in which they are operated. There are however, some basic issues and considerations which are universally relevant involving succession both on intended retirement and on death.

The issues which require particular consideration are summarised below.

1. Business Structure

- Is the arrangement the most appropriate structure for the business both from a practical and a tax perspective?
- The advantages/disadvantages of each option in relation to particular circumstances of the owners of the business.

- Is the appropriate documentation in place?
- Do the existing documents correctly reflect the position?
- It is important to ensure that business is appropriately structured and the documentation is correctly drafted in order to ensure that the very valuable Inheritance Tax and Capital Gains Tax Reliefs which may be available are not jeopardised.

2. Successions Planning

- There are different succession issues involved depending on the type of business structure under consideration.
- The issues to consider on retirement will differ to those relevant on death.
- A decision will have to be made as to whether the business interest is to pass to family members, the co-owners of the business, or if the business is to be sold to a third party.
- Do the documents accurately reflect the business holder's wishes regarding succession?
- On retirement the business owner will need to ensure that he has built up a sufficient retirement fund.
- If the business interest is to pass to non-family members it is essential to ensure that there are sufficient funds for the co-owners of the business to purchase the deceased's/retiring co-owner's interest.

3. Wills

- A properly drafted Will can ensure the smooth succession of a business on a proprietor's death.
- In particular, it is important to ensure that the Will contains the necessary powers for the Executors to continue to run the business in the administration period.
- Valuable Inheritance Tax reliefs may be available in relation to the proprietor's business interest on death and a correctly drafted Will can ensure that these reliefs are optimised.
- The Will can be structured to incorporate a trust of the business assets

which will enable long term tax planning for the family and a possible “double use” of the inheritance tax reliefs available.

4. Insurance Arrangements

Appropriate insurance arrangements can provide a very efficient way of ensuring that funds are available in order to ensure the smooth succession of a business on the death of a proprietor.

5. Pensions

It is very important that business proprietors give early consideration to having suitable pension arrangements. This will be relevant in relation to providing the appropriate “exit” strategy for the proprietor on retirement.

The above brief summary illustrates that there are a number of wide ranging issues which require consideration in order to ensure that the succession of a business can take place smoothly.

If any further assistance is required speak with David Few or Nadine Jayes in the Tax Team of Blandy & Blandy LLP.

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Contact The Employment Team

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

Sue Dowling, Head of Employment

T: 0118 951 6822

E: sue.dowling@blandy.co.uk

Tim Clark, Partner

T: 0118 951 6825

E: tim.clark@blandy.co.uk

Sukhpal Matharoo, Associate

T: 0118 951 6821

E: sukhpal.matharoo@blandy.co.uk

Laura Binnie, Solicitor

T: 0118 951 6855

E: laura.binnie@blandy.co.uk

Rebecca Hill, Solicitor

T: 0118 951 6833

E: rebecca.hill@blandy.co.uk

Shaun Hogan, Solicitor

T: 0118 951 6807

E: shaun.hogan@blandy.co.uk

Aidan McGuire, Solicitor

T: 0118 951 6830

E: aidan.mcguire@blandy.co.uk

