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Human Resources

Watson, Farley & Williams

Watson, Farley & Williams and Michael Page - Employment Law breakfast seminar

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Employment Law at WFW

The employment and immigration team at WFW provide extremely responsive, practical and commercial advice tailoring our approach to our client's requirements. We achieve this by taking the time to understand our clients' businesses and cultural environments. Our employment and immigration team delivers a proactive commercially driven service.

We are able to provide advice across the full spectrum of employment law from day-to-day queries to strategic business issues. We can support you in these areas and in relation to ancillary pensions and business immigration related matters.

Some specific areas of expertise include:

- terms of employment (including staff handbooks/policies) and consultancy agreements
- share based incentive schemes and bonus schemes
- business and service transfers and TUPE, including providing suites of template documentation for TUPE transfer and collective redundancy consultations
- establishment of consultative groups and advice in relation to European Works Councils
- restrictive covenants, the protection of confidential information and intellectual
- property
- termination of employment, including settlement agreements
- disciplinary and grievance issues and workplace disputes
- alternative dispute resolution, including mediation
- all aspects of employment and immigration compliance, including mock UK Border Agency audits
- assistance with all aspects of the Tier 2 sponsorship regime

Training

The WFW Employment Group provides a comprehensive range of employment law training. All of our training services are provided by specialist solicitors who have a real interest in and passion for employment law.

Our training programmes are always tailored to meet the needs of the audience. As a result, they vary in complexity from an introduction to employment law for managers to more specialist interactive workshops for HR specialists and legal professionals.

In addition to training on existing law, our team is engaged in the industry and uses this knowledge to provide guidance on future employment law developments which is beneficial for organisations when developing and adapting their employment policies and procedures.

Speaker profiles

London

Asha Kumar
Partner
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akumar@wfw.com

Asha joined Watson, Farley & Williams in 2000 and is a Partner within the Employment team. Her practice includes a broad range of contentious and non-contentious employment matters including drafting employment agreements, business and service transfers, collective redundancies and restructuring advice and defending employment litigation in cases concerning unfair dismissal, discrimination and whistleblowing, for example. She also acts for senior executives, usually upon joining or leaving employment. Asha's client-base spans a range of industries including energy/ resources, finance, telecoms and media. She is a regular speaker on employment law matters for clients as well as for other organisations including the Chartered Institute of Personnel and Development.

Anna Robinson
Senior Associate
London
arobinson@wfw.com

Anna Robinson is a solicitor in the Employment Team. Anna's practice includes a broad range of contentious and non-contentious matters. She regularly prepares policies and procedures, advises in relation to disciplinary/ grievance procedures, manages tribunal claims and assists in connection with matters of a contractual nature. In addition, Anna has extensive immigration expertise, particularly in relation to the Points-Based System, and has acted on behalf of individuals in relation to immigration proceedings in the Asylum and Immigration Tribunal and the Court of Appeal. Anna also regularly conducts mock UKBA audits at client sites.

Presentations

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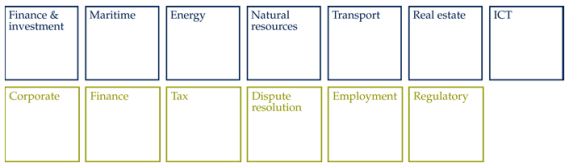
Recent and Future Developments in Employment Law

21 November 2013

By Asha Kumar



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Introduction

> In April 2011, the Government launched its Red Tape Challenge, which had the object of identifying which existing regulations could be "scrapped, merged, simplified or improved"

> In October 2011 the spotlight turned to employment law

> 2013 started with a flurry of consultations, which resulted in many amendments and new employment law provisions being introduced

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Enterprise and Regulatory Reform Act

> The Act provides for:

- limiting unfair dismissal compensatory awards to the lower of one year's gross earnings (excluding pension contributions, benefits in kind or discretionary bonuses) or the maximum cap currently £74,200 (from 29 July 2013)
- a mandatory period of Acas conciliation before instituting tribunal proceedings (from 6 April 2014)
- a power for a tribunal to impose a penalty on employers of 50% of any financial award, subject to a minimum of £100 and maximum of £5,000, where there are "aggravating features" (expected to come into force on 25 April 2014)

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Enterprise and Regulatory Reform Act

- removal of employer liability for third party harassment of employees (as was set out in the Equality Act 2010) (from October 2013)
- compromise agreements have been renamed "settlement agreements" (from 29 July 2013)
- pre-termination negotiations with an employee cannot be taken into account in unfair dismissal proceedings (from 29 July 2013)

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Pre-Termination Negotiations & Settlement Agreements (1)

> Offers to end the employment relationship on agreed terms (under a settlement agreement) can now be made on a confidential basis and generally, are inadmissible as evidence in unfair dismissal claims

> This protection applies even where there is no current employment dispute or where one or more parties is unaware that there is a problem

> There are some significant exceptions in that it does not apply to claims for automatically unfair dismissal, discrimination and breach of contract

> In addition where there has been any "improper behaviour " the tribunal can decide to admit the evidence related to the pre-termination negotiations

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Pre-Termination Negotiations & Settlement Agreements (2)

> Acas has now published a new Code of Practice on Settlement Agreements

> The Code confirms that:

– either party may propose settlement
– employers need not have followed any particular procedure prior to offering settlement
– if a settlement offer is rejected, the employer must go through a fair process before a dismissal
– negotiations on a "without prejudice basis" can still be used

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Employment Tribunal Changes - Fees

> From 29 July 2013, fees have been introduced for claims in the Employment Tribunal

> Fees are now charged in two stages, the first at the issue of the claim, and the second prior to the hearing - those on low incomes may be excused payment if they get full or partial remission

> Level 1 claims are claims for defined sums, such as unauthorised deductions from wages and redundancy payments - such claims would attract a fee of £160 when the claim is issued and a further £230 at the hearing stage

> Level 2 claims are those involving more complex issues, including unfair dismissal and discrimination

> Level 2 claims attract an issue fee of £250 and a hearing fee of £950

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Changes to TUPE

> The aim of TUPE is to protect employees should the business in which they work change hands

> However, there is no doubt that it adds substantial complications to a business sale

> The Government carried out a consultation on changes to TUPE with a view to lightening the burden on employers

> The proposal was that the "Service Provision Change" (SPC) provisions would be abolished

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Service Provision Change

> During consultation it became apparent that the abolition of the SPC provisions was not popular

> The Government then stated that it had decided not to scrap the SPC rules

> Instead, the provisions will be amended so that the activities carried on after the change in service provision must be "fundamentally or essentially the same" as those carried on before

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TUPE changes – Post-Termination Harmonisation

> The current TUPE regime expressly precludes the harmonisation of employment contracts post-transfer

> This prevents the standardisation of terms as between transferring and existing employees

> Under the new provisions contractual changes will be permitted providing the transfer is not the sole or principal reason for them and the changes are based upon an "ETO" reason

> Unilateral variations to contracts are likely to be permissible where a contractual term allowing this exists, for example a mobility clause

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TUPE Changes - Employee Information/Timetable

> The deadline by which employee liability information has to be provided to the transferee will be extended from 14 days to 28 days before the transfer

> The existing defence where the fixed time period is not reasonably practicable in the circumstances will also continue to apply

> The Government intends to lay the new Regulations before Parliament in December 2013

> There will be transitional and saving provisions to allow employers a lead-in period to plan future transfers in line with the new rules

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Whistleblowing

> There has been a growing focus on the protection afforded to whistleblowers

> This attention has emerged because of scandals, such as that in the health service where a system to encourage and protect whistleblowers could have mitigated the problems

> The definition of "qualifying disclosure" in whistleblowing legislation was restricted to disclosures "in the public interest" – workers are no longer able to blow the whistle about breaches of their own employment contracts unless they can demonstrate a public interest objective

> Protected disclosures no longer have to be in "good faith" (i.e. made with a predominantly honest motive)

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Flexible Working – Spring 2014

> The Children and Families Bill will extend flexible working rights to all employees with 26 weeks' service - rather than just to those employees who qualify as parents or carers

> In addition, employers will not have to follow the current statutory flexible working procedure, but instead must consider all requests reasonably

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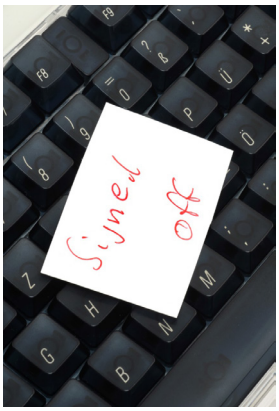
Spring 2014: Sickness Absence

> The Government is to introduce a health and work assessment and advisory service

> It will provide a state-funded assessment by occupational health professionals for employees who are off sick for four weeks or more

> It will also provide a case management service for employees with complex needs who require on-going support to enable them to return to work



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Discrimination Questionnaires

> The Government has confirmed that the abolition of statutory discrimination questionnaires would come into force on 6 April 2014

> In an apparent concession to those concerned about the abolition, the Government is now planning to set out a non-legislative approach which will be contained in future ACAS guidance

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Shared Parental Leave – Probably 2015

> The current entitlement to maternity leave (52 weeks) and pay (39 weeks) will remain the default position

> Under the new system qualifying parents can opt to share between them up to 50 weeks of leave and 37 weeks of pay

> The right to two weeks' ordinary paternity leave will be retained, although additional paternity leave and pay will be abolished

> Right to unpaid time off for ante-natal appointments

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Increase in Statutory Limits

Unfair Dismissal

> The maximum limit on a week's pay increased from £430 to £**450** and the maximum compensatory award increased from £72,300 to £**74,200** for dismissals taking effect on or after 1 February 2013

Statutory Payment Rates from April 2013

> Statutory maternity, paternity and adoption pay will increase from £135.45 to £**136.78**

> The weekly earnings threshold for these payments will rise from £107 to £**109**

> Statutory sick pay increased from £85.85 to £**86.70,** with the weekly earnings threshold also rising from £107 to £**109**

> Maternity allowance will increase from £135.45 to £**136.78**, with the earnings threshold remaining at £30

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Do's and Don'ts in the Recruitment Process

Presented by Anna Robinson

21st November 2013

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Introduction

> Employment law applies to applicants and interviewees as well as employees of a company

> A potential risk of not carrying out recruitment correctly is that an applicant may bring a costly, reputationally damaging and time-consuming tribunal claim

> Today we will provide an overview of the do's and don'ts at each main stage of the recruitment process

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Overview of discrimination legislation

> The Equality Act 2010 outlaws discrimination and harassment in relation to 9 'protected characteristics'

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

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Discrimination in recruitment

When is discrimination in recruitment unlawful?

1. In the arrangements that are made for deciding who shall be offered employment
2. In the terms on which employment is offered
3. In any decision to refuse someone a job

Who can be liable for discrimination?

1. The employer (vicarious liability)
2. Individuals (e.g. interviewers)
3. Recruitment agents

What if an applicant brings a claim?

> No qualifying period of service
> No cap on compensation award – record is > £4 million!
> Each party pays its own fees

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Advertisements (1)

> 'Advertisement' includes every form of advertisement or notice, whether to the public or not, including adverts on internal notice boards or those sent to employment agencies

> Employers should remove **blanket exclusions** which do not take into account individual circumstances

> Be aware of traditional descriptions and potentially loaded language e.g. 'mature', 'experienced', 'fresh', 'dynamic' or 'in good health'
– *McCoy v James McGregor and Sons Ltd* – advert for 'youthful enthusiasm'

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Advertisements (2)

DO ✓

- Ensure the job criteria in the advert are genuinely required and that the advert accurately describes the job
- Show willing to make reasonable adjustments so that it is possible for all people to apply
- Ensure wording does not potentially amount to direct or indirect discrimination

DON'T ✗

- Include an implied or express deterrent that would lead someone with a protected characteristic to not apply for the job
- Employers must not suggest to recruitment agencies that certain groups should be preferred

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Method of Recruitment

- Some recruitment methods may unjustifiably exclude or reduce applications from people with a particular characteristic, for example:
  - Advertising by word of mouth in a white/male dominated workforce
  - Recruiting only via the internet
  - Advertising in particular publications
  - *Locke v Lancashire County Council*

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Application form (1)

> Information requested should be limited to:
  – factual information relating to the position
  – information necessary to decide on the best candidate and sift out unsuitable candidates

> Where an employer uses an application form to test an applicant's abilities or standard of English, this can lead to indirect discrimination if this is not required for the role
  – *Isa and anor v BL cars*

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Application form (2)

When can Employers ask about a disability?
Pre-employment Health Questionnaires

> General Rule - employer must not ask about an applicant's health until the employer has:
  – decided to offer employment to the applicant; or
  – entered the applicant into a pool of successful candidate to be offered a job when one becomes available

> Exceptions:
  – establishing whether there is a duty to make 'reasonable adjustments' in connection with any assessments
  – establishing whether the applicant will be able to carry out a function intrinsic to the work
  – for equal opportunities monitoring
  – supporting positive action
  – occupational requirements

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Application form (3)

Reasonable adjustments

> An employer only needs to make reasonable adjustments to the application form (and to the interview/selection process) once they know, or could reasonably be expected to know, that a disabled person is or may be applying for the job
  – For example: *Oldham v The Leonard Cheshire Foundation*

> Employers can be discriminatory if they exclude a disabled applicant on the basis of a health questionnaire/examination first without taking into account:
  – the applicant's ability to do the job
  – whether there is any reasonable adjustment that needs to be made

Shortlisting

> Use more than one person in the panel
> Agree a marking system beforehand and apply it consistently

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Application form (4)

DO ✓	DON'T ✗
> Consider how to make the application form accessible to all, including those with disabilities	> Ask unnecessary questions that do not relate to the position, unless they aim to assist a disabled candidate or form part of equal opportunities monitoring
> Consider using a 'standardised process' to make objective assessments of applicants	> Ask for photos. If they are provided voluntarily, ensure they are not seen by the interview or selection panel
> Review application forms periodically as part of your equal opportunities review	
> Shortlist applicants using a panel, with pre-agreed marking criteria	

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The Interview (1)

> The arrangements for interviews and assessment centres must not put candidates at a disadvantage

> Employers must make reasonable adjustments if informed of a disability
  – *Gailey v Haes systems Ltd*

> Objective questions must be used which do not go beyond the job requirements or relate to protected characteristics
  – *Corus hotels plc v Woodward and another*

> Notes written by hand or sent by email may be presented at tribunals or provided to applicants if requested under the Data Protection Act

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The Interview (2)

DO ✓	DON'T ✗
> Ensure questions are objective	> Ask personal questions or questions not strictly related to the job requirements
> Agree on a marking system beforehand	> Take notes during or after the interview that you would not wish the candidate to see
> Ensure there is more than 1 interviewer and that they mark separately	> Be tempted to make comments or assumptions about a person
> Ask candidates if they need any reasonable adjustments	

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Selection (1)

> Select candidates against clear, relevant and objective criteria

> An employer may need to justify why a candidate with better qualifications or experience is not selected

> *Lyons v The Leeds Teaching Hospitals NHS Trust*
  – The applicant was rejected for being 'over-experienced'

> What may seem reasonable grounds for rejecting a candidate may indirectly discriminate
  – E.g. if the employer felt the applicant was not a 'good communicator'

> Avoid selection based on a 'gut feeling'
  – *MacDonald v Barclays Bank*

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Selection (2)

DO ✓	DON'T ✗
> Ensure selection criteria are genuinely objective	> Consider a candidate's fit over and above their ability to do the job
> Ensure you can objectively justify your final selection	> Make assumptions about candidates
> Use of personality traits should be limited to leadership and motivation, rather than 'gut feelings' or 'fitting in'	

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Conclusion

- Recruitment is a tricky area which can easily and inadvertently breach discrimination legislation
- Employers should act fairly and consistently at each stage
- Disparity of treatment is only likely to lead to discrimination claims
- Advertisements should set out the genuine requirements for the role, and applications and interviews should only request factual information related to the role
- Employers should clearly document each stage of recruitment and focus on ensuring everyone involved is well trained

Notes

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