Kernow HR

Providing Professional Business Support

January 2020 Newsletter

Happy New Year to all our clients.
Now that we have a Government with a majority, keep an eye on our section 'What's on the horizon' as the log jam of employment law is likely to end and we'll see a raft of new legislation being considered in 2020.

WHAT'S ON THE HORIZON ...

The following changes are due to come into force in April 2020. As it's still a long way off, detail is still sketchy, but this is what is on the horizon so far:-

- Increase in holiday reference period from 12 weeks to 52 weeks: the proposal is to increase the reference period used for determining a week's pay when calculating holiday pay for workers with irregular hours from 12 weeks to 52 weeks, which is seen to be a fairer time period to use
- Extension of the right to a written statement of employment particulars to all workers: Written statement will be a day one right for all workers. Employers will also have to provide additional information as mandatory content for a written statement

- Parental bereavement leave rights take effect: Provides for at least two weeks' leave for employees following the loss of a child under the age of 18 or a stillbirth after 24 weeks of pregnancy. Employees with 26 weeks' continuous service will be entitled to paid leave at the statutory rate and other employees will be entitled to unpaid leave
- In April 2020, the IR35 Regulations will begin to take effect to medium and large companies in the private sector that contract with personal service companies for the provision of services. This has the effect that these companies will have to account for tax and national insurance through PAYE in the same way as the public sector has been required to do since April 2017. (See November Newsletter for more Information)

Beware of 'hidden reasons' for dismissing an employee

Jhuti v Royal Mail Ltd
This interesting case focussed on a knowledge of whistleblowing. The Royal Mail employee was unfairly dismissed for blowing the whistle, not for the alleged poor performance. The Supreme Court stated that in a situation where an employee more senior than the claimant determines that the claimant should be dismissed for blowing the whistle (the 'hidden Reason') but invents another reason for dismissal (the 'invented reason') which a separate dismissing manager adopts, the reason for dismissal is the 'hidden reason', rather than the 'invented reason'. The fact that the dismissing manager was not aware of the 'hidden reason' does not absolve the employer of liability where automatic unfair dismissal is concerned. This landmark judgement extends the scope of whistleblower protection and suggests that employers will need to ensure they have the complete information before dismissing an employee.

Background
A short period into her new role as a media specialist for Royal Mail's Sales Division, Jhuti noticed what she thought were irregularities in the way that customers were being offered incentives that used mail as an advertising medium. She believed that these were contrary to regulatory guidelines and reported her concerns to her manager. In a meeting with her manager, Jhuti was told that her understanding of the rules was questionable. She believed that her job would be at risk if she decided to press further her concerns and she retracted her claim.

Jhuti's relationship with her manager became strained and she was subject to continuous criticism about her performance. Her case was assigned to an HR investigation officer to conduct a review. Jhuti's manager did not inform the HR investigator of Jhuti's concerns about the irregularities. Although Juti informed the HR investigator in writing that she was 'being sacked for telling the truth', the HR investigator accepted the manager's assurances and did not undertake a detailed investigation into the matter. Ultimately, the HR investigator decided to dismiss Jhuti on performance grounds. Jhuti claimed that she had been automatically unfairly dismissed for making protected disclosures.

Decision
The CA had previously decided that it was only the thought processes of the persons authorised to and who took the decision to dismiss that should be considered – in this case the HR investigator. There was no suggestion that the HR investigator was motivated by the fact that Jhuti had blown the whistle.
However, the Supreme Court determined that its role was to identify the 'real reason' for dismissal and decided that the real reason for her dismissal was the fact she had raised concerns about irregularities, which led to her manager inventing performance concerns which ultimately led to her dismissal.

Top Tips
On the face of it, this case is a worrying one for dismissing managers, who will be concerned that their decision-making may inadvertently give rise to an automatic unfair dismissal, despite the fact they were unaware of any protected disclosure having been made. However, practical steps can be taken by dismissing managers to mitigate against this:

It is good practice for dismissing managers to check if there are any whistleblowing disclosures around the employee. A clear whistleblowing policy will assist with this, as it should encourage employees to raise concerns in a way that is traceable

- Break down the events leading to the potential dismissal will help, asking the question 'What has motivated that action' at each key point of the case history
- Preparing a chronology is also often key in identifying whether the making of a potential protected disclosure has triggered any negative action.

Covert Recordings by employees

Phoenix House Ltd v Stockman
This case involved an employee who had been the financial accountant of a charity, but who had obtained a lower position following a reorganisation. Stockman alleged wrongdoing on the part of her employer in that the Director of Finance had treated her differently and that the restructuring process had been biased against her. Following a difficult meeting, she was interviewed by an HR Representative and she secretly recorded that meeting. The recording was not known about until it came to light in legal proceedings. The EAT has issued guidance on the covert recording of meetings by employees.

Background
Stockman was employed by a charity. She was dismissed without notice on the grounds that her relationship with senior management had irretrievably broken down. She brought various claims in the ET, including one for unfair dismissal which she won. During the ET hearing, it transpired that Stockman had secretly recorded a meeting with HR, and the ET reduced the compensatory award by 10% to reflect her conduct. Phoenix House appealed against the decision in relation to the covert recording stating that if it had known about the recording, it said it would have dismissed Stockman for gross misconduct so her compensation should be reduced to nil.

Decision
The EAT dismissed the appeal. It could not be said that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee. In

deciding whether it was just and equitable to reduce an award in the light of conduct that comes to light after a dismissal, the ET has to make its own assessment. The ET was entitled to find that the recording had not been made to entrap the employer and its assessment would stand.

Top Tips
The EAT gave some helpful guidance and commented that it would generally amount to misconduct for an employee not to tell the employer that a recording was being made. However, it was unlikely to constitute gross misconduct. If an employer wishes to treat secret recordings as gross misconduct, this will need to be clearly stated in its disciplinary procedure. They further advised that the factors to be considered when assessing whether a covert recording breaches the trust and confidence include:

- *The purpose of the recording:* Is this a manipulative employee trying to entrap the employer or a confused and vulnerable employee who wants to keep a record and guard against misrepresentation?
- *The blameworthiness of the employee:* Is this an employee who has been specifically told that a recording must not be made and then lied about it, or an inexperienced or distressed employee who has scarcely thought about what he or she is doing?
- *What has been recorded:* Is it a meeting where a record would normally be kept and shared or one where highly confidential or personal information relating to the employer or another employee is discussed?

HR GOOD PRACTICE

Confidentiality and the use of settlement agreements in discrimination cases

Following the #metoo campaign, there is change afoot in the use of Non-Disclosure Agreements (NDAs) or 'gagging' clauses (termed in Settlement Agreements as 'confidentiality clauses' when there is a discrimination angle to the ending of the employment relationship - there are not suggested changes to settlement agreements when there is no discrimination complaint.

The EHRC has issued new guidance on 'The use of confidentiality agreements in discrimination cases'. This guidance is likely to result in changes to settlement agreements and established practice in this area. The courts are not obliged to take the guidance into account at tribunal proceedings, but it can be used as evidence in legal proceedings where it is relevant.

While some of the recommendations are to be expected, for example, ensuring no pressure to

enter the agreement, other aspects of the guidance are quite ride-ranging. For example, if a Company agrees an employee exit by way of a settlement agreement, would there still be an investigation into the allegation of discrimination; the guidance suggests there should be to avoid future discrimination complaints. Another recommendation is retaining a central record of confidentiality arrangements for all discrimination complaints. Below are the key recommendations.

The recommendations: settlement agreements

1. The EHRC is asking employers to move away from a blanket position and to take a more tailored approach. The guidance provides some examples of cases where confidentiality agreements will be legitimate, including where the worker asks for a confidentiality agreement or where there are legitimate business interests.

2. The guidance recognises that employers can legitimately seek to stop a worker discussing or using confidential information outside of work. Including a definition of what the Company considers to be confidential information is helpful and making it clear in the wording what the employee can and cannot do.

3. The settlement agreement should not stop them from speaking out about any form of discrimination. The guidance specifies that confidentiality wording should allow the worker to have discussions with a list of appropriate people and organisations.

4. When obligations are imposed on the employee that these are also imposed on the employer.

5. Company's should pay for the costs of employee's legal advice even where an employee refuses to accept the settlement. The guidance explains 'A worker may not decide whether to enter into an agreement until they have received independent advice. Therefore, the employer should pay the worker's costs even if, having received the advice, the worker ultimately finds the terms unacceptable and reasonably decides not to sign the agreement.' This does not reflect standard practice, with most employers expressly confirming that no fee is payable unless the agreement is entered into.

6. Employers should consider investigating allegations of discrimination even where a settlement agreement is signed ie; the signing of the settlement agreement should not be seen as the end of the matter and 'where it is possible and reasonable to do so' it should investigate and take reasonable steps to prevent discrimination occurring again in the future.

7. Company's should keep a central record of confidentiality agreements in settlement agreements as a method to allow monitoring for any systemic discrimination issues in the company. The central record could include:

- When confidentiality agreements have been used
- What type of claim they were used for
- Who any allegation of discrimination were made against
- What type of confidentiality agreement was used
- Why they were used.

8. The guidance also refers to the use of confidentiality clauses in contracts of employment where they are designed to prevent workers discussing discrimination that occurs in the future.

Overall the guidance takes the approach that the use of NDAs when resolving disputes should be the exception rather than the norm, with employees being given both time and money to consider whether they are willing to agree.