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July 2018

AHUA

Perspectives

Legal updates for the world of higher education

Dear Colleague

Our mid-summer briefing includes perspectives from our national employment, pensions and immigration group, including insights and updates on a range of key issues for the higher education sector: the post-Brexit settlement scheme for EU residents, senior staff pay, industrial action, short-term teaching contracts and the top five employment cases for the first half of 2018.

Those higher education institutions which faced industrial action earlier in the year are now receiving complaints and, in some cases threats of legal proceedings, from those students where scheduled academic activities had to be changed in some way. There have also been threats by certain law firms to seek a Group Litigation Order from the courts in order to treat cases together as a class action. Our general recommendation is for institutions to treat each student's complaint on its individual facts and merits under its internal complaints procedures. This would include considering the measures put in place to communicate as much information as possible about the industrial action to students, the steps taken by institutions to minimise any disruption to teaching and assessments and the range of learning opportunities and facilities on campus and online.

Students should be reminded that they can take their complaint to the Office of the Independent Adjudicator if they remain dissatisfied once the institution's internal complaints procedures have been exhausted, although this additional external procedure is not a bar in itself to civil proceedings in the county court. If you require further advice or assistance on the legal issues, please do not hesitate to be in touch with me in the first instance.

Concerns over mental health issues in the higher education sector have escalated and the Government has announced that it is supporting a range of measures to enhance the support available for students. These measures include a new "University Mental Health Charter" which is being developed by the charity Student Minds and a range of other charities and higher education bodies. Although, technically, we do not think that higher education institutions are in "loco parentis" as a general principle, there are important issues of public interest about mental health in a higher education environment, including the support mechanisms which are in place from various sources when young people move away from home for the first time. The Government is exploring whether an "opt-in" could be considered so that institutions have permission to share information on a student's mental health with their parents or another trusted person. For further general information about the new data protection regime, please see our June edition of Perspectives or our GDPR hub.

At the time of writing, further news is awaited about the Government's review of Post-18 education and funding. However, on 2 July, the Government announced that it would be freezing the maximum tuition fee which a higher education institution will be able to charge to undergraduates starting courses in England in the 2019/20 academic year. The Government also confirmed that students from other EU member states starting courses in England that year will continue to be eligible for 'home' fee status.

We hope that you will have an enjoyable break over the summer and return refreshed to tackle the opportunities and challenges for this brave new world of higher education.

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In this issue:

"EU citizens and their family members who are residing in the UK will need to make an application under the Scheme in order to continue to reside lawfully in the UK."

The post-Brexit settlement scheme for EU residents

Overview

On 21 June, the Government published long-awaited details of the post-Brexit Settlement Scheme for EU nationals in the UK. Details, including draft Immigration Rules, are set out in the Government's EU Settlement Scheme Statement of Intent. This document essentially fleshes out the terms of the draft Withdrawal Agreement published in March 2018 and the content of the Government's Technical Paper published in November 2017.

What are the key points from the Scheme?

EU citizens and their family members who are residing in the UK will need to make an application under the Scheme in order to continue to reside lawfully in the UK. The key points are as follows:

- EU citizens and their family members (spouse, civil partner, durable partner, dependent child or grandchild, and dependent parent or grandparent) who by 31 December 2020 have been continuously resident in the UK for five years will be eligible to apply for settled status, enabling them to stay indefinitely.
- EU citizens and the family members who arrive in the UK by 31 December 2020, but who will not have been continuously resident for five years, will be eligible for pre-settled status, enabling them to remain in the UK until they reach the five year threshold. They can then apply for settled status where they have remained continuously resident in the UK.
- Individuals with settled or pre-settled status will have access to healthcare, pension, public services and social security entitlements essentially on the same basis as is the case now.
- Close family members living overseas will be able to join an EU citizen resident in the UK after 31 December 2020, provided the relationship existed on 31 December 2020 and continues to exist when the person wishes to come to the UK.

In general, a person will have been continuously resident if they have not been absent from the UK for more than six months in total in any 12 month period. There is no restriction on the number of absences permitted, provided that the total period of absence does not exceed six months in any 12 month period.

How will the application process work?

Concerns have been expressed about the documentation that EU citizens may be required to provide in support of applications, particularly following the Windrush scandal, where people who had been resident in the UK for several decades had in some cases been unable to evidence their status as British nationals and faced deportation.

The Scheme has been designed to be streamlined and user friendly with fast-track processing, using an online application portal and optional mobile phone apps (a Home Office first). Reassurance has also been given that the default position will be to grant applications, rather than to look for reasons to refuse. It is likely, however, that between three and four million applications will need to be processed and Home Secretary Sajid Javid has acknowledged that the task is of a scale not previously undertaken by the Home Office. So it remains to be seen how well-oiled the Scheme will be in practice.

There will be a phased roll-out from late 2018 with the Scheme open fully by 30 March 2019. Applicants will be required to meet three core criteria:

- **Identity** – proof of identity, usually through a passport or national identity card.
- **Eligibility** – establishing residence in the UK and, if relevant, family relationships. Cross departmental Government checks will be conducted using data held by HMRC and DWP, meaning that the additional information that will need to be provided by many applicants will be limited (e.g., to fill in gaps where there is no Government data). Appendix A of the Statement of Intent lists examples of the sorts of additional documents which may be required.

- **Suitability** – a security and criminal record check.

Individuals who have obtained permanent residence documents will be able to 'swap' these documents for settled status documents in a streamlined process with no charge, subject only to a criminality check and confirmation that their permanent residence status has not lapsed.

Applications must be lodged by 30 June 2021 and the cost will be £65 per person, or £32.50 for children under the age of 16.

What should EU citizens and their family members do now?

The further details published by the Government will provide a degree of reassurance and comfort for EU nationals. They are also more comprehensive than the information that has been made available to British citizens residing in EU countries.

However, uncertainty remains about the outcome of the Brexit negotiations and the UK and the EU are operating on the basis that 'nothing is agreed until everything is agreed'. EU nationals should therefore consider the following:

- **Documents and absences** – EU nationals should start to collate documents evidencing their continuous residence in the UK and, where appropriate, family relationships or dependency. It would also be prudent for EU nationals to retain a record of their absences from the UK and, where practicable, ensure they do not break continuous residence by reason of their absences.
- **Permanent residence** – applying for permanent residence documents may be sensible, notwithstanding that permanent resident status will not be recognised by the UK post-Brexit. Individuals who hold permanent residence documents will benefit from a streamlined application for settled status. Further, under current rules EU nationals must hold permanent residence documents in order to be eligible to apply for British citizenship. So EU nationals who wish to apply for British citizenship now, or who want to be in a position to do so in future with minimal delay (e.g., depending on the progress of the Brexit negotiations), should consider applying for permanent residence documents now.
- **British citizenship** – obtaining British citizenship may be the best way for an EU national to secure their right to live and work in the UK on a long-term basis with minimal restrictions. But very careful consideration should be given to the full implications, including the impact on home nationality status (not all EU countries permit dual nationality), the potential loss of EU free movement rights, access to social entitlements in the 'home' country, and the impact on family members.

We have worked with a large number of Universities in providing advice and support to EU nationals including running application workshops, briefing sessions, advice surgeries, and assisting in the preparation of applications.

What else is on the horizon?

Brexit is likely to precipitate the implementation of a new immigration system after the end of the transition period in December 2020, potentially impacting on the rules that apply to non-EEA nationals. The Migration Advisory Committee, which advises the Government on immigration matters, has been commissioned to advise on a future immigration system and is due to report in September 2018.

The ability of the UK to control EU migration post-Brexit provides an opportunity for the UK to create a new and more flexible immigration system. This may enable Universities to more easily recruit skilled and highly skilled staff from the global talent pool. The Higher Education sector has been very effective in recent years in lobbying the Government on immigration matters, resulting in relatively favourable provisions in the Immigration Rules. A recent example is changes to the Tier 1 (Exceptional Talent) category, providing a relatively straightforward alternative to the Tier 2 (General) category for recruiting senior academic staff.

Undoubtedly the sector will need to continue to make its voice heard over the next couple of years, in order to help shape an immigration system which enables Universities to recruit and retain the best staff and students from all over the world and to continue to internationalise their research and collaboration.

Any questions?

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"Whether, of course, it is practical to apply different methods of deduction to different groups of staff is for each HEI to determine."

Industrial action

A changing landscape

Overview

Surveying the industrial relations landscape in higher education over the last few months feels in some ways like a return to the 1970s. The power which trade unions exercised during that era was largely dismantled during the Thatcher years. But whilst 2018 is of course a very different time and place, the last few months have certainly breathed new life into the trade unions in higher education, UCU in particular. This article takes a look at some of the key lessons to be learned from what has been a fairly turbulent period for industrial relations.

Pay

It seems clear that the dispute regarding USS is by no means resolved; it is simply parked for the time being. The Joint Expert Panel met on 31 May, and a report is to be prepared for UCU and UUK in September. Realistically, it seems only a matter of time before further industrial action emerges on this issue. Even if it doesn't, UCU looks poised to initiate strike action timed for the start of the new academic year in September in connection with the latest national pay negotiations, unless agreement can be reached under the new JNCHES dispute resolution process. UNISON may do likewise.

Following the Supreme Court decision in *Hartley v King Edward VI College*, it is now clear what pay HEIs can deduct for any day of strike action. For anyone employed on what can fairly be described as an "annual contract", i.e. one which persists throughout the year, the appropriate deduction is 1/365 of annual salary. It was a crucial factor in the Hartley case that the claimants regularly worked during the evenings, at weekends and during holidays, as it was on that basis that the Court rejected the argument that a deduction should be made using 1/260 of salary to reflect normal working days. On that basis, it is broadly accepted that unless there is something specific to the contrary in the contract, as far as academic staff on standard contracts are concerned 1/365 is the appropriate deduction.

What should not be forgotten is that employees engaged on term-time only contracts or hourly paid arrangements could probably have deductions made on a different basis, as might also be the case with any professional and support staff who clearly do not work beyond their fixed hours. Whether, of course, it is practical to apply different methods of deduction to different groups of staff is for each HEI to determine.

There are still some pay issues which remain unclear, however. First, HEIs continue to take different approaches in respect of deductions for action short of a strike. Whatever the approach, the key issue is to be clear to employees beforehand what deductions will be made and on what basis. Secondly, many HEIs have received communications from UCU in relation to past pay deductions for strike action, though we are not aware of any claims actually being brought. No HEI should consider conceding or settling possible claims until UCU is able to provide appropriate particulars.

As a footnote, during the recent industrial action some local union reps asked for pay deductions to be spread out over a few months rather than all in one go. If a university is minded to do so, there is no legal reason not to, though as a practical matter this ought not to be longer than, say, 3 months in total.

Picketing

Picketing raises some potentially complex practical and legal issues, not least because a picket can foster an environment in which those involved lose sight of what amounts to lawful action. There was certainly a fair amount of emotion generated on the picket lines during the recent round of industrial action called by UCU.

The main practical difficulty for employers, including HEIs, is that action to enforce compliance with the law on picketing is far from straightforward, so that it can feel like reminding unions to make sure their members stay on the right side of the line lacks conviction. That said, all HEIs should make sure they are familiar with the Government's Code of Practice on Picketing It's a short, readable and very useful guide as to what HEIs can legitimately expect when unions organise and take part in a picket.

The very practical requirements highlighted by the Code in order for a picket to be lawful include the following:

The union must appoint a "picket supervisor".

- The picket supervisor must be present on the picket line or readily contactable and able to attend at short notice.
- The union or picket supervisor must take reasonable steps to inform the police of the supervisor's name and contact details and the location of the picket.
- The union must provide the picket supervisor with a letter stating that the picketing is approved by the union.
- The picket supervisor must wear something that readily identifies them as such.
- Most importantly of all, picketing is only lawful for two purposes – first, peaceably obtaining and communicating information; and secondly, peaceably persuading a person to work or not to work.

As and when the next industrial action gets underway, reminding trade unions of these requirements is no bad idea. The bigger picture however is that stepping back from the heat of the moment, an employer's interests will usually best be served by taking as low key approach as possible to infringements of these requirements, unless things get clearly out of hand.

Sympathy action

The last round of UCU industrial action also saw other trade unions, and indeed individual employees who are not UCU members, encouraging or taking industrial action in support of UCU. What is the position of employees involved in sympathy action?

In short the Trade Union and Labour Relations (Consolidation) Act 1992 provides:-

- Industrial action will be "unofficial" if it is not authorised or endorsed by a trade union – an employee dismissed in these circumstances would not be able to complain of unfair dismissal.
- Industrial action called by a trade union will only be "protected" if the union not only endorses it but also follows the detailed ballot and notice requirement sets out in the Act – as is well known, if it does employees are protected from dismissal for 12 weeks or possibly longer.
- There is an in-between category of industrial action which is official, because endorsed by the union, but not protected because of the absence of a ballot or notice, in which case employees will only be deprived of the right to claim unfair dismissal if all the employees taking part in the action are dismissed, which is rarely a practical option.

Pushing the boundaries

The final development to highlight is a current case which seeks to push the boundaries of trade union involvement in the sector and in which we are advising the University of London. The IWGB trade union has sought recognition by the University in respect of certain categories of employees – security staff, post room workers and so on. What is unusual about the case is that none of the employees are employed by the University, having been outsourced some years ago to a third party contractor.

The Union alleges, wrongly, that the University nevertheless determines the employees' terms and conditions of employment. It thus describes the University as the "de facto employer". The Central Arbitration Committee rejected the application on the basis that the Act makes clear that recognition can only be sought from the employer who actually employs the employees in the relevant bargaining unit.

The Union is seeking a judicial review of the CAC's decision. It is clear that compulsory recognition of a trade union in such circumstances would drive a coach and horses through outsourcing arrangements generally and therefore this is certainly a case to keep an eye on. One practical issue it raises, which the University is very much on top of, is that a fresh look at, and institutional conversation about, outsourcing may for many institutions be a helpful contribution towards positive management of industrial relations more broadly.

Any questions?

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"Employers need to engage actively with the requirements of the unfair dismissal legislation before allowing a fixed term contract to expire."

Short-term teaching contracts

Four things to think about

Overview

Fixed-term or variable hours contracts are commonly used in the HE sector for teaching staff, particularly in the more junior roles. While most of these individuals are typically treated as employees in the education sector, they are subject to a legal regime which has some subtle differences from that applying to permanent employees.

Recent case law has shown that this regime is still developing, particularly because the additional statutory framework is relatively new. In this article we discuss the issues raised by four recent cases involving atypical workers of various kinds which are relevant to education employers.

Fixed-term employees and unfair dismissal

It has always been the case that the expiry of a fixed-term contract is treated a dismissal for unfair dismissal purposes. But it was not until the beginning of this year that the Employment Appeal Tribunal had a chance to look at the relationship between this long-standing protection against unfair dismissal and the equal treatment requirements of the Fixed-Term Employees Regulations.

It had been widely assumed that ensuring a fixed-term employee was treated no less favourably than comparable permanent employees would be sufficient to see off any unfair dismissal claim resulting from the non-renewal of the fixed term. However the EAT's decision *Royal Surrey County NHS Foundation Trust v Drzymala* shows that this isn't necessarily so.

The NHS Trust had promised to explore alternative roles before the fixed-term contract expired, but hadn't followed this up. In addition it had denied the claimant a right of appeal against the decision not to renew, though this was remedied after she complained. In this particular case these factors led to a finding of unfair dismissal, even though there had been no breach of the Fixed-Term Employees Regulations.

It doesn't necessarily follow that the decision would be the same if the same factors arose in another context. But this case is a reminder that employers need to engage actively with the requirements of the unfair dismissal legislation before allowing a fixed term contract to expire. In some cases this will mean adopting (and sticking to) a formal process for evaluating alternative employment opportunities, and giving a right of appeal against the decision not to renew the contract.

Zero hours contracts and the Part-time Workers Regulations

For many temporary teaching posts the requirements of the Part-time Workers Regulations also need to be considered. Like the Fixed-Term Employees Regulations, these impose a very specific equal treatment regime. But in order to get a claim off the ground, part-time workers need to establish both that they are employed under the "same type of contract" as comparable full time workers and that they are engaged in "broadly similar" work.

We already know from earlier case law that the broadly similar work requirement is interpreted fairly widely. We now have a more recent decision from the education sector which approaches the interpretation of the "same type of contract" in a similar way.

Roddis v Sheffield Hallam University makes the simple point that an associate lecturer engaged on a zero hours contract was engaged on the same kind of contract as a full time lecturer engaged on a permanent contract, because they were both engaged under a contract of employment. That was sufficient to meet this particular test, though the Employment Appeal Tribunal was not called upon to consider whether they were engaged on broadly similar work.

The position would have been different if the University had been able to establish that the claimant was not an employee, though that would not necessarily have defeated the claim. The broad lesson however to be derived from this case is that employers need to be aware of the risk that contracts, which may look completely different from their perspective, may be lumped together by the courts when deciding whether the Part-time Workers Regulations are engaged.

Getting holiday pay calculations right for part-time workers

Given the increased publicity given to holiday pay issues by recent high profile litigation, it is not surprising that the correct approach to calculation of statutory holiday pay for term-time only workers has also come under scrutiny.

In *Brazel v The Harpur Trust* a part-time music teacher successfully challenged the calculation of her holiday pay. Her employers had calculated it by using a fixed percentage of her annualised hours, rather than basing it on the average hours worked each month. The problem could have been avoided, or at least mitigated, by making sure that the contract she was engaged under accurately reflected the employer's obligations under the Working Time Regulations, when read together with the Part-time Workers Regulations. Admittedly, that is easier said than done, given how much our understanding of employers' obligations in this area has changed in recent years.

Any questions?

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Agency Workers Regulations: how to compare terms with permanent workers

It is less usual to engage temporary teaching staff on an agency basis, but employers in all sectors should be aware of an important Employment Appeal Tribunal decision on the Agency Workers Regulations which was decided earlier this year: *Kocur v Angard Staffing Solutions Ltd.*

In this decision, the EAT ruled that a term by term approach was required when evaluating whether an agency worker who had passed the 12 week qualifying threshold had the benefit of the same basic employment and working conditions as workers engaged directly by the hirer.

It followed that there had been a breach of the Regulations where the agency worker was only entitled to 28 days' leave and 30 minutes paid rest breaks, but the hirer's employees were entitled to 30.5 days leave and one hour paid rest breaks. These shortfalls in entitlement could not be compensated by the payment of an enhanced hourly rate.

Primary liability for breach of the Regulations normally rests on the employment agency rather than the hirer. However any additional costs imposed on agencies by this reading of the Agency Workers Regulations are likely be passed on to their customers by way of higher agency fees.

"...all HEIs should ensure that they have robust, justifiable methods for determining senior pay."

Senior staff in the HE sector

Pay and severance terms

Overview

The media often raises the issue of pay and severance pay for the head of an institution. This issue has acquired a higher profile recently in the light of the pay to certain Vice Chancellors coupled with the requirement to publish gender pay gap data. In June both the CUC Senior Staff Remuneration Code and the OfS accounts direction were published. Whilst some of the requirements in the Code and accounts direction are consistent with previous requirements, there are some new provisions and we have highlighted some requirements that we consider are particularly noteworthy.

Pay

The CUC Code sets out in detail the considerations that should apply when determining remuneration including requirements about:

- **A fair, appropriate and justifiable** level of remuneration which can include performance related pay.
- Procedural fairness in determining pay, including a requirement that the HOI must not be a member of the Remuneration Committee, which must be chaired by a senior independent governor who is not the Chair of the Board.
- Transparency including a statement that **"aggregate senior post holder remuneration would normally be expected to increase no faster than the average of all HEI staff".** The method of setting remuneration for senior post holders must be transparent and justifiable. Pay multiples comparing the pay of the HOI to the median earnings of all the HEI's staff must be published. The CUC Code specifically states that over 80% of HEIs currently sit in the range 4.5 to 8.5 and that HEIs that wish to position themselves outside this range will need to be prepared to justify to stakeholders and the regulator why this is desirable. This requirement is strengthened by the OfS accounts direction.

The OfS accounts direction includes provisions on:

- The publishing of the number of staff paid over £100,000 broken down into bands of £5,000 (rather than £10,000 as was previously the case)
- The publishing of the total remuneration of the HOI and a justification for the package.

Severance pay

The CUC Code has an Appendix which sets out guidance on severance payments. This broadly mirrors previous guidance but includes:

- A reference to the government's consultation on reforms to public sector exit payments.
- The need to ensure that consideration is given to **charitable obligations** and that payments are fair and equitable as well as reasonable and justifiable, which are probably similar requirements.
- When there is **poor performance**, severance should be proportionate and there should be no perception that poor performance is being rewarded.
- **Confidentiality clauses in settlement agreements on termination of employment should be the exception** rather than the norm. Whilst this provision is one that has existed for a number of years it needs to be considered in the light of the publicity around the confidentiality provisions in the private sector which have been portrayed as gagging clauses in respect of alleged sexual harassment. Further, the Solicitors Regulation Authority has recently issued guidance to solicitors on their professional obligations in this respect, which points out that solicitors duties extend beyond their duties to their individual clients and confidentiality clauses should be justifiable.

The OfS accounts direction includes a requirement to follow the CUC Guidance on Severance Payments and to disclose severance payments.

Conclusion

The CUC Code has met some criticism and Labour has described the accounts direction as “watered down”. However, the requirement to publish pay multiples combined with the change society is experiencing is likely to mean that pay and severance payments will be more carefully scrutinised and will need to be justifiable.

Therefore all HEIs should ensure that they have robust, justifiable methods for determining senior pay coupled with proper procedures for the determination of severance pay. Any HEI whose HOI is paid over 8.5 times the pay of other staff should review if that will be justifiable to the regulator.

Any questions?

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Top five employment cases for the first half of 2018

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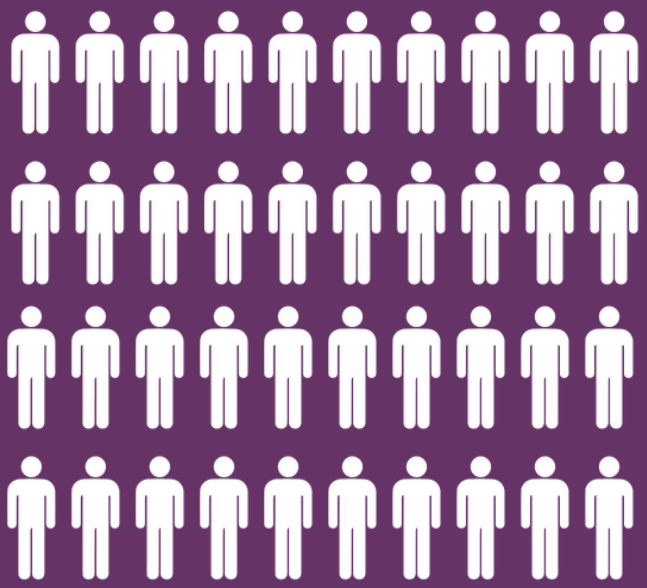
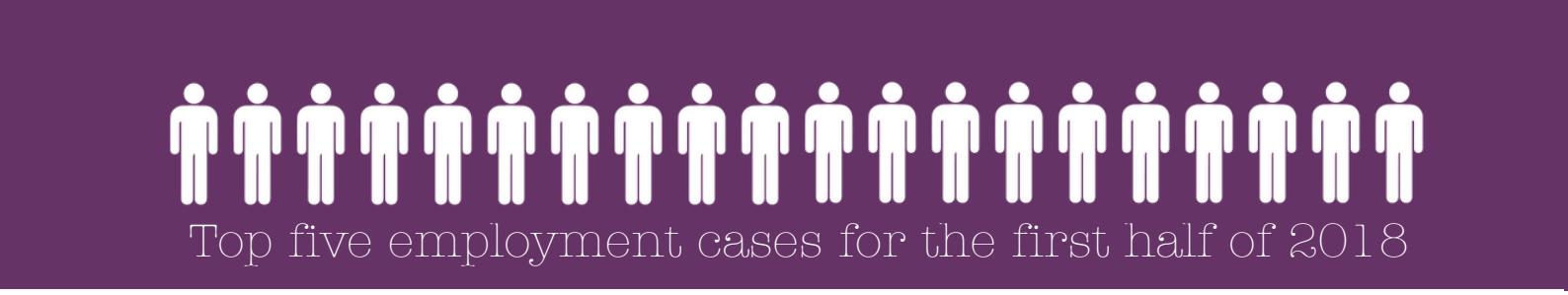
Over the past six months we have had three significant decisions from the Supreme Court - on unfair dismissal, employment status and the timing of written notices of dismissal. We have also heard from the Court of Appeal about the legal principles governing the variation of a contract of employment and the treatment of disabled employees.

See below for details on;

- Head teacher fairly dismissed for failing to disclose relationship
- No implied term that notice period starts to run at point of home delivery
- No variation of contract by continuing to work after pay freeze
- Employer liable for discrimination even though unaware disability had impaired judgment
- “Self-employed” plumber establishes worker status





Head teacher fairly dismissed for failing to disclose relationship

The Supreme Court has ruled that it was reasonable for a school disciplinary panel to dismiss a head teacher because she had failed to disclose her friendship with a man convicted of making indecent images of children. It therefore dismissed the claimant's appeal against the majority decision of the Court of Appeal, which had upheld the employment tribunal's decision that the dismissal had been fair.

Like many unfair dismissal cases, this case focused very much on the employer's decision-making process. For that reason unfair dismissal cases do not normally go all the way to the Supreme Court, since technical legal points are not normally involved. However this case is of wider significance because it emphasises that employers are entitled to take a strict view of a senior employee's obligation to disclose any personal relationship that may have an impact on safeguarding issues.

Reilly v Sandwell MBC Supreme Court March 2018

http://www.hrlawlive.co.uk/2018/03/head-teacher-fairly-dismissed-for-failing-to-disclose-relationship-with-sex-offender.html

No implied term that notice period starts to run at point of home delivery

We now have a decision from the UK's highest court about when exactly written notice given to end a contract of employment expires. It has said that there is an implied term that the notice period does not start to run until the employee has a reasonable opportunity to read the notice. That is assuming there is no express provision in the contract stating that the notice period starts at an earlier point – for example when the notice is delivered to the employee's home address.

HE institutions will need to update their management guidance in the light of this decision to make sure that managers know the legal rules that apply when sending written notices in the post. They should emphasise the need to hand the letter to the employee personally when complete certainty is required over the date the contract is brought to an end. In this particular case it had been important to the employer to end the contract before the claimant's 50th birthday to avoid liability for additional pension entitlements. However it had failed to achieve this, due to the fact that the notice was served very late in the day and the employee happened to be away on holiday when the letter arrived at her home.

In many commercial agreements it is common practice to include a contractual mechanism for serving notices. There provisions are less common in the HE sector, but may be worth considering in the light of this decision.

Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood Supreme Court April 2018

http://www.hrlawlive.co.uk/2018/04/notice-period-didnt-start-to-run-until-termination-letter-read-by-employee.html

No variation of contract by continuing to work after pay freeze

The Court of Appeal has ruled that a group of employees who continued to work following their employer's imposition of a two year freeze on incremental progression did not thereby agree to a variation of contract. This was despite the absence of formal protest by them or the unions representing them.

This decision reinforces the principle that if express agreement to a variation has not been obtained, the only sure way to implement a variation which is unfavourable to an employee is to dismiss and offer re-engagement on the proposed new terms and conditions. The Court of Appeal acknowledged that this route may seem unnecessarily confrontational, and did not necessarily wish to discourage employers from adopting a more consensual approach. However, this case illustrates that such an approach is risky if making the variation stick is absolutely crucial to the employer.

Abrahall v Nottingham City Council Court of Appeal April 2018

http://www.hrlawlive.co.uk/2018/05/working-on-without-protest-doesnt-necessarily-signal-agreement-to-new-terms.html

Employer liable for discrimination even though unaware disability had impaired judgment

A school has been found to be in breach of the Equality Act when dismissing an English teacher because of an error of judgement that it thought was unconnected with his disability. The teacher, who had cystic fibrosis, had shown an 18-rated film to his class of GCSE students. He argued that the stress associated with managing his condition in conjunction with a heavy workload had led to what he admitted had been a serious mistake.

The Court of Appeal has explained that as long as an employer is aware that a worker is disabled, it can be liable for discrimination even if it does not realise that there was a causal connection between the disability and the conduct which triggered the disciplinary action. However it remains open for the employer to justify its actions as a proportionate means of achieving a legitimate aim.

This decision may seem harsh on the employer. As noted above, employers are normally entitled to take safeguarding issues extremely seriously. However on the specific facts of this case, the employment tribunal was of the view that his dismissal was not proportionate. The decision may well have gone the other way, but we believe the main point for employers to note is the need to be aware of the potential psychological impact of what on its face may seem a purely physical disability.

City of York Council v Grosset Court of Appeal May 2018

http://www.hrlawlive.co.uk/2018/05/dismissal-of-teacher-for-error-of-judgement-was-discriminatory.html

"Self-employed" plumber establishes worker status

In this well-publicised case, the Supreme Court has followed all the lower appeal courts and ruled against Pimlico Plumbers. They had fought a long legal battle to establish that their plumbers were genuinely self-employed – i.e. neither employees nor workers.

Like all employment status cases, the result ultimately depended on a close analysis of the facts by the employment tribunal. However with this decision the Supreme Court appears to be endorsing a more pragmatic and less technical approach to worker status. Particularly since it was unanimous and expressed in a single judgment, it is likely to be a touchstone for cases of this kind for many years to come.

Employment status disputes are not common in the higher education sector, but all employers need to be aware of the approach the courts are now taking to worker status. Two particular lessons can be drawn from this case. Firstly, a limited right of substitution will not normally be sufficient to defeat a claim to worker status. Secondly, the degree of control that the organisation concerned exercises over the worker is likely to be particularly significant. This is not necessarily limited to how they do the work, but would extend to whether or not steps are taken to present the individual as part of the business to which they are supplying their labour.

Pimlico Plumbers v Gary Smith Supreme Court June 2018

http://www.hrlawlive.co.uk/2018/06/supreme-court-rules-in-workers-favour-in-pimlico-plumbers-case.html

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