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June 2016

All change?

June has been dominated by the European Referendum, which has thrown up what some saw as an unlikely outcome. The immediate impact on the stock market was alarming and unsettling.

The pound dipped to its lowest level in 31 years, but then reassurance from the Bank of England prevented further free-fall. One concern is the feeling of uncertainty as to what the future holds. We don't take sides on sensitive political issues and we know that our clients are as divided as the electorate. However, if we do find that the economy dips and you need employment advice you know how to get in touch.

In the meantime, employment laws remain unchanged - including the EU element - and it's unclear how much will actually change - although working time is a likely candidate.

Injury to feelings compensation for breach of WTR?

Ms Gomes won her claim for compensation for her employer's breach of the Working Time Regulations (WTR). She hadn't been provided with the necessary rest breaks. But did that also entitle her to damages for injury to feelings, usually claimed in discrimination cases?

No, said the Employment Appeal Tribunal. Injury to feelings compensation isn't available in cases like this. Where there is an element of discrimination involved in a failure to allow rest breaks then, yes, injury to feelings may become relevant. But otherwise, it doesn't apply.

Note, though, that if an employee's health had gone downhill as a consequence of their employer's WTR breach, that could be the basis of a compensation claim (damage to health, as opposed to injury to feelings).

Gomes v Higher Level Care

Who to contact?

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An unstable picture for young, pregnant women

Research by the Equality and Human Rights Commission has shown that pregnancy and maternity discrimination is affecting younger mothers more than others. Six times as many women under 25 than average reported having been dismissed after telling their employers they were pregnant.

This group of workers is said to have a lower level of awareness of their rights, and are in less stable employment situations. They lack confidence in talking to managers about their worries, and feel under pressure to resign rather than raise issues.

Caroline Waters, Deputy Chair of the Equality and Human Rights Commission is reported as saying, *"We cannot continue to allow these young women to be unfairly held back in the starting blocks of their working lives when they could have the potential to achieve greatness."*

The Commission's new digital campaign around this (called #PowertotheBump) has been designed to boost the knowledge and confidence of young expectant and new mothers. And there's a strong message for employers here, too: pregnancy and maternity discrimination is real and more common than you might think.

Dismissal for refusing to break up was discriminatory

Ms Pendleton was a teacher, married to the headteacher of another school. She had an exemplary record of service.

Her husband was convicted of making indecent images of children and voyeurism. Ms Pendleton decided that, although she didn't condone what her husband had done, she wouldn't leave him; she was a practising Anglican Christian and her marriage vows were important to her. She was eventually dismissed for having *'...chosen to maintain a relationship with [her] partner who has been convicted of making indecent images of children and voyeurism.'* This contravened the ethos of the school.

She won her unfair dismissal claim because of various failings. But the tribunal dismissed her claim for indirect religion or belief discrimination. While it found that she had a genuine belief that her marriage vow was sacrosanct, and the school had applied a provision, criterion or practice (PCP) (dismissing those who chose not to end a relationship in these circumstances), it held that no particular disadvantage had been shown. She would have been dismissed even if she hadn't held that religious belief.

Ms Pendleton appealed and won; there had been indirect discrimination, said the Employment Appeal Tribunal. The tribunal had found that Ms Pendleton had this religious belief in the sanctity of marriage. The PCP that the school applied was intrinsically liable to disadvantage a group that shared that belief, and it had subjected her to a disadvantage. Her belief in the sanctity of marriage vows placed her under an additional burden to those who might have been in the same situation but who didn't hold that belief. That was a particular disadvantage, given the 'crisis of conscience' that she faced.

Pendleton v Derbyshire County Council and another

Destruction of confidential information

An employer has successfully argued that its confidential information stored on computers and electronic devices of its ex-employee and their new employer should be destroyed.

Insurance brokerage Gallagher's former employee Mr Skritptchenko, admitted that he had taken a client list from Gallagher. His new employer, Portsoken had used the list to approach hundreds of Gallagher's clients. An inspection of electronic devices and computer systems confirmed the misuse.

Important points in the case included:

- the defendants' admission that they had taken and misused the confidential information, and they knew that what they were doing was wrong.

- the 'high degree of subterfuge' involved in the use of Gallagher's confidential information.

- a lack of confidence in the defendants. The Judge said *"...I am not satisfied that the defendants can be trusted to seek out and delete such material themselves, were they to retain it whether deliberately or inadvertently."*

- the likelihood of Gallagher being able to establish at trial that there had been a breach of confidence.

- that it would be the defendants' IT experts, and not Gallagher's, that would take delivery of the devices and computers and search for and delete the confidential information.

- although the confidential material would be removed from the defendants' devices, that information wouldn't be irretrievably lost; copies of imaging would be retained.

Arthur J. Gallagher (UK) Ltd v Skriptchenko and others

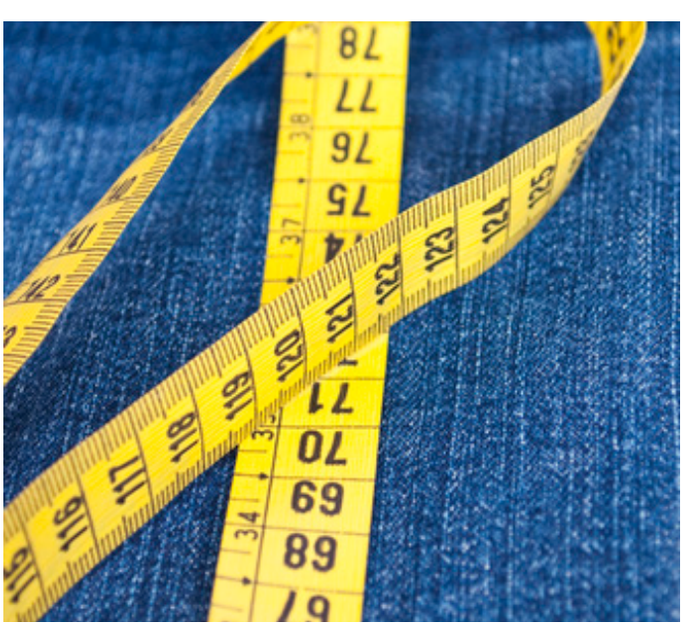
Tighter rules on illegal working

On 12 July 2016, some provisions of the Immigration Act 2016 will come into force. These include:

- A new offence of illegal working, and the power to seize illegal workers' earnings.

- Widening the offence of knowingly employing an illegal migrant to catch employers who have reasonable cause to believe that the person is an illegal worker. Punishment increases from two years to five years in prison.

If you haven't already, make sure that your checks and processes are spot-on.



What's a philosophical belief?

It is unlawful to subject someone to discrimination on the ground of their philosophical belief. But how wide can the interpretation of a philosophical belief stretch? Could it include a belief in the proper and efficient use of public money in the public sector?

Possibly. It was an issue in Mr Harron's case that reached the Employment Appeal Tribunal (EAT). The earlier tribunal had found that this belief didn't qualify for protection as a philosophical belief; it didn't meet the criteria set out in an earlier case:

1. The belief must be genuinely held.
2. It must be a belief and not an opinion or viewpoint 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.
5. It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

(The tribunal had found that numbers 3,4, and 5 weren't met.)

The EAT allowed the appeal and sent the case back to the tribunal for a fresh decision. It commented that the bar shouldn't be set too high, but that for a belief to qualify as a philosophical belief, it must at least reach a certain measure of seriousness and cogency.

This could be an example of rules which could be varied after leaving the EU. The extension of protection for religious beliefs to encompass "philosophical beliefs" does throw up some unexpected outcomes.

Harron v Chief Constable of Dorset Police

And Finally... Was that a yawn?

Let's face it, every job has its less interesting parts, whether that's form-filling, filing, or faffing with spreadsheets.

But spare a thought for one French worker who is reported to have brought a claim against his employers because his job was too boring. He says that he felt forced to resign after spending years having very little to do. Ridiculous? Not necessarily.

While having too little work is often seen as preferable to having too much, that's not to say that there aren't pressures and strains associated with a role that under-challenges a worker. Monotony, for one. And feelings of being undervalued or underutilised do little for job security, motivation, and state of mind. In some cases, there could even be health consequences. There could also be claims of demotion, sidelining, and discrimination.

Good reasons, then, to keep a close eye on what your employees are, aren't, and could be, doing.