

# Employment Law Update

## February 2017

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# Agenda

- New Legislation
- Employment Status
- Gross misconduct
- Safeguarding and employment law
- Disability Discrimination
- Supreme Court discrimination cases

# Trade Union Act

- Key provisions coming into force March 1<sup>st</sup>!
  - 50 per cent industrial action balloting threshold
  - 40 per cent 'yes' vote requirement in important public services
  - 2 weeks' notice of industrial action
  - 6 month limit on industrial action ballots (9 months with employer's agreement)
  - Union supervision of pickets

# Important Public Services

- **Transport:** Passenger railway services (including trams) – both drivers and operational staff. London buses. Air traffic control, airport security, ports,
- **Health:** Emergency hospital and ambulance services – NOT general health care provision
- **Education:** Teachers and headteachers / principals in schools and academies
- **Fire:** Firefighters and those handling emergency calls
- **Border force:** Officers of all grades

# Transition

- Balloting thresholds and mandate:
  - Will not apply 'to any ballot opened before the day on which this section comes into force'
  - A ballot is 'opened' on the first day when a voting paper is sent to any person entitled to vote in the ballot
  - That is the 'opening day of the ballot' that the union must already notify to the employer under s.226A TULR(C) Act 1992
- Two weeks' notice applies to any notice given from 1<sup>st</sup> March onwards

# Gender Pay Gap Reporting

- Introduced for the public sector as part of the 'specific' equality duty under the Equality Act
- Applies to public authorities with 250 or more employees on 31 March of each year
- Employees at maintained schools treated as employed by governing body – not local authority
- Employment has same scope as under Equality Act – contract 'personally to do work'
- First publication by 30 March 2018 – relating to pay on 31 March 2017

# What is 'Ordinary Pay'?

- **Included**

- Basic pay
- Allowances (eg location, car, retention, fire wardens)
- Pay for piecework
- Pay for leave
- Shift premium pay

- **Excluded**

- Pay for overtime
- Pay in lieu of leave
- Benefits in kind
- Payments made on termination (eg redundancy, PILON)

# What is 'Bonus Pay'?

- **Includes**

- Any money, vouchers, securities which
- Relates to profit-sharing, productivity, performance, incentive or commission

- **Does not include**

- Ordinary pay
- Pay for overtime
- Pay on termination (eg redundancy or PILON)

# Pay Period

- The period in respect of which the authority pays the employee basic pay
- If no basic pay, period that authority most frequently pays one of the elements of ordinary pay
- ‘relevant pay period’ is the pay period within which the snapshot date falls (31 March)
- A month has 30.44 days
- A year has 365.25 days

# Six steps to calculate 'hourly rate of pay'

**Step 1:** identify all ordinary and bonus pay paid to employee during relevant period

**Step 2:** exclude any ordinary pay that would normally fall under a different period

**Step 3:** where the amount includes bonus pay in respect of a period which is not the same length as the relevant pay period, divide the amount by the days in the bonus Pay period and multiply it by the length of the relevant pay period

**Step 4:** Add together the adjusted amounts under step 1

**Step 5:** Multiply the amount under step 4 by the appropriate multiplier (7 divided by number of days in relevant pay period)

**Step 6:** Divide the amount under step 5 by the number of working hours in a week  
For that employee

# Working out working hours

- ‘Normal working hours’
- Where there are no normal working hours – average over the previous 12 weeks (not counting zero weeks)
- Where that is not reasonable possible – come up with a figure that ‘fairly represents’ the average for employees in that role

# Publish: Difference in mean hourly rate of pay

$$\frac{(A-B)}{A} \times 100$$

A = mean hourly rate of all male full-pay relevant employees

B = mean hourly rate of pay of all female full-pay relevant employees

(Full-pay just means not on reduced rate because of leave (eg off-sick, maternity or other leave))

# Publish: Difference in median hourly rate of pay

$$\frac{(A-B)}{A} \times 100$$

A = median hourly rate of pay of all male full-pay relevant employees

B = median hourly rate of pay of all female full-pay relevant employees

# Publish: Difference in mean Bonus pay

$$\frac{(A-B)}{A} \times 100$$

Relevant period = 12 months leading up to snapshot date

A = the mean bonus pay paid during the relevant period to male relevant employees who were paid bonus pay during that period

B = the mean bonus pay paid during the relevant period to female relevant employees who were paid bonus pay during that period

# Publish: Difference in median Bonus pay

$$\frac{(A-B)}{A} \times 100$$

Relevant period = 12 months leading up to snapshot date

A = the median bonus pay paid during the relevant period to male relevant employees who were paid bonus pay during that period

B = the median bonus pay paid during the relevant period to female relevant employees who were paid bonus pay during that period

# Publish: Proportion of male and female employees paid bonus pay

$$\frac{A}{B} \times 100$$

A = number of male relevant employees who were paid bonus pay during the relevant period

B= the number of male relevant employees

Then again where

A = number of female relevant employees who were paid bonus pay during the relevant period

B= the number of female relevant employees

# **Publish: Proportion of male and female employees according to quartile pay bands**

1. Determine hourly rate of pay for each full pay relevant employee and then rank those employees in order from lowest to highest paid
2. Divide those employees into four sections each comprising an equal number of employees To determine the lower, lower middle, upper middle and upper quartile pay bands
3. Express the proportion of male full pay relevant employees within each quartile Pay band as a percentage of the full pay relevant employees within that band
4. Express the proportion of female full pay relevant employees within each quartile pay Band as a percentage of the full pay relevant employees within that band

# Publication

- Published on your website in a manner that is accessible to all employees and the public
- Keep online for at least three years
- Also upload information to website designated by Secretary of State

# English language requirements for public sector workers

- S.77 Immigration Act 2016 came into force 21 November 2016
- A public authority must ensure that each employee in a customer-facing role speaks fluent English
- Customer-facing role means employee is required to speak to members of the public in English, as a regular and intrinsic part of their role
- Employer must operate an 'adequate procedure' for enabling complaints to be made and considered
- Applies to employees already in post as well as those recruited post implementation date

# Early Conciliation

- Employee must have contacted Acas in respect of 'any matter' that is the subject of proceedings and obtained an early conciliation certificate
- In **Compass Group UK and Ireland Ltd v Morgan**, EAT holds that employee can rely on EC certificate in constructive dismissal claim even if that was issued before resignation
- Issue is whether it is the same 'matter' – question of fact

# Employment Status

- The key issue of 2017?
- Many who don't qualify as employees will still be 'workers' or 'in employment' under Equality Act
- **Smith v Pimlico Plumbers** just another example – personal obligation to perform work
- BEIS review of employment status did not recommend changes
- Matthew Taylor review of Modern Working Practices may be more radical

# Gross misconduct

- Gross misconduct is a fundamental breach of contract – allows employer to dismiss without notice
- **Adesokan v Sainsbury's Supermarkets** – single incident of negligence was enough to amount to gross misconduct
- Note this was a contractual claim, not unfair dismissal
- Court declines to expand damages beyond notice period

# Trade Union Activities

- Automatically unfair to dismiss for taking part in union activities ‘at an appropriate time’
- But gross misconduct not protected just because it is committed in course of union activities
- **Metrolink Ratpdev Ltd v Morris** – employee rep received photo of private page of manager’s desk diary – tried to use that in grievance case
- Held: Not automatically unfair. Employee had breached trust by retaining unlawfully obtained information

# Pendleton v Derbyshire County Council

- Teacher's husband (a headteacher) convicted of child sex offences
- She refuses to leave him – dismissed by employer for undermining trust and confidence
- Tribunal finds dismissal unfair – no potentially fair reason for dismissal
- ET rejects indirect religious belief discrimination
- EAT overturns that point – those with religious view of sanctity of marriage subject to a particular disadvantage by employer's approach

# A v B & C Governing body of school

- Headteacher has relationship with individual convicted of making indecent images of children
- Dismissed because she failed to disclose that to the school (and LADO subsequently found out)
- ET finds procedurally unfair – but dismissal would be justified, so no compensation
- Court of Appeal upholds decision (by majority)
- Employer entitled to require disclosure to ensure it is meeting its safeguarding duty

# Whistleblowing

- Whistleblowing is not making a complaint – its about disclosing information that tends to show wrongdoing
- **Eiger Securities LLP v Korshunova** – trader dismissed for refusing to share passwords – complaining that manager traded from her terminal using her identity
- Not whistleblowing in absence of clearly identified legal obligation
- Also Tribunal needed to separate disclosure from refusal to share passwords

# TUPE

- Service provision change –
  - activities cease to be done by client and are done by contractor on clients behalf
  - activities cease being done by contractor and are done by subsequent contractor on clients behalf
  - activities cease to be done by contractor and are done by client on its own behalf
- **CT Plus (Yorkshire) CIC v Stagecoach**
  - private company set up its own park and ride service
  - as a result council cancelled its subsidy to CT Plus
  - No TUPE transfer as new company not acting on council's behalf

# TUPE

- Change in service provider – activities must be ‘substantially the same’
- In **Salvation Army v Bahi** – transfer of contract to provide services for homeless people
- Transfer of many small contracts to Salvation Army led to economies of scale – two large sites rather than 10 small ones
- Other changes in hours of support services and age of those covered
- ET finds that there was a TUPE transfer – activities were ‘fundamentally’ the same
- EAT agrees – common sense rather than technical approach

# Disability

- Is Type 2 Diabetes a disability?
- **Taylor v Ladbrokes Betting and Gaming Ltd** – ET said no –because with reasonable lifestyle adjustments its effect was not serious enough
- However EAT pointed out evidence that Type 2 Diabetes is progressive
- Question was whether there was a ‘chance’ of the condition developing so that impact was serious enough
- More medical evidence needed

# Reasonable Adjustments and Pay Protection

- What does 'reasonable mean in reasonable adjustments
- Employer must take reasonable steps to remove disadvantage
- That can include a cost – but does it include pay protection?
- In **G4S Cash Solutions (UK) Ltd v Powell** employee needed alternative work – employer insisted on 10 per cent pay cut
- ET entitled to find that was a breach of the duty
- No reason in principle to exclude pay protection from scope of reasonable adjustments

# Reasonable Adjustments and Workload

- Purpose of reasonable adjustment is to remove the disadvantage
- In **The Home Office v Kuranchie** employee had dyslexia and dyspraxia
- As a result she had special equipment and a compressed week
- Claimed she should also have been given a reduced workload – employer argued they had done enough
- ET entitled to find failure to make reasonable adjustments – PCP of ‘discharge full workload’ put her at a disadvantage
- What about reasonableness?

# Taiwo v Olaigbe ,Onu v Akwiwu

- Abuse of migrant domestic workers
- Supreme Court says immigration status not the same as nationality – no direct discrimination
- Competing models of direct discrimination
  - ‘exact correspondence’ – James v Eastleigh
  - ‘sufficient connection’ – Dekker, Webb v Emo
- Immigration status as ‘relevant characteristic – Dhatt v McDonalds
- Problem might be difficulty of framing case as indirect discrimination

# Indirect Discrimination

- Application of Provision Criterion or Practice which causes 'particular disadvantage' to group sharing a protected characteristic
- Lawful if employer can show 'proportionate means of achieving a legitimate aim'
- In **XC Trains v CD** issue was flexible working options for female train driver
- Solution could not be agreed through local bargaining – blocked by male train drivers
- ET found bargaining system outdated and perpetuating gender segregation – upheld claim
- EAT send back – issue is balance, not social objectives. Employer can legitimately take employee relations into account

# Online ET Decisions

## Employment tribunal decisions

From: [Ministry of Justice, HM Courts & Tribunals Service](#), and [Employment Tribunal](#)

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**[Ms H S Chan Chi v W Wing Yip \(London\) Ltd: 2302770/2016](#)**

Employment Tribunal decision of Judge Elliott on 8 February 2017.

Decided: 8 February 2017

**[Mr I Abdulahi v Abellio London Ltd: 2302795/2016](#)**

Employment Tribunal decision of Judge Balogun on 20 January 2017.

Decided: 20 January 2017

**[Miss S Bello v \(1\) Surrey and Sussex Healthcare Trust \(2\) Ms Fiona Trimmings: 2301652/2016](#)**

Employment Tribunal decision of Judge Freer on 24 January 2017.

Decided: 24 January 2017

**[Mr G Vincent v Citizens Advice Elmbridge \(West\): 2301573/2016](#)**

Employment Tribunal decision of Judge Harrington on 29 January 2017.

Decided: 29 January 2017

**[Mr J Chawla-Premi v Jaguar Platinum Ltd: 2300681/2016](#)**

Employment Tribunal decision of Judge Siddall on 18 January 2017.

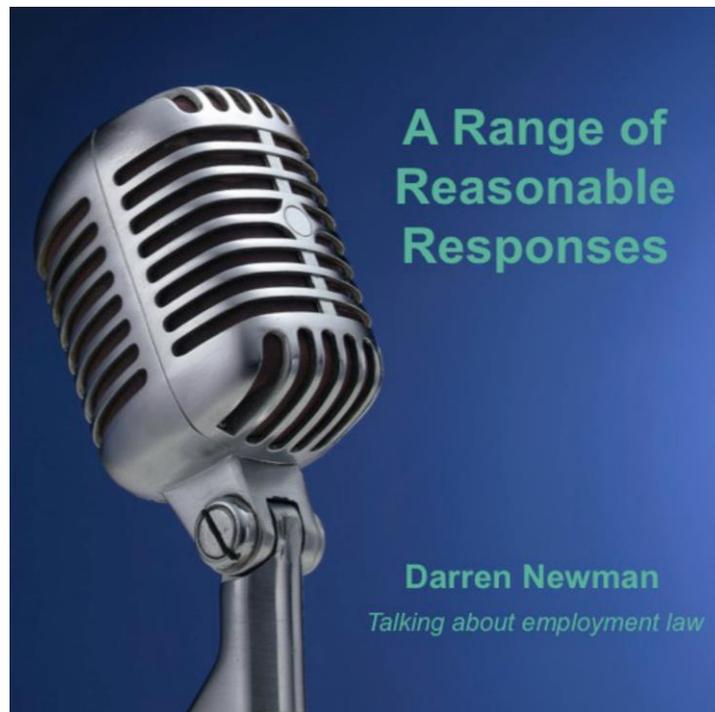
Decided: 18 January 2017

**[Mr A Oppong v London Underground Ltd: 2300369/2016](#)**

Employment Tribunal decision of Judge Martin on 23 January 2017.

Decided: 23 January 2017

Your name here?



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