Welcome to NeTWork, your Employment Law Newsletter from Taylor Walton Solicitors

Heather Cowley (Partner)
Head of Employment Law Department

This month we discuss:

- Should Time spent travelling from home to work is "working time" for peripatetic workers;
- New consultation launched by the Government on apprenticeships levy;
- Agency Workers and the right to be informed of vacancies;
- Refusal to allow employee's choice of companion at disciplinary investigation meeting breached mutual trust and confidence;
- National minimum wage campaign;

August 2015

Time spent travelling from home to work is "working time" for peripatetic workers

Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another

In August 2015, we reported that Advocate General Bot had given his opinion in a case before the European Court of Justice that for peripatetic workers (those who are not assigned to a fixed place of work), the time spent travelling from their home to their first assignment and from their last assignment back to their home constitutes "working time" for the purposes of the Working Time Directive. In the UK, the Working Time Directive is implemented by the Working Time Regulations 1998.

The reference to the ECJ came from a Spanish court, after a group of workers who drove to customers throughout Spain installing security systems complained that their employer was breaching the requirements of the Working Time Directive by not treating their first and last journeys of the day as working time.

In the Advocate General's opinion, this travelling time satisfied the three criteria which determines what amounts to working time. Workers should be regarded as working where the worker is at work, at the employer's disposal, and carrying out his duties.

With regard to the three criteria, the Advocate General commented:

1. Travel is an integral part of being a peripatetic worker and a workplace cannot therefore be reduced to the attendance of workers at customers' premises. The Advocate General stated that in his view, when such workers spend time travelling to a customer designated by their employer, they must be considered to be "at work".
2. Travel is necessary for the workers to provide their technical services to customers and travelling must therefore be regarded as forming part of the activity or duties of those workers.

3. The requirement to travel is within the context of the hierarchical relationship which links the worker to the employer. The Advocate General stated that in this case the journeys were subject to the authority of the employer in that the employer was able to change the order of customers, cancel an appointment or require workers to call on an additional customer on their journey home. The Advocate General felt that this was sufficient to demonstrate that workers are at the employer's disposal during the first and last journey of the day.

The ECJ has followed the Advocate General's opinion. In particular, the ECJ agreed that the time spent by peripatetic workers travelling between their homes and the first and last customers of the day satisfied the three criteria for determining what amounts to working time.

Businesses who engage workers on the basis that they have no fixed place of work should review their arrangements relating to travelling time in light of this recent decision to avoid claims under the Working Time Regulations 1998.

New consultation launched by the Government on apprenticeships levy

The Government announced in the budget that it would be introducing a levy on large employers to help fund 3 million new apprenticeships during the current Parliament. The levy will support all post 16 apprenticeships in England and will provide funding that each employer can use to meet their individual needs. The proposal does not affect the rest of the UK as skills training is a devolved policy area in Scotland, Wales and Northern Ireland.

On 21 August 2015, a consultation was launched on the proposal to introduce an apprenticeships levy. The consultation closes on 2 October 2015 and seeks views on various matters including which businesses should be obliged to pay the levy, how the levy should be collected and how the system should work for employers who are not obliged to pay the levy and for employers who operate throughout the UK. The consultation does not cover the levy rate which will be announced as part of the Spending Review in the Autumn.

Agency Workers and the right to be informed of vacancies

The Trustees of Swansea University Pension & Assurance Scheme and another v Williams

In this case, the Employment Appeal Tribunal (EAT) upheld an employment tribunal's decision the Agency Workers Regulations 2010 (AWR) only requires end users to inform agency workers of vacancies within their business. The EAT rejected an argument that agency workers are entitled to be afforded equal status with comparable permanent employees in being considered for any such vacancies.

The AWR implements the Temporary Workers Directive in the UK. Regulations 13 of the AWR requires that agency workers are given access to information about job vacancies at the end user from the first day of their assignment. The AWR also establishes a principle of "equal treatment" as between agency workers and permanent employees in relation to working time and pay

In this case, Mr Coles was an agency worker for the MoD. The MoD undertook a restructure and 530 employees were placed into a redeployment pool. The employees within the redeployment pool were given "stage 1" status meaning that they had priority for any vacancies at their existing grade.

The role being undertaken by Mr Coles was advertised as a vacant post. An internal applicant who had "stage 1" status applied for and was appointed to the position. Mr Coles had access to advertisement but did not apply for the role.

After Mr Coles was notified that his services were no longer needed, he brought claims against the MoD based on breach of the AWR. He argued that whilst he had been notified of the relevant vacancy, the MoD had breached the principle of equal treatment provided for in the AWR on the basis that he should have been given an opportunity to apply for the role and that permanent employees in the redeployment pool should not have been given preference over him when being considered for the role. Mr Coles contended that the AWR conferred on him not just a right to be informed of vacancies but to be considered for any such vacancies on an equal footing with permanent employees.

The employment tribunal dismissed Mr Coles claim and he appealed. The EAT dismissed Mr Coles appeal.

The EAT stated that the principle of equal treatment set out in the AWR is limited to working hours and pay and that it cannot be said that the AWR establishes a general right for agency workers to be treated no less favourably than comparable employees.

Considering the precise wording of Regulation 13, the EAT noted that the end user was required to provide agency workers with information about job vacancies in order that they had the same opportunity as permanent employees to find permanent employment with the end user. The EAT took the view that this meant that the right to be informed was not devalued by providing information to agency workers at a later date than permanent employees but that the AWR did not include any wording to suggest that agency workers were entitled to be interviewed or otherwise considered for a particular role.

This case is a useful reminder to employers of the obligations owed by end users to agency workers. The case also clarifies that agency workers should not expect to have protection against losing their role in the event of a restructure or redundancy process.

Refusal to allow employee's choice of companion at disciplinary investigation meeting breached mutual trust and confidence

Stevens v University of Birmingham

The High Court has held that a university's refusal to allow a representative of a professional defence organisation to accompany an employee at an investigation meeting concerning allegations of serious misconduct was unfair and amounted to a breach of the implied term of mutual trust and confidence.

The Claimant, a clinical academic, was the subject of allegations regarding his role as Chief Investigator to clinical trials of patients suffering with diabetes. The Claimant was invited to an investigation meeting. His employment contract entitled him to be accompanied at the meeting by a trade union representative or colleague.

The Claimant was not a member of a union and he did not have colleagues employed by the University suitable to accompany him. He had, however, from the date of the allegations been assisted via the Medical Protection Society ('MPS') by a representative, Dr Palmer. Due to an informal arrangement between the British Medical Association (the doctor's trade union) and MPS, where an individual is a member of both organisations, the MPS assist members in matters of professional conduct. The Claimant wished to be accompanied to the investigation meeting by Dr Palmer on the basis that he was equivalent

to a trade union representative and without him, he would have to attend alone which would be unfair. The university refused the Claimant's request and stated that he could only be accompanied by a work colleague or trade union representative.

The Claimant sought a declaration from the High Court that he was permitted to be accompanied at the meeting by Dr Palmer.

The court held that whilst there was no contractual right for the Claimant to be accompanied at the meeting by Dr Palmer, the university's refusal to allow Dr Palmer to attend was a breach of the implied term of mutual trust and confidence.

In reaching its decision the Court noted that the investigation meeting was a critical stage of the disciplinary proceedings and that the allegations could result in disciplinary actions which could potentially end the Claimant's career. The Court considered that in such circumstances, it was important for the Claimant to have reasonable assistance. The Court also noted that the Claimant was not a member of a trade union and that he has explained why he could not approach another member of staff to accompany him. The Court considered that the university's refusal to allow the Claimant to be accompanied by Dr Palmer meant that he was effectively being denied any choice of companion. The Court considered that given that Dr Palmer was in a similar position to a trade union representative and had been assisting the Claimant then it would be "patently unfair" to require the Claimant to attend the investigation meeting alone.

This case illustrates that employers should carefully consider any requests by an employee to be accompanied at a meeting by an individual who is neither a work colleague or trade union representatives to ensure that the process followed is fair.

National minimum wage campaign

The Government has announced that 75 employers who failed to pay their workers the national minimum wage have been named and shamed. Previously, since 29 January 2015 only 4 employers had been named under the scheme.

In addition, HMRC have published a collection of guidance, forms and case studies as part of the National Minimum Wage Campaign. The guidance provides information to employers on how to check that they are paying their employees the national minimum wage correctly. HMRC have also published new forms for employers to notify HMRC of any underpayment.

NeTWork

August 2015

New Employment Law Workshops to be announced soon.

Providing practical advice and guidance for HR Managers

Free Employment Law Workshops

In response to requests made by HR Managers who regularly attend our workshops, we are pleased to provide five new employment law workshops for
Autumn 2015 - Summer 2016

Why attend our workshops?

Firstly, our workshops are led by an experienced Employment Law Partner and, as each workshop will be conducted with a small group of no more than 12 delegates, you will have the opportunity to debate issues and raise questions with experienced employment lawyers.

Secondly, as we focus on issues and problems which cause practical difficulties for HR Managers, the workshops will help prepare you to identify and deal with employee issues that may arise in the future.

Workshop 1: Dealing with personality conflicts in the workplace
Workshop 2: TUPE Update
Workshop 3: When does workplace stress become psychiatric injury?
Workshop 4: Handling Protected Disclosures
Workshop 5: Discrimination Law Update

Our workshops will be held at our Luton and St Albans offices.

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For more information or to book your place:
Register online: www.taylorwalton.co.uk/events/
Telephone: 01582 731161 or email: events@taylorwalton.co.uk
or complete and post back the registration overleaf

Taylor Walton will again be providing free employment workshops on a variety of topics. Details will be available soon on www.taylorwalton.co.uk/events/

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If you have any questions about these or other employment issues please call Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk

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