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**Acas Launches Consultation on Flexible Working Update**

The Advisory, Conciliation and Arbitration Service (Acas) has launched a new consultation to garner views on updates to its statutory Code of Practice for handling flexible working requests.

The latest draft of the Code is intended to reflect significant shifts in ways of working, as well as anticipated changes to the law.

Susan Clews, Acas Chief Executive, said, "Rapid advances in technology alongside changes to the way many people now work since the COVID-19 pandemic have contributed to a substantial shift in flexible working globally.

"It has allowed more people to better balance their working lives and employers have also benefited from being an attractive place to work for skilled staff that value flexibility.

"Our new draft Code strengthens good practice on flexible working and addresses important upcoming changes to the law. We are keen to get views to ensure that it is clear and relevant for the modern workplace."

At present, employees who have worked for their employer for 26 weeks or more currently have the right to ask if they can work flexibly. A planned amendment to the law will make this a right that applies from the first day of employment.

Further information on the consultation is available at https://www.acas.org.uk/about-us/acas-consultations/code-of-practice-flexible-working-requests-2023

The consultation closes on 6 September 2023.

**Did European Works Councils Survive Brexit? 'Yes' Rules the Court of Appeal**

Under European law, substantial undertakings operating within the EU are required to set up European Works Councils (EWCs) to facilitate employee consultation – but did EWCs previously established by UK companies survive Brexit? In an important ruling, the Court of Appeal has answered that question with a resounding 'yes' (Easyjet PLC v Easyjet European Works Council).

EWCs are the means by which substantial European employers provide information to, and consult with, their employees on transnational issues. The obligation to set them up arose from EU directives that were transposed into English law by the Transnational Information and Consultation of Employees Regulations 1999 (TICER). TICER was, however, significantly amended on the UK's exit from the EU.

At the height of the COVID-19 pandemic, an airline which operates across Europe announced plans to reduce its staff numbers by up to 30 per cent. In that context, the airline's EWC lodged a complaint with the Central Arbitration Committee (CAC). The airline asserted that the EWC ceased to exist on 31 December 2020, the date on which the UK's departure from the EU was completed, and that the CAC thus had no jurisdiction to consider the matter. That argument, however, persuaded neither the CAC nor the Employment Appeal Tribunal (EAT).

Ruling on the airline's challenge to the EAT's ruling, the Court noted that the critical amendment to TICER on which the case hinged was poorly drafted and capable of more than one interpretation. It was undisputed that the creation of any new EWCs was precluded after Brexit day. The sole issue, therefore, was whether previously established EWCs continued to exist after that date.

In dismissing the appeal, the Court found that they did. Whilst acknowledging that its reading of the amendment would create practical difficulties – amongst other things, the airline would be obliged to establish two EWCs, one in Europe and the other in the UK – they were far from insuperable. Ruling that the CAC had jurisdiction to hear the EWC's complaint, the Court found that such an outcome did not conflict with the will of Parliament and had the advantage that the airline's UK employees would continue to be protected via the existing EWC.

Our expert lawyers have experience in handling all types of employment law issues. Contact **<<CONTACT DETAILS>>** for advice.

**Employers – Ignoring the Acas Code is Like Shooting Yourself in the Foot**

Ignoring the Acas Code on Disciplinary and Grievance Procedures is, in employment law terms, equivalent to shooting yourself in the foot. The point was made by an Employment Tribunal (ET) in the case of a payroll clerk who was afforded no procedural safeguards before his boss sacked him on the spot (Nicolas v Philips Accountants (Southgate) Ltd).

A director of the company for which the man worked accused him of throwing down some files on the floor. He denied the allegation but the director informed him that, if he was going to behave like that, he could take his things and go and find another job. The director sent him an email the following day, confirming his dismissal on grounds of alleged gross misconduct.

After the man launched ET proceedings, the director asserted that his dismissal was the culmination of various forms of misconduct – including rudeness to customers, poor timekeeping and swearing at a colleague – in which he had engaged for at least two years. The incident involving the files was, he said, the final straw.

Ruling on the matter, the ET found that the director had spoken to him once after he referred to a customer as stupid but had otherwise taken no action in respect of his past behaviour. That indicated that he did not consider his conduct unacceptable or a matter warranting dismissal. He genuinely believed that the man had thrown down the files and that this constituted an act of misconduct. There having been no investigation, however, that belief was not held on reasonable grounds.

The director was aware of the Acas Code but the ET found that he had ignored it. He did not follow it because he did not want to. The man had received no previous written warnings and he was not afforded an appeal hearing. He had no opportunity to defend himself and no reasonable employer would have dismissed him without even speaking to him about what he was alleged to have done wrong.

Given his 10 years' service with the company, his dismissal in response to the files incident was not in any event a sanction within the range of reasonable responses open to a reasonable employer. The ET upheld the man's complaints of unfair and wrongful dismissal and awarded him a total of £10,384 in compensation.

The risk of being drawn into unfair dismissal disputes can be greatly reduced by having in place and adhering to strict disciplinary and grievance procedures. Our employment lawyers can advise.

**ET Upholds Supermarket Worker's Sexual Harassment Complaint**

Those who endure the crushing experience of sexual harassment in the workplace owe it to themselves to seek legal redress. The point was made by the case of a supermarket worker who found herself immersed in a 'man's world' where sexualised comments and behaviour went unchecked (Hunter v Lidl Great Britain Ltd).

The promising teenager, who worked for a supermarket chain for about two and a half years, achieved swift promotion to shift manager. Following her resignation, however, she launched Employment Tribunal (ET) proceedings complaining of sexual harassment contrary to Section 26(3) of the Equality Act 2010.

Upholding her complaint, the ET found that she endured sexual harassment almost throughout her employment. A deputy manager of the branch where she worked was the main perpetrator, having regularly subjected her to inappropriate touching and sexually suggestive comments.

So far as she was concerned, the store was a man's world in which line managers did not consider that it was their role to police harassment. They had limited or no working knowledge of the chain's anti-harassment policy and paid no attention to her complaints, closing their eyes and ears to the culture of harassment that had been allowed to develop.

The deputy manager did not appreciate that his behaviour was offensive and he did not intend to create an intimidating and humiliating environment for her. He said that he wanted to lighten the atmosphere, that he viewed the store's staff as one big family and that workplace banter was not uncommon.

The ET found, however, that his unwanted comments and actions went beyond the realms of acceptability and reflected a lack of boundaries and a workplace culture in which, due to a lack of management training and awareness, harassing behaviour was allowed to go unchecked.

In also upholding her constructive unfair dismissal complaint, the ET found that she resigned because of the harassment, combined with her perception that she was not being paid properly and the failure of management to resolve her pay queries and complaints. There was a breach of the implied term of mutual trust and confidence on which all employment relationships are built and she was entitled to treat her contract as having come to an end.

She further succeeded in a complaint that she was not, for a period of about three months, paid equally with a male colleague doing comparable work. An unlawful deduction from her wages had, on one occasion, also been made. If not agreed, the amount of her compensation would be assessed at a further hearing.

For expert advice on harassment claims, contact **<<CONTACT DETAILS>>**.

**Hidden Disabilities and Anonymity Orders in Employment Proceedings**

People who have hidden disabilities may not wish them to become publicly known – but can such anxieties justify the making of anonymity orders in employment proceedings? The Employment Appeal Tribunal (EAT) considered that question in a guideline ruling (F v J).

The case concerned an academic who, it was not disputed, had a disability in the form of autism spectrum disorder (ASD). He lodged Employment Tribunal (ET) proceedings against his university employer in which he made multiple claims of disability discrimination, all of which were denied. At the outset of the hearing of his case, he applied for an anonymity order so that he would not be identified in the proceedings.

He said that his hidden disability was not obvious to people with whom he came into contact. He had generally chosen not to reveal its existence to employers, save in the case of the university when he became obliged to do so. He was concerned that the revelation of his disability in the public forum of an ET would destroy his future employment prospects. Although his disability would have to be discussed during the case, he argued that there was no public interest in his name being placed into the public domain. The university, however, objected to his application.

Refusing to grant him anonymity, the ET ruled that his human right to respect for his privacy, enshrined in Article 8 of the European Convention on Human Rights, was outweighed by the extremely important open justice principle. By issuing his claim, he had chosen to air his grievances in a public forum. Noting his reluctance to inform future employers of his disability, the ET did not consider that Article 8 rights encompass a right to be less than candid.

In upholding his appeal against that decision, the EAT found that the ET was wrong to assume that, by issuing his claim, he caused the subject matter of his disability to pass irrevocably into the public domain. It noted that many preliminary hearings in the ET take place in private. Even where sensitive matters have already been aired in a public hearing to some degree, it did not follow that an anonymity order would be of no utility and could not be granted.

The onus fell upon him to establish that an anonymity order was justified, yet fairness demanded that he should have been given an opportunity to present evidence in support of his application. In the absence of such evidence, it was not fair to draw an inference that he was intent on being less than candid with future employers. His application was remitted to a different ET for fresh consideration.

For expert advice on all matters regarding employment law and hidden disabilities, contact us.

**Retail Worker Sacked for Smoking at Work Succeeds in Unfair Dismissal Claim**

Even where employees have committed gross misconduct, dismissing them may be unreasonable. An Employment Tribunal (ET) made that point in the case of a store supervisor who was sacked for smoking on company premises (Williams v Wilko Ltd).

The woman worked for a national retail chain which took a zero-tolerance approach to staff use of tobacco products on any part of its property. There was a clear policy in place that categorised such use, whether inside or outside stores, as gross misconduct.

Following a disciplinary process, she was dismissed for the principal reason that she had routinely taken smoking breaks in the 'goods inwards' yard of the store where she worked. She subsequently launched ET proceedings, alleging that her dismissal was unfair.

Ruling on the matter, the ET found that her misconduct was indeed gross. The chain was entitled to take a tough approach to smoking on its premises and, even if she was unaware of the policy's full rigour, she ought to have known better. Neither the investigation nor the disciplinary process leading up to her dismissal could be characterised as unreasonable.

In nevertheless upholding her complaint, the ET noted that she had worked for the chain for over 16 years and had an otherwise unblemished disciplinary record. The evidence suggested that there was at the very least a culture of smoking in the yard to which the store's manager and assistant manager had turned a blind eye.

The ET noted that it could be said that, as a veteran employee in a supervisory role, she should have been fully aware of the strict no smoking policy and complied with it. Given the absence of any blot on her long service with the chain, however, she might reasonably have expected to be given some benefit of the doubt.

Overall, the ET concluded that her dismissal fell outside the range of reasonable responses open to a reasonable employer. The amount of her compensation would, if not agreed, be assessed at a further hearing. The ET acknowledged that she had contributed to her dismissal by her own conduct and ruled that her award should be reduced by 50 per cent.

We can advise you on all aspects of employment law, including unfair dismissal.

**Use of Discriminatory Words in the Workplace – Context Always Matters**

Employers are entitled to enforce zero-tolerance policies in respect of discriminatory remarks in the workplace. As an Employment Tribunal (ET) ruling showed, however, a thorough investigation is always required prior to a dismissal, not least because words that may be utterly unacceptable in one context may not be in another (Clark v Central Extrusions Ltd).

A sales manager with an otherwise blemish-free disciplinary record was summarily dismissed on grounds of gross misconduct on the basis that he had used the discriminatory word 'spastic' during a conversation with a colleague who was disabled by cerebral palsy.

The sales manager said that he had used the word when expressing an opinion as to how language had changed over the years in that, in the 1960s and 1970s, someone with the colleague's condition might have been referred to in that way. He asserted that he had gone on to say that he was pleased that such language was no longer used. He said that, taken in context, he had not used the word in an offensive manner.

Upholding his unfair dismissal claim, the ET noted that it was no part of its role either to determine whether he was in fact guilty of the misconduct alleged or to substitute its own view for that of the employer. Whilst accepting that he was dismissed for a potentially fair reason, the ET was not satisfied that the employer held a reasonable belief in his guilt. In the absence of a proper investigation, it had no reasonable grounds for reaching such a conclusion.

It was possible for use of otherwise discriminatory words in a historical context not to amount to misconduct, let alone gross misconduct. No steps were taken to check the veracity or accuracy of the sales manager's account with the colleague or another witness to the conversation. Other aspects of the dismissal decision betrayed hopeless confusion or a complete lack of logic and the unfairness to him was not merely procedural, but substantial and thoroughgoing. The ET directed determination of remedy issues at a further hearing, if not agreed.

We can assist you in dealing with any matters relating to unfair dismissal. Contact **<<CONTACT DETAILS>>** for expert advice.

**Working from Home – Globetrotting Workers Suffer ET Blow**

Employers are obliged reasonably to consider an employee's request for permission to work from home. However, in a ruling of critical concern to the ever-increasing cohort of globetrotting workers, an Employment Tribunal (ET) has ruled that the same rule does not apply where the 'home' concerned is outside the UK (Corke v Department for Transport).

A civil servant wished to accompany his wife to Luxembourg, where she had obtained employment. He sought permission from his employer – a government department – to work from his prospective new home in Luxembourg full time. After his request was refused, he launched ET proceedings alleging that the department had failed reasonably to consider his application.

Ruling on the matter, the ET noted that Section 80F of the Employment Rights Act 1996 confers on employees a right to request variations of their contracts so as to enable flexible working. Employers must reasonably consider such requests and may only refuse them on a number of specified grounds, including organisational difficulties, cost and a detrimental effect on the ability to meet customer demand.

The ET observed that the question of persons employed in the UK working remotely from abroad hardly ever arose prior to the onset of the COVID-19 pandemic. One obvious point was that employees who work full time at a place of business in the UK will generally have their usual abode, or residence, in this country.

It was important to note that a successful application to work full time outside the UK would result in an employee's normal place of work being in a foreign jurisdiction. In the case of a civil servant, it would effectively create a UK government workplace within the jurisdiction of another sovereign state. Any such employment would also not fall solely within the jurisdiction of UK employment law.

An employer confronted with an application to work full time from abroad would need to take legal advice on the employment laws applying in the country concerned. It might also encounter security, data protection and other risks and would be exposed to reputational damage if the employee failed to comply with local laws on tax, residency and permission to work.

The ET found that Parliament had envisaged the word 'home' to mean a home within the UK when it enacted Section 80F. The provision was never intended to apply to working outside the UK. The civil servant's application to work full time from a home outside the jurisdiction thus did not fall within the scope of Section 80F.

Contact **<<CONTACT DETAILS>>** for individual advice regarding employment law and flexible working rights.

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