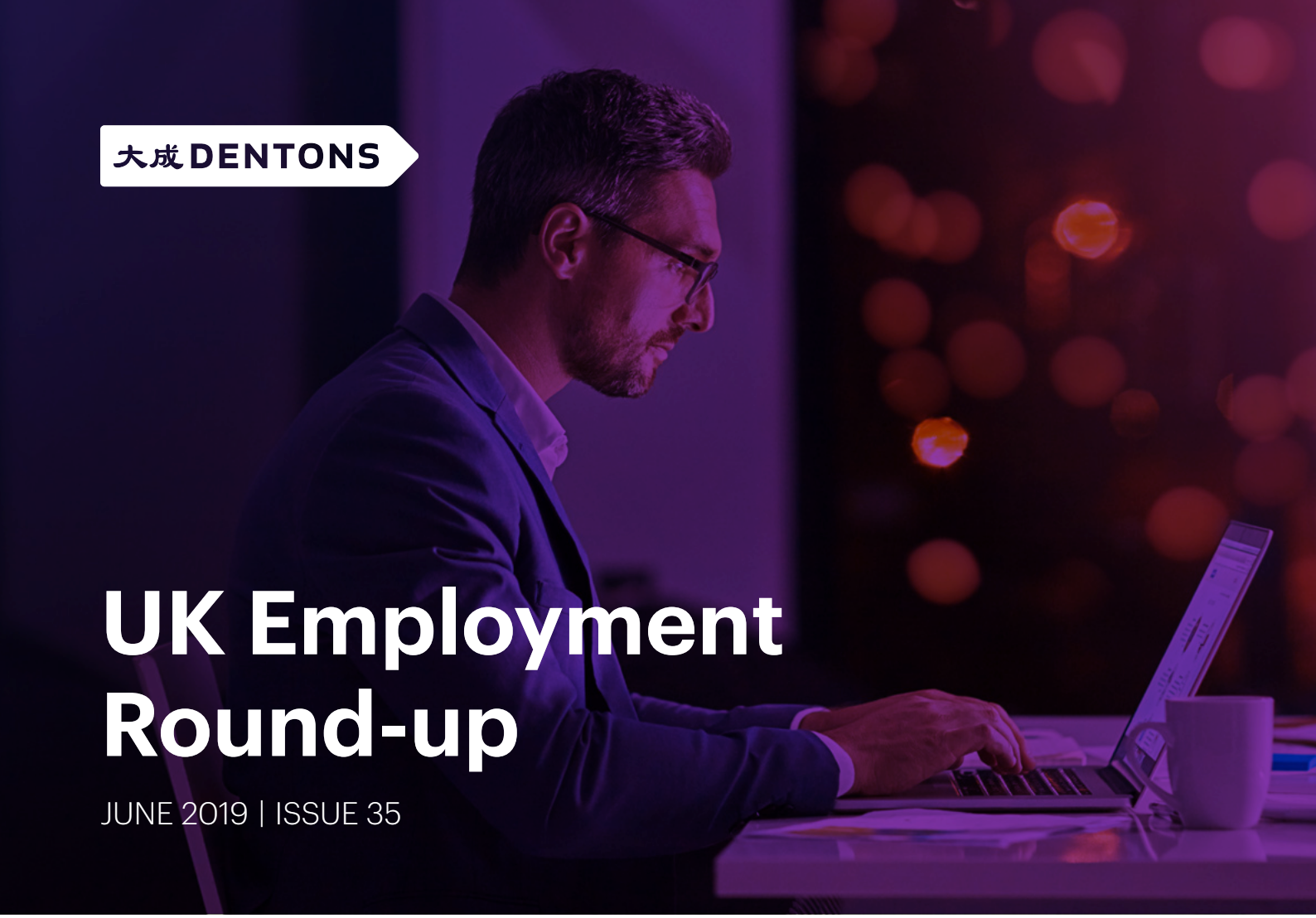

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UK Employment Round-up

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: whether an employee can be dismissed for discussing their religious beliefs at work; the latest news on pay for shared parental leave; how employers should be recording working time; and handling data subject access requests.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People, Reward and Mobilty Hub.

Employee dismissed for discussing their religious beliefs at work – can it ever be fair?

Employers are usually advised to exercise extreme caution where an employee's religion or beliefs are a factor in their own disciplinary process. However, in its judgment in the recent case of Kuteh v. Dartford and Gravesham NHS Trust the Court of Appeal has shown that it is possible to fairly dismiss an employee for inappropriately proselytising in the work place.

Background

Employers are usually advised to exercise extreme caution where an employee's religion or beliefs are a factor in their own disciplinary process. Article 9 of the European Convention on Human Rights (ECHR) provides everyone the right to freedom of thought, conscience and religion (with this right including the freedom to manifest that religion or belief, in worship, teaching, practice and observance), while religion or belief is a protected characteristic under the Equality Act 2010. However, in its judgment in the recent case of Kuteh v. Dartford and Gravesham NHS Trust the Court of Appeal has shown that it is possible to fairly dismiss an employee for inappropriately proselytising in the work place.

Facts of the case

Ms Kuteh was a Christian nurse whose role involved assessing patients due to undergo surgery, and the checklist she needed to follow required her to ask a simple question regarding her patients' religious beliefs.

Various patients had complained that Ms Kuteh had started unwanted religious conversations with them during their pre-op assessment. Following a string of complaints, the matron raised the issue with Ms Kuteh and was given assurance that she would not discuss religion with her patients again unless invited to.

However, soon after this initial warning further incidents were reported. One patient complained when Ms Kuteh gave them a Bible and said she would pray for them. Another patient described his encounter with Ms Kuteh as being like a "Monty Python skit" in which Ms Kuteh gripped his hand tightly, told him that the only way he could get to the Lord was through Jesus and invited him to sing Psalm 23.

Ms Kuteh was suspended while the Trust conducted an investigation. At the subsequent disciplinary hearing Ms Kuteh was dismissed for gross misconduct on the grounds that she had:

- failed to follow a reasonable management instruction to cease discussing religion with patients;
- behaved inappropriately by having unwanted discussions with patients about religion; and
- acted in breach of paragraph 20.7 of the Nursing and Midwifery Council (NMC) Code in relation to not expressing personal beliefs (including political, religious or moral) in an inappropriate way.

Ms Kuteh appealed her dismissal, but the decision was upheld. Ms Kuteh then brought a claim for unfair dismissal to the Employment Tribunal.

The decision

The Employment Tribunal found that Ms Kuteh had been dismissed for the potentially fair reason of her conduct and that the investigation conducted by the Trust had been both fair and reasonable.

Ms Kuteh claimed that the NMC Code had to be interpreted in a way compatible with an employee's rights to freedom of thought, conscience and religion under Article 9 of the ECHR. This argument was rejected, as a distinction could be drawn between Ms Kuteh being dismissed for proselytising her beliefs, as opposed to being prevented from manifesting them.

An appeal to the Employment Appeal Tribunal (EAT) followed, but was dismissed on the grounds that it had no reasonable prospects of success.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

Scottish Grocer – Laura Morrison looks at what retailers' responsibilities are concerning staff with disabilities

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

Ms Kuteh then took her case to the Court of Appeal on the grounds that:

- the EAT failed to consider the correct interpretation of paragraph 20.7 of the NMC Code and the distinction between appropriate and inappropriate expressions of religious beliefs; and
- the EAT had erred in failing to acknowledge that Article 9 was applicable and to consider the fact-sensitive distinction between true evangelism and improper proselytism.

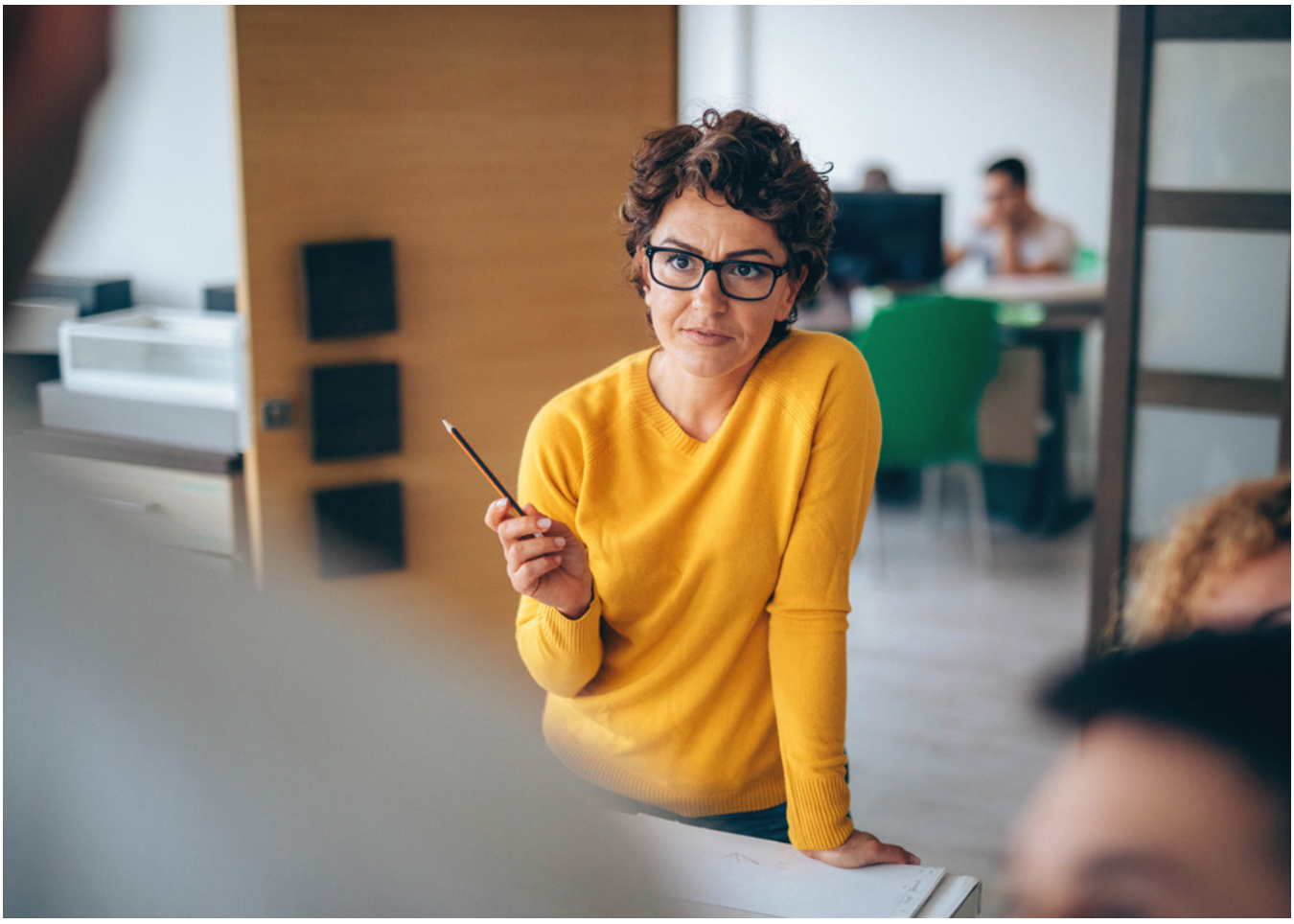
Judge Singh, in his judgment, held that Article 9 cannot be directly enforced in the Employment Tribunals because claims for breach of ECHR rights do not fall within their statutory jurisdiction. However, domestic law must be read to be consistent with the ECHR so far as possible. He went on to state that it was clear from previous case law that proselytising could fall within the rights protected by Article 9. However, it was also clear that improper proselytism was not protected by Article 9.

Judge Singh also noted that it was significant that Ms Kuteh had been informed that her behaviour was inappropriate and had given assurances that it would not happen again, only to disobey these instructions and continue to engage in conversations about religion in what was a clear case of misconduct.

Comment

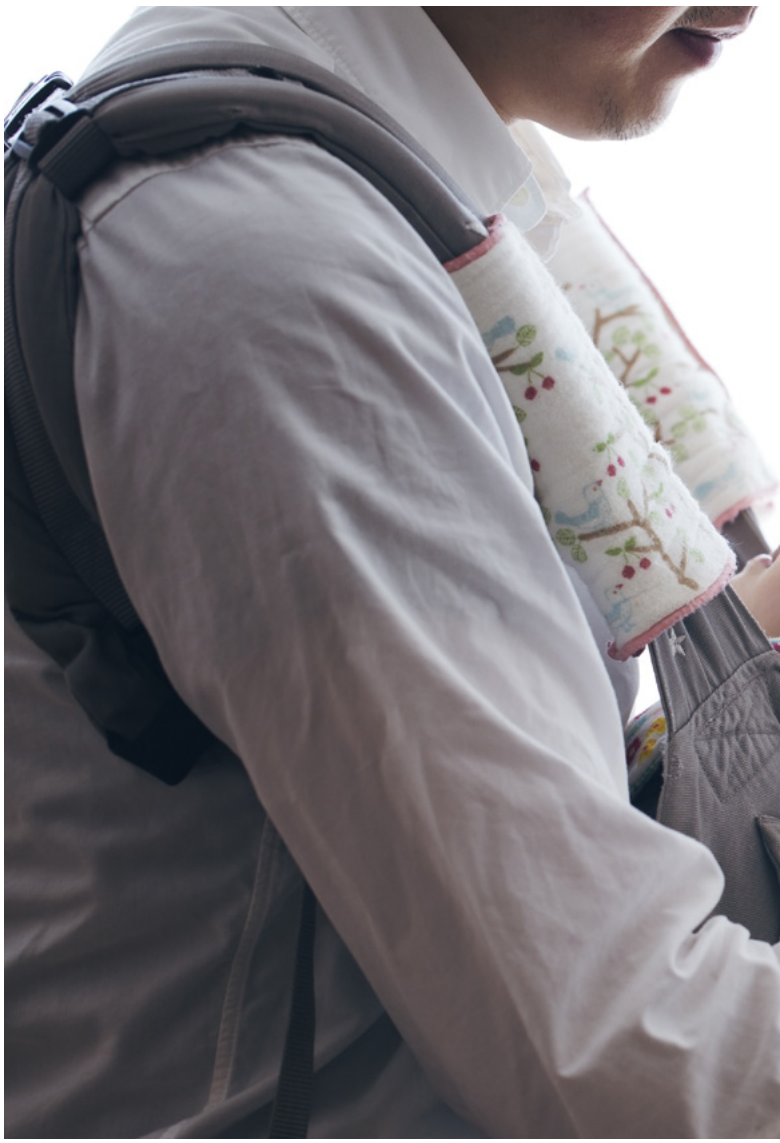
This case brings the controversial issue of religion in the workplace to the fore once again. Given the facts of the case it is notable that Ms Kuteh did not bring a claim for religious discrimination under the Equality Act. However, given the courts' findings, it seems unlikely that it would have made a difference had she done so. The findings show that an employer may fairly dismiss an employee where their actions are deemed inappropriate even when motivated by their religious beliefs. Provided that there is a potentially fair reason (in this case the misconduct of the employee in disobeying a clear instruction from her employer), a decision to dismiss may ultimately be a fair one.

This case also highlights the importance of ensuring that a company's disciplinary procedures are well documented and actually followed, throughout the investigatory, disciplinary and, if necessary, appeal stage.



Shared parental leave: law versus policy

We now have clarity from the Court of Appeal on the lawfulness of paying enhanced maternity pay to women on maternity leave but not paying enhanced shared parental leave pay to men on shared parental leave. In the conjoined cases of Ali v. Capita Customer Management Ltd and Chief Constable of Leicestershire Police v. Hextall [2019] EWCA Civ 900) the Court of Appeal confirmed this was not a breach of UK equality law.



Background

This article sets out its reasoning and gives useful guidance to employers who need to be able to explain a difference in treatment to their employees. But watch this space. We are expecting that the employees in both cases will appeal the decision. Also remember that it is unlawful discrimination to pay a woman enhanced shared parental leave pay but not to pay it to a man taking shared parental leave. In this article we also look at how this issue might be viewed from a policy point of view and the approach that organisations are taking to shared parental pay.

Since the Shared Parental Leave Regulations came into force on 5 April 2015 there has been a question around whether organisations that offer enhanced maternity pay to women, but only statutory shared parental leave pay to men, may be discriminating unlawfully on the grounds of sex. The Court of Appeal (the Court) may now have settled this issue in its well-considered judgment, which apparently closes down all avenues a man might take in bringing such a claim. The employees may still appeal to the Supreme Court and we will keep you updated on developments in this area.

The Court's decision considers two cases: Ali v. Capita Customer Management Ltd and Hextall v. Chief Constable of Leicestershire Police as well as a cross-appeal by the Chief Constable against Mr Hextall.

Both Mr Ali and Mr Hextall took a period of shared parental leave. In Mr Ali's case this immediately followed a two-week period of paternity leave during which he had received full pay. During that period his partner was diagnosed with post-natal depression and curtailed her maternity leave so that Mr Ali could take a period of shared parental leave. This was paid at the statutory rate only. However, if he had been a woman on maternity leave he would have received 14 weeks' full pay. Mr Hextall's period of shared parental leave arose in different circumstances, but was also paid at the statutory rate when women on maternity leave would have been entitled to a period (18 weeks) at full pay.

Mr Ali and Mr Hextall both brought claims against their employers. Mr Ali brought a claim for direct sex discrimination whilst Mr Hextall brought claims for both direct and indirect sex discrimination. The Chief Constable in Mr Hextall's case argued that the claim had not been correctly pleaded and should have been brought as a claim for equal terms under the equal pay provisions of the Equality Act 2010 (the Act).

Legislation

In reaching its decision the Court considered the European Union (EU) directives on both statutory maternity leave and shared parental leave, as well as the enabling regulations applicable in the UK. It also considered relevant provisions of the Act, including:

- section 13(6)(b), which provides that, when conducting a comparison between A and B in a direct discrimination claim, where A is a man, no account is to be taken of special treatment afforded to a woman (B) in connection with pregnancy and childbirth;
- section 23, which provides that a comparison between A and B for the purposes of either a direct or indirect discrimination can be made only if there is no material difference between their circumstances; and
- part 5, which deals with equality of terms and implies a sex equality clause into all terms of work. The effect of this is that, where a term of A's is less favourable than a corresponding term of B's, A's term is modified so that it is no longer less favourable. Alternatively, if that term is not included in A's terms, A's terms are changed so as to include that term. However, the sex equality clause will not have this effect where the term of work affords special treatment to women in connection with pregnancy and childbirth.

The Court found, taking all of this legislation into account, it was neither directly nor indirectly discriminatory on the grounds of sex, nor was it a breach of the implied sex equality clause, to pay a woman on maternity leave enhanced maternity pay but to pay statutory shared parental leave to a man taking shared parental leave.

Direct discrimination

The Court held that the correct comparator for Mr Ali's direct discrimination claim was not a female employee on maternity leave, but a female employee on shared parental leave. Mr Ali could not, said the Court, compare himself to a female employee on maternity leave because the purpose of the two types of leave was different. This was based on the EU legislation which lies behind the UK legislation. The purpose of statutory maternity leave, after the two-week compulsory period, is for the health and safety of pregnant workers and workers who have recently given birth or are breastfeeding. Under EU legislation the predominant purpose of maternity leave is not to care for the child.

In contrast, the purpose of shared parental leave is to care for the child. It was also noteworthy that the EU legislation on shared parental leave did not make any provision for pay. This was contrasted with the EU directive on maternity leave, which provides for at least 14 weeks' pay.

The Court also pointed to several other differences between maternity leave and shared parental leave, namely:

1. statutory maternity leave is partly compulsory whereas shared parental leave is entirely optional;
2. statutory maternity leave can begin before birth whereas shared parental leave cannot;
3. statutory maternity leave is an immediate entitlement whereas shared parental leave is not;
4. shared parental leave can only be taken with a partner's agreement whereas statutory maternity leave can be taken regardless of a partner's views or existence;
5. statutory maternity leave is acquired through pregnancy and maternity, whereas shared parental leave is acquired by a mother choosing to give up statutory maternity leave; and
6. a birth mother is entitled to statutory maternity leave even if there is no child to look after, whereas there must be a child to look after for shared parental leave to be taken.

For these reasons, said the Court, there is a material difference between Mr Ali and a female employee who is entitled to statutory maternity leave. On the facts, the correct comparator (being a woman entitled to enhanced pay for shared parental leave) was entitled to the same pay as a man, and so that claim would also fail.

In terms of the provisions of the Act stating that, for the purposes of a direct discrimination claim, no account should be taken of the special treatment afforded to women in connection with pregnancy or childbirth, the Court commented that this should not be interpreted as a general prohibition on men bringing sex discrimination claims in connection with women who were pregnant or on maternity leave, and that these would need to be considered on a case-by-case basis.

Equal terms

The Court accepted the Chief Constable's assertion that Mr Hextall's claim should have been brought as an equal terms claim. His claim, said the Court, was that his comparator's more favourable terms regarding her entitlement to take time off to care for her new baby were incorporated into his terms by operation of a sex equality clause. He would then rely on that clause to claim that he had been underpaid when he was on shared parental leave.

The Court held that that claim could not succeed because the Act expressly prevented a man from relying on a sex equality clause where his comparator's more favourable terms arose as a result of the special treatment afforded to her in connection with pregnancy or childbirth.

Indirect discrimination

The Court went on to look at Mr Hextall's indirect discrimination claim in any event. It found that this could not have been successful. This is because, where a claim could be categorised as an equal pay or equal terms claim, it could not ordinarily also be brought as a sex discrimination claim.

However, the Court still considered whether, if that claim could be brought, it might have been successful. It held that it was not the provision, criterion or practice (PCP) of paying only the statutory rate for those taking shared parental leave that caused men a particular disadvantage as compared to women, but rather the disadvantage was caused by the fact that only a birth mother was entitled to statutory and contractual maternity pay (which was not, itself, a PCP).

It also found that, under the Act, Mr Hextall could only compare himself to those who were not in a materially different position from his own. For the reasons set out in relation to Mr Ali's direct discrimination claim, the position of women taking maternity leave was materially different from Mr Hextall's. The Court therefore found that the PCP did not disadvantage Mr Hextall. It also found that, had Mr Hextall suffered a disadvantage, this would have been justified as a proportionate means of achieving the legitimate aim of affording special treatment to mothers in connection with pregnancy or childbirth.

Law versus policy

The legal reasoning behind the judgment is clear and it is difficult to argue that, legally, this was not the right decision. It will be welcome news to employers who do not, currently, enhance shared parental pay where they do enhance maternity pay. However, the decision does give rise to a question over how the issue should be addressed from a policy point of view.

There has been an ongoing conversation over recent years about trying to change the balance so that men and women share childcare responsibility more equally. Shared parental pay is one way to try to address the current gap here, but uptake has been very low with some reports suggesting only 2 per cent of eligible couples have taken advantage of the opportunity to take shared parental leave. The reasons for this are complex – but the fact that shared parental leave is, quite commonly, paid at the statutory rate means that many couples will be worse off if they take the leave than if they don't. The Court's decision, then, isn't going to help change the current outlook for shared parental leave, with the TUC suggesting the regulations are "dire" and in need of a complete overhaul.

However, this tells just part of the story. There are, now, an increasing number of large employers who are offering enhanced shared parental pay. KPMG, for example, publicises that it offers 18 weeks' shared parental leave at full pay, NHS staff taking shared parental leave are paid at the same enhanced level as those taking maternity or adoption leave, and O2 recently announced it would increase paid paternity leave (rather than shared parental leave) to 14 weeks.

Interestingly, men working for large employers in the US are increasingly being given paid leave following the birth of their child, with Bank of America, Investec, Diageo and Aviva all now offering at least four months' leave at full pay for both men and women. This is particularly significant in the US, where even mothers have no federal entitlement to paid or unpaid leave to care for a new child or recover from birth unless they work for a company with 50 or more employees (in which case they are entitled to 12 weeks' unpaid leave). Change may well be afoot.

It is also worth considering the other side of the coin. If the Court had found the other way this might not have been a policy solution but, conversely, may have led many employers who currently pay enhanced maternity pay to cease doing so to avoid discriminating against men taking shared parental leave. If the Court had decided otherwise this might well not have been a policy solution but have created a wider, more difficult, problem. It seems unlikely, based on the judgment, that leave to appeal will be granted and so, whilst this will not be the end of the story, it seems that this part of this difficult issue may now be resolved.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

http://www.ukemploymenthub.com/anything-is-better-than-lies-and-deceit

http://www.ukemploymenthub.com/leaving-no-one-behind-the-equal-measures-2019-gender-index

http://www.ukemploymenthub.com/proposal-to-make-redundancy-for-expectant-and-new-mothers-redundant

http://www.ukemploymenthub.com/can-an-employees-dismissal-be-discriminatory-if-the-employer-only-finds-out-about-the-disability-at-the-appeal-hearing

http://www.ukemploymenthub.com/can-a-transfer-of-clients-investments-amount-to-a-transfer-of-undertakings

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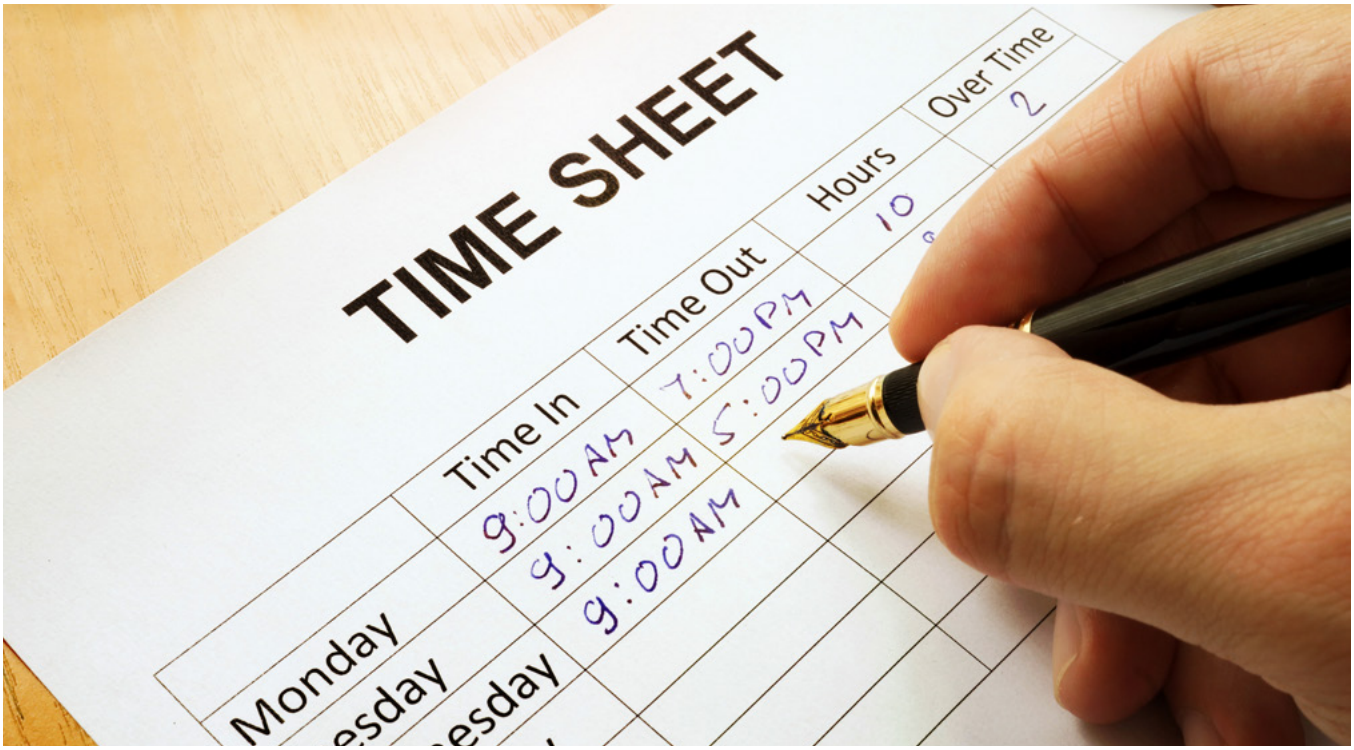
How should employers record working time?

According to a recent decision of the European Court of Justice employers should have "an objective, reliable and accessible system" which records all hours worked by employees to demonstrate compliance with the limits set down in the Working Time Directive in relation to working time and breaks.

Employers should accurately record daily working hours to comply with the EU Working Time Directive on maximum weekly working time and daily and weekly rest breaks according to a recent decision of the European Court of Justice (ECJ). The ECJ agreed with the earlier Advocate General's opinion that employers should be required to establish "an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured." The rationale for this decision does make some sense albeit that it does appear to place an onerous burden on employers. The ECJ concluded that in the absence of such records kept by the employer it would be 'excessively' difficult, if not impossible, for individuals to ensure compliance with the limits in the Working Time Directive

This decision goes further than the current requirements of UK law. The Working Time Regulations 1998 (WTR) require employers to keep 'adequate records' to demonstrate that workers (who have not opted out) have not worked in excess of an average of 48 hours a week and that the rules on night work are being complied with. Compliance is measured over a 17 week reference period. There is no express requirement under the WTR to (a) keep records of daily rest breaks and rest periods, or (b) record all daily hours of work. The existing Health and Safety Executive guidance is that specific records are not required and records used for other purposes, such as payroll, can be used instead.

The ECJ decision suggests that the WTR do not adequately implement the Working Time Directive (in the same way as some of the holiday pay cases). The government may look to amend the WTR in order to avoid the risk of a claim for failure to transpose the Directive but that is likely to depend on our future relationship with the EU, post-Brexit. The position is going to remain uncertain in the near future. That said, it may be harder for an employer to defend a claim for breach of working time limits in the absence of "an objective, reliable and accessible system" which records all hours worked. It is also possible that Tribunals may seek to interpret the WTR in a way which creates an obligation to keep such records in a similar way to that in which they have interpreted the holiday pay rules.



Handling data subject access requests: is the balance tipping further in favour of data subjects?

In High Court proceedings (Dawson-Damer v Taylor Wessing LLP and others [2019] EWHC 1258 (Ch)), the court considered whether a firm of solicitors – Taylor Wessing ("TW") – were required to search through paper files for the claimants' personal data in order to comply with data subject access requests (DSARs).

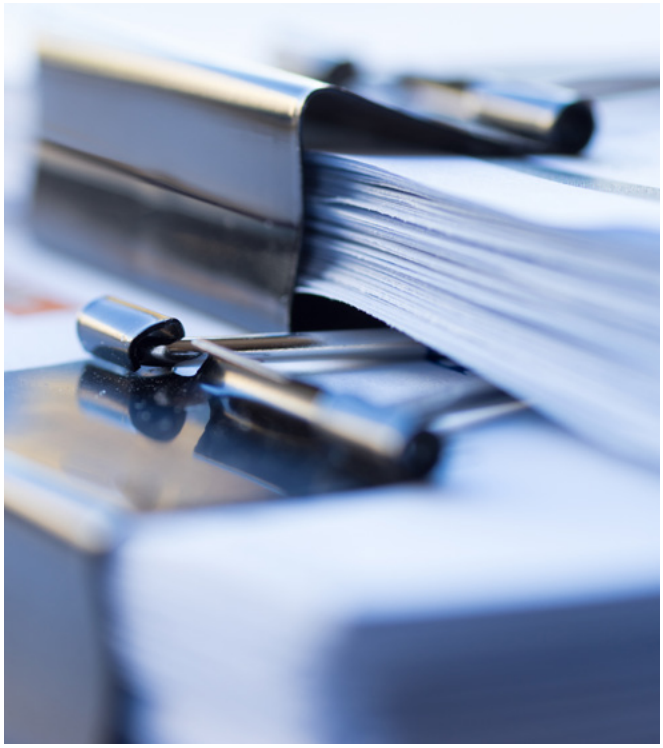
In the High Court proceedings (the case had gone to the Court of Appeal and was remitted back), Ashley Judith Dawson-Damer; Piers Dawson-Damer; Adelicia Dawson-Damer v Taylor Wessing LLP and others [2019] EWHC 1258 (Ch), the court considered whether a firm of solicitors – Taylor Wessing ("TW") – were required to search through paper files for the claimants' personal data in order to comply with data subject access requests (DSARs). The court found in favour of the claimants in part.

In reaching their decision, the court considered four issues, namely:

- whether specified paper files would be considered a "relevant filing system" under the Data Protection Act 1998 ("DPA 1998");
- whether the respondent could rely upon the legal professional privilege ("LPP") exception in the Data Protection Act 2018 ("DPA 2018");
- what would be considered to be reasonable and proportionate in respect of searches for personal data; and
- redaction and withholding personal data.

Relevant Filing System

Since the Treaty on the Functioning of the European Union was introduced, there has been a shift in focus in respect of what constitutes a "relevant filing system". The protections afforded to individuals, in respect of personal data, in Article 8 of the Charter of Fundamental Rights of the European Union have resulted in a broader interpretation of this wording being applied. The court has moved away from primarily considering the burden on the data controller and is now more concerned with the need to protect the data subject. As such, the



court found that the paper files, which were stored chronologically, were a "relevant filing system" for the purposes of s.1(1) DPA 1998. TW were therefore required to search these files for the claimants' personal data.

Although the court was considering the DPA 1998 when issuing the judgement, this case still acts as a guide on what constitutes a "relevant filing system" in the wake of *Tietosuojavaltuutettu v Jehovan todistajat – uskonnollinen yhdyskunta* (Case C-25/17) EU:C:2018:57. As such it signals a shift away from the restrictive interpretation of a "relevant filing system" found in *Durant v Financial Services Authority [2003] EWCA Civ 1746*.

LPP

TW responded to the DSAR by saying that the claimants' personal data was covered by legal professional privilege and was therefore exempt from disclosure under paragraph 10 of Schedule 7 of the DPA 1998. The data concerned related to a trust governed by Bahamian law. The judge agreed with TW that the Court of Appeal had not decided the issue of whether any aspect of Bahamian law would affect the entitlement of a beneficiary to prevent the normal application of LPP on the basis of "joint privilege". The court found that TW was entitled to rely on the LPP exception because there was nothing in the application of the Bahamian law (s.83(8) BTA 1998) which cut across, limited or qualified the trustee's claim to LPP.

Reasonable and Proportionate Searches

The case made it clear that evidence – setting out the time and cost associated with a search – is required where it is claimed that the search would be disproportionate. It was found that where documents were held on a back-up system, it would be disproportionate to enforce the searches, especially given the risks that this would result in the disclosure of confidential information/personal data about TW's employees/clients. The back-up system held too many documents and the court found it would be unreasonable to force TW to search through such a high volume of results when it was argued that the relevant documents would have been covered off in the much smaller document management site search. However, the court held that searches of the relevant current employed TW fee earners' personal spaces (where they can save documents and emails) would not be considered disproportionate.

Redaction and withholding

The court inspected a sample of documents in order to determine whether the documents had been redacted more than they should have been and held that this was the case. TW were subsequently asked to review their other redactions and ensure that there was a consistent approach throughout the documents.

With the number of DSAR requests rising, companies need to be aware of what is required to comply with these requests. DSARs can be time-consuming and costly at the best of times – even more so if the data subject ends up disputing the materials provided and processes followed.

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