UK People, Reward and Mobility Newsletter

JANUARY 2020

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: the discrimination risks associated with dress codes, changes to look forward to in 2020, team moves and the line for protected philosophical beliefs.

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Sethi v. Elements Personnel Services – the bearded face of discrimination law

The Claimant in this case is a practising Sikh observing key elements of the faith including prayer, meditation, attendance at the Gurdwara and participating in Langar. The Claimant also strictly adheres to the requirement that the hair of the body is not cut (Kesh) and, therefore, has an uncut and unshaven beard on the basis of his religious belief. The Respondent is an agency that, in the main, works with five-star hotels to provide front of house, food and beverage staff.

The Claimant applied for a role with the Respondent and attended an induction session before signing the Respondent's standard contract for agency workers. At the induction, the Respondent went through its policies and, as part of that, showed pictures of the standards of dress and appearance expected of its staff. The code of conduct also specified that "male hair must be neatly trimmed...no beards or goatees are allowed".

At the conclusion of the induction, all individuals in attendance were placed on the books, whereby they could put themselves forward for jobs through the Respondent's portal, but not offered immediate employment. The Claimant advised that he would be unable to shave his beard due to his religious beliefs. The Respondent confirmed that its "no beards policy" was for "health and safety/hygiene reasons" in line with their five-star service and therefore the Claimant was unlikely to meet the required standards and should look elsewhere.
The Claimant brought complaints of indirect discrimination in the Employment Tribunal.

Tribunal decision

The tribunal held that the "no beards policy" was a provision criteria or practice (PCP) for the purposes of section 19(1) of the Equality Act 2010. It noted that Sikhs practising Kesh were put at a particular disadvantage by the PCP and, other than suggesting that the Claimant approach a different agency, the Respondent offered no alternative options. Although the tribunal accepted that neatly trimmed facial hair was a legitimate aim for meeting client requirements, the blanket "no beards policy" was not justified as a proportionate means of achieving that aim.

The Respondent was criticised by the tribunal for the following reasons in particular:

- there was no evidence that any of the Respondent's clients had been asked whether they would make an exception for a Sikh worker;
- there was no evidence of what the Respondent's clients would in fact require when faced with a Sikh worker;
- not all of the Respondent's hotel clients had a "no beards" requirement;
- the client's requirements were untested in the context of potential exceptions for religious reasons, to enforce a blanket "no beards policy" that deprived Sikhs of work; and
- the Respondent's policy was for appearance and not health or safety reasons (even though they had advised the Claimant that it was for health and safety/hygiene reasons).

The tribunal made an award to the Claimant for indirect religious discrimination in the lower band for injury to feelings as it was a one-off incident after limited contact.

Comments

The Respondent might have avoided this issue by accepting practising Sikhs into its employment/ engagement and then seeking an exception for those Sikhs who are unable to shave for religious reasons. It was open to the Respondent to address any clients' concerns on a case-by-case basis. This would have likely met the legitimate aim of meeting a client's requirements.

This case is a helpful reminder that discrimination claims can be brought by individuals outside the employment relationship and that such claims can be brought as a result of issues arising as early as the recruitment stage. It is also a stark example of how an employer can fall foul with a dress code policy or practise in the context of equality, diversity and religious discrimination. Equality and diversity issues frequently come up in customer-facing roles. So, what do employers need to watch out for when setting dress codes?

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Veganism is a Philosophical Belief
- The Information Commissioner's Office consults on subject access guidance
- Whistleblowing: Is a detriment suffered outside work as a result of a disclosure protected by the Employment Rights Act?

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- Be sensitive to the cultural and religious needs of employees.
- Consider exceptions to blanket policies, especially where a particular group may be put at a disadvantage.
- Employers may have health and safety reasons for having certain standards; however, this must be connected to a real business or safety requirement and be justifiable as a necessary means of achieving a legitimate aim (which can be evidenced).
- Adopt a proportionate approach and do not impose overly restrictive dress codes upon employees where it is not necessary.

Welcome to 2020

As we begin 2020, the uncertainties facing businesses in the UK in the legal sense are, for most of us, unprecedented. Despite this, employment law is an area where there are some certainties and anchor points throughout the year on which we can rely as inevitable and fixed. Forewarned is forearmed as they say, so let us take a look at some of what we can confidently prepare for this year in terms of employment and discrimination law.

Changes in IR35 rules in the private sector

The importance of assessing the reality of working arrangements, not just the label given to them, comes into sharp focus early this year.

Many of our regular readers will be aware of the changes coming into force on 6 April 2020 in the UK in respect of paying contractors who provide services through a personal service company (PSC). These changes will affect medium and large companies in the private sector and bring them into line with public sector employers. The PSC route has been commonly used until now, as it can be

tax-efficient for contractors and clients/end-users.

These changes are expected to turn the contractor market on its head and cause many companies and contractors to look again at their working relationship. HMRC estimates £1.3 billion of revenue will be lost by 2023/2024 if these changes are not implemented.

The new rules will require the client/end-user to assess the status of contractors who provide services through a PSC to determine whether they should be treated "as if" they are employees (or inside IR35) for tax purposes. Where they are a "deemed employee", payments to them will need to be processed through payroll.

There are substantial cost implications. The new rules will add the cost of payroll taxes into commercial negotiations with contractors who operate through PSCs and who are assessed as being "deemed employees". The most substantial of these is the 13.8% employer National Insurance Contributions (NICs).

There will also be additional costs for administering the new rules. The responsibility for determining whether the contractor/PSC is a "deemed employee" sits with the client/end-user. It is responsible for the payments to HMRC. There is an (improved) HMRC online tool which can assist with this determination. While subject to some criticism, the "check on employment status for tax" or "CEST" tool gives clients/end-users some certainty. It has the key advantage that HMRC will be bound by the output of the test, unless it has been obtained fraudulently.

Importantly, this change will not give these contractors employment status for employment law purposes. This is about how payments are treated for income tax and social security benefit purposes only. Having said that, the "deemed employment" test is very similar to the employment law test. The continued focus on "employment status" cases over the last few years means that employers of all shapes and sizes are required to consider carefully the make-up of their workforce.

Lessons can be learned by looking at how the regime has been implemented and adjudicated on in the public sector. Almost identical rules have applied here since 2017. It is estimated that

£500 million has been gathered by the government since then.

The Good Work Plan

The government published the Good Work Plan in December 2018, in response to the 2017

Taylor Review of employment practices in the UK. The Good Work Plan introduces a number of reforms designed to provide clarity for employers and workers, ensure fair and decent work for all and facilitate fairer enforcement.

As a result, the April 2020 changes to employment law, which implement some of the suggested reforms, will affect all employers in all sectors. Whether you engage workers or employees, you will need to increase the amount of information you provide about their terms and conditions. You will also have to be ready to provide that information on day one of the relationship.

What is changing?

As part of the government's plans to provide clarity for employers and workers, the right to a written

statement of employment particulars is being extended. From 6 April 2020, written statements will have to include a number of additional particulars. The right to a statement is also being extended to workers and, from April, it will be a day one right (rather than employers having two months from the employee starting work to provide a statement).

What will need to be included in a written statement of employment particulars?

As a reminder, currently you must provide an employee with a document which provides: the names of the employer and employee; the date the employment starts and the date the employee's period of continuous employment began; pay (or method of calculating it) and interval of payment; hours of work, including normal working hours; holiday entitlement and holiday pay; the employee's job title or a brief description of the work; place of work; a person to whom the employee can appeal if they are dissatisfied with any disciplinary or grievance decision (and the manner in which any such application should be made), or any decision to dismiss them; and terms related to work outside the UK for a period of more than one month.

As of 6 April 2020, a written statement will also need to set out:

- the days of the week the worker is required to work, whether the working hours may be variable and how any variation will be determined;
- any paid leave to which the worker is entitled;
- details of all remuneration and benefits;
- any probationary period;
- any training entitlement provided by you, including whether any training is mandatory and/or must be paid for by the worker;
- the notice periods for termination by either side; and
- terms as to length of temporary or fixed-term work.

At the moment, you can refer to other documents for some of the particulars or provide a supplementary statement. That will still be possible in the case of some details, but more of the information will have to be included in the main statement from April.

Do I need to change my template contracts?

Yes. You will need to update your template employment contracts (and service agreements if you have them) to comply with the new requirements.

What about current employees? Do I need to change their contracts?

You do not have to issue new contracts to your existing staff. The new requirements only apply to new employees starting on or after 6 April 2020. However, from that date, an existing employee may request a written statement that complies with the new requirements. In that situation, you must provide the statement within one month of the request. The employee can only make this request once.

Holiday pay reference periods

The calculation of holiday will change at the same time, also as a result of the 2017 Taylor Review and subsequent Good Work Plan. Just when you may have become used to using a 12-week reference period to determine an average week's pay for the purposes of calculating holiday pay, the reference period will change to 52 weeks (or the number of complete weeks for which the worker has been employed if that is less) from April.

Agency Workers

Two key changes for employment businesses and those who engage with them are the abolition of the Swedish Derogation and provision of a Key Information Document to agency work-seekers. These will also apply from April 2020.

The Swedish Derogation currently allows employment businesses to avoid pay parity between agency workers and direct employees if certain conditions are met. Agencies must inform relevant agency workers by 30 April 2020 that the Swedish Derogation no longer applies.

A Key Information Document must be provided to agency work-seekers before agreeing the terms by which the work-seeker will undertake work. This document must include information on the type of contract, the minimum expected rate of pay, how they will be paid and by whom, any non-monetary benefits to which the work-seeker will be entitled and an illustrative example of what this might mean for their take-home pay. The document must be succinct and easy to read. The employment business will need to be able to demonstrate that the document has been given to the worker.

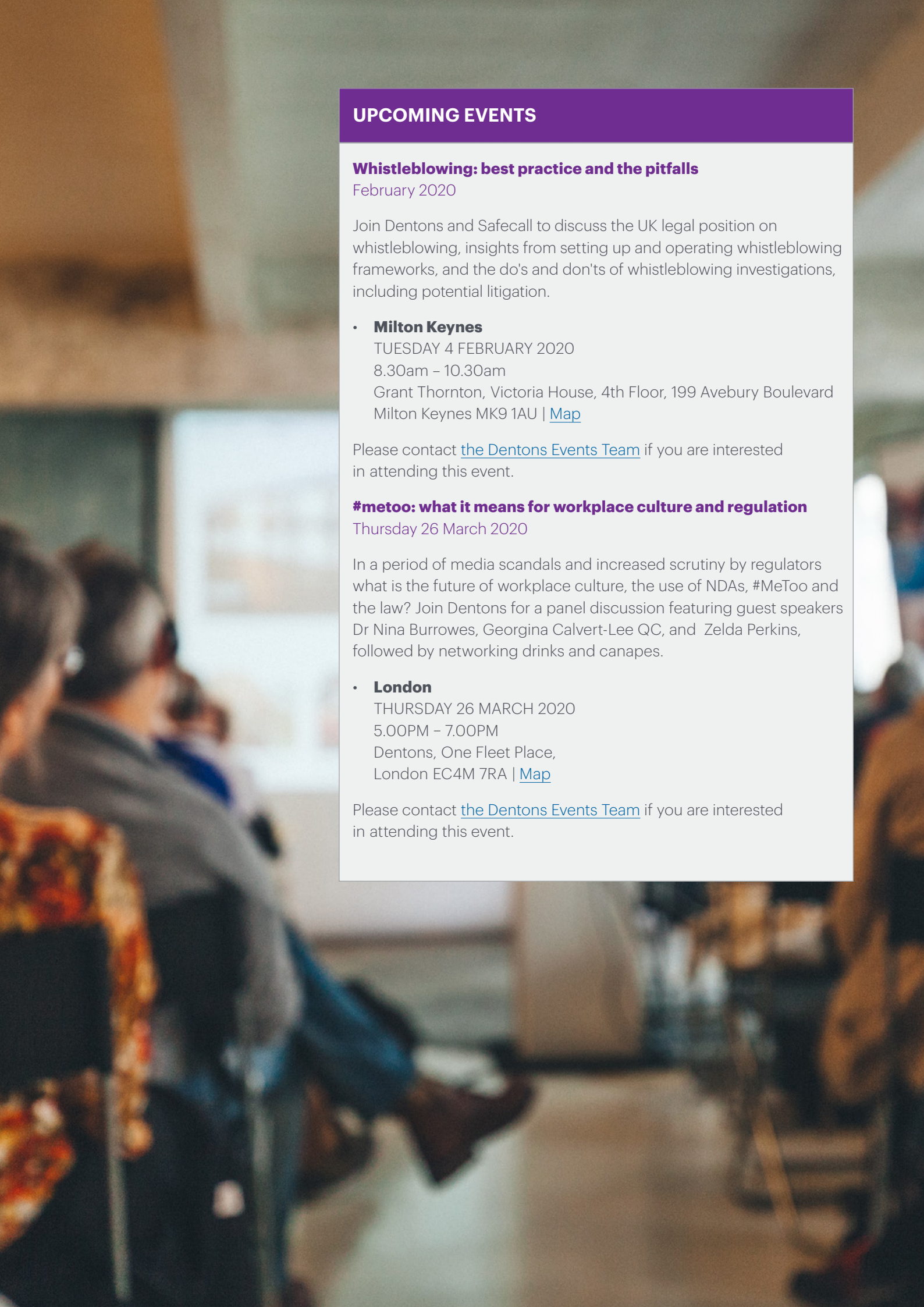
Termination payments

From 6 April 2020, all termination payments above the £30,000 threshold will be subject to class 1A employer's National Insurance Contributions.

Consultations

Always ripe for a consultation, 2020 sees various consultations on aspects of employment law and responses.

On 28 March 2018, BEIS published a consultation on parental bereavement leave and pay. Later that year, the outcome of the consultation was an announcement that parental bereavement leave and pay will be made available. This is to be taken as a single block, or as two separate weeks, and employed parents will have a period of 56 weeks in which to use their entitlement. The legislation is expected to take effect in 2020, although further details are not yet available. The consultation on the right to neonatal leave and pay, to support parents of premature or sick babies, closed in the autumn last year and the outcome is awaited.



UPCOMING EVENTS

Whistleblowing: best practice and the pitfalls
February 2020

Join Dentons and Safecall to discuss the UK legal position on whistleblowing, insights from setting up and operating whistleblowing frameworks, and the do's and don'ts of whistleblowing investigations, including potential litigation.

- **Milton Keynes**
  TUESDAY 4 FEBRUARY 2020
  8.30am – 10.30am
  Grant Thornton, Victoria House, 4th Floor, 199 Avebury Boulevard
  Milton Keynes MK9 1AU | Map

Please contact the Dentons Events Team if you are interested in attending this event.

#metoo: what it means for workplace culture and regulation
Thursday 26 March 2020

In a period of media scandals and increased scrutiny by regulators what is the future of workplace culture, the use of NDAs, #MeToo and the law? Join Dentons for a panel discussion featuring guest speakers Dr Nina Burrowes, Georgina Calvert-Lee QC, and Zelda Perkins, followed by networking drinks and canapes.

- **London**
  THURSDAY 26 MARCH 2020
  5.00PM – 7.00PM
  Dentons, One Fleet Place,
  London EC4M 7RA | Map

Please contact the Dentons Events Team if you are interested in attending this event.

The Conservative government included as part of its 2019 manifesto that it encouraged flexible working and would consult on making this option an employer's default position. The consultation is awaited and should clarify how this is intended to work.

The Information Commissioner's Office (ICO) has published draft guidance on data subject access requests. The consultation will close on 12 February 2020.

While some of the proposals set out in the Good Work Plan are coming to fruition (as discussed above), its suggestions for clarification of employment status remain outstanding. The government response to the consultation on this is awaited.

EU Settlement Scheme

With Brexit fast approaching, the high volume of applications under the EU Settlement Scheme is expected to continue. The scheme has been open since March 2019 and allows EU, EEA or Swiss citizens to submit an application under the EU Settlement Scheme with their family members to continue to live in the UK after 31 December 2020 when the proposed transition period will end. If their application is successful, they will be given either pre-settled status (temporary residence) or settled status (permanent residence), thus reassuring them of their status in the UK. Pre-settled status will lead to settled status once they have been in the UK for a period of five years and provided that an individual has not been absent from the UK for more than six months in any 12-month period.

A new UK immigration system is expected in 2021 when EU free movement comes to an end. Further details are expected at the start of the year after the Migration Advisory Committee has published a report, with recommendations regarding the new system. However, the government has been clear that the new system will involve a revamp of the current points-based system, with an attempt to mirror the Australian immigration system, which grants points based on an individual's skills. The new system will apply to all non-UK/Irish nationals who intend working in the UK (Irish nationals will continue to be able to live and work in the UK as they do now).

Team moves: the practicalities

Employees are undoubtedly one of the, if not the, most valuable assets of any business. Without employees, a business simply cannot operate.

However, whilst employees are an essential component of an employer's business, they can also pose one of the biggest threats when they decide to leave and take up employment with a competing business. This is not least because of the significant harm that can be caused by the misuse of confidential information or the exploitation of client relationships established during the employee's employment.

This threat is magnified when a number of employees resign en masse, resulting in a team move scenario. Naturally, therefore, employers will want to ensure that they are in the best position possible to take action in the face of a threatened team move.

What is a team move?

Typically, team moves involve an entire team of employees moving from their existing employer to either (i) join a competitor of the business, or (ii) set up on their own in competition.

Losing a team can be devastating for an employer. Not only does it create the risk of, among other things, losing key client relationships and the exploitation of confidential information or trade secrets, but it can also mean that the business is losing a highly skilled and successful team. There is also a very real possibility that the departing employees may try to solicit other employees who have remained with the business following the team's departure.

Legal issues

Quite often there is fine line between a lawful and unlawful team move. Invariably, they create a number of legal issues for the existing and new employer, and the departing employees. In particular, co-ordinated team moves will often result in potential breaches by the exiting employees of the legal obligations owed to their existing employer. Typically, these include:

- express contractual clauses – confidentiality clauses, disclosure of misconduct clauses, garden leave clauses and post-termination restrictions; and
- implied contractual duties – duty of good faith and fidelity, duty of trust and confidence, and fiduciary duties (in respect of senior individuals).

How do employers protect themselves?

When a business is faced with a raid on its employees by a competitor, it is vital that it is able to protect itself against the potential significant damage and disruption as best as possible.

Restrictive covenants

Arguably, the most powerful shield against the competitive threat posed by a team move are enforceable post-termination restrictions. Non-compete, non-poaching of employees and

non-solicitation of and non-dealing with client provisions tend to feature heavily in team move litigation. As such, it is essential that these restrictions are properly drafted, if they are to be relied upon.

In some circumstances, a set of legally valid restrictive covenants in the exiting employees' employment contracts may be sufficient to deter at least some members of the team from joining a competitor.

Garden leave

The ability to exclude departing employees from the workplace during their notice periods can be extremely valuable in a team move scenario. Putting an employee on garden leave helps reduce the risk of them poaching existing clients as, essentially, they should no longer be in contact with them. Exclusion from the workplace also means that the employee will have limited or no access to confidential information.

Disclosure of offers clause

It is common for employment contracts of senior employees to contain a clause which requires them to disclose an offer of employment by a competitor to their existing employer. A failure to comply with this contractual obligation would likely be considered a breach of contract by the employee, which could prove useful if litigation is commenced in response to the team move.

Evidence

It is clear from recent team move cases that there must be tangible evidence of wrongdoing by the departing employees. Suspicion will not be enough to establish an unlawful team move. It is therefore vital that, as soon as an employer learns of a potential team move, it acts quickly and begins to gather evidence. Emails, text messages, WhatsApp messages, Instant Messages and phone logs will all be key. A careful and thorough investigation that produces evidence of unlawful conduct by the departing team will help put an employer in a strong position to achieve the protection it needs to prevent or mitigate the damage.

Overall, a business faced with a team move should ensure that it puts in place, without delay, a clear strategy which has been considered from both a legal and commercial perspective.

Finding the line for protected philosophical beliefs

The Equality Act 2010 sets out the right not to be discriminated against on the basis of religion or protected philosophical belief (or lack thereof). A recent slew of decisions reveals a common thread through the approach taken by the Employment Tribunal in determining the question of what constitutes a philosophical belief.

In the leading case of Grainger plc v. Nicholson, the Employment Appeal Tribunal set down the criteria that a claimant needs to satisfy for a philosophical belief to receive protection under the Equality Act 2010:

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; and
5. it must be worthy of respect in a democratic society, be compatible with human dignity and not conflict with the fundamental rights of others.

Whilst these criteria set out a clear starting point for ascertaining what a protected belief is, they left uncertainty about what beliefs are "serious" or important enough to satisfy the requirements. However, recent cases looking at vegetarianism, veganism and an objection to transgender status have helped to shine some light on this.

Vegetarianism

– Conisbee v. Crossley Farms Limited

In the Conisbee case, the Mr Conisbee, a vegetarian, claimed that he had been bullied by other employees. This bullying had, amongst other instances, included being given snacks by colleagues who later told him (falsely) that they had contained meat. As part of the proceedings, the Tribunal was asked to consider whether Mr Conisbee's vegetarianism amounted to a philosophical belief.

The Tribunal found that Mr Conisbee's belief in this case was not protected, since vegetarianism was merely an opinion that the world would be a better place if animals were not killed for food, and that this fell short of a belief that related to a substantial aspect of human life and behaviours. The Tribunal's reasoning was that the motivations behind and reasons for being vegetarian varied greatly, ranging from ethical objections to taste preferences. Since the opinion only affected an individual's approach to diet, it was more of a lifestyle choice than a belief. The Tribunal contrasted this with the belief of veganism, which it felt had a more cogent and consistent moral principle behind it.

You can read more from Dentons about the *Conisbee* case in the October edition of our newsletter here.

Veganism

– Casamitijana v. League Against Cruel Sports

In this case, Mr Casamitijana alleged that he was dismissed by his employer for "blowing the whistle" in relation to the employer's pension fund's investments that were involved with animal testing. As an ethical vegan, Mr Casamitijana's position was that this amounted to discrimination on the basis of a protected belief.

The Norwich Employment Tribunal considered the issue of whether veganism could be considered a philosophical belief, and determined that it could. It held that the key point to distinguish veganism from vegetarianism, and other similar opinions that had not been found to be protected beliefs, was how the Claimant's belief had become a determinative part of his everyday decisions.

He outlined how he not just amended his diet but disposed of any property that he had that was made of animal products, attempted to encourage others to become ethical vegans and attempted to minimise using transport that would lead to the accidental death of animals and insects. All of these points seemed to lead the Tribunal to conclude that ethical veganism was a belief that had a substantial aspect of human behaviour with a clear, cogent moral basis, in a way that changes to diet that vegetarianism requires do not.

To read more from Dentons' Victoria Albon on the *Casamitijana* case, please see her comments in HR Grapevine here.

Opinions on transgenderism

– Forstater v. CGD Europe

The Claimant in this case worked as a researcher and writer for a public policy think tank. She believed that sex was biologically immutable. She did not believe that there was any possibility of any sex inbetween "male" and "female", or that it was possible to ever change sex. Following vocal comments on this issue on her social media, her employer refused to re-engage her services following the end of her contract. The Claimant sought to have her beliefs on transgender issues as a protected philosophical belief under the Equality Act.

Like veganism, the Tribunal accepted that the Claimant's belief in this case had the potential to be protected as it was a coherent moral principle that affected the Claimant's worldview generally (and not just with regards to one aspect of her life, e.g. like vegetarianism). However, the Tribunal held that the fifth limb of the Grainger principles was not met as this belief interfered with the human dignity and fundamental rights of others. As such, Ms Forstater's "absolutist" approach was not considered worthy of respect in a democratic society.

The key point from this case was the fact that this belief only failed to be protected because of the fifth limb of the Grainger test and that it otherwise was considered to be a belief that was a sufficiently substantial aspect of human life and behaviour. To read more on this case from Dentons' Victoria Middleditch, please see her summary in Dentons' People, Reward and Mobility blog here.

Take-aways

In these cases, there was a distinction between opinions and philosophical beliefs on the basis of whether the issue in question affected the individual's holistic view of the world and not just one narrow aspect of it. Also of key relevance is the impact that the issue has on the rights of other employees and individuals. Whilst all three of these cases are Employment Tribunal decisions, and therefore not binding, the consistency of the approach gives a strong indication of the Tribunal's view in such cases.

Employers should be alive to the issue of discrimination on the basis of philosophical belief and what might constitute a philosophical belief. Special care must be taken when it comes to office "banter" to ensure that no individual is having their personal beliefs, which may be protected, mocked or degraded in a way that could lead to a discrimination claim.

IN THE PRESS

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

- Scottish Grocer, Holiday pay during the holiday season by Laura Morrison
- People Management, Key developments on working time this year by Helena Rozman and George Williamson

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

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