



Employment Law Newsletter - November/December 2019

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I'm leaving early to vote

A winter general election coincides with dark nights and, probably, inclement weather. What if someone asks to stop work early so they can vote in daylight and before the weather worsens? Must you agree?

No. But there's more.

You're not obliged to allow people to work flexibly on election day. You can insist that they vote in their own time. However, you may choose to be flexible. If you do, allow some to start later and others to leave early to avoid becoming short-staffed.

What about those that want to electioneer at work? Politics and work make uncomfortable bedfellows so where do you stand?

Prevent political campaigning

You can ban political campaigning at work and during working hours with the threat of disciplinary action if your rules are broken. A blanket ban on political discussion would be unhelpful and unrealistic. So, strike the appropriate balance between permitting discussion but preventing campaigning. That would stop someone successfully challenging your rules as impinging upon their human right to express themselves freely.

Outside work Human rights to express yourself freely, think and associate become more relevant if you seek to control your employees' political activities outside work. Only exert control over their actions when they are working or their actions directly affect their employment.

Political symbols

Enforce your normal dress standards including prohibiting items displaying support for a political party. Remember those in public-facing roles may inadvertently suggest that your business is endorsing a particular political view if they wear a symbol. Although discrimination claims based on a philosophical belief are rare and tough to win, you should apply your rules consistently to demonstrate any action was for misconduct not belief.

Harassment

Political discussion, particularly around Brexit, can cause offence. Remember that the complaint may be from someone who has overheard an offensive comment rather than the person to whom it was directed. Follow your normal grievance and, if appropriate, disciplinary procedures.

Guidance

If you anticipate a problem, issue guidance on:

- Campaigning
- Expressing political views to colleagues, clients and suppliers
- Using your resources for political activities
- Using the business's name alongside political opinions
- The potential sanction for breaching your rules

Minimum wage announcement delayed by general election

Minimum wage rates are announced in the Budget, but it was cancelled this month because of the election. With no forum for the Chancellor to set out the April 2020 rates, they may not be announced until January. If you employ a 1st January pay review, you may have to set 2020's pay without knowing whether it will comply with the minimum rates next April. It may be sensible to delay your review.

£700,000 awarded to head teacher after investigations into his sex life

Matthew Aplin was awarded £696,000 when he was unfairly dismissed and experienced discrimination because of his sexual orientation. He had sex with two 17 year old men that he met on Grindr, a dating app. The local authority was satisfied that he hadn't committed a crime and that there were no child protection issues. However, Tywyn primary school conducted its own investigation. Mr Aplin resigned because of homophobic bias and procedural errors. Where did his employer go wrong and how can you avoid the same mistakes?

Delay

A reluctance by the employer to supply police material delayed the disciplinary hearing. Disciplinary processes are stressful for your employees. Failing to clarify the allegations and delaying the process risks the employee resigning and claiming constructive unfair dismissal before you get the opportunity to conclude the process.

Ambushing

This employer failed to disclose all of the relevant material. Avoid ambushing employees with vague allegations, limited material or giving insufficient time to prepare for meetings, even investigatory ones.

Training

Much of the blame for this employer's failing lay with the person that carried out the investigation. Ensure that you have trained managers appropriately and effectively if you will ask them to deal with discipline and grievance. Don't ask someone to do a job, you don't trust them to do.

An 'interesting' month for IR35

In a month where the Labour Party has announced that, if elected, it would halt the proposed IR35 changes due next April, HMRC has continued its losing streak. Two cases were reported in The Register:

[IT contractor has £240k bill torn up after IR35 win against UK taxman](#)
[Helen Fospero makes yet another Brit telly presenter to win IR35 case against taxman](#)

HMRC lost both because of a lack of mutuality of obligations. The businesses weren't obliged to provide the contractors with work and when they did, the contractors were not obliged to do it. These are factors pointing to self-employment.

On 25 November 2019, HMRC updated its Check Employment Status for Tax tool (CEST), intended to enable taxpayers and their advisers to check an individual's employment status by answering a series of questions.

HMRC's online assessment tool doesn't recognise the concept of mutuality of obligation, which is where it is falling down. Given the number of embarrassing, high-profile defeats, it will be interesting to see whether it continues to prosecute as aggressively when the legislation changes next year.

We have a [briefing note on employment status](#). Please speak to us if you need help to determine the status of those that work with you or to draft an appropriate contract to describe the working arrangement.

Can you ask job applicants to submit their photograph with CV?

Yes. However, while it is not unlawful, it may be unwise unless you have a good reason for asking. Those of you that follow tv chefs may be familiar with Michael O'Hare, a Michelin-starred chef who became prominent after appearing on The Great British Menu.

In October, he tweeted an advert for a 45 hour per week, £24,000 a year job in his Leeds restaurant, inviting candidates to submit a 'CV, cover letter and recent photo'. Twitter melted with correspondents referring to a 'vanity project' and suggesting that he was 'inviting discrimination'. Was he wrong?

The Law

There is no statutory prohibition on an employer asking applicants to submit their photograph. But the Equality and Human Rights Commission Code suggests that you should not ask applicants to provide photographs unless it is essential for selection purpose, for example, for an actor or to confirm that the person who attends for interview is the person who applied.

The Problem

A photograph will indicate a person's gender, race and, in some cases, disabilities. If you refuse to interview them, they may argue that their photograph was a factor in your decision. It may cost you time, money and resources to win the argument.

Remember

When interviewing a large number of candidates, their photograph will remind you who was who. However, a job applicant's image, whether sent by them, or captured by you, constitutes their personal data so get their consent if you wish to take their picture and destroy all copies of their image once you no longer need it. Set out relevant information in your GDPR privacy notice.

In this case, Mr O'Hare helpfully clarified his position by explaining that they didn't interview people in the dark so would see them before making a decision and that he didn't care what they looked like because 'I'm not trying to f*** them, I just want them to carry plates for me.'

The usual dearth of news and the effect of multiple bank holidays mean that this will be our last issue for 2019. We will catch up with you again at the end of January.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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