EmploymentBrief

Autumn 2016

Fundamental cases employers need to watch

2016 is a year that has seen a number of important employment rulings, including the recent Uber Employment Tribunal decision. There are however still a couple of further judgments expected before the end of this year, that could also have a significant impact on employers and should be watched with caution.

In Lock and another V British Gas Trading Ltd (EAT).

The Court of Appeal decision is expected on how employers should calculate holiday pay. This case has already been heard by the European Court of Justice and the Employment Appeal Tribunal.

The Court of Appeal will look at whether or not the Working Time Regulations 1998 could be interpreted to include commission in Mr Lock's holiday pay. The Court has also heard arguments about whether or not a decision to include commission in holiday pay might be too broad and have unintended consequences. Both parties have agreed that the outcome of the Court of Appeal decision should apply only to workers who have normal working hours, whose pay does not vary according to the amount of work done, but who receive individual results-based commission as a part of their normal remuneration.

Barbulescu v Romania (ECHR)

This is a Romanian case being heard by the European Court of Human Rights and the judgment is expected at the end of November. This case examined the right to a private life in relation to social media use. An engineer was dismissed for using Yahoo Messenger to chat with his family as well as professional contacts. He has challenged his employer's actions as a breach of the European Convention on Human Rights. The ECHR held that the employer's actions were justified because it was seeking to verify that the employee was using his work computer and social media account for work purposes only.

Other notable cases for employers to be aware of, which have concluded this year include:

Aslam and others v Uber BV

The Employment Tribunal has found in favour of two Uber drivers who claimed that Uber is acting unlawfully by not paying holiday or sick pay. Uber unsuccessfully argued its drivers are self-employed. Uber has more than 30,000 drivers in London and it doesn't set shifts of minimum hours or make drivers work exclusively for it. Drivers use an app which puts them in touch with customers.

The outcome of this case has found that Uber drivers are workers and are entitled to the National Minimum Wage, paid holiday and to be enrolled into a pension scheme. The case is likely to be appealed. A final decision could affect the future relationship between many firms, not just those in the so called gig economy and their self-employed workers.

Peninsula Business Services Ltd v Donaldson (EAT)

This case was concluded earlier this year and employers who offer a childcare vouchers scheme should take note.

In this case, Peninsula's childcare vouchers scheme was the subject of a legal challenge because its scheme required employees to agree to suspend their membership during maternity leave. HM Revenue and Customs advice has previously said it is unlawful for an employer to make the suspension of childcare vouchers scheme membership during maternity leave a prerequisite of joining.

The Employment Appeal Tribunal found that employers that make deductions from an employee's salary in return for childcare vouchers do not have to continue to provide the vouchers during maternity leave.

Continued…

Fundamental cases employers need to watch

…Continued

Metroline West Ltd v Ajaj: Ajaj v Metroline West Ltd (EAT)

This case concluded earlier this year and serves as a valuable lesson for employers who suspect that an employee is faking illness. The Employment Appeal Tribunal affirmed that an employee who makes up or exaggerates the effects of an injury or illness to take fraudulent sick leave is fundamentally breaching the implied term of trust and confidence and can be dismissed for misconduct. 'Pulling a sickie' is therefore a misconduct rather than a capability issue. Dismissal for fraudulent sick leave must be based on reasonable grounds, following a reasonable investigation.

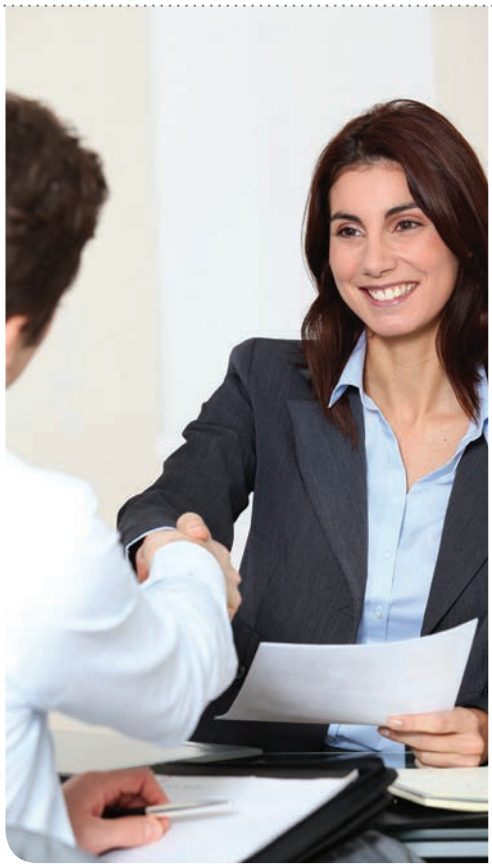
Carreras V United First Partners Research (EAT)

This case considered the duty to make reasonable adjustments which employers need to be aware of and act upon in relation to disabled workers' hours of work.

In this particular case, the claimant often worked long hours, until 11pm, prior to him having a serious accident. After the accident he initially worked until 6.30pm or 7pm, but he complained he was subsequently forced to work later hours by the respondent. The disabled employee believed he was disadvantaged because there was an expectation in his workplace that employees work late, even though there was no strict requirement to do so. He eventually resigned and claimed disability discrimination and unfair constructive dismissal, which were initially dismissed by the Employment Tribunal.

The Employment Appeal Tribunal however held that working late does not have to be presented as an instruction to cause a disadvantage. Employers can put pressure on employees to conform, even if there is no written rule or direct management instruction.

We shall of course report on the outcome of all of these cases in future issues.



The cost of making and withdrawing a job offer

A company has been ordered to pay over £3,000 for breach of contract damages, after it withdrew a job offer made by a recruitment agency acting on its behalf.

In McCann v Snozone Ltd, Mr McCann had verbally accepted a job offer which the recruitment agency had made acting on behalf of the employer, although the salary and start date had not been agreed. The employer subsequently withdrew the offer but then denied that an offer of employment had been made.

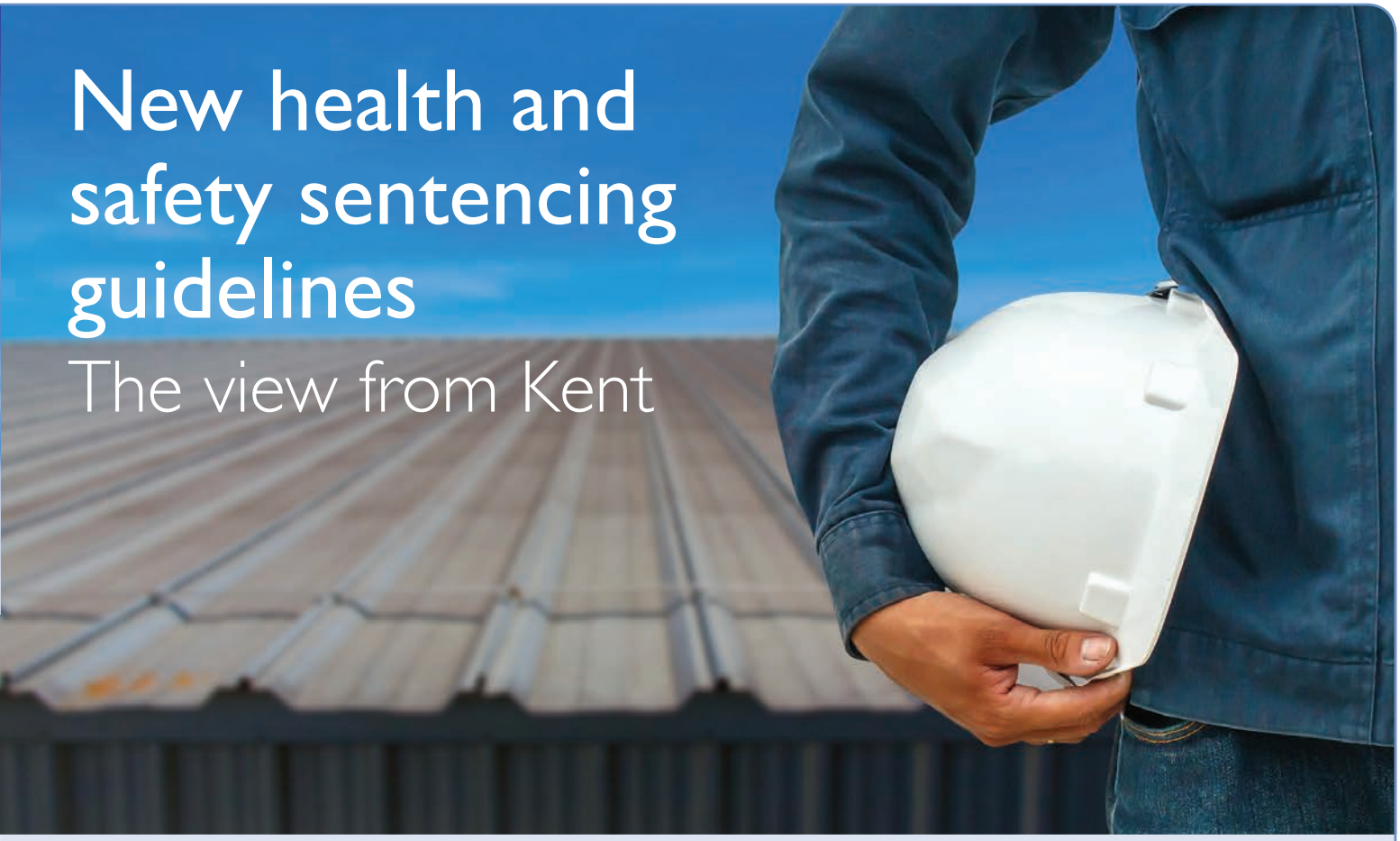
Following two interviews with the recruitment agency, Mr McCann had telephone conversations with them in which they verbally offered him a job and he accepted it. The employment tribunal ruled that the recruitment agency had created a contract of employment by making the offer to Mr McCann verbally, which he had verbally accepted.

The contract of employment should have only been terminated by giving notice. The damages which the tribunal awarded to Mr McCann were in lieu of notice and in the absence of agreed terms, the minimum contractual notice period was therefore one month. Mr McCann received one month's salary of £2,708 as well as tribunal fees of £390.

This case serves as a warning to businesses and recruitment agencies acting on their behalf, that all offers of employment should only be made with the express permission of the business and it should be made in writing to the candidate, clearly stating the agreed terms.

New health and safety sentencing guidelines

The view from Kent



Courts in England and Wales have been applying the new sentencing guidelines since 1st February. We look at how three Kent employers have been dealt with under the new regime.

Highway Care Ltd was fined £660,000 after a welder was left blind by an exploding oil drum. The work carried a high risk of explosion, as even the tiniest of oil residues could vaporise in the confined area of the drum and be ignited. This was an occasional task which had never been risk assessed, for which there was no training and of which the directors of the company claimed no knowledge. The directors did, however, admit the practice was dangerous and unnecessary and should have been spotted. We expect the court considered this as high culpability behaviour under the guidelines. There was clearly a "high likelihood of harm" and a risk of death or life changing injury, which for an £18 million a year turnover company required the Judge to apply a starting point of £950,000 within a "category range" of £600,000 - £2.5 million, depending on the aggravating and mitigating features. The eventual fine of £660,000 indicates the Judge chose £1 million as the appropriate fine, then applied the usual one third discount for a guilty plea.

A fine of £1 million was imposed on *Watling Tyre Services Ltd* following the death of an untrained 21-year-old worker carrying out a puncture repair to a 4½ foot diameter tyre which exploded. There was no evidence the worker had previously worked on such a large tyre (his training record was completely blank). Gauges were missing from the equipment he was working with. Judge Adele Williams applied the new sentencing guidelines, even though the accident happened in 2006. She gave less than the usual third off for a guilty plea, as the company did not immediately plead guilty. Watling's annual turnover was £21-25 million, so Judge Williams must have considered this a "high culpability" case involving a high likelihood of serious harm, with a starting point of £950,000 and category range as for *Highway Care* above. The fine has just been upheld in the Court of Appeal.

Both of these cases involved untrained staff carrying out tasks which had not been risk assessed, signalling "high culpability" under the guidelines, which includes:

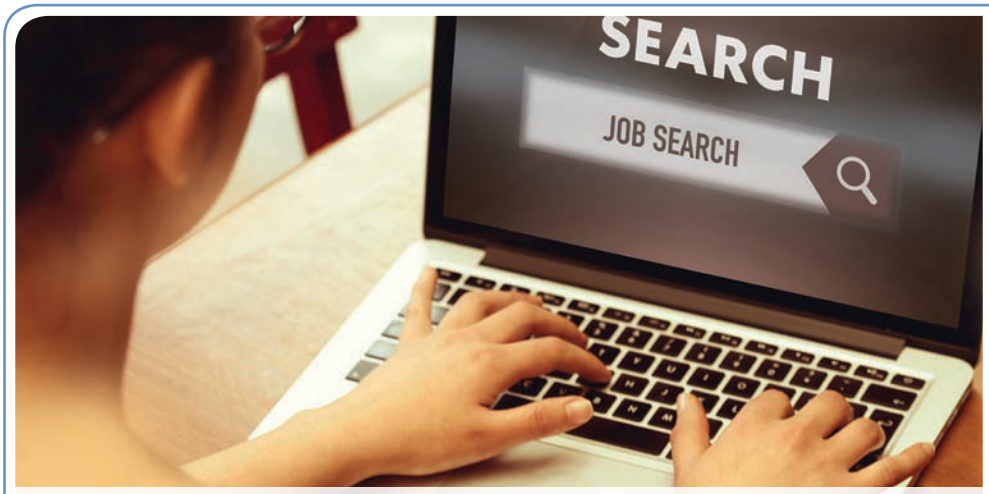
- Failing to observe recognised standards.
- Breaches over a long period of time.
- Systemic failure within the organisation to address health and safety.

Employers should examine these definitions and take measures to ensure they would be treated as "low", and never "high" culpability. That could make the difference in a medium turnover company between a starting point fine of £130,000 for "low" and £950,000 for "high" culpability. Such measures could be:

- Putting effective health and safety procedures in place.
- Mechanisms to ensure systems are adhered to and follow ups are implemented.
- Auditing for issues like blank training records, or non risk-assessed tasks to avoid the accusation of "systemic failure".

Under the new guidelines, a "near miss" is treated just as seriously as where actual harm is caused. Therefore when an M J Allen employee slipped while working on a roof, the guidelines required the court to consider the potential outcome, not just the actual outcome. The potential outcome was death or life limiting injury and a medium likelihood of this occurring. This placed the incident in harm category 2. M J Allen's turnover was in the "medium" bracket giving a starting point of £240,000. The firm pleaded guilty and therefore Judge Williams reduced this by one third, giving £160,000.

Failing to act on previous incidents is an indicator of "high culpability", so organisations must enforce systems of monitoring and review. Directors and senior managers should study HSE Guide Leading Health & Safety At Work (INDG 417 rev1), an important feature of which is monitoring, reporting and reviewing performance.



Don't fall foul

of recruitment advert wording

If you are involved in recruitment advertising, you will no doubt be aware of the importance of ensuring job adverts are not discriminatory.

The Equality and Human Rights Commission updated its guidance on discriminatory adverts in March this year, including job advertising, after it received more than 100 complaints in a year. People had complained because they felt they were discriminated against as they were older workers, due to their gender or they were prevented from having work opportunities because of disability, ethnicity, sexual orientation or other characteristics.

So what is the best way to avoid this situation occurring?

Phrases which unfortunately are still commonly used such as Saturday boy and part-time shop girl were all complained about. Other common words to avoid include young, mature, recent graduate, which can imply a certain age requirement for a role. Also job titles such as handyman and barmaid, which imply a job may be done by men or women only.

Images of people in adverts should also be used with care, and avoid single gender images such as all male mechanics or all female nurses.

Including a positive statement in an advert such as *applications are welcome from all suitably qualified or experienced people,* will help make it clear to applicants.

Despite your best efforts, you may receive a complaint about an advert you have placed, however a recent case heard by the European Court of Justice should help prevent people who are looking to exploit these situations.

In *Kratzer v R+V Allgemeine Versicherung AG*, the ECJ decided that a person who makes an application for employment with the sole view to claiming compensation for discrimination, cannot rely on EU laws which prohibit discrimination.

R+V had advertised trainee positions for graduates with a particular degree and some relevant experience. Mr Kratzer a former lawyer and manager within an insurance company applied for one of the positions. When his application was rejected, he complained of age discrimination and demanded compensation. R+V then invited him to an interview, which he declined to attend, saying his future with the company should only be discussed once his compensation claim had been satisfied.

The ECJ said that as Mr Kratzer's objective was not to secure a job with R+V, but to claim compensation, this was an abuse of process and he had not suffered damage of a sort which the laws prohibiting discrimination were designed to prevent.

Whilst this case should help prevent companies from people who are looking to gain financially instead of genuine job applicants, it serves as a reminder to make sure the advert is correctly worded and designed according to the guidelines.

Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2016)

16-17	£4.00
18-20	£5.55
21-24	£6.95

National Living Wage from April 2016

for 25+	£7.20
Apprentices	£3.40

Statutory Sick Pay (from April 2016)
per week £88.45

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2016)
£139.58

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years.
Maximum week's pay is capped for dismissals after 6th April 2016 under the Statutory Scheme at £479.00

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

Amanda Finn
Tel: 01622 689795
Email: a.finn@gullands.com
Twitter: @Gullands_HR_Law

Andrew Clarke
Tel: 01622 689733
Email: a.clarke@gullands.com

16 Mill Street
Maidstone
Kent ME15 6XT
01622 678341

18 Stone Street
Gravesend
Kent DA11 0NH
01474 887688

www.gullands.com
info@gullands.com

GULLANDS
SOLICITORS