Bevan Brittan

Employment Eye

Higher Education in Focus

October 2019

Bevan Brittan

Employment, Pensions and Immigration

Can we help?

Our dedicated team of 17 employment, pensions and immigration lawyers, including 5 partners is nationally recognised as a top tier law supplier in the Chambers and Legal 500 Directories.

We provide practical, high quality and commercially relevant legal and HR management advice and support on all workforce law issues.

We offer a collaborative working approach and provide a full support service covering the entirety of the relationship between your organisation and its employees. In particular we provide:

- practical support in relation to day-to-day employment issues (attendance, sickness, performance, disciplinaries),
- commercial advice in relation to equality and diversity issues, bullying and harassment, grievances and the provision of alternative dispute resolution;
- strategic support and advice in restructuring projects, reorganisations, redundancies, implementation of change including changing terms and conditions;
- advice in relation to exit strategies, maintaining confidentiality and restrictive covenants;
- transactional and project support on the workforce related aspects of M&A, outsourcing and high level TUPE advice;
- drafting and advising on the full complement of contractual documentation including agreements, policies, procedures and tailored remuneration arrangements;
- a dedicated 'Associates Network' of independent high level HR professionals providing an internal investigations service, and support on specific and ongoing HR projects;
- bespoke training programmes and documentation;
- representation at Employment Tribunals and Court;
- regular electronic bulletins on key developments in employment and HR law, together with twice yearly HR seminars at our offices with CPD accreditation.

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Welcome to the October 2019 edition of our update on employment law issues of particular relevance to Higher Education institutions. This supplements our regular workforce law update, Employment Eye, and is published quarterly.

Please email **subscriptions@bevanbrittan.com** if you would like to sign up to receive our regular employment bulletin, Employment Eye, and if you would like to receive invitations to our free in-house employment law training events.

Ashley Norman heads our employment law services to the higher education sector and would be pleased to discuss any issues relating to employment law, immigration and student matters.

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Re-employment order of Tribunal cannot be enforced in civil courts

Although they are irregularly sought and even more rarely ordered by Employment Tribunals, occasionally the remedies of reinstatement and re-engagement do fall to be considered if a Claimant succeeds in their claim of unfair dismissal. In **MacKenzie v The Chancellor, Masters and Scholars of the University of Cambridge [2019]** the Court of Appeal gave judicial guidance on this esoteric area of law.

DrM pursued a claim of unfair dismissal against the University; the University conceded liability and the Tribunal was asked to consider a request for reinstatement and re-engagement brought by Dr M under ss113 and 115 of the ERA 1996.

The University resisted the Tribunal's provisional order for re-engagement on the ground that it would not be practicable mainly due to an irretrievable breakdown in workplace relationships. The Tribunal rejected this argument and made the order final. However, the University failed to re-engage Dr M and although it was liable to pay additional compensation for its non-adherence to the order under s117 of the ERA, Dr M brought an action in the civil courts seeking to compel her former employer to re-employ her so as to give practical effect to the order made by the Tribunal. The Court of Appeal has however decided that orders made by employment tribunals under ss 113 and 115 of the ERA do not create '*an absolute and indefeasible obligation on the employer*', nor they do give the employee an actionable right to be employed. When read in line with s117, a situation is created whereby the employer must either re-engage the employee or become liable for the awards specified in s117(3). The employer is therefore at liberty to become liable for the additional compensation as opposed to actually re-engaging the employee.

This decision will be read with interest by many employers including HEIs which perhaps face a disproportionately higher number of claims for reinstatement or re-engagement compared to other employers. If the employer is prepared to take the financial hit, it would seem that they are not required to have the employee back, even if the Tribunal makes such an order.

International student mobility

The Government's announcement last month that it will re-introduce the two year post-study work visa for international students has been a welcomed change within higher education. The visa enables eligible students with an undergraduate degree or above to look for work for as long as two years following after completing their course. Currently, graduates with bachelors or master's degrees are entitled to look for work for only four months, and previous discussions to extend this time were appearing to go as far as six months. The new proposals revive the 2012 policy of the coalition government which was scrapped by the then home secretary, Theresa May, for being "too generous".

The revival of this policy comes in response to the drop in international student enrolments. The UK Government's international education strategy seeks to grow the number of international students coming to the UK to 600,000 over the next 10 years.

The Chief Executive of Universities UK, Alastair Jarvis, welcomed the change and said it would put the UK back as 'a first-choice study destination', addressing the 'competitive disadvantage'.

A 2018 report by London Economics for the Higher Education Policy Institute and Kaplan International Pathways estimated that the economic benefit of welcoming 231,000 new international students each year to the UK was £22.6 billion, comprising tuition fees and other spending / economic activity. These economic benefits are distributed throughout the UK according to where studies are undertaken, albeit with the largest number of international students attending London higher education institutions. With Brexit looming on the horizon, international student mobility will remain an important policy area for economic growth.

Planning for a no-deal Brexit: the immigration implications

The government took a U turn on its plans to bring a hard stop to freedom of movement last month. The general discussion around freedom of movement was that it would end abruptly on 1 November 2019 following a 'no-deal' Brexit. This came primarily from a statement by the home secretary, Priti Patel in the summer which caused concern for EU nationals and their families (and indeed some employers) that should they not arrive before 31 October 2019, they would be subject to a stringent points-based system in order to live and work in the UK.

For those entering the UK on or after 31 October 2019, the latest announcement is that EU nationals can apply for 'Temporary Leave to Remain' under a new government scheme. The scheme allows individuals to apply for permission to remain in the UK for 36 months. After this time, they will be able to apply for further leave to remain under the points based system.

For those already in the UK, the position has been less threatened. The government opened the Settled Status Scheme earlier this year which is available for EU nationals who already live in the UK. The scheme provides a pathway for EU nationals to attain settled, or pre-settled status in the UK by submitting an application through the government website. Applications are free and over a million people have applied so far.

We recommend taking the following actions to manage your workforce:

- Encourage employees who are EU nationals to apply for settled status. Be aware that the status a person is given may depend on when they apply, so it is a good idea to apply early and in any case before the proposed deadline in a 'no-deal' scenario of 31 December 2020
- Try to fast track any pipeline recruitment where contracts are due to start after the 31 October 2019. If prospective employees are brought on earlier, they may be eligible for the Settled Status Scheme
- Keep an eye on the government's position in relation to EU nationals arriving after Brexit. It has been turbulent but at the moment it seems that the Temporary Leave to Remain scheme is in place for after Brexit. Ensure any eligible new recruits sign up to the scheme to access the 36 months leave to remain

Term time teacher underpaid holiday (Harpur Trust v Brazel, Court of Appeal [2019])

Every worker is entitled to 5.6 weeks' paid annual leave under the Working Time Regulations, but the application of the law to those engaged in non-standard work continues to present difficulties. The *Harpur Trust v Brazel* case is the latest instalment in this saga which will potentially be of interest to HEI's given the nature of Mrs Brazel's working pattern.

Mrs Brazel was a part-time music teacher, engaged on an hourly-paid contract, who did not teach in the school holidays (though significantly, she remained subject to contractual duties throughout the year). As a worker under the Working Time Regulations 1998, she was entitled to 5.6 weeks' paid annual leave. The dispute arose around the time period used to calculate her holiday pay; the School computed holiday entitlement by applying the 12.07% formula based upon *actual* hours worked during term time only. UNISON intervened in the case in the Court of Appeal, contending that under the Working Time Regulations she was entitled to 5.6 weeks' paid leave and that her paid holiday leave should be determined by her average hours worked over a 12 week period.

The Court of Appeal agreed: in common with every worker Mrs Brazel was entitled to the statutory minimum wage, paid in accordance with the ordinary rules on a week's pay. The case has importance for the increasing number of workers, such as those on zero-hours contracts, who don't have permanent full-time contracts and who often don't work some weeks in a year. So, universities which engage term only 'casual' workers may wish to review their holiday pay arrangements for such individuals to ensure they do not contravene the principle established as a result of this decision.

Will covertly recording a meeting always be gross misconduct?

In the case of *Phoenix House Ltd v Stockman* the EAT confirmed that the covert recording of a meeting by an employee will usually amount to misconduct, except in the most extreme circumstances. However, whether it constitutes gross misconduct is less certain and is likely to depend on whether the employee had been informed of the seriousness of doing so beforehand.

In this case, Ms S had been summarily dismissed by Phoenix House after an unsuccessful mediation following restructure of the company where Ms S's post was reviewed. After the restructure, Ms S had been offered a more junior role. She complained to her line manager that the interviewer had been biased against her and after overhearing her line manager discussing this with the interviewer, she demanded to know the contents of their discussion. She was invited to an HR meeting, which she secretly recorded.

Ms S raised a grievance following the meeting which the court eventually found had a protected disclosure. The court subsequently found that her dismissal had been unfair.

As part of the appeal, Phoenix House argued that the covert recording would have constituted a breach of the implied term of mutual trust and confidence and it would have been entitled to terminate Ms S's contract had it known about it.

With regards to the recording, the EAT upheld the tribunals' findings that she was not doing so in order to entrap the employer, she merely felt flustered at the time of the meeting and thus the tribunal reduced her compensatory award for unfair dismissal by 10%.

The EAT made clear that the circumstances of any recording would be relevant such as the purpose of the recording, the subject matter and any evidence indicating the employer's attitude. The fact that people now carry mobile phones with recording functions mean that it is much easier to record meetings and recording is not so frequently pre-meditated. Therefore, it is not such a severe misconduct.

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Clients are reassured by the team’s availability to offer “excellent service and great legal support when needed the most.”

- Chambers UK 2018

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