

MASSERS

EMPLOYMENT LAW UPDATE

May 2017

General Election 2017

The Conservatives, Labour party and Liberal Democrats have published manifestos ahead of the General Election on the 8th June 2017. With the Election now only weeks away, what are the implications for employment law?

The Conservatives have promised to maintain existing rights post-Brexit and to introduce some new rights to include a right to request unpaid time off for training for all employees, a right to unpaid time off to care for sick relatives, child bereavement leave and new support for those returning to work after family leave. Theresa May has described the changes as the '*greatest expansion in workers rights by any Conservative government in history*'. She also promises to extend discrimination protection for those with mental health problems and take further action to address the gender pay gap and ethnicity gap.

In contrast the Labour Party has proposed a comprehensive reform of employment law to include abolishing tribunal fees, making all existing employment rights 'day one' rights and extending them to workers, increasing the length of maternity and paternity pay, and introducing statutory bereavement leave. They wish to create a Ministry of Labour to ensure all employment rights are enforced, ban zero-hours contracts and give unions new rights in the workplace and an independent body to ensure compliance with pay gap reporting obligations. Improvements to equality law and new ethnicity pay gap reporting are included in the manifesto and they wish to preserve all existing EU law rights following Brexit.

The Liberal Democrats claim to be the alternative, more effective opposition, particularly regarding issues surrounding Brexit. They want to keep the UK in a single market and preserve freedom of movement within the EU. They have promised to abolish tribunal fees, include the introduction of pay gap reporting in relation to gender, race and sexual orientation, introduce name-blind recruitment in the public sector and continue the drive for boardroom diversity. Like Labour, they would make flexible working paternity and shared parental leave 'day one' rights, provide an additional month's leave for fathers or extend free childcare places

Holiday Pay: Update

In *Bear Scotland and Others –v- Fulton and Others* (2014) the Employment Appeal Tribunal (EAT) held that more than three months between an underpayment of holiday pay broke the 'series of deductions' preventing the Employment Tribunal from having jurisdiction to consider claims relating to earlier underpayments. The decision limited the scope for workers to make substantial retrospective claims for underpaid holiday.

In August 2015, *Fulton and another – v – Bear Scotland Limited* returned to the Glasgow Employment Tribunal (ET) to consider the Claimants' individual circumstances.

The ET considered itself bound by the EAT's earlier ruling and excluded claims where more than three months had passed between successive non or underpayments of holiday pay. The Claimant's appealed. They argued that the EAT's finding on the 'break the series' point was not sufficiently material to the decision and that the three month rule 'would lead to arbitrary and unfair results'.

The EAT rejected the appeal and has confirmed that a series of deductions is broken by a gap of three months or more. This limits the scope for employees to make retrospective claims for underpaid holiday under unlawful deductions from wages legislation.

Discrimination and reasonable adjustments

The Employment Appeal Tribunal (EAT) recently held in *The Government Legal Service against –v- Brookes* that a job applicant, Ms Brookes who had Asperger's Syndrome was discriminated against by being required to sit a psychometric test.

The Government Legal Service (GLS) was recruiting Lawyers in what the ET called a '*fiendishly competitive recruitment process*'. The process included a multiple choice Situational Judgement Test (SJT).

Ms Brookes requested adjustments on the grounds of her condition, but apart from some time allowances, she was informed by the GLS that an alternative test format was not available. Ms Brookes failed the SJT and issued proceedings in the Employment Tribunal (ET) for disability discrimination.

The Employment Tribunal (ET) concluded that a 'provision, criterion or practice' (PCT) (being the requirement that all applicants' taken past the SJT) put individuals such as Ms Brookes as a particular disadvantage compared to those that did not have Asperger's Syndrome.

Ms Brookes' claims of indirect discrimination and failure to make reasonable adjustments against the GLS succeeded. The Tribunal held that whilst the PCT served a legitimate aim, the means of achieving it were not proportionate.

The EAT agreed and held that the ET was entitled to conclude the PCT placed Ms Brookes at a particular disadvantage because of her condition and the ET had adopted the correct approach when carrying out a proportionality assessment. A psychometric test was not the only way for the GLS to have achieved this.

Ramadan

The Islamic holy month runs between 26th May to 24th June 2017. It is a period of religious observance for many muslims and includes fasting from sunrise to sunset.

It is important to be aware that some employees may be observing Ramadan. To limit grievances arising and potential claims for discrimination, you may wish to consider:

1. Implementing a religious observance policy to deal with religious observance during working time;
2. Being aware of reduced productivity levels and not unduly criticising affected staff;
3. Introducing a policy on religious holidays and support holiday requests where possible;
4. Excusing affected staff from training events, conferences and offsite meeting during Ramadan, particularly where food and drink will be present.

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