Employment &BusinessBrief

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Equality Act extension to cover charity volunteers

Proposed changes to sexual harassment law which are currently under Government consultation could see charities facing more employment tribunal cases brought by volunteers.

The Government consultation closes on 2 October and they are consulting on whether the current laws provide the protections they are supposed to, considering whether there are any gaps and thinking about what more can be done at a practical level to ensure people are properly protected at work.

There are concerns that charities might find they are liable if they do not protect their volunteers from members of the public or their service users in the same way that they would with their employees.

One of the questions which the consultation asks is specifically about the protection of volunteers and whether the protections of the Equality Act should be extended to them. Although this consultation is primarily about sexual harassment, it highlights that harassment related to any protected characteristic (apart from pregnancy and maternity and marriage and civil partnerships) is also prohibited under the Equality Act and therefore the options it discusses would apply equally to all forms of harassment.

The Government's impact assessment sets out three options which are:

- To do nothing
- Make changes to the Equality Act 2010 to make employers legally liable if they fail to take all reasonable steps to protect staff from third party harassment.
- Make a number of changes to the Equality Act 2010 which impose a preventative duty on employers to prevent sexual harassment in their workplace, expanding the Act's workplace protections to include all interns and some volunteers, an extending Employment Tribunal time limits under the Equality Act.

There are naturally concerns from within the sector that bringing the 20 million plus charity volunteers that are here in the UK into the scope of this law is a big move. Whilst recognising that volunteers should receive the same level and quality of protection as paid staff, charity groups are questioning whether in practice it should only apply to larger charities or volunteers that have more formal roles within organisations.

The Government has estimated that an additional 22-38 harassment cases might be brought forward by charity volunteers annually if any changes are introduced. The largest cost from the introduction of any new provisions would be the time spent by charities to familiarise themselves with the new requirements.

Working life is changing

It is not just technology which is changing how we work, or where we work, it is also people's changing attitudes and expectations across the different generations within the workplace.

Millennials now have a more prominent role in the workplace and the running of many businesses, Generation Z, born after 2000 and the first to have grown up with the internet and social media, are now entering the workplace.

People are much more aware of the need to take care of their own personal physical and mental wellbeing. Flexible working structures can help to improve the wellbeing and work-life balance of employees and can also have a positive effect on their mental health in general.

A recent study published by Wildgoose in August 2019 highlighted 39% of individuals who work flexibly have seen a noticeable improvement in their mental health whilst 70% feel it helps them to maintain a good work-life balance.

Flexible working structures allow employees to have greater autonomy over their working hours, which can be beneficial for those who are also working carers or those with health conditions, so it is not just the young who can benefit.

Many businesses also have alternative leave policies which allow for life events and unexpected personal demands, leaving holiday allowances free for pure down time and relaxing. It requires a shift of traditional workplace culture and management attitudes however to make this successful, especially in more traditional firms and sectors.

It has been demonstrated that people who work more flexibly are happier and healthier and also take less time off sick and as their stress levels are better. This will also help to reduce the burden on co-workers and should have a positive impact on the productivity and profitability of any organisation.

Moving to more flexible working can also include arrangements regarding where employees choose to work – whether from home, remotely or in a job share arrangement, with two part-time employees fulfilling the tasks of a single full-time job.

Other options could include an annual hours arrangement. Employees would be free to set the number of hours over the whole year which would allow them to work longer hours during peak periods and cut back when there is less demand, or work hours which suits their family and or other lifestyle commitments.

Compressed hours allow employees to work their contracted time over a shorter period, ie working slightly longer days.

Another non-traditional working practice which is gaining in popularity is working a four-day week and additional 'life leave' on top of paid holidays for personal situations such as moving to a new house.

To successfully adopt a more flexible approach to work patterns means having the relevant policies and procedures in place which clarify what is available as well as training and ongoing support for managers. Holding a consultation with employees on what sort of changes to flexibility they would like see is a good starting point before taking the plunge.

Illegality in Employment Contracts

The illegality principle prevents the court from assisting a claimant who has based their claim on an immoral or illegal act. It has often been said that the principle is easy to say but not so easy to apply in practice. Although tribunals generally will not enforce an illegal contract, cases are often decided on their facts and it is therefore difficult to establish a set statement of the basis which underpins this doctrine.

The most common illegality issue in employment aspects is that where an employee or worker does not have the right to work in the UK, because their employment breaches immigration laws.

How the tribunal approach this will depend on the type of illegality and the type of claim.

The key questions that tribunals ask when dealing with the illegality defence are:

- Was the employment contract in question expressly or impliedly prohibited by statute.
- If the employment contract was not prohibited by statute was it legal on its face but illegally performed.
- Is the claim one that flows from the employment contract itself such as unfair dismissal or unlawful deduction from wages.
- Can the tribunal sever the illegality and allow the claim to proceed.

Issues heavily regulated by statute are immigration issues, the employment of children or the safeguarding of the health of new and expectant mothers. If a statue says employers cannot do something then any contract to try and achieve that will be illegal. If there is no express prohibition tribunals will have to then consider whether it can be implied. An employer's uncertainty about the legality of the contract will not necessarily affect the rights that flow from it. Case law established that an employee who was suspended without pay on a date specified in her passport as "entitled to work in the UK until…" was held by the Employment Appeal Tribunal to be wrong. The employee in question was entitled to remain in the UK and work. She did not lose that entitlement because she did not get a new stamp on her passport and therefore the employer's actions were not justifiable by claiming it was illegal for them to employ her beyond the specified date.

Statutory restriction is also one of the potentially fair reasons for dismissal under the Employment Rights Act 1996. Another example of this would be when an employee who drives for their job loses their driving licence. Employers here must still follow a fair dismissal procedure.

Illegality in the performance of the contract arises where on the face of it a contract is legally entered into but then performed in what is found to be an illegal manner. Many of the cases in this area involve misrepresentations to HMRC where an individual and their employer may fraudulently misrepresent an employee's employment status as that of a self-employed contractor; or an employee maybe paid a part of his salary in cash to avoid paying proper income tax or national insurance contributions. Even in these cases the employer, to succeed in claiming a contractor is illegal must show three things:

- The claimant knew of the illegality;
- The claimant participated in the illegality;
- The illegality infected the contract.

If both parties wrongly categorised an employee as being self-employed a tribunal finding to the contrary will not render the contract illegal. The representations as to employment status must have been fraudulent for the defence to succeed.

One case involving this area involved a sub-contractor Mr Payne who was investigated by HMRC who concluded that it was willing to treat him as self-employed although the matter was very finely balanced. The employer later terminated Mr Payne's contract and he then chose to claim he was an employee. He succeeded in convincing an employment tribunal that he was an employee and could proceed with the claim. The employer then claimed the contract was illegal and unenforceable. The Employment Appeal Tribunal held in Mr Payne's case that there had been no misrepresentation to HMRC of his status it was just that the parties wrongly, but in good faith, thought it fell into one category than the other.

Beware, as an employer's knowledge or participation in the illegality if greater or more reprehensible than the employees can also lead an illegality defence to fail. The burden of proof in any claim lies on the party who is asserting the illegality and tribunals may choose to hold preliminary hearings to decide on this issue before the claim proceeds to a final hearing.

Digital signatures on contracts

It is increasingly more common for businesses to enter into an agreement and exchange contracts via emails and we are often seeing the use of electronic and digital signatures as part of this trend. What then are the risks associated with this?

It is still preferable for both parties to meet and to use a written, signed contract as it gives you much greater certainty that the person and business you are dealing with are who they say they are, have the authority to agree to the terms which are being entered into and have the intention to be bound by the terms of the agreement that they have entered into.

However increasingly in practice, this doesn't happen.

The law does recognise a variety of valid electronic signatures from a scanned copy of an ink on paper signature to having to click on a separate link to acknowledge 'I accept' the terms online. The latter is probably the one we are all much more familiar with and don't give it a second thought in our everyday internet use.

There is of course the concern that anything electronic can be altered, so a more sophisticated approach should be taken by all businesses and a digital signature platform should be used. These provide an electronic fingerprint, coded and securely associated with the person signing and provide the ability for recorded storage, enabling accurate record keeping. DocuSign is one such platform.

It also helps to speed up business process, especially as we are entering more uncertain times and businesses may be dealing with suppliers and customers from different parts of the UK or beyond, to maintain their usual business operations or to meet new demand for goods or services.

Getting your business ready now for the future and assessing how digital signatures can be used for your business contracts will help you to stay one step ahead of your competition and to react quickly to changes in the wider world.

For advice on any business contract, contact **Sarah Astley s.astley@gullands.com**

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
01622 689795
a.finn@gullands.com
@Gullands_HR_Law

Dudley Cramp
01622 689734
d.cramp@gullands.com

Sarah Astley
01622 689727
s.astley@gullands.com

Jonathan Haines
01622 689736
j.haines@gullands.com

Andrew Clarke
01622 689733
a.clarke@gullands.com

Gabriela Alexandru
01622 689716
g.alexandru@gullands.com

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

	April 2018	April 2019
Apprentices	£3.70	£3.90
16-17	£4.20	£4.35
18-20	£5.90	£6.15
21-24	£7.38	£7.70
25+	£7.83	£8.21

Statutory Sick Pay (from April 2019)
Per week £94.25

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2019) £148.68

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 under the Statutory Scheme for dismissals after 6th April 2018 at £508.00 and after 6th April 2019 at £525.00.