

Workplace Law - Happy New Year!

We kick off 2016 reporting on the new **Exclusivity Terms in Zero Hour Contracts (Redress) Regulations 2015**, the introduction of the National Living Wage and the new ACAS guidance on legal highs in the workplace.

Exclusivity Terms in Zero Hour Contracts (Redress) Regulations 2015

The **Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 (the Regulations)** came into force on **11 January 2016**.

The Regulations provide that:

- any dismissal of a zero hour contract employee will be automatically unfair, if the reason or principal reason is that the employee breached a contractual "exclusivity" clause prohibiting him/her from working for another employer;
- there is no length of service requirement to bring such an unfair dismissal claim; and
- subjecting a zero hour worker to detriments if he/she works for another employer in breach of an exclusivity clause is unlawful.

By way of example: we recently reviewed a contract which contained a clause that stated "*your hours of work and pay will vary according to the needs of the business. It is a condition of your employment that you work flexibly. You acknowledge that there may be periods when no work is available and the Company has no obligation to provide with any work, or to provide you with any minimum number of hours of work...*"

The same contract also stated that *the Employee shall devote the whole of his time and attention to the business of the Company*. These types of provisions together are no longer permissible. This latter clause in these circumstances in any event is now rendered unenforceable.

Legal highs in the workplace is apparently becoming a major issue for employers

As a result ACAS have this month published guidance on how employers can address this issue.

Legal highs largely imitate the effects of banned substances and resulted in 129 deaths last year. If they are used in the workplace there may be implications on an employee's ability to work as well as health and safety risks.

ACAS have suggested that the best way that employers can start addressing the issue of legal highs is by incorporating their prohibition in their drug and alcohol policies. This will leave no doubt that legal highs are not acceptable.

Head Office
3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 540170

Thames Gateway
Corinthian House
Galleon Boulevard
Crossways Business
Park
Dartford
Kent DA2 6QE
T 01322 623700
F 01322 623701

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Secondly, the guidelines advise that if it is found that an employee has a problem with legal highs (or indeed any harmful substance), that a rehabilitative approach should be taken rather than a punitive one. If employers are clear that they are there to offer help and support to their staff, employees are more likely to seek treatment. Again though, there is a balancing exercise to be had as employers may be prosecuted if they knowingly allow an employee to continue work while intoxicated and that employee poses a significant risk to themselves or others under the *Management of Health and Safety at Work Regulations 1999*.

In order to try and overcome this, ACAS suggest that staff members, especially those in managerial positions, should be trained to spot the signs of drug use and be educated on the effects that legal highs can have. If managers know what to look out for, drug issues can be addressed immediately and the employee directed to the proper channels of help, whether that be within or outside the organisation.

If you would like a drug and alcohol policy to incorporate legal highs and the steps that will be taken in light of their use, please contact one of our team who will be able to provide you with further information.

Employer's instruction not to speak native language at work was not discriminatory

In the recent case of *Kelly v Covance Laboratories Ltd*, the Employment Appeal Tribunal (EAT) upheld a Tribunal's finding that Mrs Kelly's employer did not directly discriminate or harass her because of her race when asking her to refrain from speaking in her native language at work.

Under the *Equality Act 2010*, direct race discrimination occurs where someone is treated less favourably because of his/her race. Racial harassment occurs where someone engages in conduct related to race or ethnicity and the conduct has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Russian-born Mrs Kelly worked as an analyst for an animal testing company, Covance Laboratories Ltd (CL). Mrs Kelly had long conversations in Russian on her mobile phone in the office toilets, which was considered by her line manager to be unusual conduct for a new employee, and, as animal rights activists had infiltrated CL in the past, lead him to suspect that she may be an activist. He therefore instructed Mrs Kelly to not speak Russian at work so that her conversations could be understood by English-speaking managers. Mrs Kelly argued that

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other colleagues spoke their native language at work and he therefore asked other managers to pass on the same instructions to their employees.

The EAT found that the Tribunal had been entitled to find that an instruction linked to an employee's national origins could amount to unlawful direct discrimination and harassment. However, in this case, CL had a reasonable explanation for its actions which were not linked to Mrs Kelly's race or nationality; the Tribunal took CL's animal testing activities and the security requirements arising from this into account. Mrs Kelly's named comparators were also treated in the same way and therefore she did not suffer from less favourable treatment.

What are the implications?

Employers should be careful not to treat this case as permitting employers to impose language requirements at work in every case, but rather as guidance that it may be permitted when taking account of the context of the business and the reasons for the requirement. Employers should consider whether it has good business reasons to justify a requirement to speak English at work, e.g. for security reasons or to ensure an inclusive working environment and avoid bullying/exclusion, so that it is unrelated to an employee's race. The requirement should also be applied in a fair and consistent manner to employees of all nationalities.

ACAS workplace trends 2016

ACAS have produced the *Workplace Trends 2016*. In this report, ACAS have identified trends that they believe will have an impact on workplace relations in 2016. The document outlines a number of trends; we have focussed on but a few.

Workplace bullying

Last year, the ACAS helpline received over **20,000** calls relating to bullying and harassment. There has been a steady increase of grievances submitted on this topic over the past decade. Susan Clews, the Chief Operations Officer at ACAS, records that as many as **40%** of employees have experienced disrespectful or humiliating behaviour at work.

ACAS suggest that, to tackle bullying, companies require an effective anti-bullying policy that outlines unacceptable behaviour and the repercussions for breaches.

Dr Makani Purva, Director of Medical Education at Hull and East Yorkshire Hospitals NHS Trust and their Anti-Bullying Tsar, believes that bystander intervention is the most powerful method to overcoming bullying. Moreover, it is imperative that managers have appropriate training so that they are alert to potential breaches of the policy and have the skills to know how and when to intervene as early intervention of bullying can halt its progression.

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Productivity

ACAS and the current government see workplace productivity as a big issue for 2016, this follows on from their reports in June and July 2015, respectively.

The government believes that if the UK could match the United States levels of productivity then this would equate to around **£21,000** per annum per household in the UK.

UK productivity as a whole has increased but still remains behind competitors. However, the UK chemical industry productivity has increased by **46%** outpacing the **32%** increase seen in the European Union (EU) chemical sector as a whole. This comes despite the fact that there has been an overall reduction in the number of UK chemical industry jobs.

Frances O'Grady, General Secretary for the TUC, believes that communication is the essential ingredient of a productive workplace. Frances points out that workers in **19** countries within the EU have '*the right to have a voice in the corporate governance*' of their companies and draws attention to the document *Making Work Better: an Agenda for Government 2014*. In this document it is noted that '*according to the European Participation Index, only Lithuania performs worse than the UK*' when it comes to workers having a say in how their workplace operates.

Communication in the workplace

This is a recurrent theme throughout the report. The message being conveyed is that, at present, communication is interpreted narrowly and that employer's believe they are good communicators when they give instructions to employees. In the report, the consensus is that dialogue should be reciprocal and as Frances O'Grady rightly points out, good communication does not just happen. It requires a commitment to engage in constructive dialogue.

Zero-hour contracts

The Office for National Statistics estimates that there are **744,000** workers in the UK on contracts that guarantee no minimum hours. This represents **2.4%** of the total UK workforce and a **19%** increase from last year.

Don't forget the National Living Wage is effective from 6 April 2016

From 6 April 2016, the National Living Wage (NLW) will be introduced for workers aged 25 and above at **£7.20** per hour. This is set to increase each year thereafter a rate equal to 60% of median earnings by 2020, by which time it should be above £9 per hour.

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Meet the team

For more information on anything mentioned in this newsletter please contact a member of the employment team.



Nick Hobden
Partner
01892 701326
nick.hobden@ts-p.co.uk



Susanna Gilmartin
Partner
01322 422540
susanna.gilmartin@ts-p.co.uk



Ben Stepney
Associate
01892 701359
ben.stepney@ts-p.co.uk



Alex Millward
Paralegal
01322 623707
alexander.millward@ts-p.co.uk



Rahanna Choudhury
Trainee Solicitor
01892 701143
rahaana.choudhury@ts-p.co.uk



Carmina Campion
Trainee Solicitor
01892 701138
carmina.campion@ts-p.co.uk

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