

## Workplace Law

As ever legislation is on the move and case law continues to move the goal posts, challenging HR practitioners. This month we consider the Uber case, when a philosophical belief is a protected characteristic, the ACAS Code's application to ill health dismissals and the admissibility of negotiations under S. 111A and 'without prejudice' negotiations.

## Uber and employment status

As we are sure that you are aware, Uber runs a taxi hailing service through an App on mobile phones and have enjoyed a great deal of success, expanding to become a multi-national company.

On the 20 July 2016, an Employment Tribunal began considering the employment status of Uber drivers. Usually leaving the parties to decide on their employment status is quite straightforward when negotiating the arrangement and tribunals are not often asked to decide status, when documentation is in place agreed by both sides to an arrangement for the supply of labour. However, occasionally the tests for employment status do have to be studied and a sanity check is necessary.

Uber considered its drivers to be 'self-employed partners' who enjoy being their own boss and have privileges that are not afforded to employees. However, on behalf of the Uber drivers, the GMB argue that this is the wrong classification and that the drivers should be considered as employees, which will entitle them to rights such as:

- national minimum wage;
- mandatory rest breaks (which are potentially life saving, given that the work involves driving for long periods);
- paid leave; and
- unfair dismissal.

If the drivers are successful, the potential reverberations of this case could be far reaching for all organisations who have self-employed contracts for services arrangements in place and decision to regard these drivers as employees could pave the way for similar cases to be brought.

Should the drivers be deemed to be employees? There is likely to be substantial compensatory pay-outs as Uber has 30,000 drivers in London alone. Whilst not authoritative, the Company has recently lost a law suit in America involving a \$100M pay-out when a Californian court ruling determined that the Uber drivers were employees not contractors.

Other implications for Uber will be:

- tax regime based, such as whether Uber should have been making employer national insurance contributions and deductions for PAYE; and
- enrolling its new 'employee's' onto pension schemes, where they are eligible for auto-enrolment.

An adverse ruling is likely disrupt Uber's plans to increase its drivers to 46,000 in London in 2016. Watch this space a further update when the decision is released.

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## When is a philosophical belief a protected characteristic in the workplace?

An employee's philosophical beliefs are protected against discrimination in the workplace under the Equality Act 2010.

A philosophical belief must meet the criteria set out in the case of *Grainger plc v Nicholson* in order to qualify for such protection:

- the belief must be genuinely held.
- it must be a belief, not an opinion or viewpoint based on the present state of information available.
- it must be a belief as to a weighty and substantial aspect of human life and behaviour.
- it must attain a certain level of cogency, seriousness, cohesion and importance.
- it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

Philosophical beliefs are similar to religious beliefs, in their need to encompass a belief (rather than an opinion) in a weighty and substantial aspect of human life and behaviour; and have a degree of cogency and seriousness; but they are also distinct from religious beliefs in that they need not form part of a shared belief system or have regard to a supernatural being.

In the recent case of *Harron v Dorset Police* the limits of this definition were tested.

In *Harron* the claimant had a profound philosophical belief in the "proper and efficient use of public money in the public sector". At the first hearing, the Employment Tribunal (ET) determined that the claimant's beliefs were not sufficiently weighty, and did not touch on a sufficiently substantial aspect of human life and behaviour. The ET also felt that since the belief was confined to the workplace, rather than applying more widely to human life and behaviour in general, it could not qualify for special protection.

The claimant appealed. His appeal was upheld.

The judge in the Employment Appeal Tribunal (EAT) held that while a philosophical belief needed to be substantial, it did not need to have the same status or level of cogency as a religion. What was required was that the belief was more than merely trivial. The coherence and cogency of a philosophical belief relates to whether it is intelligible and capable of being understood.

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However the EAT judge also stated that the ET may have been right to conclude that a philosophical belief, which was confined to the workplace was too narrow to be protected. The law is designed to protect those with a belief on a “fundamental problem” concerning human life and behaviour. In this particular case the judge felt that the ET had not provided sufficient reasons as to why it held that the belief was too narrow. So this case is going back to the ET to have another go at getting it right. Therefore, it is still possible that the claimant’s claim will eventually be dismissed on the grounds that his belief was insufficiently narrow.

Among other beliefs held to constitute a philosophical belief include a belief in man-made climate change, certain political views (including a belief in left-wing democratic socialism) and potentially a belief in Darwinism. It is important to stress that this is a developing area of law and the interpretation of philosophical belief is likely to change over time.

The lesson from these cases is that it is important to recognise that the strongly held views of employees, which are not otherwise religious beliefs, may still be protectable as philosophical beliefs. Employers should therefore be cautious not to discriminate against such views.

## ACAS Code of Practice does not apply to ill health dismissals

An employer who dismisses an employee **on the grounds of ill health** does not have to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (the Code), the Employment Appeal Tribunal (**EAT**) has ruled. This a welcome decision which reaffirms what many employers already know about then the famous Code applies in the dismissal sphere.

The Code’s guidance states that it should be applied to dismissals arising out of conduct and performance, but does not expressly mention any other issues affecting capability. It was not made specifically clear whether the Code would apply to the situation where an employee is dismissed solely on the grounds of ill health.

If the Code applies to a dismissal scenario, an employer’s failure to follow the procedural steps and actions in the Code may entitle the employee to an uplift in the amount of compensation that they receive.

In the case of *Holmes v QinetiQ*, the Claimant was dismissed from his security guard role as a result of his ill health. The Defendant company conceded that the dismissal was unfair; however at the remedy hearing, the Claimant argued that he was entitled to an uplift in his compensation as a result of the Defendant’s failure to follow the Code.

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The EAT dismissed the Claimant's appeal and decided that the Code really only applied to situations where an employee faces a complaint or allegation that leads to a disciplinary situation. The EAT stated that there must be 'culpable conduct' in order for the Code to apply, therefore ill health was not included in this definition.

It was recognised that poor performance alone is capable of involving culpable and non-culpable conduct. The EAT however said that where poor performance is because of a genuine illness or injury, there would be no element of culpability or need for any disciplinary action. However, the position would be different where ill health, such as persistent intermittent absenteeism leads directly to a disciplinary issue, as this could potentially encompass 'culpable conduct'. Whilst the non-statutory guidance on the Code states that ill-health matters should only be dealt with as a disciplinary issue under the Code if the employee is absent for no good reason.

The decision in Holmes confirms that employers are not bound to follow the Code if they dismiss an employee solely for ill health reasons where there is no issue of poor performance. The decision also makes it clear that in order for the Code to apply, there must be some element of culpability on the part of the employee. That's good then. We know for certain when the Code needs to be followed and when it can be left in the draw.

## Admissibility of settlement negotiations under section 111A of the Employment Rights Act 1996

The Employment Appeal Tribunal (EAT) recently considered the admissibility of pre-termination negotiations (under section 111A Employment Rights Act 1996 (**ERA 1996**)) and under the common law 'without prejudice' rule in the case of *Faithorn Farrell Timms LLP v Bailey*.

Bailey was employed by Faithorn Farrell Timms LLP (the **LLP**) from March 2009. Before her resignation on 26 February 2015, Bailey and the LLP exchanged 'without prejudice' correspondence discussing, amongst other things, settlement terms. Bailey made reference to the negotiations when she submitted a grievance letter and again in her particulars of claim when lodging her claim for unfair constructive dismissal and sex discrimination. The LLP did not raise this as an issue and also made reference to the same material in their response.

The question of admissibility of this evidence was raised at the tribunal hearing. Initially, an ET found that the documents were not rendered wholly inadmissible by either the 'without prejudice' rule or by S111A. However, the decision was both appealed by the LLP and cross-appealed by Bailey.

The EAT allowed the appeal and cross-appeal in part, finding that, in relation to S111A negotiations, both the content of any settlement offers and the fact that there had been such offers or discussions were inadmissible. In addition, relevant internal correspondence is

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inadmissible. Consequently, a claimant cannot rely on the existence of such negotiations for their unfair dismissal claim.

The EAT also found that unlike 'without privilege' discussions, the privilege of S111A negotiations could not be waived by the parties. Consideration was given to the potential waiving of privilege, where there was improper behaviour, by the parties, but found that it was wider than the 'unambiguous impropriety' exception to the 'without prejudice' rule and so allowed greater flexibility for the tribunal.

The ET had not erred by finding that some of the correspondence was privileged under the 'without prejudice' rule but had failed to consider whether the LLP had waived this privilege. By failing to complain about Bailey's reference to the without prejudice discussions in her ET1 and referencing the same material in their response, indicated that they had waived privilege.

This appears to be the first EAT decision on the scope of S111A and its interaction with 'without prejudice' rule.

It should be borne in mind that negotiations under S111A can be initiated at any time, without there having been a dispute in progress. However, they can only be relied on where the matter is potentially unfair dismissal, and not for other claims, such as sex discrimination as with the case above.

One of the issues of what was privileged in the above case, stemmed from the fact that the parties wrote to each other setting out their positions and claims followed by a short negotiation regarding settlement. We would advise that parties set out their position in normal 'open' correspondence to start with. Negotiations and settlement discussions can be done separately and under either S111A or 'without prejudice' and thus removes any ambiguity on what is privileged and therefore cannot be relied on in evidence and reduces the risk of a dispute arising on this basis.

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### **Meet the team**

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