UK Employment Law Round-up

April 2017 | first edition

In this issue, we look at a recent case involving implied terms and repayment provisions, which will be particularly helpful to employers who offer training loans or enhanced maternity pay schemes. We also look at an area which seems ripe for litigation at the moment – data subject access requests.

We consider a recent unfair dismissal claim concerning flexible working and an employee who recently returned from maternity leave, with a helpful reminder not to overlook the Part-Time Worker Regulations.

We take a look at the current employee competition landscape in the context of confidential information. We also share our thoughts on the new Employment Tribunal online database.

Finally, we look at a topic that has been hitting the media recently, particularly in the context of the French presidential elections – religious discrimination and dress codes.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK Employment Hub.

Even better, come and meet us at one of our Annual Employment Law Round Up events in either Milton Keynes or London.

This seminar is designed to help in-house counsel and HR practitioners get to grips with key recent and forthcoming developments in employment, pensions and immigration law and practice and what they mean for your workforce. During this presentation, we will review:

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Read more on page 2>

- gender pay gap reporting – where we are now;
- the top employment cases of 2016 and 2017 and their implications for your business;
- legislative changes on the horizon, including employment tribunal reform, the Trade Union Act, the apprenticeship levy, and changes to the taxation of termination payments;
- recent developments in pensions law, including how some of your (non-pension) employment policies could end up in front of the Pensions Ombudsman, and what this means;
- changes to the immigration landscape for employers of EEA nationals and non-EEA nationals; and
- a brief review of the latest in health and safety law, including the new Sentencing Guidelines for safety offences and the HSE's increased powers to charge for time spent regulating companies under the "fees for intervention" regime.

The seminar will be preceded by a breakfast buffet, and an opportunity to network. Following the presentation, we will run a complimentary legal clinic, at which you can ask a member of the team any tricky questions you may be grappling with at the moment. To book, please click on your preferred location: Milton Keynes / London

No implied term releasing an employee from their obligation to repay a loan in a voluntary redundancy situation

In the recent case of *Ali v. Petroleum Company of Trinidad and Tobago* the Privy Council found that there was no implied term waiving an employee's obligation to repay a loan to their employer in a voluntary redundancy situation.

The Facts

Mr Ali had been a long-standing employee of Petroleum Company of Trinidad and Tobago (Petrotrin) when it gave him a scholarship to study for a degree abroad, which involved Mr Ali moving away from his family for a period of five years. Petrotrin paid Mr Ali a living allowance by way of a loan. One express term in the loan agreement was that Petrotrin would not seek repayment of the loan if Mr Ali worked for the company for a further five years following completion of the degree.

Mr Ali returned to work after completing his degree. Shortly thereafter, Petrotrin undertook a redundancy exercise. Mr Ali formed part of the group of "at risk employees" and, along with the other employees in the

group who had a minimum of five years' service, was offered the opportunity to take voluntary redundancy. Mr Ali took the voluntary redundancy and would have been entitled to a payment of approximately £28,000. However, Petrotrin then set off the full value of the living allowance loan against this redundancy payment, leaving Mr Ali with nothing.

Mr Ali challenged this, claiming he was not obliged to repay the loan. He asserted that the express term of the loan agreement was subject to the implied term that Petrotrin could not prevent him from completing the subsequent five years of service necessary following completion of the degree. By making him redundant, Mr Ali argued that Petrotrin deprived him of that chance and the loan was not, therefore, repayable.

The Decision

After losing his claim at first instance and on appeal, Mr Ali appealed to the Privy Council who dismissed the appeal by a majority. It held that:

- there was no implied term preventing Petrotrin from dismissing Mr Ali within the five-year period during which the repayment provisions applied;
- there was an implied term that Petrotrin would not do anything to prevent Mr Ali from working the five-year term (except in circumstances of a fundamental breach of contract by the employee or compulsion). If Petrotrin did prevent Mr Ali from working the term, he would not have to repay the loan.

The judges therefore considered whether a voluntary redundancy counted as the employer dismissing of its own initiative. On the facts, as Mr Ali had freely

volunteered to be dismissed, Petrotrin had not prevented Mr Ali from completing the required five years' service. Accordingly, the majority held that the loan was repayable. If the redundancy had not been voluntary, the outcome may have been different.

Comment

Here, the decision went in the employer's favour. Although the case is not binding on UK courts, it is likely to have persuasive authority and be relevant to other conditional loan arrangements, such as enhanced maternity pay schemes or student loans. Employers should include express wording in the terms of conditional loan agreements or enhanced maternity pay schemes etc. which address repayment conditions.

Subject access request compliance

Following on from our article in last month's edition of the Employment Law Round Up there have been further developments in the field of data protection and, specifically, subject access requests.

In the recent case of *Dawson-Damer & Ors v. Taylor Wessing LLP* [2017] EWCA Civ 74 the Court of Appeal made an order compelling compliance with a subject access request (SAR) made by the beneficiaries of a Bahamian trust.

The Facts

Mrs Dawson-Damer and her two children (the **Beneficiaries**) submitted a SAR to Taylor Wessing (TW) for access to personal data under Section 7 Data Protection Act 1998 (DPA). TW acted for the Bahamian trust at the time. The SAR was made in the context of a dispute about the trust in the Bahamas.

TW did not comply with the SAR. It argued that legal professional privilege applied to the personal data. It is relevant that under the Bahamian Trustee Act 1988, the courts cannot order a trustee to disclose certain trust documents.

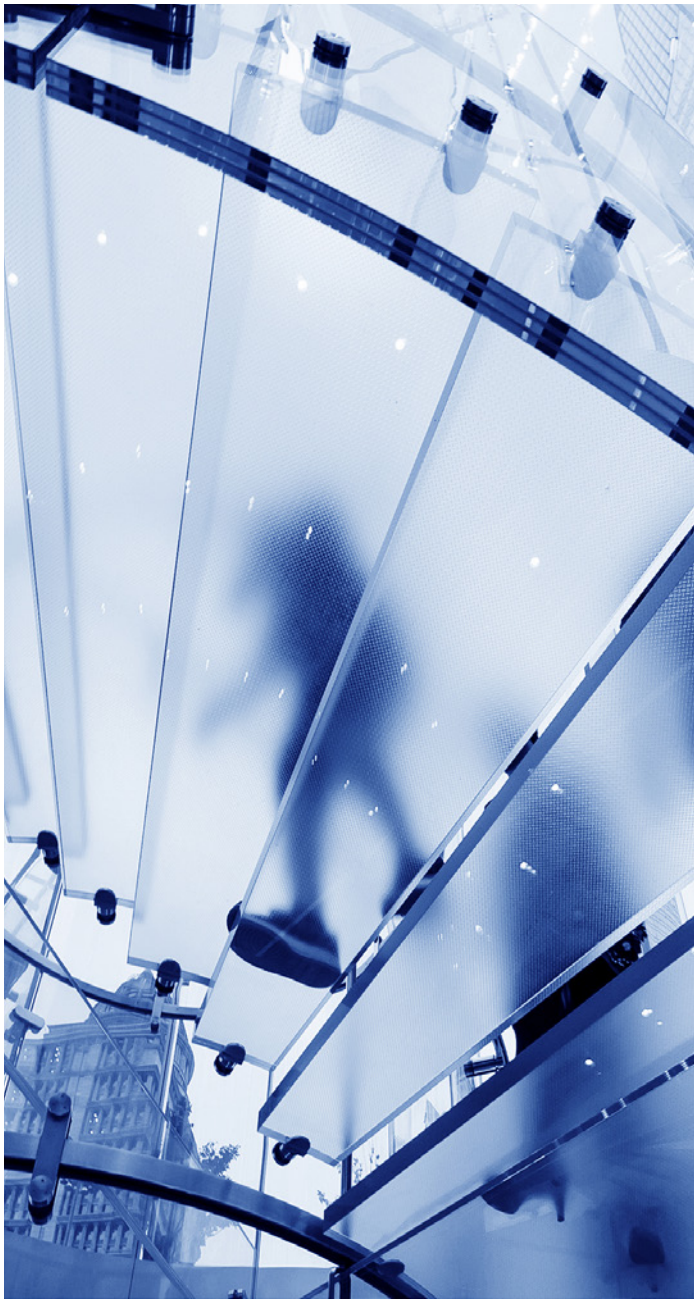
The Decision

The Beneficiaries made an application for an order to comply with their SAR; the High Court dismissed the application. When the Beneficiaries appealed, the Court of Appeal overturned the first instance decision, focusing on three issues:

- the extent of the legal professional privilege exception;
- the extent to which compliance with the SAR involved a disproportionate effort; and
- the judge's discretion to refuse to enforce the SAR because of the Beneficiaries' intended use of the information in their Bahamian litigation.

In relation to the first issue, the High Court had decided that the legal professional privilege exception should be interpreted widely to include all documents of which the trustee could resist compulsory disclosure in the Bahamian dispute. The Court of Appeal disagreed. It held that the exception should be interpreted narrowly and apply only to documents which carried the privilege under English law.

Secondly, TW successfully argued at first instance that it was not reasonable or proportionate to carry out a search for the information. The Court of Appeal held that the judge's decision was wrong. The court stated TW had singularly failed to produce evidence to show what it had done to identify the material and to work out an action plan.



Finally, the High Court was wrong to decline the SAR because the data subjects intended to use the information in legal proceedings. The Beneficiaries successfully argued there was no rule that no order should be made if the data subject proposed to use the information for verifying or correcting data but also to aid in other proceedings.

Comment

As is always the case, each claim turns on its own facts. In this case, TW sought to rely on legal professional privilege and had not searched extensively in response to the SAR. The judgment, however, provides guidance on disproportionality and strengthens the position for individuals seeking data under the DPA. Subject to any Supreme Court appeal, a party cannot refuse to comply with a SAR on the grounds that the application is made in the context of potential or actual litigation. This principle has also been applied in other recently published Court of Appeal judgments relating to SARs – we will report further in our next edition.

Focus on indirect sex discrimination and part-time workers

The recent case of *Fidessa Plc v. Lancaster* looked at two key issues relating to an unfair dismissal claim:

- whether an employer had engaged in indirect sex discrimination during a role re-organisation and failed to design an alternative role to accommodate an employee's existing flexible working arrangements; and
- whether an employee who changed to part-time working on her return from maternity leave and took annual leave immediately afterwards could rely on certain provisions of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR 2000).

The Facts

Ms Lancaster worked full-time as an engineer in the Connectivity Operations (**ConOps**) team at Fidessa, a company that develops and supplies software for financial services companies. While on maternity leave between 17 August 2012 and 15 August 2013, she submitted a flexible working request to work part-time upon her return: four days a week from 9am to 5pm. She returned under these working arrangements after a short period of annual leave.

Ms Lancaster made clear to Fidessa that it was important for her to leave at 5pm to collect her daughter from nursery. Although Ms Lancaster was required to do some work on "deletions" after 5pm, it was agreed by her ordinary line manager that Ms Lancaster could do this work remotely from home. Ms Lancaster's line manager went on annual leave in August 2014 and, during this time, the connectivity manager, Mr Tumber, did not allow Ms Lancaster the same flexibility.

In October 2014, Mr Tumber proposed a re-organisation in which the number of roles in the ConOps team was reduced. One of the new roles was a ConOps engineer, who would perform a similar role to that of Ms Lancaster, but with an enhanced requirement to perform work on "deletions" from the office after 5pm. Ms Lancaster did not apply for the role, as she was concerned about the need to work at the office after 5pm as well as about limits on her potential career progression. She was dismissed by reason of redundancy on 25 November 2014.

Ms Lancaster successfully brought a claim of unfair dismissal before the Employment Tribunal. The Tribunal held that Mr Tumber's requirement to work after 5pm constituted indirect sex discrimination and part-time worker detriment.

As part of her claim, Ms Lancaster relied on PTWR 2000. These regulations allow workers switching to part-time work to compare their new terms and conditions with those that they enjoyed immediately before the change to ensure they are treated no less favourably than when on a full-time contract. It also applies to workers who make the change to part-time work following a period of absence, provided this leave is less than 12 months (regulation 4 PTWR 2000).

The Decision

Fidessa appealed to the Employment Appeal Tribunal (EAT), emphasising that Ms Lancaster's reasons as to why she did not apply for the new role were based on a lack of career progression, not a lack of flexibility, and arguing

that she could not rely on regulation 4 PTWR 2000 as she had taken leave of more than 12 months including her annual leave.

The EAT confirmed the Employment Tribunal's decision. Ms Lancaster's desire for flexibility was the predominant reason for not applying for the new role, as was found by the Tribunal at first instance. Furthermore, the taking of annual leave immediately after her maternity leave did not stop Ms Lancaster from relying on regulation 4 PTWR 2000. If it had, it would have the undesirable effect of deterring employees from taking annual leave.

Comment

There are two key lessons for employers to take from this case. Firstly, when consulting with employees about new roles during a re-organisation, an employer should take into account any existing flexible working arrangements that have been agreed. Secondly, an employee who takes less than 12 months' maternity leave but then takes annual leave and switches to part-time work on her return must be treated no less favourably as a part-time worker than as a full-time worker.

Infused oils, investment managers and one combining factor: confidential information

Cases involving confidential information have been keeping the High Court busy over the last few months. In this article, we look at two such recent cases: *Kerry Ingredients (UK) Ltd v. Bakkavor Group Ltd* and *Marathon Asset Management LLP v. Seddon and Bridgeman*.

Wrotham Park Damages

A Wrotham Park award is sometimes referred to as "negotiating damages" or "hypothetical bargain damages" because the principle behind it is that a claimant can recover such sum as the defendant would have paid the claimant if the defendant had first negotiated a release of its obligations without having, at that stage, breached them. In the *Marathon* case detailed below, the High Court referred to "licence fee" damages.

Marathon Asset Management LLP (Marathon) v. Seddon and Bridgeman

The Facts

The hearing of this matter took the High Court nine days. The resultant judgment spanned some 74 pages. Marathon claimed a Wrotham Park award of £15 million.

Mr Bridgeman and Mr Seddon were both previous employees of Marathon, an investment management business. Mr Bridgeman admitted that, over a period of several months before he left his employment with Marathon, he copied over 40,000 files containing Marathon's confidential information onto a USB drive. Mr Seddon also shared 33 files with Mr Bridgeman which contained information about Marathon's business. Again, Mr Bridgeman downloaded these files to a USB drive.

Mr Bridgeman retained the files for around eight months before then giving them back once Marathon threatened legal proceedings. The fact that this constituted a breach of Mr Bridgeman's contract of employment was admitted. It was also common ground that the files which Mr Seddon shared with Mr Bridgeman were never actually used after their employment ended. Mr Bridgeman accessed 52 of the other 40,000 files that he had copied but Marathon did not allege that this had caused it any financial loss. Marathon claimed that it did not matter that no use was made of the files or that no loss was suffered; what mattered was that the two defendants had taken its confidential information. Marathon therefore claimed that the two defendants had to pay for the value of what they took, which it estimated stood at £15 million (with £2 million being attributed to the 33 files shared by Mr Seddon).

The Decision

As Marathon had not sustained any loss and the defendants had not made any financial gain, the High Court found it difficult to see how Marathon could be entitled to anything other than nominal damages. Nominal damages of £1 were awarded against each of Mr Seddon and Mr Bridgeman.

In reaching this decision, the High Court held that Mr Bridgeman had copied two relevant categories of information:

- information that could have been obtained from other sources, the benefit of which could be valued by estimating the costs which the two defendants would have incurred in lawfully obtaining the information; and
- information which could only be obtained from Marathon. Marathon was very clear that such information would never be sold, at any price. As such, it was not appropriate to estimate a price at which a hypothetically willing seller would license the use of this information to a hypothetically willing buyer. The just approach was to value the benefit that the defendants had gained by estimating the profits actually derived from the wrongful use of this information.

Crucially, it was only if and to the extent that any use was actually made of the files that it would be possible for Marathon to demonstrate that any benefit had been obtained by the defendants from wrongful use of the confidential information. In this case, Marathon did not claim this, it only claimed licence fee damages based on the breach of duty in copying the files and retaining them. However, the value of the right was not in question; it was the value of the benefit derived and there was no such benefit.

Kerry Ingredients (UK) Ltd. (Kerry) v. Bakkavor Group Ltd. (Bakkavor)

The Facts

Kerry manufactured edible infused oils (for example, basil flavoured sunflower oil). For many years it supplied these oils to Bakkavor, until Bakkavor decided to manufacture the oils within its own group of companies. In order to do this, Bakkavor used information which had been provided to it by Kerry and which Kerry claimed was confidential.

The Decision

In order to determine whether Kelly's information was indeed confidential, the High Court applied the three-stage test set out in *Coco v. A N Clark (Engineers) Ltd*:

- Does the information have the necessary quality of confidence? In this case, the fact that some members of the public may have already known the information did not necessarily mean that Kerry's breach of confidence claim would necessarily fail. Similarly, if the information can be reverse engineered, a breach of confidence claim might still succeed. In this case, the reverse engineering would have taken a significant amount of work and so this element of the test could be founded.
- Was the information imparted in circumstances importing an obligation of confidence? Kerry maintained, and this was accepted by the High Court, that Bakkavor had been made aware of the confidential nature of the information.
- Was there unauthorised use of that information to the detriment of the party communicating it? In this respect, the High Court referred to the fact that a potential defendant had not merely replicated the relevant confidential information precisely did not mean that he did not make use of it.

The High Court held that Kerry's information was confidential and granted an interim injunction until trial, prohibiting Bakkavor from using it. In granting the injunction, the High Court stated that where a claimant

had established that the defendant had acted in breach of an equitable obligation of confidence and there is sufficient risk of repetition of this then the claimant is generally entitled to an injunction, save in exceptional circumstances. Good news for any potential claimant.

The injunction in question was a springboard injunction for one year to cancel out the head start that Bakkavor had gained by its improper use of the confidential information. Such injunctions may be granted where the information may have a limited degree of confidentiality even though it can be ascertained from public sources. The springboard doctrine might also apply to prevent a defendant from benefiting from its past misuse of confidential information, even though the information might now no longer be confidential. Going back to the High Court's finding in relation to the reverse engineering which was possible in this case, the injunction should be limited to the amount of time that it would take for, in this case, Bakkavor to reverse engineer the oils.

Comment

Whilst the *Kerry* case is not an employment-related case, both cases provide helpful guidance in terms of the considerations that the court will take into account when determining whether there has been a breach of the duty of confidence and, if so, what the appropriate remedy should be.

Employment Tribunal online database – Will this facilitate "open justice"?

HM Courts & Tribunals Service (HMCTS) has recently launched an online database of employment tribunal decisions in a move that is intended to facilitate "open justice" - https://www.gov.uk/employment-tribunal-decisions.

Employers will now be able to search for the names of prospective and current employees to see whether they have brought any claims against previous employers. Decisions can be searched for by date range or by type of claim, and there is also a general search facility which can be used to search by name (although this might be difficult with a common name).

There are some judgments from 2015 available, but the majority are from 2016-2017. It is HMCTS's intention that all employment tribunal judgments will be published on the database going forward.

How will this affect employees?

Employers may use the database search as part of their recruitment processes, for example. What an employer then does with any information that it finds is another matter. Choosing not to offer employment to someone who has sued their former employer is a difficult decision: clearly not all claimants will be vexatious litigants. Those individuals with a genuine claim should be able to bring proceedings against their employer without being concerned that this will create a stigma and harm their future employment prospects. However, many would-be claimants may fear that this will no longer be the case.

Equally, job applicants and employees will be able to search for claims involving their (prospective) employer. There are reputational risks to employers as a result of published judgments. Might this give employers further incentive to settle claims, even where they think they have a strong defence?

Do employers risk facing victimisation claims?

Claimants have successfully argued in the past that they have been victimised by their new or prospective employer for bringing discrimination proceedings against their former employer.

Whilst a claimant faces a considerable evidential burden in succeeding with such a claim (and many claimants may not be aware of their right to bring such a claim in any event), the online database will certainly facilitate access to information which was not previously so readily available.

What are the impacts of the system?

Along with increased tribunal fees, is this just another incentive for employees not to bring a tribunal claim? Will employers now face a heightened risk of adverse publicity arising from tribunal proceedings? Will increased exposure make settlements more likely?

The online database was a proposed move towards a more open justice system. For now we can only speculate on the implications of the system. It will take time before we see if claim numbers are reduced and negotiated settlements rise.

Highlights from our Hub: Have the recent Court of Justice of the European Union (CJEU) cases of C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor rascismebestrijding v. G4S Secure Solutions and C-188/15 Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole Univers opened the door for employers to discriminate against employees who wear religious dress?

Facts

Both Ms Achbita and Ms Bougnaoui worked in customer-facing roles in private entities in Belgium and France (respectively). Both women wore Islamic headscarves at work. Both employers directly told them not to do so, and dismissed them when they did not comply. In Ms Bougnaoui's case, the disciplinary action was taken following a customer complaint that she had worn a headscarf during a site visit. In *Achbita*, G4S's concern arose from the fact that it had entered into commercial contracts with its customers agreeing to uphold their policies of neutrality. Both employees brought discrimination claims in their national courts. Both national courts referred questions to the CJEU regarding interpretation of the EU Equal Treatment Directive (Directive). The Belgian court (in *Achbita*) asked the CJEU if it was direct discrimination for a private entity to impose a general (internal) rule that individuals could not wear an Islamic headscarf at work. The French court (in *Bougnaoui*) asked if the willingness of Micropole Univers to take account of the wishes of its customer (to no longer have its services provided by an employee wearing a headscarf) amounted to a genuine and determining occupational requirement under the Directive.

Decision

Despite how close the claims are on the facts, the CJEU (on the same day) reached different conclusions in the two claims. Many will recall that, before the CJEU reached its decision (back in 2016), Advocates General in the cases provided conflicting opinions.

In *Achbita*, the CJEU found that the Belgian company's dress code policy was not direct discrimination. This was on the basis that there was no evidence that Ms Achbita was treated any differently than any other worker. For those wondering about indirect discrimination, the CJEU did not lose sight of this. It was not the primary focus in the decision, because the national court had not asked about indirect discrimination. However, the CJEU went as far as to find that this could amount to indirect discrimination and that G4S's policy of neutrality must be regarded as a legitimate aim. The issue was then referred back to the Belgian court to decide if this was appropriate and necessary.

In *Bougnaoui*, the CJEU held that the actions of Micropole Univers amounted to direct discrimination. Why the difference? The key was that the policy that Ms Bougnaoui could not wear a headscarf was imposed in response to the customer complaint. The CJEU found that an instruction from a customer could not be justified under the Directive. A "genuine and determining occupational requirement" under the Directive must be objectively dictated by the nature of the occupational activities concerned or the context in which they are carried out. The views of the customer were subjective considerations.

Comment

The decisions above will be considered by many interested parties as being unsatisfactory. This is particularly so, given that G4S's policy was imposed to reflect the client's wish (suggested in contractual negotiations) to have its policy of neutrality upheld by G4S. This means that employers (especially those based in European countries where neutrality policies are prevalent) will be able to put themselves in a good position to defend direct discrimination complaints by pre-planning. In particular, a private entity will be able to agree to enter into contractual terms to uphold a neutrality policy of a public entity. Thereafter, the employer will seemingly need to document objective reasons why those who interface with the client need to uphold the same standards. Employers will face more difficulty if they do not provide for such issues in advance, and instead wait for the customer to complain. This may give rise to the argument that subjectivity is involved.

However, even where employers have not put themselves in a good position (to align themselves with G4S) in advance, they may not be entirely at a loss in justifying their discriminatory treatment. If they can prevent any customer complaint being documented (such that it would be disclosable), they may be able to make a change in policy appear to be driven by objective considerations. This all appears to give employers a bit too much scope to justify discriminatory treatment.

However, such steps would not be without risk, especially as the CJEU was keen to ensure the national courts did not lose sight of the possibility of indirect discrimination. Further, in the UK case of *Eweida v. British Airways plc* [2010] IRLR 322, the Court of Appeal found that British Airways' policy banning a visible cross was not indirect religious discrimination. However, the European Court of Human Rights found that the UK had failed to protect Ms Eweida's right under Article 9 of the European Convention on Human Rights to manifest her religious belief. Clearly direct (or even indirect) discrimination complaints are not the only avenue open to an aggrieved worker.

More recently in the UK the focus appears to have moved from (i) dress and the protected characteristic of religion or belief to (ii) dress and the protected characteristic of sex. This was triggered by accountancy firm PwC's actions in sending a temporary receptionist home from work because she was not wearing high heels. Ms Thorp (the receptionist) set up a petition, calling for it to be illegal to require female staff to wear high heels at work, which gathered 152,420 signatures. The government's early response was rather lacklustre confirming the position was already clear in law: dress codes must be reasonable and make equivalent requirements for men and women. On 25 January 2017, the Women and Equalities Committee and the Petitions Committee published a joint report: "High heels and workplace dress codes". The government has since committed to taking strong action to tackle sex discrimination at work, including dress codes.

There is clearly more scope for discussion on workplace dress. The Chair of the Petitions Committee has reminded the government that it is not enough for the law to be clear in principle: it must also work in practice. Ms Thorpe has also highlighted the need to ensure that gender-neutral dress is acceptable to avoid worsening discrimination against LGBTQ communities and those who do not conform to gender stereotypes. The voices of individuals from these communities have not (so far) been particularly prevalent in the campaign.

Unlike in Belgium and France, there is no broad policy of neutrality in the UK. The UK's position on religious dress in the workplace may, following Brexit, differ from that set out by the CJEU (assuming the UK will not remain subject to the jurisdiction of the CJEU). In 2012 (after the *Eweida* claim), the UK government expressly responded to media reports, denying that it favoured a ban on Christian symbols in the workplace. It stated then: "where religious symbols do not physically interfere with a person's work but employers have instituted dress codes prohibiting them, employees have good grounds to ask for the code to be reconsidered. We urge employers to be flexible." We will wait to see whether, following Brexit, this remains the message that the UK government conveys.

Dentons is the world's first polycentric global law firm. A top 20 firm on the Acritas 2015 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways. Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size in more than 125 locations serving 50-plus countries.

www.dentons.com

Contacts

Virginia Allen
Senior Associate
Head of Employment UK
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner
Head of Employment UK
D +44 20 7320 4096
sarah.beeby@dentons.com

Michael Bronstein
Partner
D +44 20 7320 6131
michael.bronstein@dentons.com

Ryan Carthew
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

Gilla Harris
Partner
D +44 20 7320 6960
gilla.harris@dentons.com

Brand-2599-UK Employment Law Round-up-April 2017 – 04/04/2017