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# **u:\Users\User\AppData\Local\Microsoft\Windows\Temporary Internet Files\Content.IE5\9537Z0AL\tribunale-recesso[1].jpgIntroduction**

Our next meeting is on 30th June2017. It is being kindly hosted by Sally of NYK Group at their Canary Wharf premises-details to be sent nearer the date. Please ensure the date is in your diaries. The topic is ‘Performance Management’- see later for an introduction to the session.

I am sure you will be delighted to know that Niamh Emerson, the young heptathlete that ELE sponsors is now, at the age of only just 18 and doing her ‘A’ Levels in three subjects, the English Senior Heptathlon Champion. You can check her out on the English Athletics website, or try the Power of Ten website. She has qualified for both the Commonwealth Games on the Gold Coast, Australia for next April and the European Junior Championships in Italy this July.

The heptathlon is now amazingly competitive at the top level and the event in the World Championships in London in August it will surely be one of the highlights? (There is a very small risk that a sprinter with the unlikely name of Bolt, who is competing for the last time may try to hog the limelight, though!). I am hoping that Niamh can join us at a meeting soon-inspirational speakers usually come in older packages but she is impressive, especially for her age.

Before we look at predominately legal issues, can I raise one other possible activity that might well be to your liking. As you know, the number of people working as freelancers/contractors/consultants has grown dramatically in recent years in the UK. You will be aware of some the employment law and tax issues that have emerged recently, as well as the long running ‘sore’ of employment status. The growth in the UK has been matched or exceeded by that in other states such that the EU is developing policies to provide some basic social protections in the form of a new Social Rights Pillar (We have considered this at ELE, though it has to be said that there are currently no entirely new rights proposed-it is more of a consolidation measure).

There is an organisation called EFIP (The European Forum for Independent Professionals) that holds an annual Freelancers Week across Europe. There are events, lectures, training sessions etc. I am proposing that we have a special ELE session in the form of a Round Table where some freelancers are invited to join us to explore the distinctive HR issues and legal ones that emerge when self- employed people are recruited and work for organisations. I know from the research work that I have done, that there is much scope for misunderstanding, differing expectations and that sometimes the engagement of such staff is done in a very informal way. I thought an open discussion-to, which you could invite guests/colleagues-perhaps from beyond HR, would be valuable in identifying major tension areas but also good practice. I thought we might develop and make available an ELE Guide to Best Practice in the area. Do let me know your thoughts on this-it is a rarely explored topic and although the case-law involving Uber, Deliveroo, City Sprint and other ‘gig’ companies has hit the legal headlines, the position of highly skilled, professional workers is just as important.

**Our Special Topic on 30th June 2017.**

This is ‘performance management’ and we will explore various legal issues associated with it. To put the whole issues into context, we need to take on board the real problems with declining productivity not just but especially in many UK organisations. Many research projects have tried to explore the reasons, especially those undertaken by OECD. The service sector appears to perform worse than the manufacturing sector and the gap between so- called ‘leaders’ and ‘laggards’ is growing. The biggest gaps are in the legal and professional service organisations and ICT companies. Some see low wages and flexible employment as the major cause; others blame austerity (Why?); others see poor management as the key and yet others point at the legal problems that make restructuring, modernisation etc. difficult (TUPE?).

All commentators agree that we need improvement and we need more innovation. (I would add, and avoidance of waste-especially of time). Now then, at our meeting I want us to explore some specific issues, such as the role and management of probationary periods, terminations for poor performance, the use of incentives to improve performance and specific issues connected with the equality legal agenda . How quickly can you dismiss and do errors etc have be cumulative or can a ‘one=off suffice? Clearly, we also need to look at the possible implications of aiming to improve performance.

Can I ask, therefore, you prepare before the meeting on the 30th June information on what percentage of all terminations (Voluntarily and involuntarily) were primarily for performance reasons and compared with terminations for other reasons at your organisation?. Second, what systems do have in place to assess performance and how do they relate to your termination processes. Third, what are your major problem areas and Fourth, what do you typically do to improve performance, including use of bonuses, commission etc.?

**A few developments**

It has, of course, been quite quiet due to the General Election, but a few things have occurred. Actually, by the time we meet, the election will have been decided. Interestingly, employment law has featured strongly in those Manifestos and some of the most radical proposals have come from the Conservatives. These include a proposal for up to one year’s unpaid leave to care for a relative, workers on company boards and, of course, the misnamed Great Repeal Bill which we considered at our May meeting,that will retain most of the EU employment legislation. Whatever the outcome of the election, we are in for a period of uncertainty during the BREXIT negotiations.

Another major event to look out for will be the publication of the Taylor Review into Modern Employment in the UK. Some of you may have been involved in consultation meetings or have submitted evidence. It will only consider matters of employment and its law and will not deal with tax issues. As many of the recent policy developments have dealt with matters which combine employment law and tax (The IR 35 changes etc.) this is a shame. Clearly, anything that comes out of the Review will depend on the government in power. If Taylor recommended the abolition of zero-hours contracts it is likely that a Conservative Government would not take action whereas other parties would.

**A few legal developments**

The question of holiday pay continues to produce important case-law. Where overtime is contractually guaranteed it must be factored in to pay, but the case of Fulton v. Bear Scotland (2017) UKEAT 0010/16 has confirmed that if it is alleged that incorrect payment was made, claims have to be made within 3 months.

One of the most contentious issues of employment contracts has been identifying the effective date of termination. Given that UK employment law requires periods of continuous employment in order to bring claims and has somewhat short and inflexible time periods to bring claims the precise date of termination will often be crucial. This is the situation in an important recent Court of Appeal decision.

**Newcastle NHS Trust.v.Haywood (2017) EWCA Civ 153**

H was a Business Development Director on a salary of c £84k. He contract stated she was entitled to 12 weeks’ notice. Two health bodies were merged and H was told that she was at risk of redundancy. She was offered other work but rejected it and was then made redundant. She become ill, suffering from stress and was off work for several weeks. She was scheduled to go on holiday to Egypt in April.

Her pension entitlement changed greatly if she was dismissed after her 50th birthday, i.e. it was considerably higher. The key date for EDT required the 12-week notice period to begin by 26th if she were to receive the lower pension.

On 20th April, the employer sent three letters to her home. One was recorded delivery, the second was sent by ‘ordinary mail’ and the third was sent to her husband’s email address (There was, as you would expect, considerable discussion as to whether this was appropriate) . In fact, she was on holiday that week and although scheduled to return by the 26th, delays meant she did not return home until the early hours of the 27th.

The letters were clearly sent before the 26th? But was that adequate? Or; was the correct date the time when she read them? Or, perhaps, when she ‘received’ them? The key legal issue was resolved in favour of requiring ‘communication’ of termination, which requires, at the least, awareness of their arrival. It was also held that H had not ‘unreasonably avoided receiving the notice’.

So; where does leave employers in terms of termination but does it shed any light on communication for other purposes? First, it is possible there will be an appeal, as the case is regarded as very important. Second, the employers were clearly unwise to ‘cut it so fine’. Third, there was a lethal combination of stress/illness and holidays. A further complication was that she had said she did not want contact with her employers due to the stress, though this did not feature strongly in the judgment.

What would you have done? I assume you would not have left it so late. This was a redundancy situation with all that that entails, i.e. consultation, exploring options etc. She only took a week’s holiday so it should not have been a problem. So; always check holiday dates, hospital treatment, a secondment, out of workplace activities, or other reasons why communication might be problematic.

If the key legal demand is that the recipient of a communication should know of it, posting a letter can be followed up with a call, text or email. Then the question is whether the follow-up is done with sensitivity and is not seen as harassment or unreasonable. This can be factored into your procedures by letting staff know that if you need to communicate with them and need to ensure that a communication has arrived you may need to telephone and if they do not want to be phoned etc., is there any way to communicate. You may already have this data for other reasons. But what we know for now is that relying on the posting date is inadequate in some circumstances.

**THAT’S ALL FOR NOW. PLEASE RAISE ANY QUESTION ABOUT ANTHING IN GAVEL WHEN WE MEET ON 30th June 2017.**