Towards the end of November the BBC reported that Nigel Farage said UKIP can become a major force in Parliament at next year’s election after its victory in the Rochester and Strood by-election. Well, we hate to say this but its not fanciful, he took 16,867 votes, 2,920 more than Conservative Kelly Tolhurst’s 13,947, with Labour’s Naushabah Khan on 6,713 - ahead of the Green Party. Whilst UKIP was revelling in victory the shadow attorney general Emily Thornberry resigned from the Labour front bench just hours before the result after being accused of “sneering” by tweeting a photo of a Rochester house with flags and a white van outside. What is going on with British politics? What has this go to do with the Clangers? Well…British politics is that crazy we might as well write about the Clangers.

The Clangers take us all (well most of us) back a decade or two, or three, or even four when Jimmy Saville was a “national treasure” and it was ok for Pans People and Hot Gossip to dance around on stage in virtually no clothes and stripy knee length socks. We all understood British politics (or at least we thought we did), Conservative right, Labour left and trade unions in those days could call a strike. What has gone wrong?. Most people were poorer back then, but life worked, political pressure worked and strikes tended to work. Now, the past is all a blur. Our heroes have gone (it seems that they were never heroes) and it seems that the nations political values have gone too. UKIP are getting stronger and stronger. Where are the posters, the leaflets about UKIP? Why aren’t we educating the public now? If the anti UKIP campaign is left until spring next year then it could be too late. Still, every cloud has a silver lining…Edwina Currie, she’s on Celebrity get me out of here…“Let her eat eggs”, that’s what we say.

Back to Clangers, for those who are interested those little pink, mouse-like creatures that live in craters covered by dustbin lids are set to return to T.V next year so maybe, just maybe there will be a return to traditional values. Clangers to change the world!
Reaction to holiday pay claims

It was interesting to see towards the end of November that an employment consultancy which assists employers has publicly said that many firms will have time to adapt to the ruling around higher holiday pay. Just as they got used to a national minimum wage, they will get used to the impact of the recent ruling. All of this is of course subject to any one of the parties involved pursuing an appeal in relation to the EAT decision.

If the ruling is followed, holiday pay will clearly have to increase for staff who work a lot of overtime. The impact of this will be interesting and certainly it is an issue which union Officers must follow. The result may be that some business reduce overtime, other business may decide to allocate overtime to casual workers. A key factor will be the size and nature of the business and this will result in different employers adopting different tactics. Large reputable organisations like John Lewis may take a high moral stance and pay outstanding amounts owed. It is likely that other employers possibly in the haulage and building industry will be more inventive in their approach. The reaction to the holiday pay situation from public sector organisations will be interesting. Some Local Authorities may have already dealt with this as a result of the implementation of single Status. Other Local Authorities may have overlooked the holiday pay issue and may try and introduce change via the back door and Officers need to be alert to this. Officers should note that it is likely that these claims will have a huge impact on the private sector and this may actually create fertile ground for union recruitment, provided that unions adopt realistic and clear recruitment campaigns that aren’t misleading.

In relation to the recent ruling, some commentators have said that the UK economy stands on the brink of ruin (haven’t they been saying this for years?). All the big business lobby groups say this. The Institute of Directors thinks businesses “have had the rug pulled from under them”. The director-general of the CBI reckons the ruling “is a real blow to UK businesses” and “not all will survive”. The EEF, lobbying for manufacturers, thinks nine in 10 such companies will see payroll costs “spiral” in the short-term and that growth and jobs could turn “into dust”. Top marks for hyperbole, the critical words are “in future.” The ruling is only backward-looking at the margin. As the Chartered Institute of Personnel and Development points out, the tribunal seems “to have limited the scope for substantive retrospective claims, which was the biggest concern in terms of possible costs for employers”.

What is interesting about the holiday pay decision is that since the last General Election workers and unions have been constantly hit, over and over again by changes to legislation. It is refreshing that in relation to the Bear case, the Appeal Judges had a rare chance to support workers and guess what … they took it. However, what is worrying is that as one commentator says, “once the hyperbole machine has been cranked up a few more notches, one suspects little will be left of this sensible ruling”.

Reminder - 1 December 2014 Changes

Paternity and Adoption Leave (Amendment) Regulations 2014 come into force

The draft Regulations prescribe that an employee cannot take paternity leave in relation to a child where he or she has already taken shared parental leave in relation to that child or has taken paid time off to attend an adoption appointment in respect of that child. In our previous edition of our bulletin we provided an overview of the Regulations.
Anticipated Changes 2015

Well, 2015 is set to be another busy year. Below is list of anticipated changes obviously its general election year so anything can happen but below is a summary of intended changes in the first part of the year.

Family Friendly

• A new system of shared parental leave and pay is to be introduced for babies due or children placed for adoption on or after 5 April 2015.

• Changes to adoption leave and pay will give adopters, including those under ‘fostering for adoption’ schemes, comparable rights to birth parents.

• Intended parents in surrogacy arrangements that use parental orders will have rights to adoption leave and may therefore qualify for shared parental leave and pay.

• Single adopters, and main adopters in the case of a joint adoption, will have the right to paid time off to attend five adoption appointments.

• Joint adopters who are not the main adopter will have the right to unpaid time off to attend two antenatal appointments.

• Parents will be entitled to take unpaid parental leave up until their child’s 18th birthday (currently 5th birthday, unless the child

Fit For Work Service

• A new Fit for Work service is to be introduced on a phased basis, providing state funded occupational health assessments for employees who are off sick for more than four weeks.

Equality Act

Changes expected to be made to the Equality Act 2010 ad the will include:-

• Caste discrimination to be made unlawful, expected autumn 2015.

• Power of employment tribunals to make wider recommendations in successful discrimination claims expected to be repealed. This change was due to be implemented but it now seems unlikely. We will update officers accordingly.

The Workplace Generally

• The Government is due to respond to its consultation on the annual leave aspects of the Modern Workplaces consultation.

• Zero hours contracts exclusivity clauses expected to be made unenforceable.

Election Manifestos at a glance

Most officers are likely to be familiar with the 3 major party manifesto’s, but by way of polite reminder in employment law potential post election changes might include:-

Conservative

• 50% voting threshold for strike ballots
• Scrap exclusive zero hours contracts
• Replace Human Rights Act with British Bill of Rights

Labour

• End zero hours contracts
• Reform ET fees and Tribunals
• Nmw to £8.00 by 2020
• Large companies with 250 plus employees to publish gender salaries analysis
• Equal rights for self employed (yet to be set out in detail and likely to be difficult to define)

Lib Dem

• Flexible working to be norm
• Fathers to have further 4 weeks paternity rights
• Large companies with 250 plus employees to publish gender salaries and analysis
• Consultation on living wage

Acas Early Conciliation

Acas has published the first six months’ figures showing how early conciliation is working. Key figures:-

• Over the first six months, it has conciliated in 37,000 cases (of which about 1,000 were multiple claims, covering about 8,000 potential Claimants)

• 3% of early conciliation requests came from the employer
• 10% of employees reject the offer of early conciliation once they have submitted the EC Form

• 10% of employers decline to participate in early conciliation when Acas contacts them preliminary indications show that 18% of early conciliations resulted in a COT3.

• Of those that did not result in settlement, over 2/3rds did not progress to a tribunal claim (but bear in mind there is some time lag built into this as an employee will have at least a month to bring a claim, and they might not have done so during the survey period)
**Injunctions during notice period**

Occasionally officers may come across restrictive covenant issues. Usually these only ever apply to senior employee and managerial contracts, although depending upon the nature of the business junior employees may face post termination restrictions. For example, hairdressers and people who work in nursing homes. The aim of restrictive covenants is to protect the business once the employee leaves. Restrictive covenants are complicated and legal advice about such issues should always be obtained before providing advice to a member, in fact it is probably better to refer the member to a solicitor. A key point for officers though is always ask for a copy of the contract, if the contract of employment does not contain restrictions an employer is not allowed to introduce restrictive covenants as part of a severance package if such restrictions were not part of the original contract. The exception to this is that if the employer is willing to pay an employee or offer consideration to insert restrictions in to a severance agreement and the employee agrees to them, then going forward the employee will be bound.

The case of Sunrise Brokers LLP v Rodgers the Court of Appeal considered whether a departing employee who expresses unwillingness to work out the life of his contract (as distinct from post-termination restrictions) and then is not paid is entitled to treat the contract as at an end.

**Striking out a claim**

Can a claim for unfair dismissal due to whistleblowing be struck out without hearing the evidence as to the reason for dismissal? Daniel Barnett has reported an interesting case called Romanowska v Aspirations Care Limited. In this case the EAT held that it would very rarely be appropriate where the reason for dismissal is the central dispute between the parties. In this case the Claimant worked in a care home and was dismissed following an incident during which she allegedly used inappropriate physical force with a resident. At the disciplinary hearing prior to the dismissal the Claimant raised complaints about the care home's use of Agency staff.

At a PHR the Employment Judge held that the Claimant's complaints may be capable of being a public interest disclosure yet proceeded to strike out her whistleblowing claim as having no reasonable prospects of success. The Claimant appealed. The EAT held tat because there was a real dispute of fact and to know what was in the mind of the employer at the time of dismissal (and thus what the principal reason for dismissal was) it was necessary for the employment tribunal to hear and evaluate evidence. The Employment Judge had made an error of law, the appeal was allowed and the case was remitted to a fresh employment tribunal.

Officers will come across employees who have been dismissed because they have made a protected disclosure. Basically, this case is useful if the other side threaten to strike out a claim, which is a tactic often adopted by Respondents. This case in a nutshell highlights that it is wrong to strike out an unfair dismissal claim if the dispute relates to allegations of whistleblowing.
Discrimination - meaning of ‘employee’

As explained above, if the Labour Party is able to win the General Election, then it intends to introduce certain employment rights for workers who are self-employed. This case is interesting and highlights exactly the reason why such change is needed.

In the case of Halawi v WDFG UK Ltd the Court of Appeal considered whether UK discrimination law meet the requirements of EU law in protecting employees, upholding the decisions of the ET and the EAT. The Appellant worked through her own company as a beauty consultant in a duty-free shop at Heathrow. The company managing the premises removed her airside pass. She claimed that this amounted to a discriminatory dismissal by her ‘employer’.

On the employment tribunal’s findings of fact, with no contract between the Appellant and Respondent, the Appellant failed to satisfy two key tests for employment with the Respondent under EU law. She had not agreed personally to perform services for the putative employer, even having a right of substitution with the shop owner, which was exercised. Furthermore, she was not controlled by the Respondent, which had no control over how the Appellant worked beyond its right to restrict her access to the workplace, so there was no subordination, a key element of employment in employment law. In other words, the company did not control her or treat like she was an employee and so she was held to be self employed and for this reason she was left without a remedy. Neither the EAT or the Court of Appeal were able to assist the Claimant. However, the Court of Appeal considered the ramifications of the judgment as leaving the Appellant with no remedy if there had been discrimination, but recognised that it was bound to so find on the facts of this particular case.

Work placements - discrimination

Some unions are actively attempting to recruit students as members. This makes sense because workers this means that workers become members at the outset of their employment / career. The issues of students who undertake work placements is an issue, especially in relation to whether or not they have any employment status and this is a key issue in the NHS. In the case of Blackwood v Birmingham and Solihull Mental Health NHS Foundation Trust, the EAT confirmed that students on work placements do not have employment / worker status and on this basis an Employment Tribunal is not required to hear a discrimination claim.

On the employment tribunal’s findings of fact, with no contract between the Appellant and Respondent, the Appellant failed to satisfy two key tests for employment with the Respondent under EU law. She had not agreed personally to perform services for the putative employer, even having a right of substitution with the shop owner, which was exercised. Furthermore, she was not controlled by the Respondent, which had no control over how the Appellant worked beyond its right to restrict her access to the workplace, so there was no subordination, a key element of employment in employment law. In other words, the company did not control her or treat like she was an employee and so she was held to be self employed and for this reason she was left without a remedy. Neither the EAT or the Court of Appeal were able to assist the Claimant. However, the Court of Appeal considered the ramifications of the judgment as leaving the Appellant with no remedy if there had been discrimination, but recognised that it was bound to so find on the facts of this particular case.

Reimbursement of EAT Fees by Respondent

Most of us are still grappling with issues fees. Most union’s officers, lawyers and claimants are likely to assume that a successful claimant on Appeal will be able to recover an issue fee of £400 and hearing fee of £1,200. In the case of Old v Palace Fields Primary Academy, the EAT decided this wasn’t necessarily the case.

The Claimant was a teacher who had been dismissed after being accused of encouraging the bullying of one of her pupils. The employment tribunal found the dismissal was fair. The EAT found two (minor) faults in the tribunal’s reasoning and the case remitted back to the same employment judge.

However, the EAT did not make an order for recovery of the £400 issue fee and ordered only half of the £1,200 hearing fee to be repaid. It said that it had a wide discretion as to recovery of fees and that the Claimant had only been “partially successful” because the case had been remitted back to the same Employment Judge.

Basically, this case indicates that if an employee wins a claim but is partly to blame for the work situation leading up to the claim, then an Employment Tribunal or Court has discretion to decide whether or not fees can be recovered. Officers (and lawyers) should not make the assumption that fees are automatically recovered.
On Monday 17 November the Church of England formally adopted legislation which means that the first female bishop could well be ordained early in New Year. This decision has been a long time coming, with the first women priests being ordained in 1994, coincidentally the same year that the popular girl band the Spice Girls formed. Unlike the Spice Girls and their ‘girl power’ phenomenon which went from strength to strength, women priests have until now been unable to fulfil the Church’s most senior positions.

In comparison with the unveiling of the Spice Girls and the chain reaction that shook the music business, there is no guarantee that the same will happen in the Anglican Church. With forecasters predicting that a woman bishop will be in place in early 2015, with this estimate supported by the fact that applications from women are already being considered for the vacancy at Southwell and Nottingham diocese and publicised openings at Gloucester, Oxford and Newcastle dioceses, where new bishops will soon be appointed, it is worth bearing in mind that Churches in Scotland, Wales and Northern Ireland, all countries which already allow women as bishops, have yet to see a woman be appointed.

It can be argued that the Church is taking a somewhat cautious approach to this introduction, announcing that there will be interim measures for parishes that object to the appointment of a woman bishop by ensuring that they have male bishops under their leadership, nicknamed ‘flying bishops’, able to carry out some duties on their behalf.

In an interview the Bishop of Rochester said there would not be any “positive discrimination” as there was to be a dead heat between male and female candidates for a post. This view in contrast to what is permitted under various EU equality directives and s159 of the Equality Act 2010, which permits positive action and it is yet to be seen how the recruitment of women bishops will materialise.

Of course with a debate of this nature the first port of call for clarification must be the bible, however as with any documentary evidence, this can be open to differing interpretation. Supporters in the pro women bishops’ camp claim that St Paul was part of an early Christian world in which some Church leaders were women. Whereas opponents believe he prohibited women to exercise power in church, with both parties able to quote passages from the New Testament for support or discredit the others.

Regardless of your opinion on this subject it seems we may be preparing ourselves for another ‘Cool Britannia’ political and social climate. With the acceptance of women bishops, the failure of the Scottish referendum and with a General Election due in May 2015, can Ed Miliband can revive that 90s spirit, which saw Labour and Tony Blair bring an end to the conservatives 18 year reign or will Ed be left singing “Wannabe”. Whatever happens don’t expect to see any women bishops leading their service wearing a Union Jack cassock.
For any enquiries or questions about anything discussed in this bulletin please call or email us at the following:

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