

EMPLOYMENT UPDATE

June 2010

PAY TRANSPARENCY

Pay transparency is becoming increasingly big news. The UK's new coalition government have made clear their dedication to transparency in public sector pay, with the release of data on civil servants who are earning more than the Prime Minister. Recent weeks have seen a flurry of similar moves in the Channel Islands, with Jersey poised to release details of top public pay packages and Guernsey's Chief Minister pushing through the publication of all senior level States employees in a bid to aid transparency.

The current pressures seem to be focused on higher earning members of private sector organisations, and in relation to the public sectors of the UK and Guernsey, those earning more than the Prime Minister and Chief Minister respectively. But what is the legal position when it comes to making reward packages public?

In May 2008 the outgoing Italian government published details of all of its citizens' declared earnings and tax contributions on the internet. It was criticised by some as a gross breach of privacy, while defended by the government as a bid to improve transparency. Whichever stance you take, the website was a huge success and became jammed with people rushing to access the controversial information.

While this might be an extreme example, more organisations and public bodies are seeking to introduce more transparency to their pay structures. The publishing of employee's salaries by an employer in Guernsey or the UK, could lead to two distinct legal issues:

- Firstly the Data Protection (Bailiwick of Guernsey) Law, 2001 which is a close copy of the UK Data Protection Act 1998 requires that employers protect any sensitive information they hold on employees. Making employees' pay levels public could constitute a breach of this duty.
- Secondly, an implied term of the employment contract is that employers should act in a way that leads employees to have trust and confidence in them. The publication of such private data could be seen as a breach of this fundamental term, and therefore the employment contract.

Employers seeking more transparency might instead consider a form of pay banding, giving a degree of openness while not falling foul of the above legal

On the other side of the pay transparency coin are developments in new UK legislation regarding "pay secrecy clauses", which are commonly used in the financial services sector to prohibit an employee from discussing their pay terms with others.

The new UK Equality Act 2010 has gone further than envisioned in the initial Bill, and says that an employer cannot enforce a term in a contract which restricts an individual from discussing their terms of work where the discussion is a 'relevant pay discussion'. A relevant pay discussion is a discussion relating to whether pay is connected to a protected characteristic (such as age, sex or religion). Thus a conversation such as:

"What are others in my department paid? I'm on £25,000. Does that sound low to you?"

Could be considered a protected conversation on the basis that the employee was worried they were being paid less than members of the opposite sex.

While the Equality Act does not apply to the Channel Islands, all of the above developments and trends are worthy of note for employers whether they wish to be more transparent in their pay structure, or operate more discretionary reward packages.

THE WAGE DEBATE

There is currently no minimum wage legislation in Guernsey, with employers and employees essentially free to agree a wage between them. On 28th May the States of Guernsey resolved that the following Minimum Wage rates should come into effect in Guernsey on 1st October 2010;

Adult Rate (for those aged 19 and over)
£6.00 per hour

Young Persons Rate (for those over 16 but under 19)
£4.25 per hour

While being debated two amendments were proposed:

- To remove the lower rate for young persons, with all age groups to be paid at a standard rate.
- To review the minimum wage levels as being too low.

It was resolved in relation to these issues that wage rates were to be reviewed by the Commerce and Employment department before the end of 2011. In undertaking this review the department should take fully into account "that it is a policy objective of the States of Deliberation that the young person's minimum wage rate and the adult minimum wage rate should be equalised as soon as possible."

The desire to equalise minimum wages across the age ranges was presented to address a perceived issue of discrimination against younger workers, and has clearly carried some weight with the States. A differing level of pay for different aged workers would however be unlikely in the eyes of the law to constitute discriminatory practice. When it comes to being able to pay younger workers less money, there is a clear correlation with levels of experience that makes the practice valid.

Countries such as the UK, which operate under sophisticated new legislation which is designed to prevent discrimination on the grounds of age have no difficulty in running multi-tiered minimum wage levels for younger workers, seemingly without significant challenge.

It was argued that a higher minimum wage for those under 18 years of age could in fact have a detrimental effect on young workers. There would be no incentive to employ younger workers when employers could have a more experienced worker for the same price, resulting in significant difficulties for under 18s in finding employment. This is particularly relevant given that Guernsey has no age discrimination legislation.

Employers should ensure they are comfortable well in advance of 1st October that they have no staff whose pay falls below the current set rates. This may include not only office staff, but cleaners, maintenance, or other support staff who might in the eyes of the law be considered as employees of the company.

WORLD CUP FEVER

It will not have escaped anyone's attention that the country is now in the grip of the FIFA world cup. While the majority of the national workforce are enjoying the festivities on a personal level, the match schedules can prove a headache for employers. Not only do some games fall within working hours, but the effect of the morning after the post match celebrations is predicted to have an impact on "sick days" taken over the summer.

So what can employers do to keep their workplaces productive over the summer? Obviously employees who take unauthorised absence to watch matches can be subject to disciplinary proceedings, but waiting to see if this situation arises is far from an ideal. Employers may have already introduced an office wide policy during the world cup. Leaving the issue unaddressed will mean staff are unsure of what is expected, or more importantly not expected, of them.

Staff could be reminded that they will need to book holiday in order to watch matches, perhaps altering usual policy to allow for staff taking fractional days. Alternatively employees could be given the option to take time off to watch the matches provided that time is made up over a set period, therefore allowing them to keep their annual leave for other purposes.

It is for you to decide how long the employee will have to work back the time, but the time limit should be reasonable. If the employee still "owes time" at the end of this period, or their employment terminates before they have made up the hours, the hours they have failed to make up could be treated as unpaid leave and the relevant amount deducted from their next / final salary payment.

The issue of post celebration sick days is likely to be more challenging to tackle. Jumping to conclusions and initiating disciplinary proceedings at a single instance of "suspicious" absence, could result in a grievance being lodged by the employee, or even with a claim for constructive dismissal. Constructive dismissal claims need not be brought on the basis of a single action by the employer. An employee who may consider they already have grievances against their employer may feel that being treated differently to others or unfairly in response to world cup issues is the "straw that broke the camel's back".

Think about what evidence you have that the sickness was "world cup related". This could be difficult especially if for example, it is not for every game, or the absence is supported by a doctor's note.

That is not to say that disciplinary action could not and should not be taken in such circumstances, but care should be taken to ensure everyone is treated the same and that employers do not expose themselves to unnecessary risk.

If you require any advice on your company's world cup related issues, or any other aspects of employment law, contact our employment team:

For further information or advice, please contact:

e: employment@collasday.com
t: +44 (0)1481 734275



solutions in law

▶ **collas day** PO Box 140, Manor Place,
St Peter Port, Guernsey GY1 4EW

▶ **t:** +44 (0)1481 723191 **f:** +44 (0)1481 711880

e: inbox@collasday.com ▶ **w:** collasday.com