



March 2018

Employment Update

Key employment and business immigration developments for employers

In the News

Taylor review – the Government's Good Work?

The Government has published "Good Work", its response to the Taylor Review on employment status and modern working practices. The review was commissioned by the Government in 2016 to consider how employment law might keep pace with modern business models, particularly in the gig economy.

The Government has accepted, or is consulting on, the overwhelming majority of the Taylor Review recommendations. However, any changes in this area are likely to take some time. Four consultation papers have been launched covering employment status, increased transparency, agency workers and enforcement of employment rights.

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The key proposals being considered are:

- **Casuals:** Currently a break of at least a week between assignments for genuine casuals usually means the individual does not have continuous service for the purposes of employment rights like unfair dismissal or statutory redundancy pay. The Government will increase the period required to break continuity and is consulting on what the break should be. The Government is also consulting on proposals to give all workers, including casuals and zero-hours workers, a right to request a more stable contract that guarantees hours.
- **Written statements of particulars:** The Government is consulting on proposals to require all employers to provide a written statement of terms to all workers, not just employees.
- **Payslips:** From 6 April 2019, employers will be required to provide payslips for all workers, not just employees. In addition, employers will be required to specify the hours worked and rates paid on payslips for workers paid by the hour. Draft regulations effecting these changes have already been published.

- **Works Councils:** Employers are currently required to set up a works council where 10 percent or more of the workforce requests this. The Government is consulting on whether to lower the threshold from 10 to two percent of the workforce, making it easier for a minority of workers to insist on a works council.
- **Enforcement:** The Government plans to ask HMRC to enforce statutory holiday pay and sick pay and is consulting on how this will work in practice. It is also consulting on proposals to simplify the enforcement of tribunal awards, and to name and shame those who fail to pay.
- **Penalties:** Currently Employment Tribunals can impose financial penalties of up to £5,000 on employers that flagrantly breach employment rights. The Government plans to increase the maximum penalty to at least £20,000.
- **Agency workers:** The Government is consulting on proposals to give agency workers the right to request a direct employment contract after 12 months in a role and to require more information to be given to agency workers about their pay at the start of an assignment. The Government is also considering proposals to remove the "Swedish Derogation" – which exempts agency workers from the entitlement to equal pay where they are employed by the agency and paid a minimum rate between assignments – but it is first seeking evidence on the extent of abuse of this exemption.

The employment status consultation is open until 1 June 2018; the consultation on agency workers is open until 9 May 2018; the consultation on enforcement is open until 16 May 2018; and the consultation on increasing transparency is open until 23 May 2018.

Employment status cases

Key upcoming rulings on employment status include:

Deliveroo

The Deliveroo case is the only gig economy ruling so far in which riders have been found to be genuinely self-employed rather than "workers". The ruling came after the Independent Workers' Union of Great Britain (IWGB) applied for statutory union recognition on behalf of riders (which required it to show that the riders are workers). The IWGB is now seeking judicial review of that decision. The judicial review application is in its early stages so the outcome is unlikely to be known for some time.

Pimlico Plumbers

The highest court in the country, the Supreme Court, is due to rule on employment status. Pimlico Plumbers has appealed against the decision that one of its plumbers was a "worker" rather than a self-employed contractor. The appeal was heard by the Supreme Court in late February 2018 and judgment is awaited.

Uber

The Employment Appeal Tribunal (EAT) dismissed an appeal by Uber last year against a ruling that two of its drivers were "workers" and therefore entitled to some employment rights, such as national minimum wage and paid statutory holiday. Uber has appealed and originally tried to go straight to the Supreme Court but has been told the appeal must go to the Court of Appeal first. The appeal will now be heard by the Court of Appeal some time in 2018.

Immigration Radar

Good news for EU nationals

The Government has announced revised post-Brexit proposals for EU nationals. The revised proposals suggest that those arriving in the two years after Brexit will be allowed to remain in the UK indefinitely.

The Government proposes an "implementation period" of around two years from the date of Brexit, 29 March 2019. EU nationals and their family members who arrive in the UK during this implementation period will be able to:

- apply for temporary status, which will allow them to continue living and working in the UK until they have reached five years
- stay indefinitely after having lived continuously in the UK lawfully for five years.

After the implementation period, family members of EU nationals who arrived during the implementation period will be able to come to the UK under arrangements that are on par with the arrangements that apply to non-EU family members joining British citizens. EU nationals who live in the EU but who travel to work in the UK during the implementation period will also be able to apply for permission to continue doing this after the period ends.

"... those arriving in the two years after Brexit will be allowed to remain in the UK indefinitely. "

While the Government has not yet published its proposals for EU nationals arriving in the UK after the implementation period, these revised proposals provide some welcome clarity for employers in the interim. The EU in the meantime has published a draft Withdrawal Agreement which includes its post-Brexit proposals for EU nationals. The EU currently favours a shorter implementation period lasting until 31 December 2020. The draft agreement will now be considered as part of ongoing negotiations. **Employment Update** will continue to report developments.

Case Watch

Unlawful inducements – employers beware

The employer in this case had a collective agreement with a recognised trade union, which provided that pay negotiations would take place annually. However, the 2015 pay negotiations for 2016 broke down in December 2015 with the union rejecting the employer's offer. The employer then wrote directly to employees reiterating its offer, which comprised a two percent pay rise for 2016 and a lump sum Christmas bonus in December 2015. The letter stated that if employees failed to accept the offer by mid-December, they would miss out on the Christmas bonus. In January 2016, the company wrote to those employees who had not accepted, again restating the offer. This time the employer made it clear that anyone who did not accept could be given notice of termination of their employment. A group of employees brought claims alleging that the employer's offers direct to employees constituted unlawful inducements for them to step outside collective bargaining.

The Employment Appeal Tribunal ruled that the direct offers were unlawful inducements. The employer had claimed that it wanted to resolve the impasse and make sure employees received their Christmas bonus. However, the EAT said that the employer's true motive was to circumvent the collective bargaining process. The offer was made direct to employees immediately after the union had rejected the pay deal and before the dispute resolution process in the collective agreement had been exhausted. The EAT upheld an award totalling around £425,000.

Where the employer recognises a trade union for collective bargaining purposes, it is unlawful for the employer to make an offer directly to members of the union where the purpose is effectively to circumvent the collective bargaining agreement. As this case shows,

an offer will be unlawful where the employer's purpose is that any term of employment would be determined by individual agreement with the worker, rather than the relevant collective agreement. The consequences of a breach can be costly – a mandatory award of £3,907 in respect of each employee to whom an offer has been made. Employers faced with a breakdown in pay negotiations must, therefore, tread carefully and cannot make offers direct to staff in order to put pressure on the union. Where the employer has some other genuine business purpose for the offer, this will not be unlawful. However, it will often be difficult to establish what the employer's true motive is and it will usually be very difficult to show the employer was not motivated, at least in part, by a desire to reach an individual rather than collective agreement.

KOSTAL UK LTD V DUNKLEY

Disability – not what it seems?

The employee in this case was a police constable in Wiltshire. She had some hearing loss which put her just outside the acceptable range for police service. However, she passed a practical hearing test on recruitment and was allowed to perform police duties in Wiltshire. When she applied to transfer, a different constabulary rejected her application on the basis she did not meet the national standards for hearing. The Acting Chief Inspector was concerned about the risk that the employee might need to go on restricted duties in the future and did not carry out a further a practical hearing test, despite a recommendation from a pre-employment medical adviser to do so.

The employee brought a disability discrimination claim. She accepted that she did not have a disability but argued that she was treated less favourably because she was perceived to have a hearing disability or an impairment that could get worse over time. The employee succeeded. The Employment Appeal Tribunal ruled that her rejection was based on a belief she had either an actual or potential disability and therefore amounted to direct disability discrimination.

This case shows how wide the protection against disability discrimination goes. An employee who is not disabled can succeed in a disability discrimination claim if they are treated differently because the employer perceives that they either have a disability or may develop one in future. Clearly employers should avoid making assumptions about employees or job applicants and, where there are concerns about capability, obtain medical advice. The case also highlights that, having obtained advice, employers should follow it. Here, the employer may have avoided landing in hot water if it followed the medical adviser's recommendation to carry out a further pre-employment hearing assessment.

CHIEF CONSTABLE OF NORFOLK V COFFEY

"Employers faced with a breakdown in pay negotiations must, therefore, tread carefully... "

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NEDs liable for whistleblowing claim

The employee in this case was the CEO of an oil and gas exploration company, primarily concerned with Niger. He made a number of whistleblowing disclosures related to corporate governance and compliance with the law of Niger. Two non-executive directors (NEDs) of the company then instructed the employee not to visit Niger, meaning he could not perform his role properly. Approximately four months later, one of the NEDs instructed the other to dismiss the employee, which he did. The employee brought a claim against the employer, and also against both NEDs individually, alleging he was subjected to detriments and dismissed for having blown the whistle.

The employee succeeded in his claims and was awarded almost £1.75 million in compensation, with the company and the two NEDs jointly and severally liable (meaning they all had to contribute to the pay-out or any one of them individually could be required to pay). The Employment Appeal Tribunal confirmed that individuals cannot be liable for unfair dismissal; only a company can be liable, even when the dismissal is based on whistleblowing. However, individuals can be individually liable for subjecting the employee to a detriment. The NEDs in this case had subjected the employee to a detriment as one of them had instructed the other to dismiss the employee, and the other carried out the dismissal.

This case confirms that employees, executive directors and (in some cases) non-executive directors can be individually liable if they treat a colleague unfavourably for having blown the whistle. In practice, the non-executive directors were only on the hook in this case because they effectively exercised executive control and managerial functions. Until now, it was thought that employees and directors could not be liable for compensation flowing from a whistleblowing dismissal (as distinct from any pre-dismissal detriment). While this case suggests otherwise, it is, to some degree, limited to its facts and it will be interesting to see how widely the principle is applied in future. The decision has been appealed and is due to be heard by the Court of Appeal in July 2018. Employment Update will report developments.

INTERNATIONAL PETROLEUM LTD V OSIPOV

New Law

National minimum wage

On 1 April 2018, the rates of the national minimum wage and national living wage will increase as follows:

- £7.83 per hour for workers aged 25 and over (rising from the current national living wage rate of £7.50 per hour)
- £7.38 per hour for workers aged 21 to 24 (rising from £7.05 per hour)
- £5.90 per hour for workers aged 18 to 20 (rising from £5.60 per hour)
- £4.20 per hour for workers aged under 18 years (rising from £4.05 per hour).

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, will also increase from £3.50 to £3.70 per hour.

Statutory sick pay

On 1 April 2018, the rate of statutory sick pay will increase from £89.35 to £92.05 per week.

Maternity pay rates

On 1 April 2018, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay will increase from £140.98 to £145.18 per week (or 90% of the employee's average weekly earnings if lower).

Employment Tribunal compensation

The annual increase in Employment Tribunal compensation limits will take effect on 6 April 2018. For dismissals taking effect on or after 6 April 2018:

- the maximum compensatory award for unfair dismissal will increase to the lower of £83,682 and a year's pay (currently the limit is the lower of £80,541 and a year's pay)
- the maximum amount of a week's pay (used for calculating, for example, the unfair dismissal basic award and statutory redundancy pay) will increase from £489 to £508 per week.

Pensions automatic enrolment

On 6 April 2018, the minimum contributions required to be paid to a defined contribution scheme used for automatic enrolment (including contractual enrolment) will increase. The minimum contributions required depend on what pay counts as pensionable pay under the relevant pension scheme. There will be further increases from 6 April 2019. This applies to all employers but it is most likely to require action by employers who:

- pay only the minimum required contributions
- have a contribution matching structure that starts at a low level, or
- have an age-related contribution structure that starts at a low level.

Our Pensions team has produced a more detailed briefing note outlining the implications for employers and the action that may be required. If you would like a copy, please speak to your usual Employment Department contact.

Tax on termination payments

On 6 April 2018, the way that termination payments are taxed is going to change.

Currently, the tax treatment of a notice payment depends on whether there is a payment in lieu of notice (PILON) clause in the employee's contract. Where there is a PILON clause, the payment is subject to income tax and national insurance contributions (NICs). In contrast, where there is no PILON clause, the first £30,000 is usually free of income tax and the entire amount is free of NICs. From 6 April 2018, all notice payments will be subject to income tax and NICs on the entire amount, regardless of whether there is a PILON clause in the contract. This change will apply where the employee's employment ends on or after 6 April 2018 and the notice payment is paid on or after 6 April 2018.

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Where the employee is receiving a termination payment but has not received their full notice or a payment in lieu, employers will need to calculate how much notice is due to the employee and ensure income tax and NICs are deducted from this portion of the termination payment. It is not yet entirely clear how the notice element should be calculated, particularly where the employer operates salary sacrifice arrangements, and HMRC will be issuing further guidance on this in due course. Employers should nevertheless ensure their payroll teams are prepared for the changes and consider:

- the likely tax treatment of any settlements currently being negotiated or already signed where the termination date and payment will be on or after 6 April 2018

- whether changes need to be made to template settlement agreements, to cater for the different elements of the termination payment
- whether to include a PILON clause in all employment contracts, given that there is no longer a tax advantage to be gained from leaving one out.

Our Work

Since our last **Employment Update**, our work has included:

- advising a client on the implications of TUPE, and appropriate indemnity protection, where it was moving from one service provider to another
- working with a client in the defence of alleged whistleblowing and detrimental treatment
- supporting a client on its conduct of a disciplinary process in relation into potential gross misconduct behaviour
- working closely with a client's HR and legal teams on a gender pay gap report and equal pay audit, and presenting a session to the UK executive team on the report, the associated communication strategy and key initiatives to drive gender pay equality
- advising an asset manager on the engagement of a number of consultants, including employment status issues and structuring the arrangements to minimise exposure to income tax liability.

TRAVERS SMITH

If you have any queries on this edition of *Employment Update*, please contact any member of the Employment Department

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