1

EMPLOYMENT LAW UPDATE

Overview

Developments since October 2021:

- Legislation Update
- What's on the horizon?
- Case Law Update

2

3

EMPLOYMENT LAW UPDATE

Legislation Update

- Increase to statutory rates of pay
  - 1 April 2022: National minimum wage and national living wage will increase

Apprentices	£4.81 an hour
16 – 17 year olds	£4.81 an hour
18 – 20 year olds	£6.83 an hour
21 – 22 year olds	£9.18 an hour
National living wage (workers aged 23 and over)	£9.50 an hour
Accommodation offset	£8.70 per week

4

Legislation Update

- Increase to statutory rates of pay
  - 6 April 2022: Statutory benefit and other payments will increase

Statutory sick pay	£99.35 per week
Statutory maternity pay, maternity allowance, statutory paternity pay, statutory shared parental leave pay and statutory adoption pay	£156.66 per week
A week's pay	£571
Maximum compensatory award for ordinary unfair dismissal	£93,878

Legislation Update

- Duty to provide suitable PPE to workers
  - 6 April 2022: New Regulations will extend duty on employers to provide suitable PPE to all workers not just employees
  - Duty will apply where there is a health and safety risk
  - Prohibition on employers charging employees for PPE will also be extended to cover workers
- Adjusted right to work check measures
  - Temporary adjusted right to work check measures will now end on 30 September 2022
  - Allow right to work checks to be carried out over video calls and for scanned or photographed documents to be sent to employers rather than originals
  - Employers maintain a statutory defence against a civil penalty if they comply with the adjusted measures
  - NB: Home Office has launched a consultation on proposed amendments to its code of practice for employers on avoiding unlawful discrimination while preventing illegal working. The consultation closed on 25 February 2022 and any changes will apply from 6 April 2022

Legislation Update

- Flexi-job apprenticeship pilot scheme
  - 6 April 2022: New Regulations enabling start of a pilot scheme of flexi-job apprenticeships in England
  - Allow employers to only give a 3-month commitment, instead of the usual 12-month minimum
  - Allows flexi-job apprentices to complete discrete blocks of employment with training with different employers throughout the course of their apprenticeship
  - Currently flexi-job apprenticeships will only be available for a limited number of approved apprenticeship standards in the creative and construction sectors
  - Apprentices will be employed by flexi-job apprenticeship agencies who will hire them out to host organisations
  - The pilot scheme is intended to start in April and last for 18 to 24 months
  - If successful, the scheme may be made available to other apprenticeship standards

Legislation Update

- Gender pay gap reporting
  - 30 March 2022: Deadline for public sector organisations to report on 31 March 2021 data
  - 4 April 2022: Deadline for private sector organisations to report on 5 April 2021 data
  - April 2022: Government must review gender pay gap regulations within 5 years of them coming into force

Employment Law Update

On the horizon....

9

EMPLOYMENT LAW UPDATE

What's on the horizon?

A number of pieces of legislation due to be brought in "when parliamentary time allows". These include:

- Employment Bill (including neonatal leave and pay)
- Carers Leave
- Creation of a new enforcement body

10

What's on the horizon?

- Employment Bill
  - Extending redundancy protection
    - Covers pregnant women and new parents returning from maternity leave, adoption leave and shared parental leave
    - Would expand entitlement to be offered suitable alternative employment where a vacancy exists
  - Neonatal leave and pay
    - New right to up to 12 weeks' paid leave for parents of babies requiring neonatal care
  - Good work plan proposals
    - Measures to address one-sided flexibility, including a right to reasonable notice of work schedules and penalty for non-compliance
    - Requirement for employers to pass on all tips and service charges to workers without deductions and to distribute tips in a fair and transparent way having regard to a statutory Code of Practice on Tipping

What's on the horizon?

- Carers leave
  - Intention is to introduce up to one week (five working days) of unpaid leave per year for carers
  - Carers leave will be a day one right
  - Eligibility will depend on:
    - Employee's relationship with person being cared for (likely to follow the definition of a dependant)
    - That person needing long-term care
  - Leave can be used for providing care or making arrangements for care to be provided
  - Leave can be taken in half days, days or up to a block of one week
  - Required notice of twice the length of the leave plus one day
  - Employers can postpone if taking leave would cause business disruption

What's on the horizon?

- Creation of a single enforcement body
  - Body will:
    - Support employers to comply with the law
    - Provide detailed technical guidance
    - Have non-compliance and enforcement powers
  - Remit will cover:
    - NMW / NLW
    - Employment agency regulation
    - Modern slavery
    - Holiday pay for vulnerable workers
    - SSP
    - Unpaid Employment Tribunal awards
  - Introduction of compliance notices, civil penalties and naming non-compliant businesses

What's on the horizon?

There have been many formal consultations covering a variety of employment law topics. We do not propose to go through all of these but have picked out a handful, which we consider employers may be keen to know about:

- Domestic abuse survivors
  - Consultation on needs of domestic abuse survivors and how met by current employment rights
  - BEIS report: Workplace Support for victims of domestic abuse – sets out advice for employers on how to support victims of abuse in the workplace
  - ACAS also updated its guidance Working from home during the coronavirus pandemic to include a section on domestic violence and abuse

What's on the horizon?

- Sexual harassment in the workplace
  - We may see some changes in the laws relating to sexual harassment in the workplace following a consultation on this matter. The government's response includes:
    - A commitment to introduce a new duty for employers to prevent sexual harassment in the workplace
    - EHRC to develop a new statutory code of practice
    - A commitment to introduce workplace protections against third party harassment
    - A review of time limits for claims under the Equality Act 2010

What's on the horizon?

- Post termination non compete clauses
  - Consultation on measures to reform post-termination non-complete clauses
  - Proposals for employers to pay compensation for duration of clause, introducing a statutory limit on the length of such clauses or banning use of such clauses altogether
- National disability strategy
  - Consultation on disability workforce reporting has been undertaken to explore whether to introduce a compulsory or voluntary requirement for large employers with 250 or more employees to undertake such reporting.
- Flexible working as a Day 1 right
  - Consultation on extending the right to request flexible working to all employees, removing the current 26 weeks' service requirement
  - Also covers proposals to make changes to the eight business reasons for refusing a request and a new requirement on the employer to suggest alternatives

Employment Law Update

Case Law Update

17

EMPLOYMENT LAW UPDATE

Case Law Update

- Menopause

  Rooney v Leicester City Council

  - Ms Rooney worked as a childcare social worker until she resigned after several years of menopausal symptoms affecting her work
  - She brought various claims including for disability discrimination on the basis that her menopausal symptoms constituted a disability
  - Initially the Tribunal dismissed her discrimination claims on the basis that her menopausal symptoms did not meet the definition of a disability and her claim had no prospects of success
  - The EAT disagreed on the basis the Tribunal had not properly considered the definition of disability, in particular the balancing exercise of what the Claimant could or could not do was not carried out, the statutory definition of long term was not considered, and the Tribunal was wrongly concluded that the symptoms did not have more than a minor or trivial effect on her day-to-day activities

Key Learning:

Employers should be mindful that menopausal symptoms can be deemed a disability and should support employees experiencing such symptoms including training managers on how to manage such situations appropriately

18

EMPLOYMENT LAW UPDATE

Case Law Update

- Disability discrimination

  Sullivan v Bury Street Capital Ltd

  - The Claimant was a senior sales executive but following the breakdown of the relationship with his partner he suffered paranoid delusions that he was being stalked
  - From May 2013 to October 2013, his condition caused difficulties with sleep and social interactions and affected his timekeeping, attendance and record-keeping at work
  - In April 2017 his condition deteriorated again. His employment was ended in September 2017 on capability grounds and he brought various claims including for disability discrimination
  - The Tribunal found that his condition did not meet the definition of a disability. Although it had lasted throughout 2013 to 2017, it did not have a substantial adverse effect on his ability to carry out normal day to day activities throughout the whole of that time
  - Both the EAT and Court of Appeal agreed with the Tribunal

Key Learning:

The question of disability is always very fact specific but just because a condition does recur doesn't necessary mean it was sufficiently likely to recur to bring it within the definition of a disability

EMPLOYMENT LAW UPDATE

Case Law Update

- Disability discrimination

  Judd v The Cabinet Office

  - The Claimant was due to go on secondment in Montenegro but suffered two major health episodes in the month before, both of which involved her attending A&E
  - She was independently assessed and deemed high risk and advised not travel. Her consultant also considered her to be at risk of further unpredictable ill-health episodes
  - The employer considered that there was not the same emergency services provision in Montenegro and there was a language barrier. Even if adjustments were made, they would not resolve a potential emergency. As a result, the employer withdrew the offer of secondment.
  - The Claimant brought a claim of disability discrimination
  - The EAT upheld the Tribunal's decision that the withdrawal of the offer was to protect the employee's safety and was not disability discrimination - an employer was not required to adopt any adjustment that had the prospect of alleviating an employee's disadvantage where it would be insufficient to protect the employee's health, safety and wellbeing

Key Learning:

Employers are only required to make adjustments that are reasonable and likely to alleviate the disadvantage suffered by the disabled employee

Case Law Update

- Grievances

  Hope v British Medical Association

  - The Claimant brought numerous grievances against senior managers
  - The Claimant wished to resolve these issues informally with his line manager but his line manager had no authority to resolve issues involving senior managers. However, the Claimant refused to progress any grievances to the formal stage and did not withdraw his grievances. The Claimant failed to attend grievance meetings
  - The Respondent considered the Claimant's conduct to amount to gross misconduct in that he refused to comply with a reasonable management instruction to attend the meetings and he was dismissed
  - The Tribunal found that his dismissal was fair and the EAT agreed. The Tribunal was entitled to conclude that the employer had acted reasonably in treating the reason for dismissal, namely the Claimant's conduct, as being a sufficient reason to dismiss in all the circumstances

Key Learning:

Employees cannot insist on keeping unresolved grievances in limbo and repeated abuse of the grievance process may, depending on the circumstances, be seen as misconduct

Case Law Update

- Fire and re-hire

  USDAW and others v Tesco Stores Ltd

  - USDAW is recognized by Tesco for collective bargaining
  - Between 2007 and 2009, USDAW and Tesco agreed arrangements for “retained pay” as a way to retain employees during a relocation process which became an individual contractual entitlement. In communications, Tesco confirmed the payment would remain for as long as they were employed in their current role and could not be negotiated away
  - In 2021, Tesco sought to remove retained pay and offered a lump sum payment to buy out the right, failing which employees would be dismissed and offered new terms without the retained pay
  - USDAW sought an injunction to prevent Tesco from removing the retained pay
  - On the basis that the retained pay had been described as permanent, and Tesco was only seeking to dismiss and re-engage to avoid the payment, the injunction was granted

Key Learning:

Employers must be careful over the language used when introducing any incentive or retention benefit to allow flexibility to change the benefit in the future

Case Law Update

- Collective bargaining

  Kostal UK Limited v Dunkley

  - A trade union recognition agreement between Kostal and Unite gave Unite sole recognition and bargaining rights
  - Kostal made a pay offer of a 2% pay increase and a 2% Christmas bonus conditional upon some changes to overtime, sick pay and breaks. The offer was rejected by Unite and its members
  - Kostal then made the same offer directly to the employees, stating that if the offer was not accepted by a certain date, employees would not able to receive the Christmas bonus
  - A month later Kostal made another offer of a 4% pay increase to employees who had so far rejected the offers stating that if no agreement was reached they may have to serve notice
  - Around 10 months later a collective agreement was reached
  - 57 claimants who were members of Unite brought claims that the direct offers made to them by Kostal breached TULRCA 1992 which prohibits making offers which, if accepted, would have the result that terms of employment would not be determined by collective bargaining and where that outcome is the employer's sole or main purpose

23

Case Law Update

- Collective bargaining

  Kostal UK Limited v Dunkley

  - The Tribunal upheld the claim and awarded £3,800 to each claimant for each offer made
  - Kostal appealed to the EAT which dismissed the appeal, and then to the Court of Appeal which allowed the appeal. The claimants appealed to the Supreme Court
  - The Supreme Court upheld the appeal and restored the awards to the claimants
  - As the collective bargaining process was ongoing at the time the offer was made Kostal was in breach of TULRCA 1992. The offers were made directly to the workforce, bypassing the union during collective bargaining, with the intention that one or more of the employment terms would be determined outside of the collective bargaining process

Key Learning:

Employers should ensure that they properly follow every step in a collective bargaining process (including any dispute resolution procedure) before engaging directly with the workforce. Provided employers have followed the collective bargaining process and have a genuine belief that the process has been exhausted, there is nothing to prevent them from making an offer directly to workers

24

Case Law Update

- National Minimum Wage

  Mr W Augustine v Data Cars Ltd

  - Mr Augustine was employed as a taxi driver by Data Cars Ltd
  - He had the option of either providing his own personal vehicle or using a rented one
  - He rented a car from a company associated with Data Cars Ltd. He also hired a uniform from Data Cars Ltd; although not a requirement of his employment it was needed to earn the status of "gold driver" which gave him access to more lucrative jobs
  - Mr Augustine contended that these expenses were reductions for national minimum wage purposes so bringing his income below the minimum level
  - The EAT agreed. They considered that the expenses were incurred in connection with employment and had not been reimbursed by the employer

Key Learning:

There appears to be no requirement for expenses to be reasonable, just that they are incurred in connection with employment, for them to be deductions. Employers should carry out a NMW audit to identify potential issues as a result of this decision

Case Law Update

- Holiday pay

  Smith v Pimlico Plumbers

  - Mr Smith was treated as being self-employed but was subsequently found by the Courts to have worker status following his claim in 2018
  - He had taken various days off work over the course of six years but had not been paid for them. As a worker, however, he was entitled to holiday pay
  - The Tribunal and EAT initially dismissed his claim as being out of time; his last unpaid period of holiday was taken in February 2011 and he had 3 months from that date to bring his claim for unlawful deductions
  - Mr Smith challenged this ruling with the Court of Appeal, arguing that he was entitled to a backdated payment for all of the unpaid Euro-Leave he had taken during his employment up to the point of termination and that time for bringing his claim ran from the termination date
  - The Court of Appeal allowed his appeal

Case Law Update

- Holiday pay

  Smith v Pimlico Plumbers

  - The right to annual leave and to payment during that leave are both part of the same right and where an employer refuses to pay for leave it is preventing the worker from exercising their statutory rights
  - Mr Smith was entitled to payment in lieu of all of his accrued Euro-Leave on termination. As a result, his claim was also brought in time

Key Learning:

Employers should audit their workforce to identify any potential independent contractors who could claim to be workers in light of this decision as well as making sure that there are clear communications encouraging workers to take their statutory holiday during the relevant leave year

Case Law Update

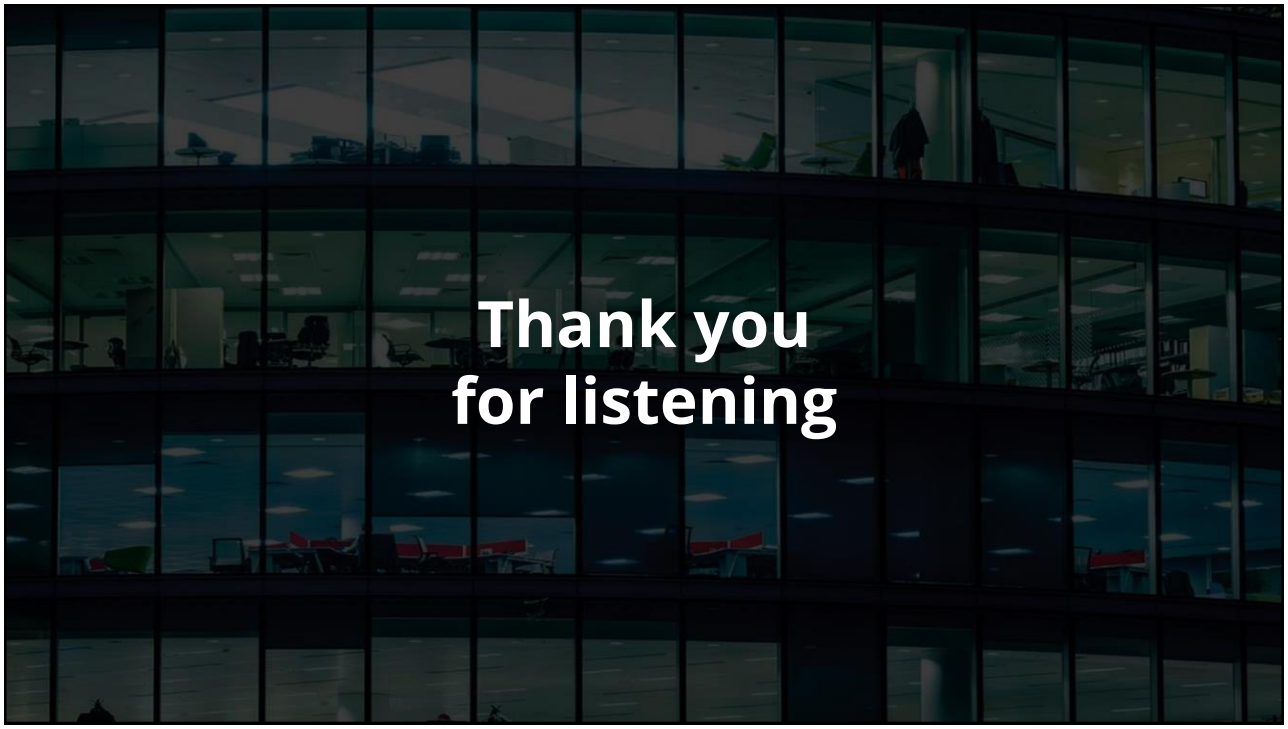
- Worker Status

  Stuart Delivery Ltd V Augustine

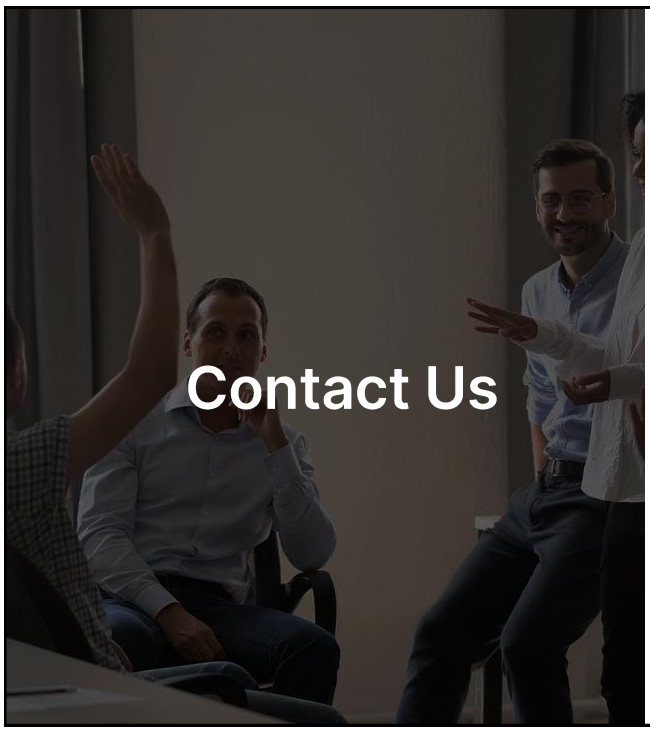
  - Stuart Delivery Ltd developed an app which connected couriers with clients
  - Couriers could opt to take individual jobs or sign up for one or more time slots via the app
  - If a courier signed up to a slot, they could request to release it via the app making it available to other couriers but if no one accepted, the original courier was responsible for completing it or incurred a penalty for failing to do so
  - The Tribunal initially found that a courier driver was a worker - the right to provide a substitute was conditional on another person being willing to take over the delivery slot and therefore did not take away the obligation to perform the work personally
  - The EAT agreed with the Tribunal – the substitution procedures for the couriers was not an unfettered right of substitution which would undermine the obligation of personal performance

Key Learning:

An unfettered right to provide a substitute is key to establishing self-employed status. However, it is rare in practice to have an unfettered right and employers need to be alive to the risk this presents



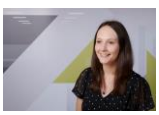
29



Charlotte Staples
Senior Associate
T: 03700 86 5077
E: Charlotte.Staples@shoosmiths.co.uk

Pav Clair
Senior Associate
T: 03700 86 4463
E: Pav.Clair@shoosmiths.co.uk

Lauren Bhole
Associate
T: 03700 86 5574
E: Lauren.Bhole@shoosmiths.co.uk



Chelsea Clapham
Associate
T: 03700 86 7436
E: Chelsea.Clapham@shoosmiths.co.uk

30

30