

Shoosmiths National Employment Team

Employment Law Update

March 2021

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Overview

Developments since October 2020:

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

EMPLOYMENT LAW UPDATE

Legislation Update



Legislation Update

- **IR35 / Off-payroll working rules**
 - To be extended to the private sector from 6 April 2021
 - Applies where individuals provide services to large and medium sized companies in the private sector via an intermediary (such as personal service company)
 - Where the nature of the engagement would, absent the intermediary, have the characteristics of an employment relationship for tax purposes, payments made to the intermediary will be treated as payments of employment income and subject to income tax and NICs
 - Responsibility for payment of tax shifts from the intermediary to the fee-payer, often the end client or agency
 - Responsibility for determining the tax status of the individual and dealing with any disagreement over that determination falls on the end user client
 - End users need to review arrangements with contractors to see whether the new rules will apply
- **PENP calculations**
 - 6 April 2021: change to current formula for post-employment notice pay
 - Covers situation where contractual notice period is expressed in weeks but the employee's pay period is in months

Legislation Update

- **Increases to statutory rates of pay from 4 April 2021**
 - Statutory sick pay: £96.35 a week
 - Statutory maternity, paternity, shared parental, and adoption pay: £151.97 a week
- **Increases to national minimum wage from 1 April 2021**
 - Age 23 or over: £8.91 an hour
 - Age 21-22: £8.36 an hour
 - Age 18 – 20: £6.56 an hour
 - Age 16-17: £4.62 an hour
 - Apprentice rate: £4.30 an hour
 - Accommodation offset: £8.36 per week

Legislation Update

- **Gender pay gap reporting**
 - Requirement to publish reports by April 2020 had been paused due to COVID-19
 - Requirement has now been reinstated
 - Deadline for private sector organisations is 5 October 2021 to report on 5 April 2020 data
 - Include furlough workers when:
 - looking at number of employees for triggering reporting duties
 - calculating gender bonus gap
 - Don't include furlough workers when calculating gender pay gap where they received less than full pay during furlough leave
 - GEO has published updated guidance documents on gender pay gap reporting to assist employers

Immigration Update

- **EU Settlement Scheme**

Settled status

- 5 years or more in the UK
- Resident in the UK by 31 December 2020
- 2–3-week processing time
- Apply by 30 June 2021
- No supervening event
- Criminality assessments

Pre-settled status

- Less than 5 years in the UK
- Resident in the UK by 31 December 2020
- 2–3-week processing time
- Apply by 30 June 2021
- Absences – 6 months out of 12 (with exceptions)
- Criminality assessment

- **End of free movement**

- Free Movement ended on 31 December 2020
- New points-based immigration system from 1 January 2021
- Some individuals may not be eligible to work in the UK now if they are not already in the UK
- Ensure that you are prepared to sponsor EU and non-EU nationals in certain roles by obtaining a Sponsor Licence

Employment Law Update

On the horizon....



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
- Carers leave
 - One week's unpaid leave per year for carers
- Good work plan proposals
 - Measures to address one-sided flexibility, including a right to reasonable notice of work schedules and penalty for non-compliance
 - Proposal for flexible working to be the default position and to encourage employers to be more transparent about flexible working policies and parental leave and pay policies
 - Proposal to require employers to pass on all tips and service charges to workers
 - Creation of a single enforcement body

What's on the horizon?

- **Domestic abuse survivors**
 - Consultation on needs of domestic abuse survivors and how met by current employment rights
 - Closed 9 September 2020
 - On 14 January 2021, BEIS published its 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
- **Family related leave and pay**
 - Consultation on possible reform of family-related leave and pay, in particular considering increasing the amount of paternity leave and/or pay and overhauling current rights
 - Closed 29 November 2019 - awaiting government response
- **Sexual harassment in the workplace**
 - Consultation on measures to address sexual harassment in the workplace
 - Closed 2 October 2019 - awaiting government response

What's on the horizon?

- **Misuse of non-disclosure agreements**
 - Consultation on use in situations of workplace harassment or discrimination complaints
 - Applies to contracts of employment and settlement agreements
 - Closed on 29 April 2019 - awaiting legislation
- **Health**
 - Consultation on reform of statutory sick pay and a right to request workplace modification
 - Closed 7 October 2020 - awaiting government response
- **Ethnicity Pay Gap Reporting**
 - Consultation on mandatory ethnicity pay reporting
 - Closed 11 January 2019 – awaiting government response

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
 - Closed on 26 February 2021 – awaiting government response
- **Extending ban on exclusivity clauses**
 - Consultation on measures to extend the ban on exclusivity clauses to cover those earning under the Lower Earnings Limit (currently £120 a week)
 - Closed on 26 February 2021 – awaiting government response

Employment Law Update

Case Law Update



Case Law Update

- Redundancy

- *UQ v Marclean Technologies SLU*
- The claimant was dismissed on 31 May 2018. A further 36 employees were dismissed between 31 May and 15 August 2018
- The claimant argued that her dismissal formed part of a series of redundancies which, when added, triggered the obligation to consult collectively
- The ECJ considered how to identify the 30- or 90- day reference period during which dismissals are counted for the collective consultation obligations
- The ECJ concluded that the relevant period to take into account covers any 30- or 90- day consecutive days which include the date of dismissal in question, whether those days are before, after or both before and after that dismissal

Key Learning:

Employers proposing redundancies must look both back and forward from an individual dismissal to determine whether there are 20 or more proposed dismissals and, if there are, to ensure that collective consultation obligations are complied with

Case Law Update

- Protected characteristics
 - *Higgs v Farmor's School*
 - The claimant was a Christian and was employed as a pastoral administrator at the school
 - The school received a complaint relating to Facebook posts which the claimant had made demonstrating homophobic views
 - The claimant was dismissed for gross misconduct for breaching the school's conduct policy relating to discrimination and inappropriate use of social media
 - The claimant claimed direct discrimination and harassment on the grounds of her religion
 - Although the claimant's beliefs were protected, the claim failed because she had not been treated differently as a result of those beliefs

Key Learning:

Be mindful of competing protected characteristics and always follow your policies and procedures

Case Law Update

- Discrimination

- *Ryan v South West Ambulance Services NHS Trust*
- The Trust had a recruitment tool called the Talent Pool to identify and develop future leaders and managers within bands 1-7 and to retain existing leaders and managers at band 8a plus
- The claimant, aged 66/67, worked as a Education and Business Manager at band 8a
- The claimant was not put into the Talent Pool
- When the claimant became aware of another band 8a role she was told she could only apply if the role was not filled from someone within the Talent Pool
- The claimant alleged age discrimination on the basis that employees aged 55 and over were under-represented in the Talent Pool and the EAT agreed there was a disadvantage to this group

Key Learning:

Be careful when introducing policies or practices that they do not indirectly discriminate against protected groups

Case Law Update

- Discrimination
 - *Heskett v Secretary of State for Justice*
 - The claimant was a probation officer who brought proceedings for indirect age discrimination
 - He argued that the rate of pay progression for his job disproportionately disadvantaged younger employees such as himself and that the main reason behind the reduction in pay progression was a cost-cutting exercise which, alone, could not be a legitimate aim
 - However, it was held that the respondent was compelled to reduce its costs due to financial and economic pressures and that was a legitimate aim
 - The disadvantage suffered by the claimant was therefore justified

Key Learning:

Employers may now be able to carry out potentially discriminatory practices on the basis that they can be justified by reason of reduction in company costs

Case Law Update

- Reasonable steps defence
 - *Allay (UK) Ltd v Gehlen*
 - The claimant is of Indian origin. He was dismissed in September 2017 for performance-related reasons
 - He raised a complaint of harassment related to his race which was investigated as a result of which it was established that a colleague had made racist comments towards him
 - The colleague was made to attend further equality and diversity training, have already attended a session early in 2015
 - The claimant brought a claim of harassment and the employer relied on the reasonable steps defence
 - However, both the Employment Tribunal and EAT found that the defence was not available and that the training relied upon had become “stale”

Key Learning:

Make sure your equality and diversity training is kept up to date

Case Law Update

- Post termination restrictions
 - *Quilter Private Client Advisers Ltd v Falconer and another*
 - A financial adviser joined Quilter to take over the clients of another adviser
 - Employment contract contained a confidentiality clause, garden leave clause, 9 month non-compete restriction and 12 month non-solicitation and non-dealing restrictions
 - After less than 6 months, the adviser left to join a competing business
 - Quilter brought a breach of contract claim and sought to enforce the restrictions
 - The restrictions were held to be invalid on the basis they were unreasonable
 - In particular, the court took the view the adviser had not had time to build established relationships with clients

Key Learning:

Consider the reasonableness of your restrictions in different scenarios and tailor them as appropriate – e.g. applying shorter and more limited covenants for an initial period

Case Law Update

- Constructive dismissal
 - *Gordon v J&D Pierce*
 - The claimant resigned and claimed constructive dismissal after the employment relationship deteriorated
 - Initially, his claim failed on the basis that he had affirmed his employment contract by engaging in his employer's grievance procedure after he had resigned
 - However, the EAT disagreed with this and held that the exercise of a right of grievance or appeal should not be regarded as affirmation of the contract as a whole
 - As a result, the claimant could continue with his claim

Key Learning:

Just because an employee may continue with an internal process following their resignation, this does not prevent them from bringing a constructive dismissal claim in the tribunal

Case Law Update

- Constructive dismissal
 - *Chalmers v Airpoint Ltd*
 - The claimant worked as a business support manager and carried out HR functions
 - The claimant was not able to attend a Christmas staff event. She subsequently raised a grievance complaining about her treatment, in particular stating she had been excluded from the Christmas night out, which she stated “may be discriminatory”
 - Her grievance was not upheld and she brought claims of harassment and victimisation on grounds of her sex but was unsuccessful
 - The Tribunal was entitled to consider the claimant’s HR experience, articulation and education
 - Her grievance did not make a specific allegation of sex discrimination and the words “may” signified doubt and uncertainty

Key Learning:

Employers are entitled to consider all of the circumstances when deciding whether a complaint of discrimination has been made and should be acted upon

Case Law Update

- Vicarious Liability
 - *Chell v Tarmac Cement and Lime Ltd*
 - The claimant was a site fitter whose services had been contracted out to the respondent at one of its quarry sites
 - The claimant was injured at work when a practical joke by one of the respondent's employees went wrong
 - The contractor had previously made his supervisor aware that there were rising tensions between employees and contractors on-site
 - However, the employer was not liable as there was no foreseeable risk of injury – the tension was not so serious as to suggest the threat of violence or confrontation

Key Learning:

Be vigilant about workplace issues and, where there are signs of horseplay, ill-discipline or malice consider whether additional steps are required to avoid vicarious liability for any wrong doing



**Thank you
for listening**

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