

Shoosmiths National Employment Team

Employment Law Update

October 2020

SH ∞ SMITHS

Overview

Developments since April 2020:

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

EMPLOYMENT LAW UPDATE

Legislation Update



Legislation Update

- Working Time Regulations
 - Changes to carry over of holiday
 - Allows **carry-over of up to 4 weeks'** untaken holiday
 - Applies where it was not reasonably practicable to take it in the leave year *“as a result of the effects of the coronavirus”*
 - Holiday can be carried over to the **next two** leave years
 - Employer can require an employee not to take carried over leave on certain days where they have a good reason to do so
 - A worker will be entitled to be paid in lieu of any untaken carried-over holiday on termination

Legislation Update

- Statutory Sick Pay
 - Various changes introduced in response to the current pandemic
 - Statutory Sick Pay now available to those who:
 - Experience symptoms of or tested positive for Covid-19 and are self-isolating for 10 days
 - Live with someone who is isolating due to having symptoms of Covid-19, and are self-isolating for 14 days
 - Live with someone who has tested positive for Covid-19, and are self-isolating until the later of 10 days from when that person first had symptoms / tested positive or the date that person no longer has symptoms
 - Develop symptoms of Covid-19 while already self-isolating, and are self-isolating for 10 days
 - Have been advised through the contact tracing system that they have come into contact with someone who was infected, and are self-isolating for the duration specified in the notification
 - Has been advised to self-isolate at home for up to 14 days prior to going into hospital for planned or elective surgery

NB: Employer's must not knowingly allow an employee who is self-isolating to come into work. If they do, the employer can be **finned between £1,000 and £10,000** for repeat offences

Legislation Update

- Vento bands
 - Injury to feelings award in discrimination and whistleblowing claims based on Vento bands
 - For claims presented on or after 6 April 2020, the bands are:
 - Lower band: £900 - £9,000
 - Middle band: £9,000 - £27,000
 - Upper band: £27,000 to £45,000

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

Immigration Update

- Prepare for the end of free movement
 - Free Movement will end on **31 December 2020**
 - You can recruit from the EU up to that date **as long as they enter the UK before 31 Dec 2020**
 - Prepare your business – some individuals may not be eligible to work in the UK in the future 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**
 - Apply for a Sponsor Licence as soon as possible. There will be an influx towards the end of the year

Immigration Update

- Immigration rules changes from 2021
- **Skilled Worker Route**
 - Sponsor licence required
 - EU and Non-EU nationals will be treated the same
 - Mandatory Criteria
 - Job offer from a licensed sponsor
 - English language
 - Minimum skills level lowered (RQF Level 3 equivalent to A Levels +)
 - 70 points required
 - Tradeable points
 - PHD or PHD in stem subject
 - Shortage Occupation List
 - Salary (Minimum £20,480 unless the job is in a specific shortage occupation or that they have a PHD relevant to the job)

Immigration Update

- Immigration rules changes from 2021
- **New Graduate Immigration Route**
 - Launches in Summer 2021
 - Is an “unsponsored” route
 - 2 years maximum
 - Only for graduates
- **Other routes** – Global Talent Route
- **Visitors**
 - EU, EEA and Swiss citizens and other non-visa nationals will not require a visa when visiting for up to 6 months for **permitted activities**
 - All migrants entering for other reasons (such as work or study) will still need to apply for entry clearance in advance

Employment Law Update

On the horizon....



What's on the horizon?

- **Extending redundancy protection**
 - Consultation on extending redundancy protection for 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
 - from point at which employer notified of pregnancy
 - until 6 months after end of maternity leave
 - Closed 5 April 2019
 - Covered by the forthcoming Employment Bill
- **Neonatal leave and pay**
 - Consultation on new right to up to 12 weeks' paid leave for parents of babies requiring neonatal care
 - Closed 11 October 2019
 - Covered by the forthcoming Employment Bill

What's on the horizon?

- **Family related leave and pay**
 - Consultation possible reform of family-related leave and pay generally, in particular considering increasing the amount of paternity leave and/or pay and overhauling current rights
 - Closed 29 November 2019
 - Awaiting government response
- **Carer's leave**
 - One week's unpaid leave per year for carers
 - Closed 3 August 2020
 - Covered by the forthcoming Employment Bill

What's on the horizon?

- **Ethnicity Pay Gap Reporting**
 - Consultation on mandatory ethnicity pay reporting
 - Closed 11 January 2019
 - Government response due by the end of 2020
 - Petition calling for the introduction of ethnicity pay gap reporting passed 100,000 signatures
 - As a result, Parliament will now debate the issue
- **Misuse of non-disclosure agreements**
 - Consultation on use in situations of workplace harassment or discrimination
 - Applies to contracts of employment and settlement agreements
 - Closed on 29 April 2019
 - Awaiting legislation

What's on the horizon?

- **Sexual harassment in the workplace**
 - Consultation closed 2 October 2019
 - Awaiting government response
- **Domestic abuse survivors**
 - Consultation on needs of domestic abuse survivors and how met by current employment rights
 - Closed 9 September 2020
 - Awaiting government response
- **Health**
 - Consultation on reform of statutory sick pay and a right to request workplace modification
 - Closed 7 October 2020
 - Awaiting government response

What's on the horizon?

- **Good Work Plan consultation**
 - Measures to address one-sided flexibility, including on 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
 - Covered by the forthcoming Employment Bill

Employment Law Update

Case Law Update



Case Law Update

- Status

- *Gorman v Terrace Paul (Manchester) Ltd*

- Ms Gorman worked as a self-employed hairdresser for 5 years
 - Engaged under an consultancy agreement
 - Ms Gorman brought various claims including for unfair dismissal, sex discrimination and redundancy pay
 - Held that the salon had strict control over when she worked, which clients she saw and when she took holiday
 - She had to perform the work and the salon had to pay her for it
 - She was an employee

Key Learning: Ensure that any consultancy agreements properly reflect the reality of the situation

Case Law Update

- Unfair dismissal

- *K v L*

- K was a teacher who was suspended while the police investigated an allegation of possession of indecent images of children against him
 - Illegal images were found on K's laptop, but K was not prosecuted due to the lack of sufficient evidence that he had downloaded the images, other members of his household having access to his computer
 - K was dismissed on the basis that public knowledge of this investigation could cause reputational damage to the school but the school failed to mention the issue of reputation at the disciplinary hearing
 - The EAT held the dismissal was unfair because K did not have the chance to address the issue of reputational damage at the disciplinary hearing as he thought the issue was his conduct

Key Learning: Employers should ensure that all allegations are put to an employee during a disciplinary hearing for them to have the opportunity to respond

Case Law Update

- Constructive Unfair Dismissal
 - *Williams v The Governing Body of Alderman Davies Church in Wales Primary School*
 - Mr Williams was a teacher with an accepted disability
 - He was suspended and subjected to 2 disciplinary procedures, one in relation to child protection allegations and the other over alleged breaches of the data protection policy
 - Mr Williams raised a grievance regarding the process followed by the school and eventually resigned when he learnt that a colleague, subject to a connected investigation, had been stopped from contacting him
 - Even though this final act seemed “innocuous”, Mr Williams had not accepted the prior breaches by the school and therefore was entitled to resign and claim constructive dismissal

Key Learning: Employers need to be mindful that even seemingly trivial acts could allow an employee to resign and claim constructive dismissal on the basis of earlier conduct

Case Law Update

- Redundancy

- *Gwynned Council v Barratt*

- Teachers at a school were made redundant following a reorganisation.
 - As part of the redundancy exercise, the school held a competitive interview process for jobs at a new school rather than applying selection criteria or scoring. The jobs were the same or very similar to those the teachers already held.
 - The school did little by way of consultation and failed to provide a right of appeal.
 - The teachers brought unfair dismissal claims which were successful. They had effectively been asked to “apply for their own jobs” without any way to challenge the redundancy process.

Key Learning: Requiring employees to undergo a competitive interview process in a redundancy situation will be unfair where employees have to apply for the same or substantially similar jobs to those they already occupy

Case Law Update

- Reinstatement

- *Kelly v PGA European Tour*

- Mr Kelly was employed as Marketing Director eventually becoming Group Marketing Director.
 - A new Chief Executive had concerns about Mr Kelly's performance and willingness to "buy in" to his ideas.
 - Mr Kelly was dismissed and brought a claim for unfair dismissal.
 - PGA conceded that the dismissal was procedurally unfair. In considering remedy, the Tribunal decided that Mr Kelly should be offered re-engagement to the role of Commercial Director.
 - PGA successfully appealed on the basis that trust and confidence had been damaged.

Key Learning: An employer can refuse to re-engage an employee where it has a genuine and rational belief that trust and confidence has been lost as result of the employee's conduct

Case Law Update

- Vicarious Liability
 - *WM Morrison Supermarkets plc v various*
 - Mr Skelton was employed as an internal IT auditor
 - As part of his role, he was asked to provide payroll data to external auditors
 - He copied the data onto a USB stick, took it home and posted the data on the internet, using another employee's details to conceal his actions
 - When this became known to Morrisons, they removed the data, informed the police and began an internal investigation
 - Various Morrisons employees or former employees sought damages from Morrisons for misuse of private information on the basis Morrisons were vicariously liable for Mr Skelton's actions
 - Supreme Court held Morrisons were not vicariously liable – Mr Skelton's actions were not closely connected with the acts he was authorised to do in the course of his employment

Key Learning: Employers should remember the importance of safeguarding data and have governance in place to curb malicious acts of rogue employees

Case Law Update

- Discrimination
 - *Taylor v Jaguar Land Rover Ltd*
 - Ms Taylor identified as gender fluid / non-binary
 - She claimed that she was subjected to insults and abusive jokes at work, suffered difficulties with the use of toilet facilities and managerial support
 - ET upheld claims for harassment, direct discrimination and gender reassignment on the grounds of gender reassignment

Key Learning: Be aware that the definition of gender reassignment is inclusive of complex gender identities and that such situations require sensitivity

Case Law Update

- Definition of disability
 - *Sullivan v Bury Street Capital Limited*
 - Mr Sullivan suffered from delusions which caused him to believe he was being tracked by a gang of Russians.
 - His delusions impacted upon his timekeeping and attendance at work and he was dismissed for reasons to do with capability and attitude
 - Mr Sullivan brought a claim for disability discrimination but his employer argued that his condition did not come within the legal definition of a disability
 - The Employment Tribunal found that, at the relevant time, the substantial adverse effect that was caused by the condition was not long term as it was not likely to recur. The EAT agreed with this and stated that the fact the substantial adverse effect had in fact recurred did not change the conclusion that, at the earlier date, it was not likely to do so

Key Learning: When considering whether a condition is long term, remember to consider whether the adverse effect is likely to last for 12 months or will recur

Case Law Update

- Settlement Agreements

- *Duchy Farm Kennels Limited v Graham William Steels*

- Mr Steels brought several claims against his former employer
 - With the assistance of ACAS a settlement was reached with the settlement monies being paid in instalments
 - The agreement contained a confidentiality clause and a warranty that he would not disclose the facts and terms of the agreement
 - Mr Steel breached this clause and told a former colleague about the settlement. The employer ceased making further payments to him
 - However, the confidentiality clause was found not to be a condition of the agreement
 - Therefore, Mr Steels' breach did not terminate the agreement and the employer had to continue making instalments of settlement sum

Key Learning: Consider drafting of agreements carefully and be clear if payment of settlement is conditional on certain terms being upheld

Case Law Update

- TUPE transfers
 - *ISS Facility Services v Govaerts*
 - ISS carried out cleaning and maintenance of certain buildings
 - These services were put out to tender split across 3 lots
 - Lots 1 and 3 went to one bidder and Lot 2 to a different bidder
 - The project manager for the 3 Lots was told that she would transfer to the bidder for Lots 1 and 3 but the bidder disputed this and so she brought claims against both ISS and the bidder
 - The ECJ decided that her employment had transferred to both bidders in proportion to the work taken on by them
 - Currently UK case law does not support the division of employment contracts in this way

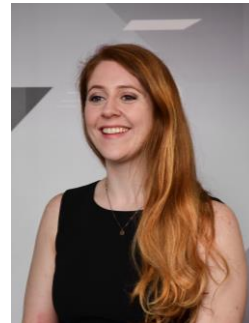
Key Learning: Where there are multiple transferees consider whether it would be practicable to split employment across them and whether any indemnities are necessary to protect parties

Contact Us



Michelle Clarke
Senior Associate

T: 03700 864 406
M: 07864 247500
E: Michelle.Clarke@shoosmiths.co.uk



Laura Wright
Associate

T: 03700 864 427
M: 07808 215226
E: Laura.Wright@shoosmiths.co.uk



James Chadwick
Associate

T: 03700 867 324
E: James.Chadwick@shoosmiths.co.uk



Navi Atwal
Associate

T: 03700 868 443
M: 07912 206446
E: Navjhot.Atwal@shoosmiths.co.uk