HR & EMPLOYMENT LAW INSIDER: YOUR MONTHLY UPDATE

November 2024

HR
Solutions

RECENT AND FUTURE CHANGES

RECENT CHANGES

ARE YOU ABOUT TO START A NEW HOLIDAY YEAR? THIS IS AN IMPORTANT NOTICE

You will remember that back in April, we had significant employment law developments, in particular, with regards to how you calculate holiday entitlement and pay for someone who works irregular hours or part year.

When the changes came into force, the Government did so in order for employers to be able to transition to the new rules. What this meant, was for those employers whose holiday year ran from 1 April to 30 March, they would move to the new rules immediately on the legislation coming into effect.

However, for those employers who were part way through a holiday year at the time of the legislation changing, they had to wait to implement the new rules. This was so that the rules could be introduced at the start of a holiday year and not part way as it would be easier to manage.

With the end of the year in sight, there will be employers who will be about to start a new holiday year (most likely from January). This means, the legal changes that came in back in April, will now need to be implemented to come into force from the start of the new holiday year. This means, for those who are irregular hours or part year workers, you will need to ensure:

1. Your employee handbook, template contract of employment, template worker agreement and annual leave policy are updated for using from the start of the next holiday year.

2. If you are in the process of recruiting now, but the expected start date will be in the new holiday year, then the updated contract of employment / worker agreement must be used as part of the new starter process.

3. This is a contractual change for existing employees, which means employers are legally required to consult and serve appropriate notice before introducing contractual changes, see our article on 'dismissal and re-engagement' and 'managing holidays' and 'changing contractual terms'.

8 NOVEMBER 2024 – THE SCHOOL TEACHERS' PAY AND CONDITIONS (ENGLAND) ORDER 2024

The updated pay and conditions book for school teacher's has come into force this month, but only for teachers in England. It was published on 8 November 2024.

We expect the pay and conditions book for school teachers in Wales to be published later this month on 29 November, with it being given a retrospective effect from 1 September 2024.

NEW BILL EXPECTED: EQUALITY (RACE AND DISABILITY) BILL

Anytime now, we can expect to see the publication of a new employment Bill, called the Equality (Race and Disability) Bill. Which, if it becomes law, will:

1. place a legal duty on employers with more than 250 employees to carry out ethnicity (and disability) pay gap reporting
2. extend equal pay rights to protect workers who suffer discrimination on the grounds of their race (and disability)
3. ensure that outsourcing services cannot be used to avoid paying equal pay
4. implement a regulatory and enforcement unit for equal pay with involvement from trade unions

IS YOUR BUSINESS COMPLIANT THE NEW DUTY TO PREVENT SEXUAL HARASSMENT?

The Worker Protection (Amendment of Equality Act 2010) Act 2023 came into force at the end of last month (26 October) and it means that there is a new legal duty on employers to take reasonable steps to prevent sexual harassment from occurring during the course of employment.

In practice, this means, that where there is a finding of sexual harassment at the Employment Tribunal and the employer has been found to have failed in fulfilling their duty to take reasonable steps, the tribunal can increase the amount of compensation that is paid to the employee/worker by up to 25%.

Central to this new duty is the carrying out of an assessment of the risks of it occurring and because the scope of this new duty is "during the course of the employment", it extends to work events and activities that take place off site, or out of hours, which can be suitably connected to employment. This means, it will include off site training, work conferences, and even Christmas parties and may even extend to other social events, such as leaving do's. We discuss the topic of vicarious liability and what may constitute a work event in our latest Hot Topic, which you can read here as well as watch back on demand our recent webinar in which we explore the law around what constitutes a work social event.

Another critical step in complying with the duty is to ensure that everyone is trained, and that the training provided is relevant to your workplace and specific, meaning that managers would need training from a different perspective to the training that employees receive.

For instance, management training needs to be specific on how to conduct impartial and thorough investigations into harassment complaints. This includes understanding legal requirements, gathering evidence, interviewing witnesses, and maintaining confidentiality. Furthermore, managers set the tone for the workplace culture and training is one way in which they can fully understand their responsibility for creating a respectful and inclusive environment, model appropriate behaviour, and intervene when required.

Employee training on the other hand needs to ensure that they gain a clear understanding of what constitutes sexual harassment, including subtle forms like inappropriate jokes, comments, or gestures. As well as training them on the organisation's reporting procedures, encouraging employees to come forward without fear of retaliation and to emphasise the importance of reporting incidents promptly. Employees can play a crucial role in preventing harassment by intervening when they witness inappropriate behaviour.

In a recent webinar, we asked Business Leaders to what extent they provide training, with 33% reporting that harassment training was carried out as a one off event, but overwhelmingly, 67% said that it was carried out at least annually.

When it comes to having anti-harassment policies and procedures, 57% of respondents said that they have them in place, and of those, the majority (78%) monitor and review them regularly. Monitoring policies and reviewing is crucial for ensuring they remain effective and legally compliant.

WILL EMPLOYMENT TRIBUNAL AND EAT FEES BE INTRODUCED AS EXPECTED?

Back in February this year, the previous Conservative Government launched a public consultation on its proposal to re-introduce Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) fees. This announcement was significant, because fees had previously been in place until a Supreme Court ruling in 2017 deemed them to be unlawful because they prevented access to justice.

The proposals the Government at the time put forward, were significantly less, therefore more affordable and less of a risk of them preventing justice being sought. We also understand that there would be exceptions to the rules for when a fee will be required.

These proposed fees had been planned to be introduced in November 2024. However, under the new Labour Government, we are waiting to hear if they are to proceed. There have been indications in the press that they may be in favour to do so, given the proposed fees are nominal and that they meet the tests of affordability, proportionality and simplicity. Balancing this also along with the administration work that is involved by the courts in managing claims.

The proposed fees, if they do go ahead are:

- A fee of £55, payable by an individual when bringing a new ET claim
- Regardless of whether the claim is by multiple complainants or an individual, it will remain a flat fee of £55. It could therefore be split by several individuals and would cover the entire ET process
- A fee of £55 to be introduced, paid by an appellant when lodging an EAT claim
- The fee for an EAT claim would be for each judgement, and so it could be greater where an appeal is against two ET decisions.

We will continue to monitor this and will share any updates in next month's newsletter.

FUTURE CHANGES (LEGISLATION BY COMMENCEMENT DATE)

NOVEMBER 2024

29 November 2024 – Pay and conditions of school teachers in Wales

The updated pay and conditions book is published, with pay and conditions being given retrospective effect from 1 September 2024.

November 2024? – Re-introduction of employment tribunal, and employment appeal tribunal fees.

A public consultation earlier this year sought the views on introducing fees in the Employment Tribunal and Employment Appeal Tribunal. No further update has been provided since the new Government took office.

DECEMBER 2024

1 December 2024 - The Seafarers' Wages Act 2023 part 1 draft regulations and guidance

The Seafarer's Wages Act 2023 is to protect those who work on ships that operate a regular international service to/from the UK from being paid less that the national minimum/living wage. Operators will be required to provide a declaration that seafarers on certain services are renumerated at a rate equivalent to the minimum wage.

2 December 2024 – The Supreme Court Rules 2024

These replace the rules from 2009, and will provide for a new digital case management portal.

13 December 2024 (part 1) – The Recognition of Professional Qualifications and Implementation of International Recognition Agreements (Amendment) (Extension to Switzerland etc) Regulations 2024

These Regulations will recognise Swiss professional qualifications in the UK.

JANUARY 2025

1 January 2024 (part 2) – The Recognition of Professional Qualifications and Implementation of International Recognition Agreements (Amendment) (Extension to Switzerland etc) Regulations 2024

Remaining Regulations that were not enforced on 13 December, will come into effect 1 January 2025.

20 January 2025 – The Trade Union and Labour Relations (Consolidation) Act 1992

This amendment will allow Employment Tribunals to increase an employee's award when making a protective award in regards to an employer's non compliance with collective consultation requirements. It will also extend to situations where an employer has unreasonably failed to comply with the Code of Practice on Dismissal and Re-engagement. If it is the employee that has unreasonably failed to comply with the relevant Code, their award can be reduced by up to 25%.

FEBRUARY 2025

1 February 2025 – Employment Tribunal rules

These rules amend EAT rules to allow the use of an electronic case management system for all legally represented parties and also updates the definition of 'legal representative'.

APRIL 2025

April 2025 – Increase to National Minimum and National Living Wage

The National Living Wage (for those aged 21 and above) increases by 6.7% to £12.21 per hour. The National Minimum Wage (for those 18-20) will increase by 16.3% to £10 per hour with the rate for 16-17 year olds, and apprentices increasing to £7.55 per hour – an increase of 18%.

SEPTEMBER 2025

1 September 2025 – The economic crime and corporate transparency Act 2023

This Act will make it an offence where certain organisation's (turnover greater than £36 million and more than 250 employees) have failed to prevent, or to have in place reasonable policies and procedures designed to prevent fraud. It includes where there has been fraud, false accounting, fraud by false representation, fraudulent trading and cheating the public revenue. Employers will be liable even if the fraud is committed by an associated person such as self-employed contractors, agency workers.

2026 AND BEYOND

1 July 2026 – The Drivers' Hours, Tachographs, International Road Haulage and Licensing of Operators (Amendment) Regulations 2022

The purpose of the Regulations is to implement fully some of the international road transport provisions in the Trade and Cooperation Agreement between the European Union and the United Kingdom. This includes prospective provisions related to drivers' hours rules and tachograph equipment in goods vehicles (such as bringing into scope some light goods vehicles and the introduction of new tachograph equipment). It also applies to some specialised international provisions and removes some access rights for EU operators to reflect the market access in the TCA.

2028 – Pension age increase

The new normal minimum pension age will become 57 years from 2028, following the amendment to Part 4 of the Finance Act 2004 (pension schemes etc).

FUTURE CHANGES (LEGISLATION COMMENCEMENT DATE TO BE CONFIRMED)

APRIL 2025? NEONATAL CARE (LEAVE AND PAY) ACT 2023

A new law that will entitle employees to take a period of leave of absence when their baby requires neonatal care. Neonatal care is regarded as care that is medical or palliative and would apply to someone with parental or other personal relationships with a child who is to receive or has received neonatal care.

THE PATERNITY LEAVE (BEREAVEMENT) ACT 2024

New legislation is to come into force that will provide new statutory rights for those taking paternity leave in cases where a mother, or a primary adopter, passes away. In this tragic situation, it will provide the other parent or partner who would have taken paternity leave with an automatic day-one right to take immediate paternity leave.

SOMETIME 2024/2025? EMPLOYMENT RIGHTS BILL

This Bill when passed, would introduce 28 reforms to employment rights Changes are not expected before 2026 for most, with the rules around unfair dismissal rights not coming into effect until Autumn 2026 at the earliest.

SOMETIME 2024/2025? DATA (USE AND ACCESS)

Update current data protection laws including new rules relevant to AI systems and decision making processes.

SOMETIME 2024/2025? PENSIONS (EXTENSION OF AUTOMATIC ENROLMENT) ACT 2023

This legislation removes the current age requirements for eligible workers to be automatically enrolled into a workplace pension. The current minimum age is 22 years, but this will be reduced to 18 years.

SUNDAY TRADING – PROTECTION FOR SHOP WORKERS

The right of shop workers to opt out of working Sundays on religious or family grounds is to be extended to any 'additional' hours above their normal hours which they may normally be obliged to work if requested. The duty of employers to advise workers of these rights is also to be extended.

WHISTLEBLOWING – PROTECTION FOR CHILDREN'S SOCIAL CARE APPLICANTS

This protection will be introduced into the Employment Rights Act, section 49C which will prevent employers from discriminating against a job applicant for a children's social care role because they have made a protected disclosure.

EMPLOYMENT BILLS (A-Z)

ARTIFICIAL INTELLIGENCE (REGULATIONS AND WORKERS RIGHTS) BILL

The Artificial Intelligence (Regulation and Workers' Rights) Bill if passed, would regulate the use of artificial intelligence technologies in the workplace and to make provision for workers' and trade union rights in relation to the use of artificial intelligence technologies.

ASYLUM SEEKERS (PERMISSION TO WORK) BILL

This Bill, if passed, would enable asylum seekers who have waited six months for a decision on their asylum application, to be able to take up employment.

BULLYING AND RESPECT AT WORK BILL

A new Bill has been proposed that aims to address workplace bullying and promote a respectful working environment.

CARERS AND CARE WORKERS BILL

This Bill would require the Secretary of State for Health and Social Care to publish and implement a Carer Worker's Employment Strategy which would be aimed at improving the recruitment and retention of care workers and establish an independent National Care Workers Council that would have responsibility for setting professional standards for care workers. It would also be responsible for establishing a system of professional qualifications and accreditation for care workers.

DATA PROTECTION AND DIGITAL INFORMATION (NO.2) BILL

This Bill aims to make changes to the UK General Data Protection Regulations (UK GDPR) and to introduce several significant data protection and ePrivacy reforms.

Some of the key proposed changes include:

- removing the traditional role of Data Protection Officer and to replace it with 'Senior Responsible Individual' (SRI)
- remove the requirement to complete a data protection impact assessment – although risks must still be identified and managed but on a risk based approach
- require only controllers or processors of data that is likely to result in high risk to the rights and freedoms of individuals, to keep and maintain records
- the Regulator, the Information Commissioner's Office, will be replaced by the Information Commission and supported by a statutory Board, with a Chair and Chief Executive

- remove the requirement for non-UK based controllers and processors to appoint a UK representative
- remove the current test threshold "manifestly unfounded or excessive" when managing subject data access requests and replace with "vexatious or excessive". Examples quoted in the Bill include requests that are intended to cause distress, not made in good faith or are an abuse of process.

DEVOLUTION (EMPLOYMENT) (SCOTLAND) BILL

This Bill would amend legislation (Scotland Act 1998) that would change the legislative competence on employment matters from the UK Government to the Scottish Parliament.

EMPLOYMENT (APPLICATION REQUIREMENTS) BILL

This Bill is aimed at introducing legislation that would regulate the use of minimum qualification or experience requirements in job applications.

EMPLOYEE SHARE OWNERSHIP (REFORM) BILL

This Bill would introduce a new share ownership scheme which would not require regular monthly contributions and so aimed at lower income and gig economy workers. It would also reduce the share incentive plan holding period from five years to three years and require companies to declare in their annual reports the type of share ownership plans they have in place and level of take up.

EMPLOYMENT AND TRADE UNION RIGHTS (DISMISSAL AND RE-ENGAGEMENT)

This Bill if passed, would provide workers greater rights and protection against 'fire and rehire', the practice where a dismissal occurs only for the worker to be offered new employment but on lesser terms.

FERTILITY TREATMENT BILL

This Bill is about providing employees with the legal entitlement to time out of the workplace in order to attend appointments for fertility treatment.

HEALTH AND SAFETY BILL

This Bill would amend the Enterprise and Regulatory Reform Act 2013 to make provisions about civil liability for breaches of health and safety duties.

MISCARRIAGE LEAVE BILL

This Bill would provide employees who have experienced a miscarriage with at least three days paid leave.

NON-DISCLOSURE AGREEMENTS BILL

This Bill would make provisions about the content and use of non-disclosure agreements and for connected purposes.

PATERNITY LEAVE (BEREAVEMENT) BILL

This Bill would make special provisions for paternity leave, including to be become a day one right where the mother or primary adopter dies within the first year of birth or placement.

PUBLIC SECTOR EXIT PAYMENTS

This Bill would limit the amount of exit payments made to those working within some public sector organisations.

WORKERS (RIGHTS AND DEFINITION) BILL

This is a Bill which would amend the definition of worker.

WORKING TIME REGULATIONS (AMENDMENT) BILL

This Bill seeks to amend the Working Time Regulations so the maximum working week would become 32 hours per week, rather than the current 48 hours.

CONSULTATION AND GUIDANCE

NEW AND OPEN CONSULTATIONS

CALL FOR EVIDENCE - MAKE WORK PAY: EMPLOYMENT RIGHTS BILL

Last month, we reported on the publication of the new Employment Rights Bill, which when passed, would bring the most significant of development in employment law in decades. In this Bill, there are 28 reforms that have been put forward, covering banning exploitative zero hour contracts, ending fire and rehire, strengthening statutory sick pay, update trade union legislation, to name a few.

Through this public consultation, the Government are wanting to understand:

- "how the Bill will contribute to the Government's stated goal of achieving the fastest growth in the G7
- Whether the Employment Rights Bill will adequately protect workers, improve security at work and raise living standards in every part of the country.
- The impact the Bill will have on businesses, in particular investment rates, start-up rates, the supply of labour and the employment rate.
- How to ensure adequate protection against exporting poor labour standards, including concerns over forced labour in international supply chains."
- The Government have now opened a public consultation and are calling for evidence that will help the later stages of the Bill formation."

The specific questions it is seeking public input on include:

Protecting workers:

- Does the Employment Rights Bill adequately safeguard the workers it seeks to protect?
- Are there weaknesses or loopholes in the Bill that could be exploited or have unintended consequences?
- Are there areas of employment law not covered by the Bill that weaken workers' protections?
- Can the measures in the Bill be adequately enforced? What are the barriers to setting up a Single Enforcement Body (Fair Work Agency) and how can these challenges be overcome?
- Will the proposed trade union reforms improve working relationships between workers and businesses, and hence, productivity and enable voice at work?

Impact on businesses:

- What impact will the areas covered by the Employment Rights Bill have on small, medium and large businesses?
- What impact will these measures have on staff retention, hiring practices, probationary periods and wages?
- How will other areas set out in the Plan to Make Work Pay impact businesses?
- What impact will strengthened protections, such as day one rights, have on the hiring practices of businesses, UK employment rates and UK investment rates?
- To what extent could the Employment Rights Bill cause businesses to offshore employment and continue with weaker workers' protections abroad?

Economic growth and wealth creation

How will the Plan to Make Work Pay impact:

- Economic growth?
- Productivity levels?
- Rates of investment?
- Business start-up rates?
- Supply of labour?
- Employment levels?
- Incomes?
- Household wealth?
- What solutions or actions are required by Government, businesses and workers to effectively support the labour market while boosting productivity and protecting workers' rights?

For business leaders, this is a great opportunity to feed into a process that supports the formation of this new Bill. Following the consultation period, the Government will then analyse all the responses and review evidence submitted, to help guide them in developing the Bill further.

DEPARTMENT FOR WORK AND PENSIONS CONSULTATION: MAKING WORK PAY – STRENGTHENING STATUTORY SICK PAY

The Government have opened a public consultation on its proposals to reform statutory sick pay, as part of the Employment Rights Bill. In fact, this will be one of the biggest reforms under the Bill because of the cost implications, but its aim is to improve financial security, reduce illnesses spreading at work and support productivity.

Currently, to be eligible, an employee must have been ill for more than 3 consecutive calendar days and their average weekly pay is at or above the current Lower Earnings Limit (LEL), which is currently set at £123 per week. This criteria means that up to 1.3 million people on low wages are not eligible and those who do qualify only receive pay for absences lasting 4 days or more.

The reforms proposed include:

- removing the lower earnings limit criteria, so everybody qualifies.
- those who are on low earnings would have their SSP calculated based on either a percentage of their earnings (determined following the public consultation) or the flat rate of £116.75 (the current SSP rate), whichever is the lowest.
- Non-compliance with SSP rules would be an area that could be addressed and dealt with by the forthcoming new enforcement body, the 'Fair Work Agency'.

These reforms are significant and have been on the table a while. In fact, earlier this year, an inquiry was carried out by the Work and Pensions Committee (cross party group) to investigate the relatively high levels of sickness absence rates in the UK and the concerns around ill health relating to economic inactivity, i.e. people not in employment and who have not been seeking work within the last four weeks or who are unable to start work within the next two weeks.

The inquiry reported their conclusions and recommendations, which was published 28 March 2024 identifying that the rate of SSP is too low and current provisions do not provide adequate protection to those in financial hardship, nor does it meet its core aim of providing a basic level of income during periods of sickness.

This consultation runs until 2 December 2024 and is seeking views on the proposed reforms, and in particular, what the percentage should be for calculating SSP for low income earners and provides examples and how operating a cap would work, such as:

- A percentage rate of 80%, would mean an employee who earns £100 a week, would receive £80 when off sick for a week
- Someone who earns £150 a week, would receive the flat rate of £116.75 because 80% of £150 equals £120, and the cap of £116.75 and the method would require the employer to pay the lowest out of the two.

In the consultation paper, there is a flag for those who employ workers who earn just above the LEL. It could, in some cases, and depending upon what the percentage figure is set to, result in someone seeing a reduction in their weekly SSP entitlement, as the example below, which assumes the percentage is set at 60% illustrates:

- *An employee would receive either 60% of their weekly earnings or the flat rate of £116.75, whichever is the lowest.*
- *If the LEL is £123, and an employee earns £125 per week it means that under the new proposals, they would receive £75 per week in SSP and not £116.75, which is what they would receive now under the current arrangement.*

The consultation paper highlights that even with this apparent reduction, it could be offset by the fact that waiting days would be removed.

As part of the Government's analysis in putting forward these SSP proposals, they carried out a series of modelling based on absence data and earnings that suggests:

1. Overall, employees will not be worse off with a rate that is set to 60% or above because the removal of waiting days offsets any potential loss for most mid-term absences
2. Theoretically however, some employees earning just above the LEL and then have longer absences could receive a lower entitlement than under the current system
3. Their analysis has also shown that generally, the lower the percentage of earnings the more incentive there is for those off sick to return to work when able.
4. The replacement SSP as a percentage means it better reflects the amount of what a full time employee would receive

5. It reduces the likelihood of someone who has several low paid jobs from earning a higher replacement rate than someone who has one job
6. The analysis also suggests that a higher replacement percentage rate is more likely to be effective at reducing presenteeism, especially when you consider the removal of the waiting days. Presenteeism is when someone shows up for work despite being unwell.
7. The impact of these proposals on business are unclear and will depend upon the sector and type of work, however, it could be that the proposals disproportionately impact small and micro businesses simply because they make up around 47% of the population.

As an employer, you can have your say by sharing your views either by responding via an online form, or email or post. For full details of the consultation aimed at strengthening statutory sick pay click here.

FINANCIAL REPORTING COUNCIL (FRC) CONSULTATION: STEWARDSHIP CODE

This month, the FRC opened a public consultation on updates made to its Stewardship Code. This Code promotes transparency, disclosure and accountability when it comes to the responsible allocation, management and oversight of capital by the institutional investment community.

The public consultation will run between 11 November 2024 and 19 February 2025, and, according to the Financial Reporting Council, it is seeking views on the following proposals:

- "Amending the **definition of stewardship** to support more transparent conversations between actors in the investment chain about their investment beliefs and objectives, while being sufficiently broad to be applicable to signatories across the investment chain and different asset classes.
- **Streamlining the Principles** with more concise reporting prompts to help concentrate reporting on the most insightful areas of reporting, while reducing the volume.
- **Tailoring the Service Provider Principles** to include some that are dedicated to proxy advisors and investment consultants respectively.
- For the first time, **issuing guidance** to support signatories in demonstrating how they have implemented stewardship throughout the year.
- Introducing **Policy and Context** disclosures to be updated only as necessary.
- Testing whether the updated Code could better enable signatories to use **cross-referencing** to disclosures they make to meet other requirements or frameworks to support their reporting against the Code."

If you would like to participate in this public consultation, and apply to take part in a series of roundtable discussions run by the FRC, you can find more information directly at www.frc.org.uk.

EHRC CONSULTATION: CODE OF PRACTICE FOR SERVICES, PUBLIC FUNCTIONS AND ASSOCIATIONS

We wrote in last month's newsletter that the above-named code from the Equality and Human Rights Commission (EHRC) added been published and was subject to a public consultation.

This draft code addresses issues of discrimination, harassment, and victimisation in services and public functions and discrimination by associations, as described in the Equality Act 2010. It provides guidance on the steps that should be taken to prevent discrimination in these areas and explains how the Act applies to everyday situations.

The EHRC have updated the code to reflect key changes in legislation and case law since its initial publication in 2011 and have launched a consultation to seek feedback on the revised code.

You can share your views through the online survey which opened on 2 October 2024, until 5pm on 3 January 2025.

GUIDANCE

EQUALITY AND HUMAN RIGHTS COMMISSION NEW AND UPDATED GUIDANCE

To accompany the recently introduced Worker Protection (Amendment of Equality Act 2010) 2024, the EHRC have published updated guidance – 'Sexual harassment and harassment at work: technical guidance' as well as producing a new 8 step guide for employers and employer checklist.

Following this latest employment law development, we have also created two new tools to help small businesses in managing their legal obligations to prevent sexual harassment. You can download our risk assessment and action plan.

CASE LAW UPDATE

WHAT IS AN "ESTABLISHMENT" FOR THE PURPOSE OF COLLECTIVE CONSULTATION? IS SOMEONE WITH A FULL GENDER RECOGNITION CERTIFICATE WHICH RECOGNISES THEIR GENDER AS FEMALE A 'WOMAN' FOR THE PURPOSE OF THE EQUALITY ACT 2010?

OVERVIEW

The primary issue in this Employment Tribunal case, was whether the Respondent (Vets Now Emergency Ltd) had failed to comply with the duty to inform and collectively consult with employee representatives when they restructured their business.

Under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), an employer has a legal obligation to inform and collectively consult with its employees when it proposes to dismiss 20 or more employees at one establishment, on the grounds of redundancy.

In this case, the key question that required determination by the courts, was what constituted an 'establishment'.

THE CIRCUMSTANCES

Vets Now Emergency Ltd ran 60 veterinary practices and two hospitals across the UK, which were split into districts, headed up by a District Manager. Each District Manager would then be responsible for operational matters on a day to day basis for the effective running of their district.

In 2023, Vets Now Emergency announced the business would be restructured which would involve the loss of 38 roles across the entire business, which included removing the role of the District Manager, and replacing it with six new Director roles.

The claimant (Miss Flett) was employed as a District Manager. Her role was based from home but she worked in the field within her district area with occasional visits to the head office where central functions such as IT services were based. She was also required to adhere to head office protocols and company policies.

When carrying out the restructure, Vets Now Emergency considered each district to be a separate establishment and because of this, did not deem the threshold for triggering collective consultation to have been met. They instead entered into a period of individual consultation with Miss Flett, which at the end of the process, the decision was made to confirm her redundancy and she was dismissed.

Having been dismissed for redundancy, she lodged complaints at the Employment Tribunal which included a claim for the failure to carry out collective consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

Miss Flett argued at tribunal that the entire workforce was in fact one establishment because organisational decisions had come from the head office, rather than each district. She therefore argued that the numbers to trigger collective consultation had been met.

THE JUDGEMENT

The tribunal determined that the "establishment" for the purposes of section 188 was the entire undertaking of Vets Now Emergency Ltd, not just the individual districts because of the significant overlap, central management and shared resources amongst districts.

This meant, that it was held that the numbers of proposed redundancies across the entire business did in fact trigger collective consultation as overall, there were 38 roles at risk. The company had therefore failed to comply with the duty to consult collectively, leading to a finding in favour of the Claimant.

KEY LEARNINGS:

1. **Understand the Definition of Establishment:** Employers must accurately define the establishment when considering redundancies. The entire organisation may be considered a single establishment if there is significant overlap and central management.
2. **Collective Consultation Requirements:** When proposing to dismiss 20 or more employees, employers must engage in collective consultation with affected employees or their representatives.
3. **Clear Communication and Documentation:** Ensure all communications and documentation related to redundancies are clear, consistent, and accurately reflect the company's structure and processes.
4. **Legal Compliance:** Adhere strictly to legal requirements for redundancy processes to avoid claims of unfair dismissal and failure to consult.
5. **Employee Support:** Provide adequate support and information to employees during restructuring to help them understand their rights and the company's obligations.

WHAT COUNTS AS A "SERIES OF DEDUCTIONS" IN CLAIMS FOR UNLAWFUL DEDUCTION FROM WAGES?

OVERVIEW

This is a case that deals with unlawful deduction from wages claims and specifically examines what is meant by a "series of deductions".

Under the Employment Rights Act 1996 (ERA), where there are two or more deductions, it is a question of fact that is relevant to the circumstances that must be considered when determining if they form a "series" of deductions.

The ERA requires a claim to be lodged within three months of the date of the deduction, or where there is a series of deductions, the date of the last deduction in a series. So the question of what forms a series is fundamental in establishing if a claim can be made.

THE CIRCUMSTANCES

In 2023, in the case, of Ms. A Deksne versus Ambitions Ltd, the Employment Tribunal (ET) struck Ms Deksne's claim for the unlawful deduction from wages out. She had claimed that her holiday pay prior to December 2020 had been miscalculated. The ET considered her claim to be out of time due to the timeframes and relied on the ruling in Bear Scotland v Fulton in 2014 which said that where an employee is obliged to work overtime (when requested), the additional hours must be included when calculating holiday pay. It was also in this case that it was ruled that claims must not have a gap of three months or more between holiday underpayments. As a result of this case, the Deduction from Wages (Limitation) Regulations 2014 came into force, bringing in a 'back stop' so that employees could not bring a claim for unlawful deductions from wages for matters going back more than two years.

Ms. Deksne appealed this decision arguing that all holiday pay short falls since the beginning of the two year backstop should be considered part of a series even though there had been gaps of more than three months between them.

For the Employment Appeal Tribunal (EAT), the primary issue was if the unlawful deduction from wages in regards to her holiday pay had been a series of deductions. If so, then her claims relating to deductions prior to December 2020 would be valid.

THE JUDGEMENT

The Employment Appeal Tribunal (EAT) found that the original ruling at the ET had erred in its application of the law regarding the series of deductions. It concluded that the reliance on the case of Bear Scotland was wrong, particularly given that a further judgement had been ruled in the Supreme Court in the case of Chief Constable of the Police Service of Northern Ireland V Agnew.

It was in this case that the Supreme Court considered how the Working Time Regulations (WTR) and the Employment Rights (NI) Order 1996 (ERO) interacted with each other as each set out a different approach to how far back claims can be raised. But the Supreme Court ruled that the ERO should be followed by allowing claims of underpayments to be brought within three months of the last in the series of deductions. Meaning that claims can be brought for periods that go much further back than the timeframe set by the WTR.

So if underpayments can be linked, then the Agnew case tells us that they can form a series, when considering the facts of the case and in doing so, employers must consider all relevant facts including:

- The similarities and differences between the deductions
- The frequency of the deductions
- The size and impact of the deductions
- How they came to be made and
- What links the deductions together.

For Ms Deksne, the EAT concluded that the original tribunal had therefore been incorrect to conclude that the gap between deductions exceeded three months because in fact, all the underpayments of holiday pay had been because they had been based on the same calculation method. Therefore, forming part of a series of deductions.

The EAT concluded that Ms. Deksne's claim was within scope and that the total amount of unlawful deductions which included those prior December 2020, was £496.75.

LEARNING POINTS FOR EMPLOYERS:

The case highlights the importance of correctly calculating holiday pay and the interpretation of what constitutes a series of deductions under employment law. The ruling ensures that employees can claim for a series of underpayments even if there are significant gaps between them.

1. **Accurate Calculation of Holiday Pay:** Ensure that holiday pay calculations are accurate and comply with legal requirements, including using the correct average pay calculation methods.
2. **Understanding Series of Deductions:** Recognise that a series of deductions can span over time, and breaks of more than three months do not necessarily disrupt the series.
3. **Timely Addressing of Claims:** Address employee grievances and claims promptly to avoid legal disputes and ensure compliance with statutory time limits.
4. **Documentation and Record-Keeping:** Maintain accurate and detailed records of pay calculations and communications with employees to support the company's position in case of disputes.
5. **Legal Compliance:** Stay updated with legal precedents and rulings to ensure that company policies and practices are in line with current employment law.

FURTHER INFORMATION

https://www.personneltoday.com/hr/lets-do-it-song-sexual-harassment-nunns-v-sbh-windermere-and-wilson/

PAYROLL

DO YOU WANT TO SHARE YOUR FEEDBACK ON THE NATIONAL MINIMUM WAGE?

EARLY CHRISTMAS PAYDAY?

Does your business have an early pay day in the lead up to Christmas? If so, it is essential that you continue to meet your obligations when it comes to 'Full Payment Submission' (FPS) reporting.

M Revenue and Customs (HMRC) allow employers to send the FPS early; just ensure that if you do, you still report the contractual pay date, rather than the actual pay date prior to Christmas. This is important because if any other date is reported to the contractual pay date, it can impact on those employees and workers who claim universal credit.

For example; the contractual pay date in your business is the last calendar day of the month; 31 December. You are bringing forward when you pay your employees and workers before Christmas and will pay them on 20 December. For FPS reporting purposes, you continue to report the contractual pay date, i.e.31 December.

THE ADMINISTRATIVE BURDEN ADVISORY BOARD

Each year, the Administrative Burden Advisory Board (ABAB) publishes the results of its annual survey; in which they gather views of small businesses experiences of engaging with HMRC.

According to ABAB, this year was a record year in completed responses, here are some of the key findings:

1. 52% respondents employed home workers and 17% nomadic workers (those who work away from the office using devices with connection to the internet). This was a decrease on the previous year of 9.6%. This does reflect the trend we have seen in the last year of more employers wanting people to return to the office
2. 60% of small businesses were not aware that HMRC had arrangements in place that allow company's to settle its arrears over a period of time. This is known as a 'time to pay' arrangement, or TTP.
3. 40% of small businesses that were aware of TTP, just 16% had utilised the service. Whilst low, it is an increase on the previous year, of 3.8%. This reflects the challenging economic climate that employers are in, particularly for small businesses.

4. 82.3% of respondents said they had not used the HMRCs employment status tool, known as CEST, which stands for 'check employment status for tax'. This is a key tool available to all employers to help guide them in understanding if a worker should be classed as employed, or self-employed. The rules changed in 2021 for off IR35 off payroll working and it is fundamental to the employment relationship for the employer to accurately determine the status of the worker. Incorrect classification brings significant risk of tribunal claims. You can read about IR35 in our Knowledge Base article. We also ran a webinar when the rules changed, which you can watch back on demand here.

MAJOR PENSION INVESTMENT REFORMS ANNOUNCED

Earlier this month, the Government announced major reforms aimed at driving economic growth and improving retirement outcomes for millions of workers. The creation of pension "megafunds" will see assets from the Local Government Pension Scheme (LGPS) and defined contribution (DC) schemes being consolidated, leading to larger "megafunds."

Doing this, would mean that the one pool of funds can be used to invest in high-growth potential assets, which, according to the Government is expected to generate around £80 billion that can be used for investment.

Access to larger funds means that there can be investment in a wider range of assets, which then help to stimulate economic growth and job opportunities. For employers, the reforms expect to lead to more predictable pension costs and reduced administrative burdens that are associated with managing smaller pension schemes, whilst for employees, the reforms will aim to provide more predictable and secure retirement incomes by leveraging the scale of the 'megafunds'.

For businesses it is hoped that these reforms create opportunities to enhance pension offerings and support employee financial well-being, thereby giving employees greater confidence in their retirement plans.

We will continue to monitor these developments and provide updates on how these changes will be implemented.

HEALTH & SAFETY

WORLD COPD DAY AND LUNG CANCER AWARENESS MONTH

November is Lung Cancer Awareness Month which underscores the deadly risks associated with work-related lung diseases, with approximately 12,000 annual fatalities, including those from lung cancer. It was also World Chronic Obstructive Pulmonary Disease (COPD) Day on 20 November 2024, which brings attention to a range of respiratory issues characterised by damage to the lung's breathing tubes and air sacs.

Workplace exposure to dusts, fumes, chemicals, or gases can result in significant and enduring lung damage, including lung cancer. This encompasses risks associated with respirable crystalline silica (RCS), released during activities like handling sand or cutting stone, brick, or tiles.

Workers need to be aware of the health risks associated with the materials they are working with. Employers bear a legal obligation to safeguard their workforce against preventable health hazards through effective control of exposure risks.

For comprehensive information on preventing work-related lung disease and guidance tailored to various workplaces, go to the Dust Kills campaign and the HSE website. Featured sectors include construction, woodworking, and waste management.

WINTER WEATHER

As the wintery weather arrives, slips, trips and falls and dangerous driving conditions are likely to increase due to the wet and cold weather conditions typical for the time of year. It is important to put in place appropriate measures to remove or limit these. Employers should risk assess for seasonal factors that may begin to pose hazards, such as:

- Slippery surfaces
- Poor lighting
- Excess water from rain, puddles and flooding
- Wet and decaying leaves
- Cold temperatures
- Heating appliances
- Increased traffic, poor travel conditions and breakdowns

The HSE offer support and guidance on slips and trips accidents as well as icy and winter weather.

SEASONAL AND TEMPORARY WORKERS

Seasonal work is particularly common at this time of year and many temporary positions are created. It is important for employers to give focus to the health and safety of gig economy, agency, and temporary workers as statistics indicate that workers are just as likely to experience accidents in their first 6 months on the job as they are during the entire remainder of their working life.

For those new to a job, the HSE offer guidance, outlining six effective ways to ensure their protection, as well as advice to assist both users and suppliers of agency and temporary workers in understanding their health and safety obligations.

ANNUAL HEALTH AND SAFETY STATISTICS

Each year in November, the Health and Safety Executive (HSE) releases its annual statistics on work-related ill health and workplace injuries, and this month, they have published the latest trends and figures.

- For the year 2023/24, key facts and figures published include:
- 1.7 million workers reported work related in health, a decrease on the previous year (which was 1.8 million)
- Just under half of the work related illness cases (776,000) were attributed to work related stress, depression, or anxiety, remaining at similar levels to 2022/23. Whilst 543,000 workers suffered from a work related musculoskeletal disorder.
- 33.7 million working days were lost due to self-reported work-related ill health or injury, a decrease of approximately 2 million compared to the period 2022/23.
- The annual costs of workplace injury and new cases of work-related ill health is £21.6 billion, an increase of almost one billion on the year 2022/23.
- 138 workers were killed in work-related accidents, which is an increase on the period 2022/23, which was 135.
- 604,000 of working people sustained a workplace injury
- 61,663 workers sustained a non-fatal work related injury, reported by employers to RIDDOR, which is an increase of 499,337 on 2022/23.

According to the HSE, the UK compares favourably to other European countries when it comes to health and safety standards. The only other European countries ahead of the UK in this regard, is Malta, Finland, Germany, Ireland and Norway.

It is good practice to audit and review your working practices on a regular basis. Did you know, we have available on our website workplace audit tool that you can use to audit your health and safety practices.

We also provide other risk and compliance audits too, as shown below:

- Health and Safety risk audit
- HR Risk and Compliance risk audit
- GDPR Risk and Compliance audit
- Preventing Sexual Harassment risk audit.

You can access the risk audits here.

INTERESTING HR STATISTICS

ONS LABOUR MARKET OVERVIEW

The latest data from the Office for National Statistics (ONS), in their Labour Market Overview, published 12 November 2024, shows the following economic indicators:

EMPLOYMENT

For the period July to September 2024:

- Employment levels for those aged 16+ has increased on the previous quarter to 33.31 million, which is 74.8% of the working population
- Unemployment is at 4.3%, and is an increase when compared to the same period last year, which was 4.1%
- The number who are economically inactive is 9.24 million, 21.8% of the working age population
- Current redundancy rate per thousand, of those aged 16+ is 3.1.

UNEMPLOYMENT IS AT 4.3% (JULY – SEPT 2024).

VACANCIES

For the period August to October 2024:

- The estimated number of vacancies was 831,000, a decrease of 35,000 (4%) compared to the previous quarter
- This quarter is the 28th consecutive period with vacancy numbers decreasing

PAY

For the period August to October 2024:

- The number of payrolled employees increased by 0.3% compared to the previous year. This is an increase of 95,000

MISCONDUCT IN THE FINANCIAL SERVICES SECTOR

This month, the Financial Conduct Authority (FCA) published their research into non-financial misconduct (NFM) that occurs within the financial services sector. The types of misconduct that the research investigated included bullying and harassment, discrimination, data protection breaches as well as incidents involving intoxication.

The research focussed on incidents in the period 2021 to 2023 occurring within London market insurers, market intermediaries, wholesale banks and wholesale brokers, key findings are:

1. An increase on the number of NFM incidents
2. Bullying and harassment and discrimination were the most reported types of incident
3. Incidents tended to be identified through reactive company processes, such as the grievance
4. Disciplinary and other actions were taken in 43% of cases
5. Disciplinary and other action was not taken on 57% of cases. The outcome in these ranged from being unable to conclude, investigations were ongoing, investigations did not take place, or the outcome was to uphold the allegation but with no other action
6. Not all participants in the survey had relevant policies such as Whistleblowing or Disciplinary.

You can read more about the FCA's survey here, The findings are a reminder of the importance of being able to demonstrate appropriate policies, processes and governance. Does your organisation have a Whistleblowing Policy, a Bullying and Harassment Policy, Grievance or Disciplinary? These are all essential employment documents we advise all employers to have in place.

The report identified that bullying and harassment, and discrimination were the most reported types of incident. Are your managers aware of their responsibilities in both preventing these issues from occurring, but also, how to deal with claims of this very serious nature.

Got questions?

If you need any further guidance or have any HR-related queries, feel free to get in touch with us. You can also browse through our previous newsletters for more insights and updates here.