TAYLOR WALTON SOLICITORS

Welcome to NeTWork, your Employment Law Newsletter from Taylor Walton Solicitors

This month we discuss:

- April changes to Employment Law;
- The Small Business, Enterprise & Employment Act 2015;
- Employee admissions during the disciplinary process;
- Increases to National Minimum Wage;

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April changes to Employment Law

The following changes come into effect in April 2015:

1. The new system of shared parental leave will be available to parents of children due to be born or placed for adoption on or after 5 April 2015. Eligible employees will be entitled to a maximum of 52 weeks' leave and 39 weeks' statutory pay upon the birth or adoption of a child which can be shared between the parents.

2. From 5 April 2015, changes will be made to the current rights for adopters, including:

    - Removal of the requirement for 26 weeks' service before employees become entitled to adoption leave.
    - Single and joint adopters will have the right to attend adoption appointments and will be protected from suffering a detriment or being dismissed in relation to exercising that right.
    - Statutory adoption pay will be brought into line with statutory maternity pay.
    - Current adoption rights will be extended to couples who have a child through surrogacy, couples adopting a child from outside the UK and couples fostering children as part of a Fostering for Adoption placement.

3. From 5 April 2015, the age of a child up to which unpaid parental leave may be taken, will be increased from the child's fifth birthday up to the child's eighteenth birthday.

4. The amended record-keeping, returns and penalties provisions under the Finance Act 2015 intended to combat false self-employment through service companies will apply from 6 April 2015 with the first return due by 5 August 2015.

5. From 6 April 2015, statutory pay for maternity, paternity, adoption and shared parental leave will increase to £139.58 per week. Statutory sick pay will increase to £88.45 per week.

The Small Business, Enterprise and Employment Act 2015

The Small Business, Enterprise and Employment Act 2015 (the Act) received Royal Assent on 26 March 2015. As has been widely reported in the press, the Act includes new restrictions on the use of zero hours contracts although it is not currently known when the restrictions will come into force.

The Act inserts new sections section 27A and 27B into the Employment Rights Act 1996. Section 27A(3) renders unenforceable any provision in a zero hours contract which prohibits the worker from:

a) doing work or performing services under another contract or under any other arrangement; or

b) doing work or performing services under another contract or under any other arrangement without the employer's consent.

For the purposes of the exclusivity ban, a zero hours contract is defined as "A contract of employment or other worker's contract under which (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker."
New Section 27B gives the government wide-ranging powers to make further provisions in relation to zero hours contracts in the future. The Explanatory notes to the Act confirms that this power is intended to be used to deal with attempts by employers to avoid the ban on exclusivity terms contained in new section 27A.

The new restrictions will apply to both new and existing zero hours contracts.

The Act also includes the following provisions:

- New financial penalties for unpaid tribunal awards and settlements.
- Extension to the financial penalty for failure to pay the national minimum wage.
- Power to restrict the number of times that a party can postpone or adjourn an employment tribunal hearing.
- Power to require "prescribed persons" to produce annual reports of protected disclosures.
- Power to require repayment of public sector exit payments in certain circumstances.
- New rules in relation to gender pay gap reporting for large employers.

As mentioned above, the majority of the employment provisions require a commencement order before they will enter into force (with the exception of Section 151 relating to the power to make regulations in relation to postponement of tribunal hearings which came into force on 26 March 2015) Parliament did not make any commencement orders before dissolution on 30 March 2015 and it is therefore not known when these provisions will come into force.

Employee admissions during the disciplinary process

CRP Ports London Ltd v Wiltshire

In this case the Employment Appeal Tribunal (EAT) considered whether a tribunal had erred in holding that an employee who had made admissions during their employer's disciplinary process had been unfairly dismissed.

Mr Wiltshire started work for CRO Ports London Limited (CRO) in April 1991. By January 2013 he was working as a Supervisor and he had a clean disciplinary record.

On 21 January 2013, Mr Wiltshire was called to deal with a problem with locking into place and lifting a damaged container. A manager suggested that he should use a "heavy duty twist lock". This was the first time that Mr Wiltshire became aware that CRO had such equipment to deal with a problem of this type. When Mr Wiltshire arrived to assist with the problem the team leader was already trying to resolve matters in what Mr Wiltshire considered to be the usual way by placing a piece of wood on top of a pin in order to twist it into place. Following this process, the crane driver did a preliminary lift to check that the container was locked and Mr Wiltshire told the crane driver to continue lifting the container. When the container was about 20 feet off the ground it fell from the crane. The container was badly damaged and the incident could have caused a fatality.

Mr Wiltshire was suspended.

Mr Wiltshire took full responsibility for the incident and admitted that he had previously supervised similar practices despite knowing that it was dangerous and in breach of health and safety rules. However, he also noted that CRO had effectively sanctioned the practice and that the main motivation for doing so was time pressure.

The disciplinary officer found that as Mr Wiltshire had condoned the practice and had failed to report or stop it, he had no option but to summarily dismiss him for gross misconduct. Mr Wiltshire appealed, referring to the previous custom and practice of resolving this type of problem in this particular manner, the fact that he had not been aware of "heavy duty twist locks" until 21 January 2013 and that there were no express safety procedures in place dealing with this issue. His appeal was rejected and he claimed unfair and wrongful dismissal.

The employment tribunal upheld Mr Wiltshire's claims. It found that CRO had not undertaken a reasonable investigation. The tribunal considered that a reasonable investigation would have taken on board the custom of dealing with this problem in the manner condoned by Mr Wiltshire, the failure to identify the pressure of work, the problems in dealing with damaged containers on a regular basis and the absence of any specific health and safety advice in that context.

CRO appealed. The EAT allowed the appeal and remitted the unfair dismissal and wrongful dismissal claims to be reheard by a fresh tribunal.

The EAT considered that by failing to make clear the different tests that it had to apply in relation to wrongful dismissal and unfair dismissal the tribunal had fallen into error. In relation to wrongful dismissal, the tribunal had to reach its own conclusion on whether CRO had established that Mr Wiltshire was guilty of a fundamental breach of contract entitling it to summarily dismiss him. In relation to unfair dismissal, the tribunal had to test CRO's decision to dismiss against the range of reasonable responses test, not by applying its own view.

When considering the unfair dismissal claim, The EAT stated that given that CRO had relied on admissions made by Mr Wiltshire during the investigation and at his disciplinary hearing, the question for the tribunal was whether CRO acted within the range of reasonable responses of the reasonable employer in limiting the scope of its investigation in the light of those admissions.

The EAT noted that the tribunal had drawn conclusions about what would have been discovered had the employer undertaken further investigation and in doing so it had failed to appreciate the significance of the admissions made by Mr Wiltshire at the time. As a supervisory employee, both

during the investigation and at his disciplinary hearing, he had admitted knowledge of the practice which led to his dismissal and of having done nothing about it despite knowing that it was a serious breach of health and safety rules. However, the EAT also noted that despite the admissions made by Mr Wiltshire, he had highlighted issues relevant to custom and practice and as a result the EAT considered that there may be a question of whether those issues, applying the range of reasonable responses test, necessitated further investigation.

When considering the claim for wrongful dismissal, the EAT noted that the tribunal had not applied the correct legal test. Even if the practice followed that gave rise to the incident had been generally condoned, issues arose given Mr Wiltshire's role as supervisor and the fact that he apparently accepted the health and safety risks the practice entailed.

This case may assist employers when considering how to deal with an employee's admissions of misconduct. Employers will need to consider whether an employee's admission leaves relevant issues unresolved in which case further investigation may be necessary to avoid a future finding of unfair or wrongful dismissal.

Increases to National Minimum Wage

The government has responded to the recommendations of the Low Pay Commission on increases to the national minimum wage. With the exception of the apprenticeship rate, the government has accepted the recommendations which will come into effect from 1 October 2015:

- The adult rate will be increased by 3% to £6.70 an hour.
- The apprenticeship rate will be increased to £3.30 an hour (rather than to the recommended £2.80 an hour).
- The young workers rate will be increased by 2.2% to £3.87 an hour.
- The youth development rate will be increased by 3.3% to £5.30 an hour.
- The accommodation offset limit will be increased by 27p to £5.35.

Employment Law Workshops

Taylor Walton is providing free employment workshops on a variety of topics designed to assist and prepare businesses for the upcoming changes.

Please see our website for more details by clicking on the links below:

Employment Law Workshops for HR Managers. **Find out more**

Employment Law Workshops for Businesses without an in-house HR resource. **Find out more**

If you have any questions about these or other employment issues please call Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk