Welcome to, your Employment Law Newsletter from Taylor Walton Solicitors

This month we are looking ahead to 2016:

- Legislative Changes;
- Key Cases

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Looking ahead to 2016

A number of employment related legislative changes and Court of Appeal decisions are expected in 2016. In this edition we are considering 10 key developments that businesses should look out for in 2016:

Legislative Changes

Zero Hours contracts

In April 2015 we discussed the provisions of the Small Business, Enterprise and Employment Act 2015 which make exclusivity clauses in zero hours contracts unenforceable. These provisions came into force in May 2015.

The Government consulted on how to tackle avoidance of the ban and in October 2015, we reported that the Government had published the draft Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015. The Regulations are intended to prevent employers including exclusivity clause in zero hours contracts. The regulations came into force on 11 January 2016.

Gender Pay Gap Reporting

The Small Business Enterprise and Employment Act 2015 obliges the Government to adopt regulations requiring mandatory gender pay gap reporting for large employers by March 2016. Details of the reporting requirements will be included in regulations which are due to published in early 2016.

Our recent briefing note will assist your business in considering whether you need to make any changes to address gender pay gaps before the reporting requirements come into force.

National Living Wage

In August 2015, we reported on recent government announcements relating to employment law, including the introduction of the National Living Wage. This comes into effect from April 2016 and ensures everyone aged 25 and over receives a wage of at least £7.20 per hour. The rate will rise from £7.20 to £9 by 2020.

Strike Reforms

As we reported in August 2015, in the summer the Government published a new Trade Union Bill to reform aspects of the law relating to industrial action.

The Bill has had its second reading in the House of Commons and the committee stage was concluded in October 2015. The consultation on the Bill closed in September 2015 and the response to this is expected in 2016.

Taxation of Termination Payments

In July 2015, the Government launched a consultation on the future of the £30K tax exemption for payments paid to employees as compensation for loss of employment. The consultation closed in October 2015 and we expect the response in 2016.

Under the current rules, contractual payments in lieu of notice are taxable as earnings whilst non contractual elements are liable to income tax only on the amount exceeding £30K and are not liable to National Insurance Contributions.

The new proposals include removing the distinction between contractual and non contractual payments so that all payments in connection with termination of employment would be subject to tax and National Insurance. It is proposed that the £30K tax exemption would be replaced with an exemption for employees with two years' service at a rate increasing with length of service. Further exemptions would be introduced for payments in connection with unfair or wrongful dismissal and discrimination.

Key Cases

Whistleblowing and the public interest

Protection for whistleblowers changed in 2013. One significant change was the removal of the requirement that a disclosure be made in good faith. This was replaced with a new requirement that the disclosure be made "in the public interest."

The Courts have now considered this new requirement on two occasions in the case of Chesterton Global v Nurmohammed which we discussed in our May 2015 edition and more recently in the case of Underwood v Wincanton Plc, considered in our October 2015 edition. The judgments in these cases

indicate that it will not be difficult for Claimants to show that their disclosure has been made in the public interest.

Leave to appeal the decision in the Chesterton case was granted in 2015 and the Court of Appeal is due to hear the case in late 2016. It will be interesting to see whether the Court of Appeal upholds the EAT's broad approach to this issue.

Reasonable Adjustments in Absence Management

The Court of Appeal has recently handed down judgment in the case of Griffiths v Secretary of State for Work and Pensions. This case concerns whether the duty to make reasonable adjustments applied to an absence management policy and, in particular, the trigger points used in the policy.

Ms Griffiths had 62 days absence due to post viral fatigue and she also suffered from fibromyalgia. She was disabled for the purposes of the Equality Act 2010. The employer's absence management policy stated that an employee could be issued with a warning if they were absent for more than 8 days in a 12 month period. The policy stated that the trigger point could be adjusted for disabled employees but no adjustments were made for Ms Griffiths and she was issued with a warning. Ms Griffiths claimed that her employer had failed to make reasonable adjustments.

The Employment Appeal Tribunal (EAT) found that there was no duty to make reasonable adjustments in these circumstances. The EAT stated that the policy did not place Ms Griffiths at a substantial disadvantage as she had been treated in the same way as a non - disabled employee absent for the same length of time.

The EAT's decision caused confusion as it is not consistent to that in the 2013 case of HMRC v Whitely, also heard by the EAT. In the Whitely case, the EAT found that the employer should have acknowledged medical evidence that a few days' absence three or four time per year is normal for an employee with asthma and that the employer should have discounted those periods of absence when considering absence levels .

The Court of Appeal upheld the EAT's judgment on the basis that the Department for Work and Pensions did not fail to make reasonable adjustments. However, the Court made it clear that the duty to make reasonable adjustments does apply to sickness absence policy trigger points. In light of this decision, businesses should carefully consider how to approach matters under sickness absence policies.

Commission and Holiday Pay

There has been a series of recent decisions concerning how holiday pay should be calculated for employees and workers who receive regular payments in addition to their basic salary. Our briefing note which focuses on this area provides guidance to businesses in light of the recent decisions that employees and workers should receive their "normal remuneration" during periods of holiday.

The case of Lock v British Gas Trading, which is considered in detail in our October 2014 edition, is concerned with whether commission payments should be taken into account for the purposes of calculating holiday pay. In May 2015, British Gas confirmed that they have lodged an appeal against an employment tribunal's decision that Mr Lock's holiday pay should have been calculated to take into

account his commission payments. The EAT's decision is expected in early 2016 and it is likely that the EAT will uphold the employment tribunal's decision given that this is based upon European case law.

Agency Workers

In the case of Moran v Ideal Cleaning Services, the EAT decided that the Agency Workers Regulations (AWR) did not apply to agency workers placed with an end user indefinitely. In this case, the agency workers were cleaners who had been assigned to the end user for between 6 and 25 years until they were made redundant. The cleaners argued that they were agency workers under the AWR and were therefore entitled to equal treatment with the end user's permanent employees. The EAT rejected this argument on the basis that the AWR applies to individuals who are assigned to work temporarily for an end user.

The appeal in this case was due to be heard by the Court of Appeal in March 2016 but there are reports that the case has settled. Businesses should be aware of the uncertainty surrounding the distinction between "temporary" and "permanent" workers for the purposes of the AWR.

Duty to inform and consult – business closures

The Court of Appeal is expected to consider when the obligation to collectively consult arises in 2016 in the case of USA v Nolan.

This long running case arose following a decision by the US Government in 2006 to close a US army base in Hampshire which resulted in 200 job losses. Ms Nolan brought a claim against the USA that it had failed to comply with its obligations to collectively consult under the Trade Union and Labour Relations (Consolidation) Act 1992. The claim was upheld by the employment tribunal and subsequently appealed. In July 2015, the Supreme Court held that the USA was obliged to collectively consult with staff about the closure of the base and the case was remitted back to the Court of Appeal to consider whether the USA had in fact complied with its duty to collectively consult.

It is hoped that the Court of Appeal will provide guidance about when the duty to collectively consult arises in a business closure situation. At the current time it is not clear from the case law as to whether the duty arises when an employer is contemplating making a decision that will lead to the workplace closure or whether the duty only arises once the decision has actually been made.

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