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NeTWork

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Employment Law Update

This month we talk about:

- April 2019 increases to statutory maternity, paternity, adoption, shared parental and sick pay
- Discrimination arising from disability - *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another*
- Updates on immigration matters - UK immigration requirements announced for EU citizens arriving after no deal Brexit and modernising right to work checks
- Government Consultation on Extending Redundancy Protection for Women and New Parents
- Whistleblowing - *Ibrahim v HCA International Ltd*

April 2019 increases to statutory maternity, paternity, adoption, shared parental and sick pay

The draft Social Security Benefits Up-rating Order 2019 has been published. The order will increase various payments in the 2019-20 tax year. Payment increases include:

- From 7 April 2019, statutory maternity pay, paternity pay, shared parental pay and adoption pay will be increased from £145.18 per week to £148.68; and
- From 6 April 2019, statutory sick pay will increase from £92.05 per week to £94.25.

Discrimination arising from disability - *Williams v The Trustees of Swansea University Pension & Assurance Scheme and another*

Under section 15 of the Equality Act 2010, "discrimination arising from disability" occurs where A treats B unfavourably because of something arising in consequence of B's disability, unless A can show that the treatment is a proportionate means of achieving a legitimate aim

In this case, the Supreme Court considered what may amount to "unfavourable treatment". Mr Williams suffered from Tourette's Syndrome, obsessive compulsive disorder, depression and other psychological problems. He worked for Swansea University (the University) for approximately 13 years, the first ten of which were full-time. In the last three he reduced his hours by half as a result of reasonable adjustments agreed by the University. His salary reduced accordingly. Eventually, his medical conditions made him incapable of continuing work and he took ill-health retirement at the age of 38. Under the University's pension scheme rules, he was entitled to his accrued pension, as well as an enhanced pension based on a period of deemed pensionable service, as though he had continued to be employed to normal pension age. Both the accrued and enhanced pension were based on his actual final salary at retirement, without actuarial deduction.

Mr Williams successfully brought a claim for discrimination arising from disability. The employment tribunal held that the failure to base his enhanced pension on the full-time salary he had received prior to his reduction in hours amounted to unfavourable treatment because of something arising in consequence of his disability, and that the treatment was not justified.

The University successfully appealed to the EAT arguing that the Employment Tribunal had erred in its decision on what could amount to unfavourable treatment. The EAT decided that the concept of unfavourable treatment is "measured against an objective sense of that which is adverse as compared with that which is beneficial" and that it "has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person." Accordingly, treatment which was advantageous could not be said to be unfavourable merely because it could have been even more advantageous. To be treated unfavourably, a person would need to show that he was not in as good a position as others generally would be. The EAT accordingly remitted the case to a freshly constituted tribunal.

Mr Williams unsuccessfully appealed to the Court of Appeal, which held that treatment which confers advantages on a disabled person does not amount to unfavourable treatment even though it would have conferred greater advantages had the disability arisen more suddenly. In contrast to the EAT, the court did not consider that remission was required; it substituted a finding of no discrimination.

Mr Williams appealed to the Supreme Court. The Supreme Court also dismissed the appeal.

The court stated that section 15 of the Equality Act 2010 appears to raise two simple questions of fact: What was the relevant treatment? Was it unfavourable to the claimant?

In this case, the relevant treatment was the award of a pension. There was nothing intrinsically "unfavourable" or disadvantageous about that. The only basis on which Mr Williams was entitled to any award was by reason of his disabilities. Had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all. Mr Williams's treatment was not in any sense "unfavourable" and nor could it reasonably have been so regarded. . On the facts of this case, the court took the view that a reasonable worker would not consider themselves disadvantaged.

The Supreme Court's decision confirms that, broadly speaking, advantageous treatment cannot be unfavourable, even though it could have been more advantageous.

Updates on immigration matters - UK immigration requirements announced for EU citizens arriving after no deal Brexit and modernising right to work checks

Brexit - The government has announced immigration provisions that will apply to EEA and Swiss nationals coming to the UK after Brexit if Britain leaves the EU without agreeing a deal.

In the event of a no deal Brexit, the government will seek to end free movement as soon as possible, using the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 to do so. There will then be a transitional period until the UK's new skills-based future immigration system comes into force on 1 January 2021.

During the transitional period, EEA and Swiss nationals and their family members will be able to come to the UK for up to three months without applying for any immigration status or visa. To stay longer than three months they will need to apply for and obtain European Temporary Leave to Remain (ETLR).

ETLR will be valid for a period of three years only and will not lead to indefinite leave to remain in the UK or status under the EU Settlement Scheme. To stay for longer than three years they will need to make a further application under the UK's new skills-based future immigration system after 1 January 2021. Applicants for ETLR will be subject to identity, criminality and security checks.

Non-EU family members who wish to accompany or join an EU citizen under these arrangements will need to apply in advance for a family permit. However, only "close" family members (spouse, partner and dependent child under 18 years) will qualify. This is a much narrower definition than under the EU Regulations.

This announcement does not affect EEA and Swiss nationals in the UK before the UK leaves the EU on 29 March 2019. Those individuals will be eligible to apply for settled or pre-settled status under the EU Settlement Scheme irrespective of whether the UK leaves the EU with a deal, but must do so by 31 December 2020 in the event of a no deal.

Right to work checks - The Home Office Right to Work Checking Service was launched in April 2018. It is free to use and enables UK employers to check the current right to work of a person and to see whether they are subject to any restrictions.

The system works on the basis of the individual first viewing their own Home Office right to work record online. They may then share this information with an employer if they wish, by providing their employer with a "share code" to access the record. However, currently, employers still need to request paper documents alongside using the online service.

The Immigration (Restrictions on Employment) (Code of Practice and Miscellaneous Amendments) Order 2018 was recently laid before Parliament together with a revised Code of practice on preventing illegal working. The Order provides that employers will be able to rely solely on an online check from 28 January 2019, where a prospective employee has an immigration status that can be checked using the service.

The online checking service can be used by non-EEA nationals who hold biometric residence permits or biometric residence cards and EEA nationals who have been granted immigration status under the EU Settlement Scheme. EEA nationals who have not been granted status under the EU Settlement Scheme will still need to demonstrate their right to work using the appropriate documents.

An employer using the online service will be excused from a civil penalty if:

- The online check confirms that the employee is allowed to work in the UK and perform the work in question.
- It satisfies itself that any photograph on the online right to work check is of the employee.
- It retains a copy of the online check for at least two years after the employment ends.
- It obtains and retains details of the term and vacation dates of the person's course of study, if they are a student.

Employers will be able to request either the online check or the existing document-based check whilst migrants and employers develop familiarity with the new service.

From 28 January 2019, employers can also accept short-form birth and adoption certificates together with a National Insurance number when conducting right to work checks, making it easier for British citizens who do not hold a passport to demonstrate their right to work.

Government Consultation on Extending Redundancy Protection for Women and New Parents

On 25 January 2019, the Government launched a consultation into protecting pregnant women and new parents against potential redundancy situations both during leave and on their return to work. This follows research commissioned by the Department for Business, Energy and Industrial Strategy (BEIS) which revealed that 1 in 9 women said they had been dismissed or made redundant when they returned to work after having a child or, as discovered by the Women and Equalities Select Committee (WESC), felt forced to leave their position as a result of poor treatment. More recently, the Government published the "Good Work Plan" following the Taylor Review of Modern Working Practices which outlined a fair and decent UK economy with no place for unlawful discrimination.

The current position under the Equality Act 2010, Employment Rights Act 1996 and the Maternity and Parental Leave etc. Regulations (1999) is that no individual should be discriminated against on the grounds of sex or pregnancy or maternity. If a redundancy situation arises whilst a pregnant employee or new parent is on maternity leave then she must be consulted and the employer must follow a fair procedure. Where an employee is made redundant while she is on maternity leave she is entitled to be offered a suitable alternative vacancy, if available, without having to interview for the post.

The BEIS Consultation on Pregnancy and Maternity Discrimination "Consultation on Extending Redundancy Protection for Women and New Parents" is considering the following issues:

- The consultation sets out the current legal protections for pregnant workers or those on maternity under the Equality Act 2010 and the Maternity and Parental Leave etc. Regulations 1999.
- Whether to extend the enhanced protection afforded to women on maternity leave against redundancy to the period following the employee's return to work. The WESC recommend this is extended for 6 months after the employee has returned to work.
- Whether the enhanced protection extended to mothers returning from maternity leave should also be extended to employees returning from adoption leave, shared parental leave, longer periods of parental leave or other types of family related leave.
- It sets out the steps the Government is taking to increase employees awareness of their rights and obligations and asking how effective the steps have been in informing women of their rights and employers of their rights and obligations to employees who are pregnant or on maternity leave.
- Considering the existing approach to enforcement;
- To discuss the 3 month time limit within which a claim of discrimination can ordinarily be brought to an Employment Tribunal.

The consultation closes on 5 April 2019.

Whistleblowing - *Ibrahim v HCA International Ltd*

Under employment legislation, employees are protected from detriment or dismissal where they make a "protected disclosure". This is often referred to as "whistleblowing". In simple terms, a protected disclosure can be described as any disclosure of information by the employee about wrongdoing where the employee has a reasonable belief that it is in the public interest to make a disclosure and the wrongdoing either taking place or likely to take place is one of the six specified types under the legislation. Examples include, criminal activity and breach of legal obligations.

In this case, the Claimant was an interpreter for the Respondent in private hospitals. He alleged in grievances that colleagues had falsely blamed him for breaches of confidentiality. The Claimant had asked the Respondent to investigate certain rumours regarding the Claimant which he said affected his reputation. In essence, the Claimant was alleging defamation.

The Claimant was later dismissed and he bought a claim against a Respondent for subjecting him to a detriment in relation to having made a protected disclosure under the Employment Rights Act 1996. The Claimant argued that the matters raised in his grievance regarding defamation amounted to a protected disclosure.

The Employment Tribunal dismissed the claim on the basis that (1) the complaint regarding the spread of rumours was not a disclosure that showed a breach of legal obligation (one of the six categories) and (2) the complaint was not in the Claimant's reasonable belief, made in the public interest. Rather it had been made in the Claimant's own interest in clearing his name and restoring his reputation.

The Employment Appeal Tribunal dismissed the Claimant's appeal on the second reason. The tribunal was entitled to hold that the Claimant did not have a subjective belief at the time that his allegations were in the public interest as his concerns centred around his personal situation. However, the EAT confirmed that the category "breach of legal obligation" could include tortious duties, including defamation, and statutory duties under the Defamation Act 2013.

This decision is a good reminder for employers that disclosures made in the interest of an employee may also have a public interest element in some cases. The fact that the Claimant did not believe his disclosure was in the public interest meant that his appeal failed but this may not be the case where the disclosure concerns matters which may affect the public. Employers should assess disclosures carefully to ascertain whether any particular disclosure may have a public interest element, even if the disclosure also affect the employee in a personal way.

If you have any questions about these or other employment issues please call:
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