TAYLOR WALTON SOLICITORS

NeTWork

March 2019

Employment Law Update

This month we talk about:

- Disability Passport from TUC/GMB
- Working Time Regulations: Rest Breaks and Compensatory Rest
- Consultation for off-payroll working rules from April 2020
- Brexit: Protection of Workers' Rights
- Confidentiality Clauses - Proposals for Reform

Disability Passport from TUC/GMB

A Disability Passport has been created jointly by trade unions GMB and TUC. The aim of the Disability Passport is to reduce the number of disabled workers who leave the work place for avoidable reasons. GMB has said that disabled workers are twice as likely to drop out of work than non-disabled workers. One such avoidable reason being the disabled worker having to fight to keep reasonable adjustments that have previously been put in place due to a change in line manager. Under the Equality Act 2010, employers have a duty to make reasonable adjustments to ensure that workers classed as disabled under the Equality Act 2010 are not disadvantaged by any provision, criteria or practice in the workplace.

The Disability Passport is a document which provides a framework in which an employee and employer can record reasonable adjustments that have been put in place for the employee. It records the health condition suffered by the employee and the effect this has on them in the workplace. Importantly for employers, the template produced by TUC/GMB includes a section under which additional advice sought (such as occupational health or other medical reports) can be recorded and attached to the Passport.

The idea of the Disability Passport is that it forms an agreement between the employee and employer for the implementation and continued benefit of reasonable adjustments in the workplace. This will then be passed on to each new line manager the employee has to ensure that continuity for the employee is maintained.

The aim of GMB/TUC is to implement the Disability Passport throughout all workplaces. Although heavily focussed on the employee's needs, rather than the adjustments considered reasonable by an employer, the Disability Passport could prove a useful tool for employers to show their compliance with the Equality Act 2010 as well as creating an inclusive and disability-friendly working environment.

Working Time Regulations: Rest Breaks and Compensatory Rest

Under the Working Time Regulations 1998 (WTR) a worker is entitled to a rest break of at least 20 minutes where their daily working time is more than 6 hours. There are some "special cases" workers who are excluded under the WTR from the right to a 20 minute rest break save that employers shall wherever possible allow the worker to take an equivalent period of compensatory rest. Where this is not possible employers must put in place appropriate protections in order to safeguard the worker's health and safety.

These provisions have been considered this month in

the cases of Network Rail Infrastructure Ltd v Crawford and Grange v Abellio London.

In Grange v Abellio the Claimant was employed as a Relief Roadside Controller. The Claimant initially worked 8.5 hour days with half an hour being unpaid and treated as a lunch break. However, in 2012 the expectation of working hours changed so that the Claimant was expected to work 8 hours without a break and then leave half an hour early. In 2014 the Claimant submitted a grievance that he had been prevented from taking a meal break for 2.5 years which had impacted his health as he was now signed off work. The Claimant later raised a claim in the Employment Tribunal (ET) that the Respondent had refused to permit him to exercise his statutory right to a rest break. The case was initially rejected in the ET holding that the Claimant had not asked for a rest break and therefore could not have been refused to exercise a statutory right.

The EAT allowed the Claimant's appeal on the basis that no request was necessary for there to be a claim under WTR and that the arrangements the employer had put in place amounted to a refusal. On remittance to the ET the Claimant was awarded compensation for dis-comfort and distress caused by the lack of opportunity to eat properly.

In Network Rail Infrastructure Ltd v Crawford the Court of Appeal considered whether a worker's right to compensatory rest under WTR needed to be an uninterrupted rest break of 20 minutes. The Claimant was a railway signalman for the Respondent working 8 hour shifts. As he was required to monitor his post continually, the Claimant was unable to take a continuous period of 20 minutes as a rest break. However, he was able to take short breaks which amounted to well over 20 minutes over the course of a shift, albeit he would have been on call during these periods.

The Claimant brought a claim that the arrangement did not comply with the WTR and claimed he was entitled to either a 20 minute rest break (regulation 12) or compensatory rest (regulation 24(a)). The Claimant was held to be a special case worker by the ET who found that the Claimant had been permitted to take compensatory rest breaks. The EAT reversed this decision stating that a number of short periods of rest could not amount to compensatory rest and that the period free from work needed to be the full 20 minutes.

The case progressed to the Court of Appeal which restored the decision of the ET. It held that the obligation of compensatory rest is to provide an "equivalent" rest to the 20 minutes provided for in regulation 12 is not necessarily the same. The only requirement is that the rest needs to have the same value in terms of its contribution to the well-being of the worker.

These cases illustrate the need to carefully consider how to accommodate rest breaks for workers who have working patterns or arrangements which make it difficult for the employee to take a rest break.

Consultation for off-payroll working rules from April 2020

HMRC launched a consultation on 5 March 2019 on the changes to the rules governing off-payroll working. This follows the announcement in the Autumn 2018 Budget that the public sector off-payroll working rules introduced in April 2017 will be extended to the private sector from 6 April 2020. The introduction in 2020 gives the relevant businesses longer to prepare for the changes.

The purpose of IR35 is to ensure that individuals who's working relationship with the engager is largely the same as an employee and pay the same employment taxes as employees, regardless of the structure they work through (i.e. an intermediary company). The rules to be extended state that where an individual is engaged by a medium-sized or large business and works through a company, the engager will be responsible for assessing the individual's employment status. If the rules do apply then the engager will be required to deduct income tax and NI contributions through PAYE under the Income Tax (Earnings and Pensions) Act (ITEPA) 2003.

As employer's will be acutely aware, the Employment Tribunal has long disregarded the existence of an IR35 company in establishing the employment status of an individual. It appears that with the implementation of these rules, HMRC is now following suit for tax purposes. The consultation specifically states that the consultation is not intended to consider the interaction between employment rights and being taxed like an employee. However, reference has been made to the government's promise under the Good Work Plan that plans to align these two separate tests will be put forward in due course.

The consultation is asking for views and information on the following subjects:

1. The scope of the reform and impact on non-corporate engagers;

2. Information requirements for engagers, fee-payers and personal service companies;

3. Address status determination disagreements.

Questions that are being asked in the consultation include: the application of the rules to non-corporate entities, whether a determination of status should be provided to the off-payroll worker by the engager and whether this would give sufficient certainty, information regarding the flow for information within the supply chain and the number of parties in a supply chain and where the liability for unpaid income tax and NICs

would fall. The aim of the consultation is to ensure that the rules for the public sector are properly adapted to take account of the differences in the private sector.

The consultation on off-payroll workers in the public sector will close on 28 May 2019.

We will be considering issues relating to off payroll working and changes in the law at our upcoming workshops on employment status. For further details or to book a place please contact Marketing on: 01582 390568 email: events@taylorwalton.co.uk

Brexit: Protection of Workers' Rights

On 6 March 2019 the government announced that new measures will be introduced to protect and improve workers' rights after the UK has left the EU. Much of the UK's employment law comes from regulations and Directives from the EU and many EU decisions directly affect the rights of workers in the UK. In this respect, the government has committed not to reduce the standard of workers' rights derived from EU law and any changes to the law will be assessed against this commitment.

As announced by the Prime Minister's Office, the measures will provide for:

1. Parliament to be given a vote on adopting future EU rules on workers' rights;

2. The government will consult with trade unions and businesses on future workers' rights proposals;

3. Proposals include introducing a single enforcement body to protect vulnerable and agency workers; and

4. New parliamentary power builds on the governments' Good Work Plan.

Under the Withdrawal Agreement Bill Parliament will be given regular updates on changes to EU law and will consider those that strengthen workers' rights and vote on whether they should be adopted into UK law. Two EU Directives that will come into force after the UK has left the EU will demonstrate this. The Work Life Balance Directive and the Transparent and Predicable Working Conditions Directive will be put before Parliament to decide whether they should be implemented in the UK.

Taylor Walton's employment law teams will aim to keep you up to date with all employment related Brexit developments.

Confidentiality Clauses - Proposals for Reform

The government has issued a consultation document seeking views on new measures to prevent the misuse of non-disclosure agreements in situations of workplace harassment or discrimination.

Confidentiality clauses serve a useful purpose in the employment context in protecting the employer's confidential information. This may be both during and after the employment relationship has ended and included in the employment contract and settlement agreements. There are already some limits on their use. Confidentiality clauses cannot prevent someone making a protected disclosure.

The government is now consulting on further measure including:-

1. Legislating to ban confidentiality clauses which prevent a victim reporting or discussing potential criminal acts to/ with the police

2. Ensuring any confidentiality clauses in employment contracts (as contrasted with settlement agreements) are included in the written statement of particulars of employment issued at the start of the employment relationship

3. Requiring all confidentiality clauses to highlight the disclosures which confidentiality clauses do not prohibit, and making any confidentiality clauses which do not comply with this void in their entirety.

We will be considering appropriate use of confidentiality clauses at our upcoming workshops on sexual harassment. For further details or to book a place please contact Marketing on: 01582 390568 email: events@taylorwalton.co.uk

If you have any questions about these or other employment issues please call: Heather Cowley (Partner & Head of Employment Law Department) on **01582 731161.**
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