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NeTWork

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Employment Law Update

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Increases in awards for injury to feelings in discrimination claims

From 6 April 2019 the bands of compensation that employment tribunals can award for injury to feelings in discrimination cases, known as Vento bands, increased.

The most serious cases of discrimination will now attract compensation in the £26,300 to £44,000 "upper band" (previously £25,700 to £42,900). Cases that do not merit an award in the upper band will attract compensation ranging between £8,800 and £26,300 (the middle band), while the level of compensation awarded in less serious cases will range from £900 to £8,800 (previously £8,600). Awards in excess of £44,000 will be awarded in only the most exceptional cases, usually where there has been a serious and lengthy campaign of discriminatory treatment and/or harassment relating to sex or race.

The Vento bands were defined by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) in 2003 and assist employment tribunals in determining the appropriate compensation for injury to feelings. The Presidents of the Employment Tribunals in England and Wales and Scotland increase the bands annually on 6 April.

Good Work Plan – Legislation so far

The government's policy paper, the Good Work Plan was published on 17 December 2018, setting out what the government described as "the biggest package of workplace reforms for over 20 years." Further details of the Plan appear in our January edition of NeTWork. The Good Work Plan set out the government's commitment to implement may of the recommendations included in the Taylor Review of Modern Working Practices.
On 28 March 2019, new regulations were made to bring into force various commitments set out in the Good Work Plan. In particular, the following regulations have been made:

1. **The Agency Workers (Amendment) Regulations 2019** – this legislation amends the Agency Workers Regulations 2010 to abolish the "Swedish derogation" which currently allows temporary work agencies to avoid the "equal treatment" provisions in the 2010 Regulations by allowing for pay between assignments. This comes into force on 6 April 2020 and means that by no later than 30 April 2020, temporary work agencies must provide agency workers whose existing contracts contain a Swedish derogation provision with a written statement advising that, with effect from 6 April 2020, those provisions no longer apply. Agency workers asserting rights under the new Regulations will also be protected from detriment and unfair dismissal.

2. **The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019** – this legislation comes into force on 6 April 2020 and requires employment businesses to provide agency work-seekers with a key information document, before agreeing the terms by which they will undertake work. The document must include information such as the type of contract under which the work-seeker will be engaged, the minimum rate of pay, any deductions that will be made to their pay, how they will be paid and by whom, and annual leave entitlement.

3. **The Employment Rights (Miscellaneous Amendments) Regulations 2019** – this legislation:

a. increases the maximum penalty for an "aggravated" breach of employment law from £5,000 to £20,000. An "aggravated" breach could be, for example, an employer who deliberately and consistently ignores their responsibilities in employment law, and in particular ignores the line of case law in recent years regarding employment status and associated rights. The increase will apply in respect of breaches of workers' rights that take place on or after 6 April 2019.

b. extends the right to a written statement of terms of employment to all employees and workers from day one. Previously employees were entitled to a statement and it could be provided up to 2 months after the start of employment. The changes will apply to workers who start work for an employer on or after 6 April 2020.

c. amends the Information and Consultation of Employees Regulations 2004 to lower the percentage required for a valid employee request for the employer to negotiate an agreement on informing and consulting its employees. The threshold will be lowered from 10% to 2% of the total number of employees employed by the employer, subject to the existing minimum of 15 employees. The change will come into force on 6 April 2020.

4. **A further development on 6 April 2019 arising from the Taylor Review of Modern Working Practice is the change in the rules on payslips. The changes are as follows:**

a. The right to receive an itemised payslips has been extended to all workers (previously, it was only employees); and
b. Where a workers' pay varies depending on the number of hours worked, the payslip must show the number of hours that are paid on this basis.
It is open for a worker to bring a claim in an Employment Tribunal against their engaging company where they do not receive either of the above.

Despite the changes that the Government have implemented this month, there is still a long way to go in order to bring the full Good Work Plan into law and employers can expect the legislative changes to continue. Taylor Walton is able to assist HR managers with managing the upcoming changes set out in the Good Work Plan.

Issues relating to PHI benefits - *ICTS Limited v Visram.*

It is not unusual for employers to provide their employees with permanent health insurance (PHI) to cover periods of long-term sickness or incapacity. Employers will normally provide these benefits by taking out an insurance policy with a third-party insurer. In this case, the Employment Appeal Tribunal had to consider whether the employment tribunal had erred in finding that an employee should have been entitled to continue to benefit from a PHI policy on the basis that he could not return to his old job with his employer, rather than just any suitable employment.
In May 1992, Mr Visram started work at Heathrow Airport with American Airlines (AA). His contract of employment included a long-term disability benefits plan (the Plan), the details of which were set out in a booklet (the Booklet). The Plan is funded by an insurance policy (the Policy).
The Booklet provides that benefits will commence 26 weeks after the start of the employee's absence and continue under the "earlier date of your return to work, death or retirement".

The Policy provides that:
- An Insured Member will be entitled to benefit under the Policy but only so long as he is a Disabled Member.
- A Disabled Member is defined as an insured member who "is incapacitated by an illness or injury which prevents him from performing his own occupation". His own occupation is defined as "the essential duties required of the Insured Member in his occupation immediately prior to the commencement of the period of absence.

In October 2012, Mr Visram went on sick leave from his job as International Security Co-ordinator and, two months later in December 2012, his employment transferred from AA to ICTS (UK) Limited under TUPE. Mr Visram attempted a phased return to work on a part-time basis in March and April 2013 but that was unsuccessful and he reverted to sickness absence until his dismissal. Once Mr Visram had been absent on sick leave for 26 weeks, he expected to receive benefits pursuant to the Plan. When that did not happen, he presented a grievance in June 2013. That prompted negotiations between ICTS and the insurer and the insurer agreed to pay those benefits only for one year until the end of September 2014. After expiry of that period, Mr Visram was dismissed on the grounds of capability.

He brought a claim for unfair dismissal and disability discrimination which were successful.

At the remedy hearing, the employment tribunal accepted that Mr Visram was contractually entitled to benefits under the Plan until his return to his original job with ICTS, death or retirement. It rejected ICTS's argument that his entitlement ceased when he was able to return to any full-time suitable work. The tribunal therefore awarded compensation to Mr Visram on the basis that the benefits which he would have been entitled to under the Plan would have continued until death or retirement.

ICTS appealed. The Employment Appeal Tribunal dismissed the appeal.

ICTS argued that the words "return to work" in the Booklet meant return to any suitable work which Mr Visram was able to carry out, whether for ICTS or otherwise. The EAT dismissed these arguments as "linguistic sophistry" and stated that return means 'going back' and 'going back' means going back to work for the original employer for whom Mr Visram remained an employee, which was ICTS.

However, it was not clear from the Booklet what work Mr Visram had to return to in order to be disentitled to the benefits. The employment tribunal had to decide whether "return to work" meant a return to the work performed when going absent due to illness or return to ICTS to carry out any suitable full-time remunerative work. To resolve this ambiguity, the employment tribunal considered the wording in the Policy. The terms of the Policy provided that subject to other terminating events, the benefits would continue so long as the Insured Member was a Disabled Member. A Disabled Member is defined as incapacitated from carrying out the duties of the job he was carrying out when he became incapacitated. The employment tribunal was, therefore, entitled to come to its conclusion.

This case is a reminder of the importance of carefully assessing matters, including the wording of any relevant documentation, prior to taking a decision to dismiss an employee who has a contractual right to PHI benefits.

Once interesting point arising from this case is the fact that in 2013, the insurer stated that it would only continue to pay the benefits for one year. This may have been related to the TUPE transfer and issues relating to replication of benefits post transfer. This case highlights the importance for transferees in a TUPE transfer situation of getting to grips with the details of any insured benefits provided to transferring employees and putting appropriate arrangements in place post transfer.

Gender Pay Gap – Results and Recommendations

4 April 2019 was the deadline for private sector employers with 250 or more employees to publish their gender pay gap reports in relation to 2018 (with reports for public sector employers due on 31 March 2019). Despite the increased focus on the gender pay gap that reporting has caused in recent times, of the 10,444 companies who met the deadline for filing their reports, 45% had seen an increase in their gender pay gap since 2018. Questions have been raised about increasing gender pay gaps in circumstances where employers are under pressure to reduce the gap. Data produced by Easyjet revealed the greatest disparity between the wages of men and women. In their explanatory statement, Easyjet contended that they are employing women into more entry-level roles with the goal of achieving equality in the long run as these women are promoted.

Sam Smethers, chief executive at The Fawcett Society said the regulations were "not tough enough" to get firms to close their gender pay gaps and suggested that employers need to set out a five year strategy for how they will close their gender pay gaps, monitoring progress and results. She also suggested that the Government should require employers to publish action plans that they can hold them accountable to, with meaningful sanctions in place for those who do not comply.

The Equality and Human Rights Commission has said it will take enforcement action against organisations that had not published their gender pay data before 31 March deadline for public sector employers and the 4 April deadline for private sector organisations. It is not yet known how many employers, if any, have failed to submit their data.

Taylor Walton is able to assist private and public sector employers with gender pay gap reporting queries. Further details can be found in our briefing note.

Sexual Harassment – Non-Disclosure

Non-Disclosure Agreements (NDA's) have come under attack recently, particularly in the context of sexual harassment in the workplace.

The Department for Business, Energy and Industrial Strategy are in the process of looking into the appropriate use of NDAs in an employment context in relation to sexual harassment. Their consultation "Confidentiality Clauses (Non-disclosure agreements – NDAs): Consultation on measures to prevent misuse in situations of workplace harassment or discrimination" closed on 29 April so we can expect to see the result of this in the near future. Employers should take advice prior to requesting an employee to sign an NDA, especially if there have been allegations of sexual misconduct or harassment.

We will be considering the issues surrounding Sexual Harassment in the workplace including the use of NDA's at our upcoming workshops running every week in June. For further details or to book a place please contact us on 01582 390568 or email: events@taylorwalton.co.uk

Increased participation in Workplace Pension Schemes

Recent figures published by the Office of National Statistics show that an increasing number of employees are now part of workplace pension schemes. Overall, membership increased to 76% in 2018 from 73% in 2017. The increase was seen across public and private sectors and the largest growth came from private sector employers with 1 to 99 employers (despite this group having the lowest rate of membership across public and private sectors). The rise in the level of contributions to pension schemes also rose, however, this is likely due to the phased increase of pension contributions under the automatic enrolment legislation. At the beginning of April, the minimum contributions for employees rose to 5% and for employers to 3% with a total minimum contribution of 8%.

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