TAYLOR WALTON SOLICITORS

HR Briefing Note

2019 – Employment Law highlights

2020 – What is round the corner

As we approach the end of a year of political turmoil we look back at the key changes in employment law and look forward to the changes already scheduled for 2020.

Holiday Pay

Under the Working Time Regulations 1998 (WTR), workers are entitled to a minimum of 5.6 weeks paid holiday per year (inclusive of bank and public holidays). Payment for holiday is calculated by reference to the complicated provisions of the Employment Rights Act 1996 (ERA) concerning a "week's pay". A weeks' pay should be calculated in accordance with a worker's "normal remuneration" rather than basic pay. Variable pay elements such as commission, bonus, overtime, shift allowances and premiums, travel allowances etc. should all be included for the purpose of calculating a week's pay. Of course, where a worker works irregular hours or does not consistently receive a variable element, such as overtime, holiday pay can be much more difficult to calculate.
2019 has seen some key developments in the complex area of holiday pay:

- In February, The Department for Business, Energy and Industrial Strategy published guidance to assist employers with calculating holiday pay for irregular hours workers called "*calculating holiday pay for workers without fixed hours or pay*". Employers who engage irregular hours or casual workers may find this a particularly useful tool.

- In *East of England Ambulance Service NHS Trust v Flowers* the Court of Appeal confirmed that regular and predictable voluntary overtime payments should be included in holiday pay calculations. Therefore, so long as voluntary overtime meets the test of being "regular and predictable" it will be considered "normal remuneration" for the purposes of calculating a "week's pay" pursuant to ERA.

- Many businesses with irregular hours or casual workers will pay rolled up holiday pay at the end of an assignment or set period. This is sometimes calculated by reference to the 12.07% method whereby workers receive 12.07% of the total pay they have received throughout the assignment/period. The idea behind the 12.07% method is that if a full time worker was to receive the statutory minimum holiday entitlement of 5.6 weeks, this would be 12.07% of their working year.

However, in *Harpur Trust v Brazel* the Court of Appeal (CA) held that a visiting music teacher who was a part-year worker should have had her holiday pay calculated by reference to the previous 12 weeks that she had worked (i.e. term time) pursuant to the ERA rather than using 12.07% to pro-rata her holiday pay. The CA held that using the 12.07% meant there would be a shortfall in Ms Brazel's holiday pay as she clearly would have received more had her holiday been calculated by reference to the previous 12 weeks she had worked and been paid.

From 6 April 2020, the required reference period to calculate holiday pay will change from 12 weeks to 52 weeks (or as many whole weeks of pay information an employer has available is less than 52 weeks) in order to even out the season variation in pay for many casual workers.

Taylor Walton has published an up to date briefing note to assist businesses to understand their obligations regarding holiday pay which can be found here [***https://taylorwalton.com/download/507.pdf?09:51:12&_e=.pdf***]

Working Time
The rules regarding an employee's working time in the UK are governed by the WTR. In particular, employees are entitled to:

- A maximum working week of 48 hours (subject to opt-out) (regulation 4);
- A daily rest period of 11 hours' uninterrupted rest per day (regulation 10(1));
- A weekly rest period of 24 hours' uninterrupted rest per week (or 48 hours per fortnight) (regulation 11(1) and 11(2));
- A rest break of 20 minutes when a day's working time is more than six hours (regulation 12(1))

Recently, questions have been asked as to how an Employer should keep track of an Employee's working time to ensure they are having the required breaks. Guidance from the Advocate General in May 2019 and a ECJ decision in *CCOO v Deutsche Bank SAE* confirmed employers must set up an objective, reliable and accessible system enabling the recording of duration of time worked each day by workers to ensure health and safety of workers is fully protected.

In this case, Deutsche Bank did not record working hours on a particular day and the CCOO argued that the bank was under an obligation to do so. The ECJ decided that if there was no requirement to keep records, it would be impossible to determine "objectively and reliably" either the number of hours worker or when the work was done. Currently, the WTR is not compliant with this requirement and the government will need to amend UK law to be compliant (subject to the caveat that EU law remains in force after Brexit!).

Restrictive Covenants
In July employers were reminded of the importance of drafting reasonable and effective restrictive covenants when the Supreme Court held in *Tillman v Egon Zehnder Ltd* that impermissibly wide wording in a six-month non-compete restriction could be severed for the clause to remain valid but that the original clause has been too wide to be enforceable.
This case concerned a six month non-compete restriction which, among other things, prevented the Claimant from being interested in a competitor business. The effect of this clause was to prevent her from holding even a 1% shareholding in a competitor and therefore was considered an unreasonable restraint of trade.
The Supreme Court held that the clause was drafted unreasonably wide. However, where the offending words could be removed from the clause in order to remove the unreasonable effect, without changing the meaning of the covenant and without the need to add or modify what remains, those words could be removed and the covenant would be enforceable.

Family Friendly Rights
2019 saw a number of consultations launched in the area of family friendly rights for employees. The topics covered include:

- protection against redundancy for pregnant women and new parents
- reform of family related leave and pay;
- a new right for neonatal leave and pay; and
- transparency surrounding flexible working and parental leave and pay policies.

The Government's response to the consultation regarding protection against redundancy has now been published. The response proposes to extend the redundancy protection period for 6 months once a new mother has returned to work and to afford the same protections to those taking adoption or shared parental leave.
The Government's response to the consultation "Good Work Plan: Proposals to support families" which captures the latter three topics has not yet been published.

Does TUPE apply to workers?
Lastly in 2019, a very recent decision in the first instance by the Employment Tribunal in *Dewhurst v (1) Revisecatch Ltd t/a Ecourier (2) City Sprint (UK)* has held that the Transfer of Undertaking (Protection of Employment) Regulations 2006 covers both employees (i.e. those employed under an employment contract) and workers (i.e. those who perform work or services for another under a contract). As this is a first instance judgment, it does not set a precedent. However, in the event of a potential transfer, employers will need to consider carefully whether there are any workers affected by the transfer and whether details of any workers will need to be included for the purposes of providing Employee Liability Information under regulation 11.

The Taylor Review
Looking forward to 2020, employers will see the results of the Taylor Review, a review of modern working practices from 2018. There is a host of legislation expected to come into force in April 2020 and we expect that all employers will be affected by at least one, if not more, of the changes. To name a few:

- **medium and large end-users will be required to make a determination on employment status of individuals providing services through an IR35 company** - currently, if an individual performs services personally for another person (i.e. end-user) through an intermediary (i.e. a personal service company), it is the intermediary's responsibility to make the determination as to whether the individual should be considered employed by the end-user for tax purposes. Prior to the election, the Conservative Party indicated a potential delay or review therefore we await further developments in this area.

- **agency workers will be entitled to receive a "key information document" from the employment business** – the document must be headed Key Information Document and be a separate document providing certain information to the agency workers. BEIS has published guidance on the Key Information Document which end-users of agency workers may find useful;

- **the "Swedish derogation", which allows employers to pay contracted workers less than direct employees in some circumstances, will be revoked** – under the Agency Workers Regulations 2010 (AWR) agency workers have the right to the same basic pay and working conditions as direct recruits. However, currently there is an exemption to this principle (i.e. the Swedish derogation) regarding pay if an agency worker is employed under a permanent contract of employment and is paid a minimum amount between assignments; and

- **a written statement of terms must be given on or before the first day of employment** – all new employees and workers will have the right to a statement of written particulars as a "day 1" right from the first day of employment. The information to be included in the written statement of terms is set out in the Employment Rights Act 1996, however, from 6 April 2020 additional information such as working days, variability in hours/days, paid leave, benefits, probationary periods and training will also have to be included in the statement.

Parental Bereavement (Leave and Pay) Act
From April 2020, parents who have lost a child under the age of 18, or have a stillbirth after 24 weeks of pregnancy, will have the right to two weeks of leave following the loss of the child. Further any parents with 26 weeks' continuous service will be entitled to statutory parental bereavement pay.

Taxation of Termination Payments
It was announced in the Autumn 2018 budget that Class 1A employer National Insurance Contributions would become due on the balance of a termination payment above £30,000. Currently, no National Insurance Contributions are payable on termination payments pursuant to section 403 of ITEPA 2003.

Post Election

Employment law in 2020 will also be affected by the outcome of the election and Brexit. There will be noteworthy developments in 2020 as a result of these events.

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