Devonshires

Employment Brief
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Welcome

Welcome to our latest round up of employment law and cases. In this edition we consider the dangers of getting suspension wrong, what every employer needs to know prior to the GDPR coming into force, and an overview of right to work checks. We also consider the case of Chestertons which gives employers guidance on whether a protected disclosure is made in the public interest.

If you have any questions on the matters raised in this briefing, please speak to your usual contact in the Employment and Pensions team.

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The Employment Round-Up

A busy summer in the Employment appellate courts has led to some notable decisions which impact upon the payments due to employees during their employment, on termination and if they bring a Tribunal claim – and the likelihood of such claims being brought.

The headline issue from the summer was the abolition of Employment Tribunal fees which had been introduced in 2013. No fee is now payable for lodging or pursuing an Employment Tribunal claim. Whilst the Government works on arrangements for the refund of all fees paid to date by claimants, we expect to see at least a small spike in new claims from those recently dismissed and those seeking to persuade a Tribunal that the fees regime prevented them from bringing a claim before and therefore, whilst outside of the limitation period (in some cases significantly so), this

is the earliest opportunity they have had to bring a claim. However, claims should not go back to their pre-2013 level because of the ACAS Early Conciliation process which will still apply.

So the number of Employment Tribunal claims is likely to rise once more, at the same time as some of the most common compensation awards also increase because of decisions in some other cases.

Firstly, the Court of Appeal has said that the amounts payable for injury to feelings in discrimination claims are out of date and thereafter the Tribunal Service consulted on a proposal to increase the bands as follows:

Band	Current	Proposed
Lower	£600 - £6,000	£1,000 - £8,000
Middle	£6,000 - £18,000	£8,000 - £25,000
Upper	£18,000 - £30,000	£25,000 - £42,000

Following closure of the consultation, Presidential Guidance has now been issued which, for claims issued on or after 11 September 2017, sets the bands as:

Band	Range of award
Lower	£800 - £8,400
Middle	£8,400 - £25,200
Upper	£25,200 - £42,000

This reflects increases in RPI inflation over the years and a 10% uplift applicable to all civil claims. The banding will now be renewed annually.

Unfair dismissal awards will also increase as a result of a separate judicial decision that employer pension contributions should count for the purposes of calculating weekly pay. This will impact on the calculation of both the Basic Award and the calculation of the Compensatory Award. The Basic Award is calculated the same way as statutory redundancy pay so lower earners will see an increase as a result of employer pension contributions being added to salary, however the current statutory cap of £489 remains unchanged which will limit the impact of this for anyone earning anything above £25,500. The Compensatory Award is subject to a cap of the lower of 52 weeks' pay or £80,541 which is where this change will have a much broader impact in terms of the number of former employees who could benefit and how much they will benefit by. Where an employee is in a Defined Benefit pension scheme then this could mean a significant increase in what they receive – for example, employer contribution rates to the LGPS can exceed 20% of pensionable pay.

The weekly pay calculation case will also have wider implications outside of just unfair dismissal awards. It will affect Statutory Redundancy payments in the same way as Basic Award calculations because the two apply the same formula. Employers should also check their enhanced redundancy pay terms to see if it could have an impact on the amounts payable – if a policy states that enhanced payments reflect the statutory formula but "with the weekly cap disapplied" (or similar wording) then that could mean that employer pension contributions have to be counted for that too.

The arena where employers have been getting most familiar with the concept of "weekly pay" recently is in the calculation of holiday pay. We now have the expected confirmation that voluntary overtime and/or voluntary standby/call-out payments should be reflected in the amount of holiday pay (for the first 4 weeks of annual leave in any year) if worked sufficiently regularly. Employers who didn't change their practices before should now do so and may be faced with grievances or claims for holidays previously taken but underpaid. Of some solace, will be the 2 year limitation cap introduced after Bear Scotland, and the confirmation that a gap of more than 3 months between underpayments will break a series and disallow an individual from going back any further.


Is Suspension a Neutral Act?

Disciplinary policies refer to suspension as a neutral act as employers often consider that it is not a disciplinary sanction nor does it imply guilt. However, there is already case law that states suspension is not a neutral act and can be regarded as a detrimental one.

In the case of Agoreyo v London Borough of Lambeth [2017] Ms Agoreyo was a primary school teacher and taught classes for five and six year olds. Two of the children Ms Agoreyo taught exhibited challenging behaviour. Ms Agoreyo asked the school for assistance with these two children as she had never dealt with this type of behaviour before. After a few weeks the school put some supportive measures in place but had not fully implemented those measures.

A few days after the measures were put in place Ms Agoreyo was suspended from the school for using unreasonable force towards the children due to their behaviour in that:-

- she dragged one child out of the classroom on the floor;
- she dragged one child along the corridor; and,
- she carried another child out of the classroom.

After being suspended by the school Ms Agoreyo resigned from her position and challenged the lawfulness of the suspension. Ms Agoreyo claimed that the suspension was not reasonable and therefore a repuditory breach of the implied term of trust and confidence allowing her to resign. As Ms Agoreyo lacked the required service to commence proceedings for constructive unfair dismissal she issued a claim in the County Court for breach of contract.

The County Court found that the school was "bound" to suspend Ms Agoreyo after receiving reports of unreasonable force being used against children. Ms Agoreyo appealed to the High Court.

The High Court allowed the appeal. It found that the County Court were not correct in their assumption that the school was "bound" to suspend Ms Agoreyo and that suspension was a "knee-jerk reaction" to the allegations. The High Court found that prior to suspending Ms Agoreyo the school made no attempt to ascertain Ms Agoreyo's version of events, failed to consider any alternatives to suspension, and the suspension letter did not explain why the investigation could not be conducted fairly without the need for suspension. The High Court also found that the Head teacher had already made inquiries about the first two allegations and had already found that reasonable force had been used. Suspension in these circumstances was sufficient to breach the implied term of trust and confidence. In addition to the above the High Court also found that suspension within a few days of supportive measures being put in place after Ms Agoreyto had asked for assistance several weeks ago and the failure to fully implement those measures also constituted a breach of the implied term of trust and confidence.

This case does not create any new law but reinforces the fact that employers must give careful consideration before suspending an employee. Employers should always take the following into consideration:-

- regardless of how serious the conduct is suspension must never be a knee-jerk reaction;
- ascertain the employee's version of events before suspending;
- consider why suspension is necessary in order to conduct a fair investigation;
- consider any alternatives to suspension; and,
- suspension should never be a routine response to allegations of misconduct.

It is also interesting to note that employees that lack the required service to commence claims for constructive unfair dismissal may bring claims in the County Court for breach of contract. However, these types of claims fall into the "Johnson exclusion zone" which prevents employees from seeking compensation in civil courts for the manner in which they were dismissed. The compensation Ms Agoreyo would be entitled to for the breach of contract claim is limited to her notice period.

GDPR: Guidance for Employers

The General Data Protection Regulations (GDPR) will come into force on 25 May 2018 and will be directly applicable to all EU member states.

The Data Protection Bill is also making its way through Parliament and will replace the Data Protection Act 1998. The UK Government has decided to introduce the Bill to ensure that UK and EU data protection laws are aligned post Brexit.

HR departments will need to make sure that they are familiar with the new obligations placed on businesses under the GDPR to ensure compliance. We have set out below answers to some of the most common questions raised by employers in the lead up to the implementation of the GDPR.

Can employers continue to rely on consent in employment contracts?

Under both DPA and the GDPR consent is one way to process personal data. However there is a higher threshold of consent under the GDPR as it must be freely given, specific, informed and unambiguous. Consent will not be regarded as freely given if there is no genuine choice on the part of the employee. It is not uncommon for contracts to be offered to employees on a "take it or leave it" basis and therefore it is unlikely that consents contained in employment contracts will be valid under the GDPR. Employers may wish to consider advising employees that clauses in their contracts of employment dealing with data protection consent no longer apply and refer employees to the employer's policy on data protection or their privacy notice (see below).

The ICO have also published a consultation document on consent which states that consent will not be freely given if there is an imbalance in the relationship and employers and public authorities should consider alternative lawful basis for processing data.

How do employers process personal data if they cannot rely on consent?

Employers may wish to consider other conditions for lawful processing that can be relied upon under the GDPR such as:-

- the processing of the data is for the legitimate interest pursued by the employer; or
- it is necessary to fulfil obligations under a contract of employment.

Employers will also need to notify employees how they use their data through "privacy notices". Employers already have an obligation under the DPA to notify staff how their data will be used. However, the GDPR requires privacy notices to contain much more information which will include which condition the employer is relying on under the GDPR to process personal data, retention periods of personal data, the rights of the data subjects (such as subject access, right to rectification, right to be forgotten

etc) categories of data being processed, how to raise a complaint etc. These notices will need to set out the above matters so employees can see how the employer intends to process their personal data in a concise and transparent manner.

When dealing with special categories data (sensitive personal data), such as medical records, employers should continue to seek explicit consent to legitimise the processing of that data unless it can rely upon another condition under the GDPR such as that the processing is necessary for carrying out obligations under employment, social security or social protection law.

Has the law changed on Subject Access Requests?

Under the GDPR employers are no longer permitted to charge a fee of £10 to carry out a data subject access request. The timeframe to comply with the request has also been shortened from 40 days to one month. However the GDPR does allow employers to apply for an extension of 2 months to comply with the request.

The GDPR also gives employers a right to refuse to comply with the subject access request or charge a fee if the request is "manifestly unfounded or excessive". Although this is welcome news for employers the GDPR does not define "manifestly unfounded or excessive", so employers should exercise this right with caution until there is further guidance from the ICO or the courts.

What are the new employee rights?

Employees will have additional rights under the GDPR as they can ask for their personal data to be rectified if it is incorrect, deleted (if the processing is no longer necessary), or frozen.

Employees will also have the right to ask for their data to be transferred from one data controller to another. This right is known as data portability under the GDPR but it only applies to personal data the employee has provided to the data controller.

Implications for non-compliance

Under the DPA organisations can be fined up to £500,000 for a serious breach of the DPA. However the GDPR provides that organisation can be fined a maximum of 20 Million Euros or 4% of the company's annual worldwide turnover if higher. Given the severe penalties for a breach of the GDPR compliance should be at the very top of every organisation's agenda.

Next steps

HR departments may wish to consider the following in order to comply with the GDPR:-

- carry out an audit of what personal data you process and consider whether consent is the best way to process data;
- consider whether you should rely on alternative conditions other than consent for processing personal data under the GPDR;
- ensure there are procedures in place dealing with the new data subject rights such as data portability, the right to be forgotten, the right for data to be rectified and the right for data to be frozen;
- ensure privacy notices are updated and employees have access to these;
- consider whether a separate privacy notice needs to be prepared and sent to job applicants or whether such notices can be incorporated into an online application process;
- amend new contracts of employment to remove consent clauses for new joiners;
- notify existing employees that consent clauses in their contract no longer apply; and,
- arrange training for staff on the impact of the GDPR.

The GDPR will not only affect employees but also customers of an organisation. Accordingly, HR teams will have to liaise with other departments within the organisation to ensure that it has adequate procedures in place to process personal data and there is a joined up approach to implementing the GDPR.

Right to Work - Employers fined £10M in the first quarter of 2017

UK Visas and Immigration have published a quarterly report showing the total number of fines for illegal working given to employers in the United Kingdom. The report shows that 902 illegal workers were found across the UK between 1 January and 31 March 2017 and employers were fined £10 Million for this period.

Although this is a reduction in the number of fines issued in 2016 for the same period it is still concerning that employers are either ignoring the laws regarding illegal working or just failing to carry out the appropriate checks prior to recruitment.

Obligations of an employer

All employers have an obligation to prevent illegal working and employers must:-

- carry out right to work checks on all prospective employees before they commence work;
- conduct follow up checks on employees who have time-limited permission to stay and work in the UK;
- keep records of the checks carried out; and
- not employ anyone it knows or has reasonable cause to believe is an illegal worker.

The Immigration, Asylum and Nationality Act 2006 sets out the civil penalties for employing an individual who does not have the right to work. The current maximum penalty is £20,000 for each individual found to be working illegally. However a number of factors will be taken into account to determine the level of the penalty such as whether the employer has a history of employing illegal workers, any pre-employment checks carried out, whether the employer reported the suspected illegal working, level of co-operation by the employer and whether the employer has any procedures in place for illegal working.

In additional to a fine, the Home Office also has the power to publish details of the civil penalty, the name of the employer and the number of employees working illegally in a public register which can be viewed online.

The Statutory Excuse

Employers have a defence for employing illegal workers and therefore may be excused from any fines if they can show that they have complied with specific requirements (the Statutory Excuse). An employer must be able to show that initial right to work checks were carried out **prior** to employment commencing. There is a three step process as follows:-

- obtain original documents as required by the Home Office Guidance;
- check (with the employee present) that the documents relate to the individual, are originals and valid; and,
- copy and keep the documents securely, record the date for any follow up checks.

It is also important to note that the Statutory Excuse will be time limited if the employee's permission to live and stay in the UK is also time limited. An employer must make follow up checks in the same manner as above to establish that the employee and a continued right to live and work in the UK.

When should you contact the Home Office?

In order to retain the Statutory Excuse employers are also required to contact the Home Office in the follow circumstances:-

- you are presented with a Certificate of Application which is less than 6 months old;
- you are presented with an Application of Registration Card stating that the holder is permitted to undertake the work in question; or,
- you believe that you have not been provided with acceptable documents because the person:-
    - has an outstanding application with the Home Office which was made before the permission to work in the UK expired; or,
    - has an appeal or administrative review outstanding and cannot provide evidence of the right to work.

Employers will only retain the Statutory Excuse in the above circumstances if they are issued with a Positive Verification Notice confirming that the individual is allowed to carry out the type of work in question.

TUPE

An employer may have in place a robust pre-employment process to check the right to work of prospective employees but are they liable if they inherit an illegal worker under TUPE? In this scenario employer can still rely on the Statutory Excuse if they carry out original document checks within 60 days of the transfer date. If employers fail to do so and it transpires that some employees inherited under TUPE are working illegally, they will be liable to fines from the Home Office.

Discrimination claims

Employers should have in place policies on recruitment that apply to all staff. If employers only carried out right to work checks on applicants who appeared to be of non-British descent this could be classified as discriminatory. Employers should also consider basing selection on merit at the early stage of the interview process with right to work issues considered at the latter stages.

Conclusion

Failure to comply with the requirements to prevent illegal working are not only costly but can also cause reputational damage to an organisation. Employers should consider having in place policies on recruitment and ensuring that standard pre-employment checks are carried out for all staff prior to them commencing work. With Brexit on the horizon it is possible that the free movement of workers enjoyed by European nationals will come to an end and replaced with more limited rights on residence and access to the UK labour market. This in turn will require employers to be more vigilant about ensuring all their employees have the right to work in the UK.

The Home Office have also recently issued amended guidance on carrying out Right to Work checks in August 2017 which is always a useful starting point for employers.

Whistleblowing Protection:
When is a disclosure in the Public Interest?

The Public Interest Disclosure Act 1998 gives protection to employees who blow the whistle on malpractice by their employer. The dismissal of an employee will be automatically unfair when the sole or principal reason for their dismissal is that they have made a "protected disclosure". To qualify for protection the employee must satisfy a number of tests. One of these is whether the disclosure is made in the public interest, a requirement which was introduced to try to limit the number of claims for whistleblowing protection based on grievances relating to a worker's personal contract.

In the case of Chesterton v Nurmohamed the Court of Appeal considered the meaning of "public interest" in the context of whistleblowing legislation, and its decision may widen the number of people seeking to gain protection.

Mr Nurmohamed (Mr N) was employed by Chestertons as an estate agent until his dismissal in October 2013. Prior to his dismissal Mr N had complained that Chestertons were manipulating their accounts so as to reduce commission payable to him and around 100 senior managers.

Following his dismissal he pursued a number of claims against Chestertons on the grounds that he had made protected disclosures. His claim was upheld by the employment tribunal. Chestertons appealed on the grounds that the public interest test was not satisfied just because other employees were also affected by his complaint. They argued that it was still a private complaint about his own employment contract and argued that the issue had to extend outside the workplace.

The Court of Appeal disagreed and upheld the tribunal's findings. They decided the fact that whilst a disclosure relating only to other employees is not normally enough in itself, a disclosure does not have to extend outside of the workplace for it to satisfy the public interest test. In this case, relevant was the number of employees affected, the size of the alleged account manipulation (£2-3m) and that the alleged action was deliberate. The fact that Chestertons is a prominent national estate agent was also a relevant factor.

The factors to consider are:

- The numbers in the group whose interests the disclosure served. In practice, the larger the number of persons whose interests are engaged by a breach of their contracts, the more likely it is the situation will engage the public interest.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
- The nature of the alleged wrongdoing. Disclosure of deliberate wrongdoing is more likely to be in the public interest than inadvertent wrongdoing.
- The identity of the alleged wrongdoer. The larger or more prominent the wrongdoer the more obviously should a disclosure about its activities engage the public interest, though this principle should not be taken too far.

This case reinforces the fact that an employee complaining about a breach of their own employment contract is still possible notwithstanding the public interest test. Whether or not the test is passed will depend on the circumstances of the case, taking into account the above factors. This is likely to reduce certainty in this area, since whether or not a whistleblowing claim in relation to an employment contract breach will succeed will be extremely fact sensitive.

The Court has effectively left open the prospect of a breach of a worker's own employment contract to be regarded as being in the public interest. The court did say that tribunals should be cautious about reaching such a conclusion. In principle it is likely to be in limited circumstances that a tribunal will be prepared to find such a disclosure in the public interest.

The ruling will remind employers to consider whether an employee's complaint about a breach of their employment contract could amount to a whistleblowing complaint.

Legislation Update

Summary	Legislation	Date due to come into force	Details
Tax Evasion	Criminal Finances Act 2017.	30 September 2017	An employer may commit an offence if it fails to prevent an employee, agent or person performing services for the organisation from criminally facilitating the evasion of tax.
Trade Union Ballots and Elections	Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Amendment Order 2017; Recognition and Derecognition Ballots (Qualified Persons) (Amendment) Order 2017.	1 October 2017	The list of bodies which act as independent "scrutineers" of Trade Union ballots and elections, including industrial action and the recognition of a trade union, has been amended.
Whistleblowing	Public Interest Disclosure (Prescribed Persons) Amendment Order 2017.	1 October 2017	Amends the list of persons a disclosure can be made to by a potential whistleblower.
Review of e-balloting in trade union disputes	The Trade Union Act 2016.	December 2017	An independent review of methods of electronic balloting must report to Parliament by the end of the year. It will address how issues of fraud and security can be addressed.
Cap on public sector exit payments	Public Sector Exit Payment Regulations 2016.	2017	A proposed cap of £95,000 is due to be introduced on exit payments from employers in the "public sector". NB The government have stated their intention to exclude housing associations on the basis of their ONS reclassification in 2015, but no changes have yet been made to the draft Regulations.
Recovery of public sector exit payments	Small Business, Enterprise and Employment Act 2015.	2017	Proposals to recover exit payments from high-earning employees who leave a public sector organisation and then re-join the public sector within a year.
Financial Penalties for Trade Unions	The Trade Union Act 2016.	2017	Regulations are due to be introduced so that the Certification Officer has new powers to impose financial penalties of up to £20,000 for breach of some statutory requirements.

Summary	Legislation	Date due to come into force	Details
Caste Discrimination		2017	An order is expected to be introduced for caste to be an aspect of race under the Equality Act 2010, so that employees will have statutory protection against caste discrimination.
Trade Union check-off arrangements	Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulation 2017.	10 March 2018	Public sector employers can only deduct trade union subscriptions from workers' wages if the trade union pays the employer for this service and workers have the option to pay subscriptions by other means.
Childcare Vouchers		6 April 2018	Employer backed Childcare Voucher schemes will close to new applicants. Eligible employees will be able to take advantage of the Tax-Free Childcare government backed scheme.
Salary Sacrifice Scheme	Finance Bill 2017.	6 April 2018	Salary sacrifice schemes put in place before April 2017 will be subject to tax with the exception of payments for cars, school fees and accommodation, which will be subject to tax from 5 April 2021.
Termination Payments	Tax (Earnings and Pensions) Act 2003.	6 April 2018	Proposals aimed at simplifying the treatment of tax and national insurance on termination payments, including making all payments in lieu of notice taxable and subject to Class 1 NICs and requiring employer NIC to be paid on payments above £30,000.
Pensions Auto-enrolment		6 April 2018	The employer minimum contribution will rise to 2% and the total minimum contribution will rise to 5%. Employees must contribute at least 3%.

Summary	Legislation	Date due to come into force	Details
Data Protection	General Data Protection Regulations.	25 May 2018	There will be a range of changes to how employers can process personal data, including subject access requests; consent for processing personal data; and, employee rights for data to be corrected, deleted or transferred. Fines for non-compliance have significantly increased. NB The government is currently working on a Data Protection Bill so that data protection laws are aligned with EU equivalents (such as the GDPR) post-Brexit.
Trade Secrets	Trade Secrets Directive 2016/943.	June 2018	New rules on the protection against unlawful acquisition, disclosure and use of trade secrets for all EU members.
Grandparental Leave	Children and Families Act 2014.	2018	Shared parental leave and pay will be extended to include working grandparents.

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