APRIL 2015

# Employment law update

Welcome to our April update. This month is set to be one of the busiest months for employment law this year.

The Budget was announced on 18th March and there was very little of interest in the employment law arena however, I would like to take this opportunity to point out that National Insurance Contributions (NICs) will be abolished for under 21 year olds this April and also for young apprentices from April 2016. Additionally, the Government have released the figures for the National Minimum Wage. From 1st October 2015 we will see the following changes:

- Adult rate (worker aged 21+) will increase from £6.50 to £6.70 per hour;
- Development rate (worker aged 18-20 inclusive) will increase from £5.13 to £5.30 per hour;
- Young workers' rate (16 & 17 year olds) will increase from £3.79 to £3.87 per hour; and
- Apprentices under 19 or in their 1st year of apprenticeship will increase from £2.73 to £3.30 per hour.

We are in the process of sending out in the post a new data booklet to all those on our mailing list and we hope you find this useful when trying to get to grips with the latest changes in employment law. Do let us know if you require any further copies. There is not long now until the General Election and we look forward to updating you on any further changes there may be in the near future.

This month we also have news of our own. We have said goodbye to Alice Cummins, who has moved on to join our Private Client team and we welcome Sophie Davies to our team as the new trainee.

If you have any comments or questions, please contact me on 023 8071 8094. Don't forget that you can also follow us on twitter @MBEmployment.

With kind regards,

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## Employment tribunal fees: what the future may hold

Following the latest statistics from the Ministry of Justice (MoJ), together with Vince Cable's calls for an investigation into whether Employment Tribunal (ET) fees are a barrier to justice, we look at the impact that the introduction of the fees has had and what the future may hold.

Since the ET fees were introduced in July 2013, those wishing to bring a claim to the ET now must pay fees of up to £250 to lodge a claim and a hearing fee of up to £950 before their case is heard.

Figures have shown that since the fees were brought in there has been a 70% reduction in claims and the numbers are still falling. Recent statistics published by the MoJ demonstrate that single claims received by the ET service were down 12% in the last quarter compared with the same period in the previous year.

The general opinion of employers also seems to have shifted. Initially, employers welcomed the introduction of fees, with the average cost of a claim being £8,500, whilst those representing employees saw them as a barrier to justice. Interestingly however, in a recent survey of 1,000 employers by the CIPD, almost as many employers now feel that the fees should either be significantly reduced or abolished altogether (36%) as those that feel they should remain (38%); with the balance being undecided about their impact.

What is becoming clear is that there is a wave of dissent and the current system of ET fees may soon be subject to review and amendment.

When the ET fees were introduced in July 2013, the Liberal Democrats supported the proposal on the basis that there would be a review within a year. With the MoJ failing to respond to requests for such a review, Vince Cable has now launched his own inquiry and we can expect this report imminently. Unison has also now appealed to the Supreme Court in their judicial review challenge to overturn ET fees.

The current fee system appears to be under the microscope and as Mike Emmott of CIPD suggests, "*it's unlikely that the current fees regime will survive the general election in May by many months as all three major political parties have indicated an intention to review it.*"

# ‘Back-door’ criminal checks outlawed

From 10 March 2015, it is now a criminal offence for employers to require job applicants or employees to obtain and produce a copy of their criminal record by way of a subject access request. This practice is known as “enforced subject access” and now carries a penalty of an unlimited fine.

It had emerged that employers were bypassing data protection laws by requesting that individuals make a subject access request to obtain their entire criminal record as a condition of their appointment or employment. The issue here is that a subject access request contains information that employers are not able to discover or rely on when making a decision about an individual’s employment when adhering to the proper processes, such as spent convictions and cautions.

It is important to note that regardless of how an employer comes across information relating to an individual’s criminal record, they should exercise caution when relying on it to make a decision in respect of their appointment or employment. An employer cannot refuse to employ someone or dismiss an employee on the basis that they have a spent criminal conviction and to do so could give rise to a claim.

To reduce the chances of a claim being brought, employers should ensure that they follow the correct procedures to undertake a criminal record check. Where the position, office or profession is covered by an exception an application can be made to the Disclosure and Barring Service (DBS). However, even where the exception criteria are met, the information supplied by the DBS may only include that which may be relevant to the role in question.


## Fit for Work service rolled out nationwide from 9 March 2015

In our February article “Changes to employment law in 2015” we reported that the proposed date for implementation of the Fit for Work service was May. This date has now been brought forward and the Fit for Work service commenced in Sheffield and Betsi Cadwaladr University Health Board (UHB) on the 9th March 2015. It is planned that there will be a phased roll out of the referral service across England and Wales and this will take place over a period of months. There is not a date set yet as to when we can expect to see this service in the South of England, although we will of course keep you informed.

Fit for Work is a Government funded service which has been created to hopefully help the employer better understand and manage sickness absence within the business. It is anticipated that this scheme will help small and medium size businesses the most as they are less likely to already have access to occupational health professionals.

In the future, an employee who has been, or is likely to be off sick for 4 weeks can, with consent, be referred to an occupational health professional by either their GP or their employer. Currently, however, only GP’s in Sheffield and Betsi Cadwaladr UHB can refer employees. It is hoped that all employers nationally will be able to refer employees to the occupational health professionals from autumn 2015. It is believed that a gradual roll-out will enable the individuals at the Fit for Work service to build experience, learn and implement improvements into their ongoing roll-out plans.

The occupational health professional will be able to provide expert and impartial advice and identify obstacles preventing the employee from returning to work. A Return to Work Plan will be agreed, this will provide recommendations tailored to the employee’s needs. The Return to Work Plan will then replace the need for a fit note. Employers start to receive Return to Work Plans from employees who have been referred by GPs as roll-out continues.

It is important to ensure that all staff are aware of the Fit for Work service and how it works. Additionally it is important to ensure that the Fit for Work service ties in with the Company’s sickness absence policies.

## Anti-avoidance measures for zero-hours contract restrictions announced

Zero-hours contracts have long been a useful tool for employers to effectively have workers on 'standby' for when they are required, whilst also contributing to the reduction in unemployment in the UK. With the UK's unemployment rate being the lowest it has been in six years, it is no coincidence that the number of those employed by means of a zero hours contract has increased to almost 700,000.

The prevalence of zero-hours contracts has highlighted the controversies that come along with them and in particular, the use of 'exclusivity clauses'. These clauses allowed employers to prevent workers on zero-hours contracts working for another employer, even though they are were not guaranteeing them any work.

The Government's Small Business Enterprise and Employment Bill, published in June 2014, contained provisions to make these exclusivity clauses unenforceable. It then became apparent that employers may attempt to avoid any ban on exclusivity clauses and the Government therefore announced its plans for a consultation to consider anti-avoidance measures. The response has recently been published and includes draft regulations (Zero Hours Workers (Exclusivity Terms) Regulations 2015) that will effectively make exclusivity clauses unenforceable where a worker's income and hours fall below a certain threshold and will also provide protection from detriment for zero-hours contract workers.

Under the new regulations, an employer will be unable to require a worker to sign any exclusivity contract unless their level of weekly income is above a certain level. The level of weekly income will be calculated by multiplying the agreed number of hours by the adult national minimum wage rate. There will be an exception to the threshold if the rate of pay for each hour worked under the contract is at least £20.

In addition to the introduction of anti-avoidance measures, zero-hours contract workers will also be able to make a complaint to an Employment Tribunal if they consider that they have suffered a detriment for working or performing services for another employer.

You may have heard David Cameron speaking on the Jeremy Paxman show as if these had already come into force. However the Small Business, Enterprise and Employment Bill is still being processed through Parliament and the regulations are therefore yet to be implemented. Nonetheless employers would be best advised to start reviewing their practices and contracts in preparation.

Employers should ensure that any zero-hours contracts they offer or have in place are carefully drafted and are appropriate for the requirements of their business. They should also familiarise the rights and protections that zero-hours contract workers have.

# Mandatory gender pay gap reporting to be introduced

Companies who employ more than 250 workers will soon be required to publish details relating to their gender pay gap, i.e. the difference between what they pay their male and female workers, or potentially risk facing fines of up to £5,000.

The Liberal Democrats have recently pushed through regulations that will make it mandatory for companies with over 250 employees to publish information relating to their gender pay gap in a bid to increase transparency. These regulations are expected to come into effect within the next 12 months.

Although the power to compel companies to produce this information has been available to the government since the Equality Act 2010 came into force, no regulations have been put in place in order for it to be implemented. To date, the government has only introduced gender pay reporting on a voluntary basis and the coalition's 'Think, Act, Report' policy did little to encourage disclosure from companies, with reportedly only 5 companies volunteering to publish their gender pay gap information.

Under the new regulations, employers will be required to publish the difference between the basic average pay and the average pay for both male and female employees on an annual basis. It is expected that they will also need to provide information relating to the difference between male and female employees working on a part-time or full-time basis as well as other elements, such as bonuses. Failure to comply with these regulations could result in fines of up to £5,000.

It is therefore recommended that employers who either currently meet the criteria, or expect to do so in the upcoming year, use these next 12 months to gather and review their data and policies to ensure that they are fully prepared to comply with the new measures.

# Resignation amounting to constructive dismissal is not harassment

In the case of Timothy James Consulting v Wilton the Employment Appeal Tribunal (EAT) held that while constructive dismissal may be the result of acts of harassment having taken place, as a matter of law, the act of constructive dismissal cannot in itself be an act of harassment for the purposes of the Equality Act 2010.

In this case the claimant worked for Timothy James for nearly 6 years as head of sales. Towards the end of her employment, several incidents occurred involving a director, Mr O'Connell, with whom she had previously had a personal relationship. Amongst other things, the Claimant was subjected to a 30 minute tirade of criticism where she was described as "a green eyed monster". This was with reference to an alleged jealousy of another female colleague with whom Mr O'Connell had now formed a relationship.

The Employment Tribunal (ET) concluded that the incidents had taken place because she had previously had a relationship with Mr O'Connell. It was therefore related to the protected characteristic of sex. The ET found three such incidents of sexual harassment.

In the end, the claimant resigned, claiming constructive dismissal. The ET found that the constructive dismissal was, in itself, an act of harassment under the Equality Act 2010. The EAT disagreed on this point. On a correct interpretation of the Equality Act, an act of constructive dismissal does not, in itself, fall within the meaning of harassment.

The ET made an order for £10,000 for injury to feelings for the harassment that did occur. It went on to gross this up to take into account income tax. The EAT considered whether an award for injury to feelings should be taxed. The EAT decided that such awards are not taxable, however it is important to note that this decision does not mean that all awards for injury to feelings are not taxable as this case is not binding on HMRC and does conflict the latest tax case to consider this issue.

# Diet-controlled Type 2 diabetes was not a disability

**The Employment Appeal Tribunal (EAT) in Metroline Travel Ltd v Stoute held that Type 2 diabetes, which could be controlled by a managed diet, was not a disability under the Equality Act 2010.**


Under the Equality Act 2010, 'disability' means a physical or mental impairment with a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.

The Employment Tribunal (ET) considered the Equality Act 2010 Guidance which stated "where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have an effect". The ET held that following a diabetic diet designed to avoid sugary foods such as fizzy drinks was equivalent of a medical treatment and without the treatment the employee's condition would meet the definition of a disability.

The EAT disagreed as a diet consisting of abstaining from sugary drinks did not have a substantial adverse effect on the employee's ability to carry out day-to-day activities and is not sufficient to amount to a particular diet and therefore does not amount to treatment or correction.

Neither the ET or the EAT referred to the Equality Act 2010 Guidance which states "... the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet". However, it seems that the EAT's decision is consistent with this Guidance, provided that the EAT was correct in saying that abstaining from sugary drinks is not a diet.

Following this judgement we would warn employers not to assume that anyone with diet-controlled Type 2 diabetes is not disabled. Each case should be considered on its facts as there may be other substantial effects that the condition has on an individual, which could mean they do satisfy the definition of 'disability'.

# New rules for investors, entrepreneurs, visitors

The Government has announced significant changes to the Immigration Rules which are due to impact applications submitted on or after 6th April.

Tier 1 Investors must open a UK regulated investment account before first applying for leave to enter or remain in this category. The minimum age for principal applicants is now to be 18. Investors will no longer need to top up their portfolios if these drop to a value below £2million on the sale of an investment at a loss, but will need to re-invest the gross proceeds of all sales into qualifying investments in the portfolio. The latter is a welcome clarification and one which ends a degree of ambiguity in the provisions announced last year.

The Tier 1 Entrepreneur category is subject to a 'genuineness' test on extension and indefinite leave to remain applications, as well as initial applications for entry into this category. This has proved a difficult obstacle in visa applications and, in many cases, seems a strong deterrent to making such an application. All new applicants under Tier 1 (Entrepreneur) also need to provide a business plan.

One of the previously announced changes was the re-classification of the Rules regarding visitors. These provisions reduce the potential applications available to four: visitor (standard), visitor for marriage or civil partnership, visitor for permitted paid engagements and transit visitor.

Those travelling to the UK for longer than six months must pay a £200 per year 'health surcharge' when they make their application for a visa from this date onwards. Those coming for less than six months do not need to pay the surcharge but, if they do use NHS services, will be charged in order to do so. This reflects debate regarding "health tourism" over the last year or so. Concern has been expressed by some involved in the tourism industry and in the public health field also.

Some of these changes constitute welcome clarifications which were previously understood to be requirements anyway but appeared in guidance or as policy known to practitioners. The provisions concerning entrepreneurs and "genuineness" do continue to cause concern; the prospect of needing to meet such a test in future leave to remain applications can only increase this.

# Changes to the right to be accompanied at disciplinary and grievance hearings

ACAS launched a consultation following the Employment Appeal Tribunal's (EAT) ruling in the case of Toal v GB Oils 2013 ("Toal"). ACAS has now amended the ACAS Code of Practice on Disciplinary and Grievance Procedures ("Code") to take into account the EAT ruling and the new Code came into force on 11th March.

Section 10 of the Employment Rights Act 1999 (the "Act") states that workers have a right to be accompanied if they make a reasonable request. A "reasonable request" is not defined in the Act but the old ACAS Code stated that it would not normally be reasonable for a worker to insist on being accompanied by a companion who would have come from a remote geographical location if someone suitable and willing was on site, or whose presence would prejudice the hearing.

In the Toal case the EAT held that an employee has an absolute right to request their choice of trade union representative or workplace colleague to accompany them, provided the request to be accompanied is itself reasonable. The EAT held that the 'reasonableness' requirement does not apply to the precise choice of companion, provided they fall within the statutory categories. The judgment from this case suggested that the Code did not accurately reflect this position and therefore a consultation was launched and the Code was amended.

The new Code includes the following changes:

- The Code makes it clear that the statutory requirement for a worker's request to be accompanied to be "reasonable" applies;
- Employers must agree to a worker's request to be accompanied by any chosen companion from one of the statutory categories of companion;
- A worker may change their mind on the choice of companion;
- A worker should ensure that they provide to the employer the name of the companion where possible and specify whether they are a fellow worker, trade union representative or trade union official;
- The employer should be given enough time to make the necessary arrangements to allow the chosen companion to attend;
- A request to be accompanied does not have to be in writing or made within a particular time frame; and
- If a worker's chosen companion is not available, an alternative time must be arranged by the employer that is reasonable and within five working days of the original date.

Following the revision to the Code, I would advise that you check the Company's grievance and disciplinary procedures to ensure they are up to date and comply with the revised Code. Additionally, ensure that staff who deal with these processes fully understand who can accompany an individual.

# Please contact one of our team

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