Employment Law Update

MOORE BLATCH
solicitors

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In this update, we report on new legislation that was introduced in January 2016 and which will put an end to employers preventing zero hours workers from working elsewhere.

Further details of these regulations and other employment law changes that we expect to see in 2016 are set out in our first article.

Our immigration article this month focuses on CBI Director-General Carolyn Fairbairn's calls for easier transfers of staff from overseas offices to UK sites and how these calls contradict current Government intention.

In addition, this month we have included an article from our Family team in relation to the impact divorce can have on your employees and workplace.

As always, if you have any comments or questions, please do not hesitate to contact me on 02380 718094. Don't forget that you can also follow us on Twitter @MBEmployment.

With kind regards,

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What changes will we see to Employment Law in 2016?

Every year seems to be a busy year in the employment law world and 2016 is set to be no different. We have already seen a range of legislation coming into force in January.

On 1 January 2016, sections 154-7 of the Small Businesses, Enterprise and Employment Act 2015 ("SBEEA 2015") came into force. These sections enable the Government to make regulations requiring the clawback of public sector exit payments. Additionally, section 148 of the SBEEA 2015 came into force, empowering the Secretary of State to make regulations requiring prescribed persons to report annually the anonymous disclosures made to them by whistle-blowers.

As mentioned in the introduction to this months update, on 11 January 2016, the Exclusivity Terms in Zero Hour Contracts (Redress) Regulations came into force. The Regulations provide that a zero hour contract employee is protected against detriment and unfair dismissal in the event that they breach a contractual clause prohibiting them from working for another employer.

Below, we have set out some other key events that we will be updating you on in 2016:

- Further consideration of tribunal fees is expected during 2016.
- The Government has plans to extend shared parental leave and pay it to working grandparents by 2018. It is likely that the consultation on grandparental leave will take place in the first half of 2016.
- In February 2016, the Government intends to publish its response to the consultation on regulation of recruitment agencies and further restrictions on overseas recruitment.
- In March 2016, the Senior Managers' Certification Scheme is due to come into force.
- In April 2016, the National Living Wage is due to be introduced.
- In October 2016, a ban on corporate directors in due to come into force.

We are also anticipating some interesting case decisions.

In the first half of 2016, the Court of Appeal are expected to hear cases on:

- Employment status (Windle v Arada and another) (Pimlico Plumbers Ltd v Smith);
- Changing terms and conditions (Sparks v Department for Transport); and
- Agency Workers (Moran and others v Ideal Cleaning Services Ltd).

In the second half of 2016, the Court of Appeal are expected to hear cases on:

- Whistleblowing (Chesterton Global Ltd and anor v Nurmohamed); and
- Disability Discrimination (First Group PLC v Paulley).

We also expect the EAT to hand down the long awaited decision in British Gas Trading v Lock and another in the coming months.

We will keep you up to date with all of these changes. In the meantime, please do not hesitate to contact us should you have any queries click here.

Monitoring personnel messages in the work place

In the recent case of Barbulescu v Romania, the European Court of Human Rights ("ECtHR") handed down its decision on the right to privacy under Article 8 of the European Convention on Human Rights.

It was held that the right to respect for private life is not breached if an employer monitors an employee's personal communications at work, subject to reasonableness and proportionality.

In this case, the employer had a rule in which all personal use of the employer's IT systems was 'forbidden'. The employee had used his business Yahoo email account to communicate on a personal level with his girlfriend and brother during work time and via the employer's systems. This was in breach of his employment contract and the employer invited the employee to a disciplinary meeting.

The employee claimed that his use had been professional only, however the employer had printed copies of the personal messages which included messages about the employee's health and sex life. The employer dismissed the employee and the employee brought a claim stating that his dismissal was unfair.

The Romanian courts upheld the employee's dismissal. The employee argued that the Romanian courts should have excluded all evidence of his personal communications on the grounds it infringed his Convention rights to privacy.

The ECtHR held that the Romanian courts were entitled to look at that evidence in deciding whether the dismissal was justified. It seems the ECtHR were swayed by the fact that the Romanian court judgment did not reveal the precise content of the personal messages. Additionally the ECtHR held that the monitoring and use of the personal messages was a proportionate interference of an employees Article 8 rights as there is a need for employers to be able to verify that employees are completing professional tasks during working hours.

It is important to note that this case does not now give employers the right to search through employees' personal emails and does not overrule previous ECtHR case law on the reasonable expectation of privacy. Nor does it override existing UK legislation, including the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000, which place important limitations on employers' power to monitor their employees' private communications.

It is important for all employers to ensure that their rules in relation to employees using IT systems at work are clear and that their internal policies allow them to monitor an employee's use of the systems. It is important for an employer to take advice before monitoring an employee's private emails as overstepping the mark could lead to the employee bringing a claim against the employer.

Please do not hesitate to contact me, or a member of my team, if you would like some advice regarding the monitoring of employees or the effect of this recent case on your business.

Disability discrimination: ET should consider whether employer could reasonably be expected to wait longer before dismissing.

In Monmouthshire County Council v Harris, the EAT re-affirmed that tribunals should consider whether an employer could reasonably be expected to wait longer before dismissing an employee on long term absence.

The claimant, Mrs Harris, was employed by the County Council as a senior education welfare officer. Mrs Harris suffered from depression, sinusitis, asthma and underactive thyroid and was therefore disabled for the purposes of the Equality Act 2010. Following occupational health advice, it was agreed that Mrs Harris would spend some of her working week working from home.

In August 2010 a new manager was appointed, who refused to allow Mrs Harris to work from home and she was later dismissed following a period of long-term absence.

The employment tribunal initially held that Mrs Harris had been unfairly dismissed and that this was also a case of discrimination arising from disability. However, on appeal, the EAT found that the employment tribunal had failed to consider whether there were good reasons why the Council decided to dismiss without waiting longer.

The significance of this case is that if employers should find themselves in a situation where they decide to dismiss an employee who is on long-term absence, they should consider and document the reasons why it is necessary to dismiss the employee at this point, and why the business can therefore wait no longer. On the basis of this case, and preceding case law such as BS v Dundee City Council in 2013, a tribunal should consider the 'fundamental question' of why an employer has decided to dismiss an employee at a specific time and therefore whether the employer could have been expected to have waited longer.

ECJ guidance on calculating holiday pay for workers who increase their hours

The case of Greenfield v The Care Bureau Ltd held that in circumstances where a part time worker increases their hours, an employer is not required to recalculate the employee's entitlement to annual leave retrospectively, taking into account leave that had already been accrued and taken.

Ms Greenfield was employed as a care worker whose working days varied from week to week. The remuneration paid to Ms Greenfield for any given week also varied depending on the number of days or hours that she worked. Ms Greenfield took 7 days' paid leave during a period when she was working one day per week. She then increased her hours to work a pattern of 12 days working followed by 2 days off.

Ms Greenfield subsequently requested a week of paid leave and was told by her employer, the Care Bureau Ltd, that she had already exhausted her entitlement to paid leave as she had taken her leave at a time when her work pattern was one day per week and so had taken an equivalent of 7 weeks' leave.

Ms Greenfield brought a successful tribunal claim for pay in lieu of leave not taken, however, following an appeal by the Care Bureau Ltd and an application for reconsideration of judgement, the matter was referred to the European Court of Justice (ECJ).

The ECJ ruled that although member states were not required to retrospectively adjust annual leave already accrued in circumstances where a worker increases the number of hours that they work, a new calculation should be performed to determine the amount of annual leave that a worker is entitled to based on their amended working pattern.

The positive effect of this case for employers is that the ECJ decision does not require accrued holiday to be recalculated retrospectively in situations where a worker's hours increase. However, this case law does mean that employers may need to distinguish between periods where a worker may work fewer days or hours and periods where more hours or days are worked. Therefore, employers will be required to calculate separately the annual leave entitlement for each period where a worker is working a different pattern of hours.

Childcare vouchers: the real cost to employers

It has come to our attention that in some circumstances, employers may be obliged to pay for and provide childcare vouchers to employees whilst they are on maternity leave in order to avoid a potential discrimination claim.

You will be aware that when an employee is on maternity leave, she should continue to receive all non-cash benefits. In effect, this means that the only thing that should stop during maternity leave is normal remuneration.

Most childcare voucher schemes which are facilitated by employers revolve around a salary sacrifice agreement whereby the employee agrees that their employer can sacrifice a certain amount of their salary to pay for their childcare vouchers. By doing so, the employee will receive a tax benefit as the sacrificed proportion of their salary is tax free and exempt from National Insurance contributions.

In circumstances where an employee is provided with only statutory maternity pay whilst on maternity leave, HMRC guidance notes state that she is unable to sacrifice her statutory maternity pay in order to pay for childcare vouchers. The "how can you help your employees with childcare" HMRC note then goes on to confirm that "childcare vouchers are an employer provided non-cash benefit. Employer provided benefits provided under a contract of employment must continue to be provided whilst an employee is absent from work on maternity leave. This applies even if the employee is getting no pay or only getting SMP."

We understand that the implication of this advice is that where an employee is paid only statutory maternity pay, and therefore cannot sacrifice her pay in order to pay for childcare vouchers, her employer should continue to provide the vouchers throughout her maternity leave. The reality of this is that, in order to avoid a claim for discrimination, an employer may be required to pay for an employee's childcare vouchers and provide these to her for the duration of her maternity leave. This has highlighted the unfortunate circumstance where employers may no longer be able to afford to offer a childcare voucher scheme to their employees.

On 22 January 2016, the EAT heard an appeal in relation to the employment tribunal's finding in *Donaldson v Peninsula Business Services* that an employer discriminated against employees by introducing a provision that staff could only join their childcare voucher scheme if they agreed to suspend their membership of the scheme during maternity leave periods.

As part of the appeal, the question of whether childcare vouchers are a benefit that must be provided during maternity leave was raised. Although the EAT reserved judgement, we are hopeful that the judgment will provide some clarity in relation to this worrying issue for employers.

Despite the confusion surrounding childcare vouchers, the Government has proposed the introduction of a tax-free childcare scheme due to be rolled out in 2017. The details are yet to be officially confirmed but the scheme is expected to provide families where both parents are working and not earning more than £100,000 each per year, with help in the form of a 20% contribution towards their yearly childcare costs of up to £2,000 for each child. The allowance is set to be up to £4,000 per child where the children are disabled.

Family article:

Divorce costs the British economy some £46bn a year*

Divorce is the second highest cause of stress ...can you afford to ignore its impact on the workplace.....

January and February are two of the bleakest months of the year and a time when anecdotally there is a spike in the divorce rate and relationship breakdown. To the individual in question a divorce can be akin to bereavement with the loss of the love and support of a spouse or no longer living in the same home as their children impacting heavily upon their wellbeing. That can give rise to a myriad of emotions and although the issue is a personal one, of course the effect can often spill into the workplace.

The impact upon employees can range from the practical issues such as increased absenteeism due to attending appointments with solicitors, mediators, experts and the court to emotional ones such as being unable to cope with the extra burden the workplace places upon them at such times of distress.

It is a well known fact that divorce affects productivity in the workplace or work relationships between the employees due to one acting out of character under such stress.

It is important as an employer that one has an understanding of the issues and that one is sensitive to the genuine needs of your employees at such a time.

Employers may need to consider flexibility around working hours as although many solicitors may offer appointments before and after work, court dates and meetings with third party experts are not so easy for the individual to organise and are subject to other people's timetables and requirements, not their own.

Often there are requests made for disclosure concerning an individual's employment salary details, benefits in kind and pension information with supporting paperwork and having an understanding as to what you can provide and when could help not only the employee but their legal advisors too.

Although many are embarrassed about such matters and feel hampered about discussing their difficulties in the workplace, fearful about how, what they perceive to be their personal failings, may colour their reputation at work if, as an employer, you can assuage their fears and offer practical assistance that could be invaluable to both you and your employee in the longer term. If you can assist in promptly providing the paperwork requested, and by being informed enough to give advice to your employees about their various options, that can but help cement a strong and loyal relationship between you and the employee.

If you or any of your employees require an additional discussion about such matters please do not hesitate to contact Jan Galloway at our Richmond office, by email; jan.galloway@mooreblatch.com or dd on 020 8332 8673

*Relationships Foundation,

Counting the Cost of Family Failure 2013 Update

(Research Note), Cambridge: Relationships Foundation, 2013 p5

Immigration article:

CBI: Immigration benefits the economy

The new Director-General of the CBI is quoted in her first keynote speech as calling for less Government restrictions upon Tier 2 visas to improve the economy. Carolyn Fairbairn is to make a case for easier transfers of staff from overseas offices into their UK sites.

Each year, the Government limits the number of 'restricted' Certificates of Sponsorship awarded to newly-hired overseas migrants. This was set at 1,750 per month for 2014/15. The limit was exceeded for the first time in June. Those issued certificates needed to undertake either a shortage occupation job, a PhD role or one in which the gross salary was above £46,000. Engineers, teachers, lawyers and IT workers were all refused certificates in June on the basis that their salaries were too low.

The Government's intention in respect of Tier 2 workers appears to be to tighten the criteria further. The Migration Advisory Committee ("MAC"), a group of economists which advises the Government on migration issues, has undertaken a consultation exercise in the last six months. The points on which the MAC were asked to advise all related to ways in which less people could be brought to the UK for employment; restriction of Tier 2 visas to only the highest-qualified staff, limiting the length of time people may work further, raising fees further and preventing the spouses of Tier 2 workers taking employment. The Chancellor's recent Autumn Statement advised that visa application fees were to increase between now and 2020 to make UK Visas and Immigration entirely self-funding. The Government seems persuaded by the case for restriction of these visas; the opposite of what the CBI states will create economic growth.

Both the CBI and the Institute of Directors have a recent record of supporting business immigration, in direct opposition to current Government policy. This appears likely to continue throughout this Parliament.

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