Employment law update

MOORE BLATCH
solicitors

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Welcome to our July update.

The much awaited review of Employment Tribunal fees has now commenced and we wait with baited breath to see whether this leads to a scrapping of the system as called for by the unions. We report in detail on the review below.

The Queen's Speech also promised legislation "to reform trade unions and to protect essential public services against strikes". Commentators expect to see a draft Trade Union Reform Bill published before the parliamentary recess. Attempts to curb industrial action are likely to give rise to hot debate. I promise to keep you updated.

There has also been an important development in business immigration as the limit on the number of 'Restricted' Certificates of Sponsorship was exceeded for the first time since 2011. Initially, for reasons including the recession, applications remained well below the limit when it was set. The steady increase in applications is now going to impact on UK employers who are looking to sponsor skilled workers, We have included a feature length immigration article in this month's update where Simon Kenny examines the criteria for certificates and how employers may seek to handle this going forward.

In our own news, we happily welcome back Associate Solicitor, Emma Edis from maternity leave.

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,

Katherine Maxwell

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ACAS issues guidance for calculating holiday pay

In our last update, we reported in detail on the Lock v British Gas Trading case and its impact in respect of calculating holiday pay. ACAS have since issued guidance for both employers and employees.

The guidance provides employers with some much needed clarity on how to calculate an employee's holiday pay where working and pay structures are irregular, such as where there are elements of overtime and/or commission.

Employers will also welcome the news that any claim for unlawful deductions from pay will be limited to a maximum of 2 years from 1 July 2015.

Breaking news however is that the much anticipated judgment in the case of Patterson v Castlereagh Borough Council has last week been delivered by the Northern Ireland Court of Appeal. The judgment makes clear that voluntary overtime can, in principle, be included for the purposes of calculating holiday pay in Northern Ireland

Grandparents to possibly share parental leave

David Cameron has recently announced that he will look at Labour's proposals relating to grandparents being able to take time off to look after their grandchildren.

Under current law, every employee who has a child under the age of 18 has the legal right to take up to 18 weeks' unpaid parental leave before the child's 18th birthday and couples can share up to 50 weeks of parental leave between them.

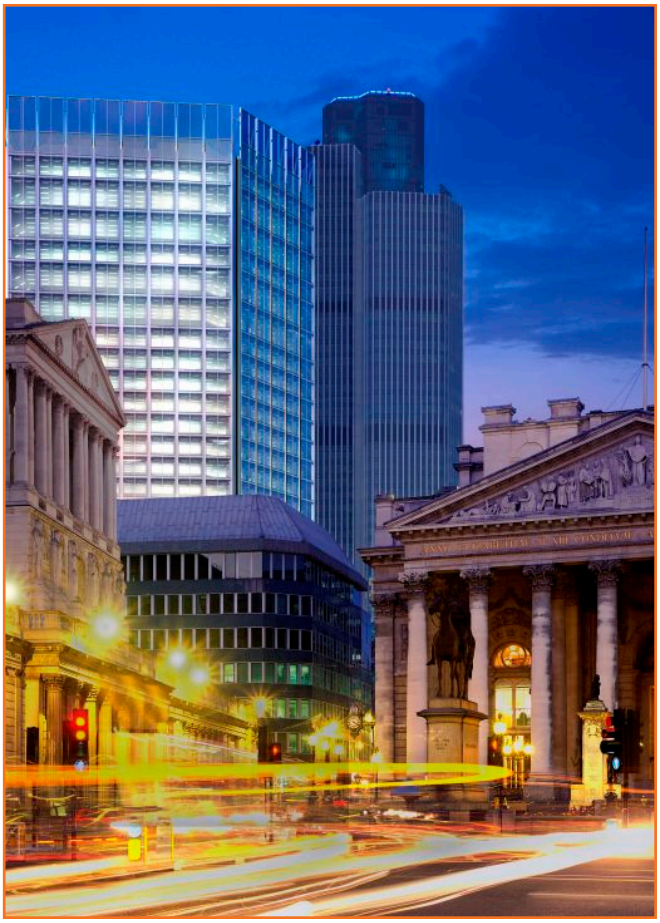
The Prime Minister has indicated that he will look at plans to allow parents to transfer part of their family-friendly leave to grandparents.

If implemented, it is not yet clear how this would be put into practice, however it is not welcome news for those employers who are struggling to get to grips with the already complex family leave laws. That said, it is highly unlikely that leave (and certainly paid leave) will be extended for grandparents in the near future.

Central London Employment Tribunal user group meeting

On 10 June 2015 one of our team attended the Central London Employment Tribunal user group meeting. We believe it is useful for employers to be kept up to date with the developments in the tribunal system, should they be in the unfortunate situation of being faced with a claim. We have therefore summarised the main topics of discussion below:-

- Backlog: Due to both the fire at Holborn and a reduction in the numbers of staff, there is a large backlog that the tribunal is trying to clear.
- Timeliness: There is now an onus on both judges and staff to deal with cases in line with new national targets set out below:-
  - Fast track (money claims) = 10 weeks
  - Standard track (unfair dismissal claims) = 20 weeks
  - Discrimination claims = 13 weeks
- Early Conciliation: The Central London Tribunal have reached an agreement to pilot a national scheme whereby they will send out Early Conciliation certificates when serving a claim, to assist employers in preparing their response to a claim.
- Litigants in person: A leaflet is to be issued shortly in order to support litigants in person, together with a 3 month pilot scheme for pro bono representation and support for litigants in person.
- Number of cases: These remained constant throughout the last 8-12 months with around 130 to 140 singles claims being received each month.



Employment tribunal fees: gathering momentum for change

In our April update, we reported on what the future may hold for Employment Tribunal (ET) fees.

We commented that the current system was likely to be subject to scrutiny and that scrutiny has now commenced with the tribunal quarterly statistics being published, the government announcing their review into their introduction and the Court of Appeal hearing Unison's latest appeal in their challenge against the fees.

Government review:

When ET fees were introduced in July 2013, the government promised a review into their impact and on 11 June 2015, this internal review was launched. Notably this does not amount to a fully public consultation although we understand that the Government is expecting to receive input from interested bodies which we know includes the ELA (the employment lawyers' association).

The purpose of the review is said to consider the effect of the introduction of fees and the current remission scheme in achieving their financial and behavioural objectives, while maintaining access to justice. The Ministry of Justice set out in their Terms of Reference, what evidence they will seek to rely on in their analysis, together with the factors they will consider.

The review is expected to be completed later in 2015, with the recommendations to follow.

Unison's appeal:

Following our report in our May update regarding Unison's latest appeal in their challenge of the lawfulness of ET fees, the Court of Appeal heard submissions from both the Ministry of Justice and Unison in a 2 day hearing. The judgment is yet to be issued.

Quarterly Statistics:

The Ministry of Justice has also published the statistics for tribunals for the period January to March 2015. Overall, there was a decrease of 52% of single claims received in 2014/15 compared to 2013/14.

What is clear from these recent developments is that there is clearly momentum and pressure is gathering for change. With all of this activity, we will make sure that we keep you posted on any further developments.

Forward-thinking staff incentives: who's doing what

Employers are constantly looking for new ways to incentivise their staff and employees. Over the last year a number of employers in the UK have taken this to the next level by offering unprecedented and generous terms in respect of leave and pay in a bid to revolutionise the workplace.

Virgin announced last year, that following a success story at Netflix in the US, they were to start operating a non-policy on holidays. This allows all salaried staff to take annual leave whenever they want for as long as they want. There is no need to ask for prior approval and neither the employees themselves nor their managers are asked or expected to keep track of their days away from the office. It is left to the employee alone to decide.

Virgin is now offering employees who make use of the new Shared Parental Leave legislation up to 100 percent of salary over 52 weeks.

Josh Bayliss, CEO at Virgin Management, explains the philosophy behind this decision:

"We pride ourselves on our family-friendly and home/work life policies – from parental leave and unlimited leave entitlement to flexible working. The introduction of the new Shared Parental Leave legislation was a great opportunity for us to review our existing maternity, paternity and adoption benefits, and offer something special to our people."

Sacha Romanovitch, the first female CEO of major City accountancy firm, Grant Thornton, has also announced forward-thinking plans for implementing an employee profit share scheme and intends to cap her own salary. She wishes to instil a new philosophy and bring back trust and integrity into the business world.

Her plans are to introduce a "shared-enterprise" system, modelled on that operated at John Lewis, to allow for future profits to be shared between all of Grant Thornton's 4,500 staff. In addition, she intends to "crowd-source" new business ideas, potentially allowing more junior staff to join board meetings.

Some of these new ideas and schemes are likely to be expensive to trial and implement and therefore may only be limited to larger companies. However, it is possible that if these new schemes and policies (or non-policies) prove to be successful, more and more employers will follow and adopt them for their own employees.

Advocate General says: for workers with no fixed place of work, time spent travelling to and from home is "working time"

In a Spanish case, Advocate General (AG) Bot has given his opinion before the European Court of Justice (ECJ) that, for those workers who do not have a fixed place of work, the time spent travelling from their home constitutes "working time".

This case involved companies involved in the installation of security systems and maintenance. Each technician would travel from home in a company vehicle to their first installation job and drive home at the end of the day. They would be told by their employer where their jobs would be via a mobile phone app. The companies did not factor in the journeys to and from a technician's home when calculating working time. The technicians complained to the Spanish courts, who referred the question of whether the time spent travelling at the beginning and end of the day by a worker with no fixed place of work constituted "working time" for the purposes of the Working Time Directive.

The AG gave his opinion that the first and last journeys of the day should be classified as working time. To satisfy the definition of "working time", workers must be: at the workplace, at the disposal of the employer or carrying out their activity or duties. The AG commented that the workers were travelling to or from locations determined by the employer and therefore considered to be at the employer's disposal. As they had no fixed workplace, travelling was an integral part of their job and inherent in the performance of their activities. The AG therefore concluded that those requirements were met during the first and last journey of the day.

Whilst this is only the opinion of the AG and the full judgment from the ECJ is awaited, these opinions are usually followed.

If the ECJ do follow the AG's opinion, we would advise that employers, who have employees with no fixed place of work, analyse their working patterns and hours. This is especially relevant to those who employ mobile engineers. Employers may wish to check whether they have opt-out agreements in place for employees over the 48 hour week average and whether they allow for appropriate rest breaks. Under EU law, workers are entitled to a period of 11 consecutive hours' rest in each 24-hour period.

This could have significant implications in respect of pay, national minimum wage and health and safety. Employment documents may therefore need to be reviewed to ensure compliance and employers may wish to implement new policies, including monitoring procedures to avoid any abuse.

No implied duty to disclose previous misconduct

The EAT has ruled that, in the absence of an express term, an employee was not under an implied duty to disclose allegations of previous misconduct to his employer.

In the case of The Basildon Academies v Amadi, Mr Amadi worked part-time as a tutor at The Basildon Academies on Thursdays and Fridays. From September 2012, he entered into a zero hours contract with Richmond-upon-Thames College to work Monday to Wednesday. Mr Amadi did not inform the Academies of his employment with the College in breach of an express term of his contract requiring him to do so.

In December 2012, allegations of sexual assault were made against Mr Amadi by a pupil at Richmond-upon-Thames College and he was suspended as a result. Following police involvement, no further criminal action was taken against him. He did not inform the Academies of these allegations.

As a result of the police investigation, the Academies found out about the allegations and Mr Amadi's employment with the College and dismissed him for two acts of gross misconduct on these grounds.

In the first instance, the Employment Tribunal held that Mr Amadi had been unfairly dismissed. The Academies subsequently appealed, arguing that there was an implied duty to disclose the allegations, however the Employment Appeals Tribunal (EAT) upheld the decision. The EAT found that, as a matter of law, there was no implied term requiring employees to disclose their own misconduct to their employer. The Academies Code of Conduct, which formed part of Mr Amadi's contract of employment, did not expressly state that he had to disclose his own misconduct. There was therefore no breach of contract.

Mr Amadi's failure to notify the Academies of his employment with the College was held to be insufficient to justify dismissal in isolation, however his compensation was reduced by 30% due to his own contributory fault.

The EAT commented that the tribunal's original decision, was fact-specific and not necessarily of general application. It is likely the outcome would have been different had there been an express term requiring Mr Amadi to report his own misconduct and/or allegations. Therefore, where an employer requires such a disclosure, as there is no implied duty on employees, employers should review their employment documents to ensure that their terms and policies are clear and well-drafted.

If you have any concerns in relation to your current employment documents, please do not hesitate to contact us.

Dismissal for coming to work smelling of alcohol was unfair

An Employment Tribunal (ET) has held that an NHS worker was unfairly dismissed for coming to work smelling of alcohol in the absence of evidence to demonstrate he was unfit for work.

In McElroy v Cambridge Community Services NHS Trust, Mr McElroy was suspended after his line manager reported that he smelled of alcohol. The matter was also referred to the Trust's Occupational Health (OH) department.

Mr McElroy denied that he had come into work drunk and had instead asserted that he had only had a few drinks the night before. There were also accounts from colleagues that he had attended work under the influence on more than one occasion. However, there was no evidence to suggest that he was unfit for work. An OH report suggested that he was fit to return to work but he refused to attend a further appointment once disciplinary proceedings had commenced.

Following a hearing, Mr McElroy was summarily dismissed for gross misconduct. In the decision letter, the Trust added the refusal to participate in the OH referral as a reason for dismissal. Mr McElroy appealed against the decision, however his appeal was rejected and he then issued a claim for unfair dismissal.

The ET held that, as there was no evidence of impairment to function and no one had expressed concern in respect of Mr McElroy's behaviour, the reasonable employer would not treat smelling of alcohol as amounting to gross misconduct under the Trust's disciplinary procedure and substance misuse policy. The ET held that it was unreasonable for Mr McElroy to refuse to attend the OH appointment, however it was not put to him that it would be considered a disciplinary matter prior to the hearing. The ET held that the dismissal was unfair.

This case demonstrates the need for employers to ensure that they tailor their procedures and policies and ensure that they follow them. In this case if the Trust had wished to be able to dismiss in these circumstances their policy would need to have included being under the influence of alcohol and not just unfit for work as an act justifying summary dismissal.

If you would like to discuss reviewing your current policies and procedures, please contact us.

The cap doesn't fit: restricting the restricted certificates

Each year, the government limits the number of 'Restricted' certificates of sponsorship awarded to newly-hired overseas migrants. This is set at 1,750 per month for 2014/15. The limit was exceeded for the first time in June. This article looks at what the criteria are and how employers may seek to manage this.

These rules first came into force in April 2011. It was envisaged at that time that the cap may soon be exhausted but, in practice, this did not happen. It has been apparent in the latter half of 2014 and 2015 that an increasing number of requests were being made.

How does this work?

UK Visas and Immigration considers submissions made each month by employers for the issue of restricted certificates of sponsorship. Every application must score a minimum of 32 points to be considered for approval.

The consideration is based on the number of points scored by each application based on the following criteria. Priority consideration is given to:

- roles on the shortage occupation list (scores 75 points);
- jobs in a research field which need a PhD (scores 50 points); or
- posts in respect of which a resident labour market test has been carried out, if necessary (30 points).

Points are also scored based on the salary the role attracts; the higher this is, the more points are awarded. This is currently includes the following:

Salary range	Points available
£25,000 - £25,999.99	7
£26,000 - £26,999.99	8
£27,000 - £27,999.99	9
£28,000 - £31,999.99	10
£32,000 - £45,999.99	15
£46,000 - £74,999.99	20
£75,000 - £99,999.99	25

It is understood that, in June, the minimum qualifying mark was 50 points to be issued a Certificate. This means that, subject to meeting the other qualification criteria, 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, IT workers, architects, nurses, healthcare professionals and those in the creative industries were all refused certificates of sponsorship in June on the basis that their salaries were too low.

What are the potential issues?

Whilst this is far from a new policy, it is the first time the cap has impacted applications. The main differentiator for the allocation of certificates will be salary. Groups of employers who may be disproportionately impacted by the cap include:

- Employers outside London, where salaries are generally lower;
- Companies in relatively low-paid sectors (such as those to do with science and engineering, for example);
- Smaller employers;
- Those who hire international graduates or people at early career stages as trainees.

The existence of a cap has caused controversy in the past and the fact that some applicants were rejected on the basis of salary has drawn criticism. Mark Hilton, head of immigration policy at London First, was quoted as saying: "Every skilled migrant we turn away as a result of this cap will hit jobs and growth. Of course business wants to hire locally, but you can't just magic people up with highly specific skills because they take years to develop." Madeleine Sumption, director of the Migration Observatory at Oxford University, had a similar view, stating: "The cap has been hit at a time when many companies are hiring recent graduates from both the UK and overseas. In the short term there is likely to be some disruption for businesses that have been counting on hiring specific candidates. More broadly, the cap is reshaping the skilled migration system as we know it in the UK, making it much more difficult for businesses and the public sector to hire lower-paid skilled workers, including nurses and younger people - who tend to earn less. The impact on net migration …is likely to be relatively small - non-EU workers made up 13% of UK immigration in 2014."

The Migration Advisory Committee has been asked to report by the end of the year on further restricting work visas to a narrower range of job shortages or highly specialist experts. Ministers are also proposing a "skills levy" on visas to fund UK apprenticeships and raising salary thresholds to prevent firms using foreign workers to undercut wages.

How might these be resolved?

I have been making restricted certificate of sponsorship applications for companies over the last four years and had two initial observations:

- The salary level required to be issued a certificate this month seems high. That would have impacted almost all those at entry level for whom I have made these applications in the past, but also many experienced professionals too. Employers need to make a substantial commitment to start this process.

- Many companies only enter the process of sponsor licencing in order to hire one specific individual, for whom there is no alternative immigration solution. Making an offer of employment, ensuring a resident labour market test is properly conducted and assessed then requesting the restricted certificate of sponsorship require time and expense for all employers, although there is a disproportionate cost to small users of the system. For employers to be advised, several weeks into the process, that sponsorship is not possible after all because the salary is to low seems extremely unfair; a major deterrent to employers considering international candidates at all.

What are the alternatives to making a restricted certificate of sponsorship application and hoping things will be OK? I think there are three possibilities:

- Trying to find alternative applications within existing UK immigration law. The United States has been subject to an immigration cap for skilled workers over many years and lawyers are used to thinking creatively about different ways to hire new employees. This article illustrates some of the potential alternatives there and whilst the names and requirements of the categories differ, I suspect we will be providing similar advice shortly;

- That the terms of the cap may be amended to better reflect the needs of the employment market. There does seem to be unfairness in simply allocating permission to work to those earning the highest salaries for the reasons above. The consequences of it proving difficult to hire key public sector workers as a result of this needs to be re-visited;

- International assignments to the UK may need to be restructured generally, such that restricted certificates are no longer necessary. For global companies, that might be done by ensuring that potential assignees to the UK meet the Intra Company Transfer criteria, with an acknowledgement at the outset that the permission to stay will be temporary only. For many however, there will simply not be a suitable opportunity to make new international hires from outside the company.

It seems unlikely that the cap will simply be increase to meet employer demand in view of the Government's commitments to reduce net migration. Next month's Certificate cap will be watched with great interest.

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