Employment law update

MOORE BLATCH
solicitors

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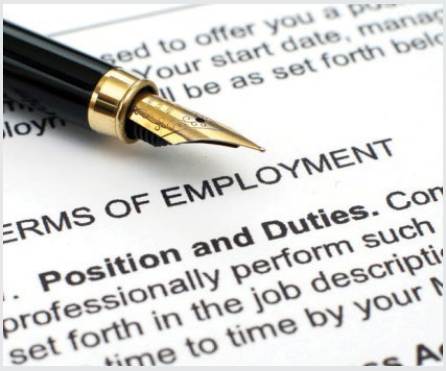

Welcome to our employment law monthly update.

This month, following the end of the summer and the holiday season we re-consider the issue of holiday pay following the Court of Appeal's judgment in Lock v British Gas. Additionally the dispute continues in relation to whether holiday pay should include voluntary and non-voluntary overtime. In addition we report on the proposed changes to the tax treatment of termination payments.

This month's immigration article considers the steps EU nationals can take to acquire British Citizenship.

We also say goodbye to Hayleigh Sears and welcome David Hutber as our trainee solicitor in the employment team for the next six months.

If you have any comments or questions, please do not hesitate to contact me on 02380 718094. You can also follow us on Twitter for the latest employment news @MBEmployment.

With kind regards,

Katherine Maxwell

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Employers cut down on hiring and investment following Brexit

In our last update we reported on the likely effect of the Brexit vote on UK employment law. Whilst there are no immediate plans to change workers' rights, a new study suggests that some employers have halted recruitment following the outcome of the EU referendum.

The study, by CIPD and Adecco Group UK and Ireland, found that 33% of employers expect Brexit to increase their costs and 40% expect it to make it more difficult to recruit EU migrants over the next 12 months. The survey is based on UK employer opinion both two weeks before and two weeks after the EU referendum.

Similarly, 21% of employers expect they will need to reduce investment in training. Whilst 36% expected to increase staffing levels over the next three months, this was a reduction from a pre-Brexit 40%, showing a significant 4% decrease.

The data provided therefore demonstrates a clear decrease in employer optimism following the Brexit vote. However, it is likely that the current uncertainty around Brexit is making employers cautious, and it will be interesting to see how recruitment trends change further once the exact terms of the UK's exit have been negotiated and finalised. In particular, if there is difficulty with obtaining workers from the EU, or obtaining sponsorship for existing EU workers, we may see a significant increase in hiring levels in order to address a deficit in the workforce.

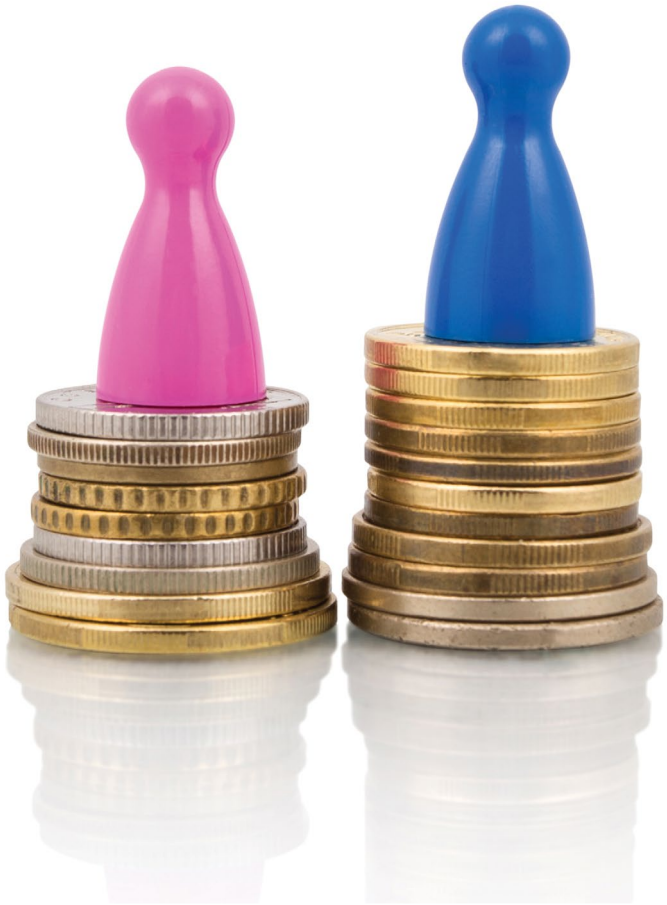
If you have any queries on the effect of the Brexit on your employees or workers, please get in touch.

Full details of the survey can be found here.

Quick fire news

Gender pay reporting regulations delayed

It has been confirmed by the Government Equalities Office (GEO) that the publication of the final Equality Act 2010 (Gender Pay Gap Regulations) 2016 has been delayed.



The Regulations, which will require companies with 250 or more employees to publish certain information in relation to the way they pay their employees and their gender pay gap, were originally intended to come into force on 1 October 2016. However, it is now expected that they will be laid before Parliament in the autumn and come into force in April 2017.

Nonetheless, provided the Regulations come into force by 30 April 2017, it is unlikely that the first "relevant date" for the purposes of the Regulations will be altered. This means that the first gender pay reports will still be due by the end of April 2018.

Similarly, despite the delay in the publication of the Regulations, section 78 of the Equality Act 2010, which allows for the creation of the gender pay regulations, still came into force on 22 August 2016.

We will continue to keep you updated on the progress of the gender pay reporting legislation. In the meantime, please get in touch if you have any queries in relation to gender pay reporting or equality of employment terms.

National minimum wage update: rates increase for most age bands

As of 1 October 2016, the national minimum wage has increased for most age bands as set out below:

- Workers aged 21–24:
  from £6.70 per hour to £6.95 per hour
- Workers aged 18–20:
  from £5.30 per hour to £5.55 per hour
- Workers aged 16–17:
  from £3.87 per hour to £4.00 per hour
- Apprentices (aged under 19 or in the first year of their apprenticeship):
  from £3.30 per hour to £3.40 per hour.

The national living wage (the minimum hourly rate permitted to be paid to those aged 25 and over) remains at £7.20 per hour.

Please get in touch if you have any queries in relation to the national minimum wage.

Holiday pay update

The issue of holiday pay has been highly contested in recent years, particularly in relation to whether payments beyond basic wages, such as commission or overtime, should be included.

It is well known that under the Working Time Directive ('WTD'), all member states must ensure that workers have the right to at least four weeks' paid annual leave. The WTD is implemented into UK law by the Working Time Regulations 1998, which states that employees are entitled to be paid at the rate of a week's pay for each week of leave, calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996 ('ERA 1996').

The ERA 1996 makes a distinction between employees with normal working hours and those with no normal working hours. Where an employee has no normal working hours, their week's pay will be based on their average weekly remuneration calculated over a 12 week reference period. As mentioned above, there has been significant judicial debate over whether these payments should include other payments, such as commission and overtime pay.

This month we bring you two updates in relation to holiday pay: one in relation to results-based commission; and one in relation to voluntary overtime.

Should commission be included in holiday pay?

On 7 October 2016 the eagerly awaited Court of Appeal's ruling in the case of Lock v British Gas was handed down. The Court of Appeal upheld the Employment Appeal Tribunal's decision that results-based commission should be included in holiday pay.

As a reminder, in this case Mr Lock brought a complaint of unlawful deduction of wages in the form of unpaid holiday, because when he was on annual leave he did not generate any commission payments and therefore felt he was at a disadvantage when taking annual leave. This case has since been to the Tribunal, the European Court of Justice, the Employment Appeal Tribunal and finally the Court of Appeal who have confirmed that results-based commission should be included in holiday pay.

However, there is a chance that British Gas may choose to appeal this decision to the Supreme Court and therefore we still may not have a definitive judgement. Additionally the Court of Appeal gave no guidance in their judgment on how to calculate the amount when factoring in commission payments. Therefore although the long awaited judgement is now with us, we question how much assistance it has given us!

We will of course keep you updated with any further developments.

Should voluntary overtime be included in holiday pay?

An employment tribunal has recently determined that voluntary overtime and other voluntary payments should have been included in the payment of statutory holiday pay (Brettle v Dudley Metropolitan Borough Council ET/1300537/15).

The current position is that non-guaranteed but compulsory overtime should be included in the payment of holiday pay (Bear Scotland Ltd v Fulton and others UKEAT/0047/13). Similarly, in the case of Williams and others v British Airways plc, the European Court of Justice ruled that a worker is entitled not only to their basic salary whilst on holiday, but also to any remuneration which was "intrinsically linked to the performance of the tasks he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided."

The recent case of Brettle involved a claim for unlawful deduction of wages against a directorate which carried out housing repairs for the Dudley Metropolitan Borough Council. The claim was brought by five lead claimants in respect of 56 employees. The claimants argued that they had received the incorrect rate of holiday pay and that their holiday pay should have included amounts in respect of voluntary overtime, voluntary standby allowances and call out payments. The employees worked different patterns and worked overtime with varying degrees of regularity.

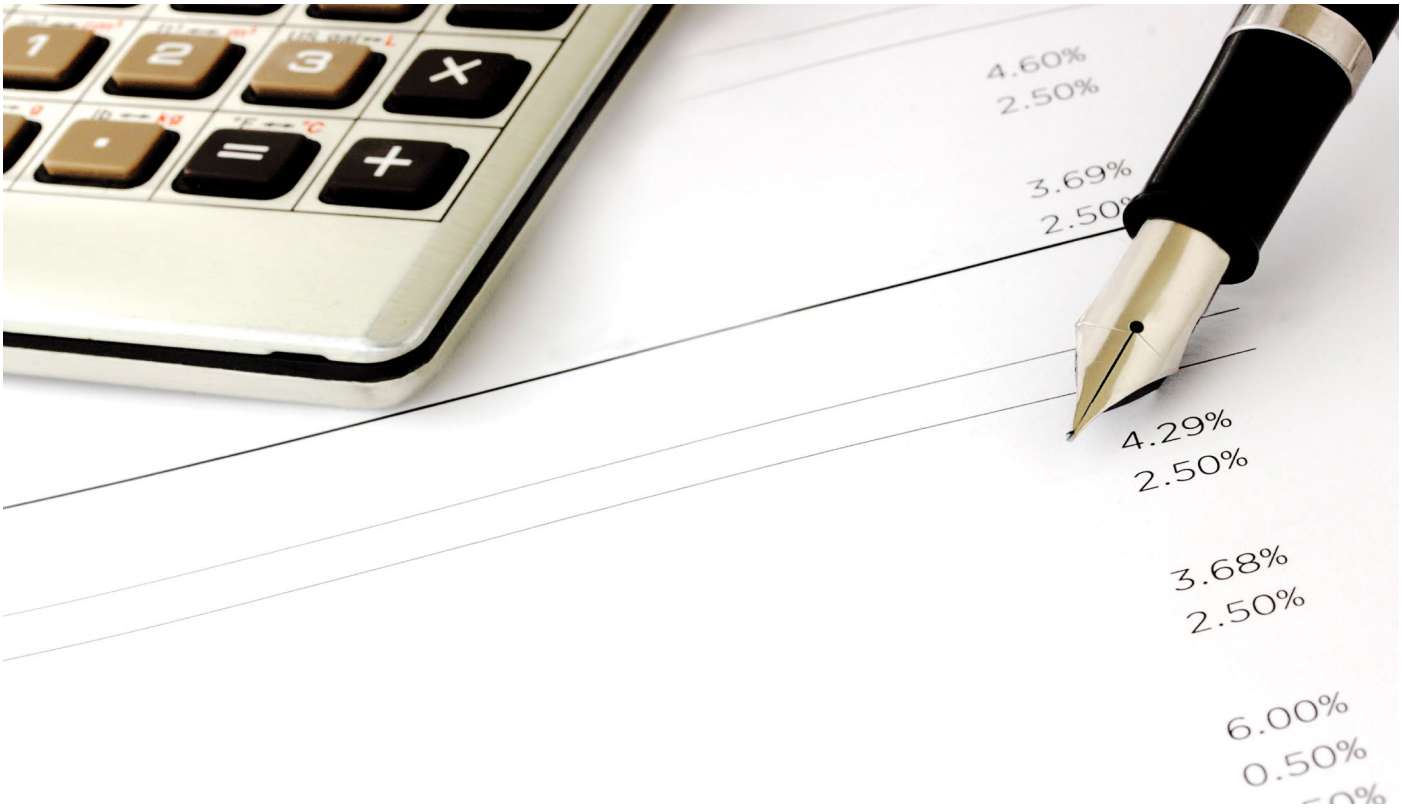
When making a decision in favour of the employees, the employment tribunal considered the test in Bear, which stated that "that which is normally received is normal remuneration" for the purposes of calculating holiday pay. On this basis, the tribunal considered that the voluntary payments should be included in holiday pay for most of the lead claimants. Similarly, it noted that failing to include these payments might deter a worker from taking their holiday, which went against the principle set down in the case of Williams and others v British Airways plc that workers should not be deterred from taking leave.

As a first instance decision, this decision is not binding on other tribunals. It will be interesting to see if other decisions are decided in a similar fashion. Similarly, it is not surprising that the simple test in Bear, whereby a payment an employee normally received is part of remuneration, was applied to include voluntary overtime, where overtime was regularly worked. In particular in this case, although the rotas were voluntary, once an employee's name was on a rota, they were required to attend work. As such, the payments could be said to be "intrinsically linked" to the work that was required to be done under the contract by the worker. Going forward, in the case of employees with no normal working hours, employers may wish to consider whether voluntary overtime is worked with sufficient regularity and so intrinsically linked with the employment contract that it should be included in the payment of holiday pay.

If you have any queries in relation to the payment of holiday pay please do not hesitate to get in touch.

Draft legislation on changes to termination payments published

HM Revenue & Customs has published draft legislation on changes to the taxation of termination payments.



Consultation on possible changes to the taxation of termination payments began in July 2015. The government has now published its response to the consultation together with draft legislation. Currently, the proposed changes are as follows:

- To make all payments in lieu of notice ('PILON') taxable and subject to national insurance contributions, even if they are non-contractual payments. Currently, PILONs are generally not considered taxable unless there is an express provision in an employee's terms and conditions of employment allowing for PILONs to be made.
- To make employer NICs payable on all termination payments over £30,000. Under current rules, termination payments over £30,000 are only subject to deduction for income tax.
- To remove the current foreign service relief exemption; and
- To clarify that the tax exemption on awards for injury does not include injury to feelings, as there are currently conflicting judicial authorities on this point.

As such, all termination payments up to the value of £30,000 will continue to be tax free. Similarly, whilst employer NICs will be due on sums in excess of this amount, employees will not be liable for any employee national insurance contributions in respect of the entirety of the termination payment.

The government is proposing the changes to avoid manipulation by employers seeking to avoid paying employer national insurance contributions. However, it is possible that some employees will be slightly worse off as a result of the changes, as PILONs become taxable in the same way as any outstanding accrued holiday, whereas previously they may have been paid tax free as part of the £30,000 exemption.

Consultation on the draft regulations remains open until 5 October 2016 and any changes are intended to come into effect in April 2018.

Please get in touch if you have any questions in relation to employee termination payments.

ACAS publishes new research that finds employer concerns re tattoos might prevent them from hiring talented individuals

In 2014 we advised that a person should take the risks to their employment prospects seriously when getting a tattoo. Tattoos are expressly excluded from the protection of the anti-disability discrimination provisions of the Equality Act 2010. As a consequence employers may dismiss or refuse to hire someone because they have a tattoo, though any action taken by employers is subject to the general obligation to conduct a fair and reasonable process.

Nevertheless while we advised of the dangers of getting a tattoo, we also asked whether, with the number of people with tattoos growing each year, employers might be forced to alter their stance to ensure that they hire the most appropriate person for the job.

In line with our comments, new research from workplace experts Acas reveals that employers risk losing talented young employees due to concerns about employing people with visible tattoos.

The research found that some employers expressed fears about how potential clients and customers might react to employees with tattoos. Nonetheless despite these worries, Acas also highlighted the fact that 29% of people aged 16–44 now have a tattoo. Consequently it is important to ensure that any policy regarding tattoos does not prevent employers from drawing from this potential pool of talent.

Acas Head of Equality, Stephen Williams, said:

"Businesses are perfectly within their right to have rules around appearance at work but these rules should be based on the law where appropriate, and the needs of the business, not managers' personal preferences…almost a third of young people now have tattoos so, whilst it remains a legitimate business decision, a dress code that restricts people with tattoos might mean companies are missing out on talented workers."

In light of the above while businesses might have understandable concerns regarding visible tattoos, they might also want to adapt their recruitment policies to ensure that potential talent is not missed where it is appropriate to do so.

If you have any questions regarding your recruitment policies and dress codes at work please do not hesitate to contact us.

Cases

Discrimination protection does not extend to job applicants who only apply to seek compensation

A recent decision of the European Court of Justice has confirmed that EU directives prohibiting age and sex discrimination cannot be relied upon by a job applicant who only applies for a role with the intention of claiming compensation (*Kratzer* v *R+ V Allgemeine Versicherung AG* C-423/15).

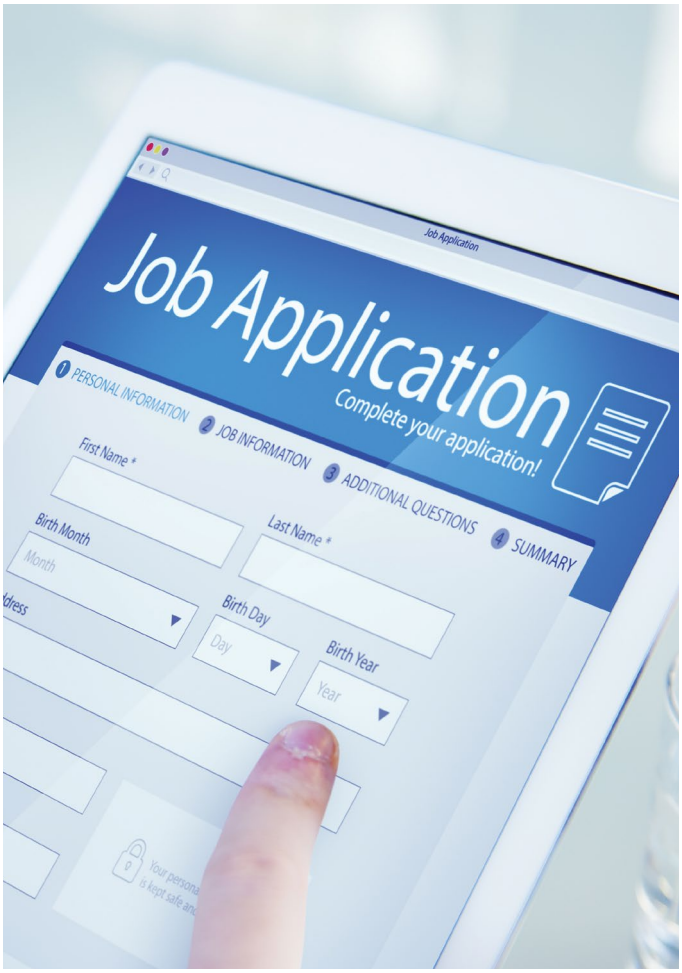
The Equal Treatment Framework Directive (2000/78/EC), together with the Recast Equal Treatment Directive (2006/56/EC) (the 'Directives') prohibits discrimination in employment. This protection extends to job applicants and therefore covers selection criteria and recruitment conditions.

This case involved an advertisement by R+ V Allgemeine Versicherung AG ('RAV') for graduate trainees in the fields of economics, mathematical economics, business informatics and law. The application stated that applicants must have a good university degree in one of the specified fields completed within the last year or due to be completed in the next few months, as well as relevant practical experience. Legal graduates were also required to have passed both state examinations and have completed an employment law option, or have medical knowledge.

The Claimant, Mr Kratzer, had applied for a legal position and had experience as both a lawyer and as a manager of an insurance company. RAV rejected his application. In response, the Claimant wrote a letter of complaint to RAV and demanded 14,000 (euros) for age discrimination. RAV then invited the Claimant to an interview, and explained that his rejection had been automatically generated and was not in line with its intentions. The Claimant refused the invitation, and subsequently learned that despite a 50/50 split between male and female applicants, the successful candidates were all female. The Claimant therefore brought a case for both age and sex discrimination in the Weisbaden Labour Court.

Mr Kratzer's claim was dismissed and ultimately reached the Federal Labour Court. The Labour court sought clarification from the ECJ as to whether the protection afforded by the Directives extended to an applicant who had no intention of seeking employment, but instead sought the status of job applicant in order to bring a claim for compensation. The Federal Labour Court also asked whether this would be considered an abuse of rights under EU law.

The ECJ confirmed that where an application for employment is submitted only to entitle the applicant to claim compensation, this does not come within the scope of the Directives. When making its decision, the ECJ reasoned that such an individual



could not be considered to be "seeking employment" within the meaning of the Directives. Additionally, an individual in these circumstances could not be considered a "victim" of discrimination and could not be said to have sustained any loss or damage.

With regards to whether this amounted to abuse, the ECJ considered that this was for the national court to determine. However, the tone of the judgment strongly suggested a finding of abuse was likely on the facts of the case.

The protection offered by the Directives has been incorporated UK law by the Equality Act 2010 and the courts and tribunals are under an obligation to consider applicable case law when making their decisions. It is likely this decision will be seen positively by tribunals and provides support for the decision in Keane v Investigo & Others, which stated that job applicants who have no interest in accepting the role cannot claim discrimination. However, such job applicants are very rare and employers should treat all applicants equally unless it has clear evidence that an applicant is applying disingenuously.

Discrimination: Awards for injury to feelings to increase can increase in line with inflation

The Employment Appeal Tribunal ('EAT') has confirmed that employment tribunals can take the effect of inflation into account on the guidelines on injury to feelings awards, without waiting for further guidance.

When making an award in a successful discrimination claim, an employment tribunal will usually order the respondent to pay compensation for injury to the claimant's feelings. The level of compensation for an injury to feelings award will be decided with reference to the "Vento" guidelines, which derive from the leading case of *Vento* v *Chief Constable of West Yorkshire Police (No.2)* EWCA Civ 1871. In this case, the Court of Appeal set out three bands of potential awards, with the appropriate band being decided with reference to the seriousness of the discrimination. These were subsequently updated in the case of Da'Bell v NSPCC to take into account the effect of inflation. The bands are currently as follows:

- Lower Band: £600 – £6,000
- Middle Band: £6,000 – £18,000
- Higher Band: £18,000 – £30,000

Similarly, from 1 April 2013, the Court of Appeal ruled that any compensation awarded in civil courts should be increased by 10%, to take into account changes to the recovery of costs. However, there is currently conflicting judicial authority as to whether this applies to tribunal awards.

The Vento guidelines were recently reconsidered by the EAT in the case of AA Solicitors Ltd v Majid. Here, the claimant, Miss Majid, successfully brought claims in the employment tribunal against her employer for sexual harassment. The tribunal awarded her compensation for injury to feelings in the sum of £14,000, in addition to an award for loss of earnings. When making an award for compensation, the tribunal considered that the case fell within the middle band. The employer appealed to the EAT on the basis that the injury to feelings award was excessive. The EAT dismissed the appeal.

When making its decision, the EAT noted that the Vento bands had already been increased in line with inflation in the case of Da'Bell and confirmed that in future cases, the tribunal did not need to await guidance from the EAT or higher courts to adjust the bands in line with inflation. The EAT also discussed the issue of whether the 10% uplift should be applied, and noted that whilst there is an outstanding appeal to the Court of Appeal on this point in *De Souza* v *Vinci Construction UK Ltd*, until a decision is made in that case, the uplift should apply.

This decision is likely to be considered sensible by tribunals and practitioners and this mirrors the practice of civil courts when awarding damages in personal injury cases. Similarly, it would be unduly burdensome if a ruling from the EAT was required each time.

Please feel free to get in touch if you would like to discuss potential awards for discrimination further.

Immigration

Steps EU Nationals can take to acquire British citizenship

Following the referendum we have received a number of enquiries from EU Nationals keen to formalise their immigration status in the UK as they are currently exercising treaty rights.

The good news is that changes have been made to the provisions relating to EU Nationals becoming British Citizens.

Prior to the 12th November 2015 EU Nationals could qualify for British Citizenship once they had attained the required years of residence and possessed permanent residence for the last twelve months.

However, in accordance with the British Nationality (General) (Amendment No.3) Regulations 2015, after the 12th November 2015 any EU Nationals with permanent residence became required to obtain a residence certificate/card prior to any application for Citizenship.

It has generally been understood due to feedback from the Secretary of State for the Home Department that naturalisation applications can only be made twelve months after a permanent residence certificate/card is issued.

On closer inspection of the Regulations there is no such requirement. Therefore EU Nationals who have completed their five years, a year or more prior to their application for a permanent residence card, can apply for citizenship as soon as the card is issued.

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