MOORE BLATCH

UPDATE

Employment - May 2018

HIGH STREET SUFFERS DESPITE FALLING UNEMPLOYMENT

FACEBOOK'S DATA PROCESSING SCANDAL

CHANGE TO TAXATION OF TERMINATION PAYMENTS

WELCOME TO MAY'S EMPLOYMENT LAW UPDATE

This month we will be discussing the gender pay gap and those that failed to report before the deadline of the 4th April. We also look at Facebook's data processing scandal and how it has brought the GDPR to light in the press. We also detail the most significant change to the taxation of termination payments in many years which has just come into effect.

As always, we bring you some recent case law updates, including the ruling of 'stand-by' time when an employer is 'on-call' and restricted due to work requirements.

If you have any comments or questions, please do not hesitate to contact me on 023 8071 8094. You can also follow us on Twitter for the latest employment news @MBEmployment.

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HOW TO TAX NOTICE PAY WHEN IT IS PAID IN LIEU

RECENT CHANGES TO THE LAW

This April saw the most significant change to the taxation of termination payments in many years. The intention of the change is to tax payments for unworked notice as though the notice had been worked, though the details of the implementation are inevitably more complicated than that.

The main consequence of the change relates to employments that are terminated without full notice, and therefore in breach of contract. Assuming that a contract contains no PILON clause, any settlement of the employee's claim for that breach would previously most likely have been taxed only to the extent it exceeded £30,000.

Under the new rules, the part of that settlement payment taken to compensate the employee for insufficient notice is subject to tax and NICs (any compensatory amount beyond this is taxed under the old rules, potentially with the benefit of the £30,000 tax-free amount).

The new rules contain detailed provisions for determining how much of any settlement payment is to be taken as compensating the employee for insufficient notice. In particular, those provisions start with a notional "basic pay" that takes a specific reference period, deducts commissions and bonuses, and adds back any amounts that are normally deducted under salary sacrifice arrangements.

So it is not enough to just start with the employee's last gross pay. Also, there are detailed (and not entirely intuitive) provisions for computing the amount of notice that the employee did not work, and a detailed fact find will always be necessary to carry out the calculation.

Because the provisions are complex, there is a certain amount of misinformation in circulation. For example, although people may think otherwise, the new rules do apply equally to employees whose contracts contain a PILON clause. Although in practice the new rules are unlikely to significantly prejudice an employee in that position, the employer nevertheless needs to carry out the detailed calculation and withhold any additional PAYE that results.

The new rules represent a significant risk for employers to manage, given that any errors (even if minor) may result in substantial PAYE penalties. We are able to provide training for employers on how to operate the new rules, and of course we are also able to assist you with specific issues when they arise.

At the same time as the change mentioned above, Foreign Service relief for termination payments was also withdrawn for employees who are resident in the UK in the last year of their employment. In some scenarios there may be scope for departing employees to take steps to substantially improve their tax position, but timely tax advice will be essential.

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THE ABOLITION OF EMPLOYMENT TRIBUNAL FEES HAS OPENED THE FLOODGATES

It's less than 12 months since the Employment Tribunal fees were scrapped and already claims are up by 90%.

Moreover, employers should brace themselves as Acas has reported receiving approximately 500 more notifications of early conciliation per week in the last quarter of 2017 compared to the period before the abolition of fees.

Legal opinion

Whilst the Government's time is focused on Brexit, there is unlikely to be any political appetite to revisit the decision to scrap fees following Unison's win in the Supreme Court in July 2017.

As a result, employers need to be prepared for more claims, some of which are likely to be questionable. Employers should take a pragmatic approach as to whether to fight or settle a claim based on costs, potential compensation and chance of success.

We would advise that as soon as you receive any communication from Acas and/or notice of a claim, you seek legal advice so that we can assist you in assessing the best approach to follow.

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WHAT IS WORKING TIME FOR ON-CALL WORKERS?

In the case of Villes de Nivelles v Matze, the European Court of Justice (ECJ) held that 'stand-by' time (which a worker spends at home while being duty bound to respond to calls from his employer within eight minutes) must be regarded as 'working time'.

In the above case, the obligation for the worker to remain physically present at a place determined by the employer (his home) and the 'geographical and temporal constraints' resulting from the requirement to reach his place of work within eight minutes limited the workers ability to devote him/herself to personal and social interests.

The above situation can be distinguished from that of a worker who, during stand-by duty, must be at his/her employer's disposal so that he/she can be contacted only.

Legal opinion

The ECJ's decision that 'stand-by' time should be regarded as 'working-time' confirms that where a worker's freedom to engage in non-work activities during on-call time spent at home is severely impacted, then that time must be classed as working time.

One potential difficulty arising from this decision is how to determine what constitutes 'significantly restricting' opportunities for other activities. In this case, the requirement to respond to calls within 8 minutes was considered a significant restriction. Arguably, the longer the time to respond, the less restrictive a requirement it is.

Ultimately, the quality of time spent on-call (and naturally the freedom that the worker has to pursue other activities) is of overriding importance when determining whether 'stand-by' time is working time.

Any organisation with an on-call requirement would be advised to check whether their policy is appropriate. If requirements are set, employers should consider whether they are too restrictive.

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FACEBOOK'S DATA PROCESSING SCANDAL COULD SET THE TONE FOR GDPR CLAIMS

Ahead of the implementation of the GDPR on 25 May, Facebook and its relationship with Cambridge Analytica could set a quasi-benchmark in consumers' minds about how much their GDPR claim could be worth if their personal data is mishandled.

Accepting the fact that the GDPR and data protection is not the most scintillating subject for most people, Facebook's woes have enabled the press to bring GDPR to light, specifically the right to be forgotten and the right to make a financial claim when data is misused - possibly the most interesting requirements of GDPR from the general public's perspective.

Legal opinion

Employers have huge databases, often many times larger than their current staff numbers as businesses often retain information on former employees, contract staff, failed job applicants and even the numerous CV's that they receive.

While a data breach at your company won't necessarily be as headline grabbing as Cambridge Analytica's acquisition of 50 million Facebook users without their consent, it could be equally damaging.

There are other issues that employers must consider including the ways rules and regulations surrounding employee data are being tightened.

One notable change is that employers cannot rely on blanket consent to process their data.

Consent can only be requested if the employee can genuinely give consent and has the option to say 'no' or withdraw this consent at any time.

If you haven't already done so we advise carrying out an audit of all the personal data that you hold on your employees.

You will need to put in place privacy notices to address the different points in the employment life cycle that you may retain personal data such as recruitment and your practice in relation to former employees.

You should then consider updating your template employment contracts for new employees; updating data protection policies and other policies in your handbook where relevant for example disciplinary policies, and updating or drafting privacy policies and data retention policies.

We can assist you in reviewing the results of your audit and determining whether you have a lawful justification for retaining this personal data under the GDPR.

We can also assist with drafting and updating relevant documentation.

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THE HIGH STREET SUFFERS DESPITE FALLING UNEMPLOYMENT

ENSURE REDUNDANCY POLICY IS FAIR

We have just seen the lowest unemployment figures since May 1975, but despite this positive outlook, in many parts of the country the High Street is suffering.

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Already in 2018, according to the Press Association, 21,413 staff have been made redundant or had their role threatened - the bulk of these losses being at established high street chains.

Since January, Toys R Us and Maplin have filed for administration, while retailers such as New Look and Select are closing stores. The casual dining sector has also suffered, with Prezzo, Byron and Jamie's Italian chains all shutting restaurants and culling hundreds of jobs.

Supermarket giants have also made deep cuts, with Morrisons, Sainsbury's and Tesco axing 5,200 roles between them.

Legal opinion

The High St is undergoing major structural changes coupled with arguably unsustainable business rates. As a result, cuts are likely to be ongoing. It is important to ensure that whilst there is never a good time to make redundancies; if redundancies are required the process is carried out fairly to avoid any potential unfair dismissal claims.

EQUALITY AND HUMAN RIGHTS COMMISSION REPORTS ON TACKLING SEXUAL HARASSMENT IN THE WORKPLACE

The Commission has made a number of recommendations to the government, including:

- The introduction of a statutory code of practice, with tribunal discretion to increase compensation by up to 25% where the code is not followed.
- The introduction of legislation making any contractual clause which makes disclosure of future acts of discrimination, harassment or victimisation void.
- Amending the limitation period for harassment claims in an employment tribunal to six months from the latest of (i) the act; (ii) the last in a series of acts; or (iii) exhaustion of any internal complaints procedure.
- Safeguards to restrict the use of confidentiality clauses to prevent disclosure of past acts of harassment.

Legal opinion

The government has not stated or implied that it will be following this report but we would advise businesses to be aware of the way the tide is turning.

Ultimately employers should be taking reasonable steps to protect workers from harassment and victimisation in the workplace and ensure that they have an effective anti-harassment policy in place which they would feel confident to publish if requested.

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FAILURE TO ENHANCE SHARED PARENTAL LEAVE IS NOT DIRECT SEX DISCRIMINATION

The case of *Capita v Ali* concerns a father who took shared parental leave so that his wife could go back to work. The wife was suffering from PTSD and was advised that returning to work could help her condition.

The father was not entitled to full pay during his shared parental leave. The father claimed direct sex discrimination because he argued that a female equivalent worker would have received full maternity pay for maternity leave during the same period.

The Employment Appeal Tribunal (EAT) found that the purpose of maternity leave and pay is to protect the health and wellbeing of a woman during pregnancy and following childbirth, the level of pay being inextricably linked to this purpose. Therefore, the Tribunal found that a father's situation is not comparable to a mother's.

The EAT said that there is therefore no direct discrimination when a higher level of maternity pay is given than would be given to either sex on shared parental leave. The EAT held that payment of maternity pay at a higher rate did fall under s13(6)(b) of the Equality Act as special treatment afforded to a woman in connection with pregnancy or childbirth.

Legal opinion

This case confirms the procedures that most employers already abide by and therefore no changes in policy are necessary. In any event, the case is useful to know as there is now appellate authority on the matter.

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THE GENDER PAY GAP
DID YOU FAIL TO REPORT?

More than 1500 companies who employ over 250 people failed to report their gender pay gap results on the 4th April.

While for many businesses it was a bit of a damp squib, those that failed to report could face a tougher time, not least because failure to report is a breach of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. In addition, businesses that fail to report could face more scrutiny both internally and externally.

Legal opinion

For many employers any gender pay gap difference is a function of their workforce structure and historic recruitment policies (or indeed applicants) and is in no way a reflection of unequal pay, which is unlawful.

However, it will now form the benchmark going forward and does provide an open opportunity to address the female role in the workplace.

Where there are opportunities to address any issues with the underlying male /female ratios there are various options that can be considered.

Options that could make a significant difference include better childcare arrangements, improved recruitment methods, salary transparency, encouraging paternity leave, assessing targets and bonus structures, improved training and addressing any cultural issues a business may have.

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