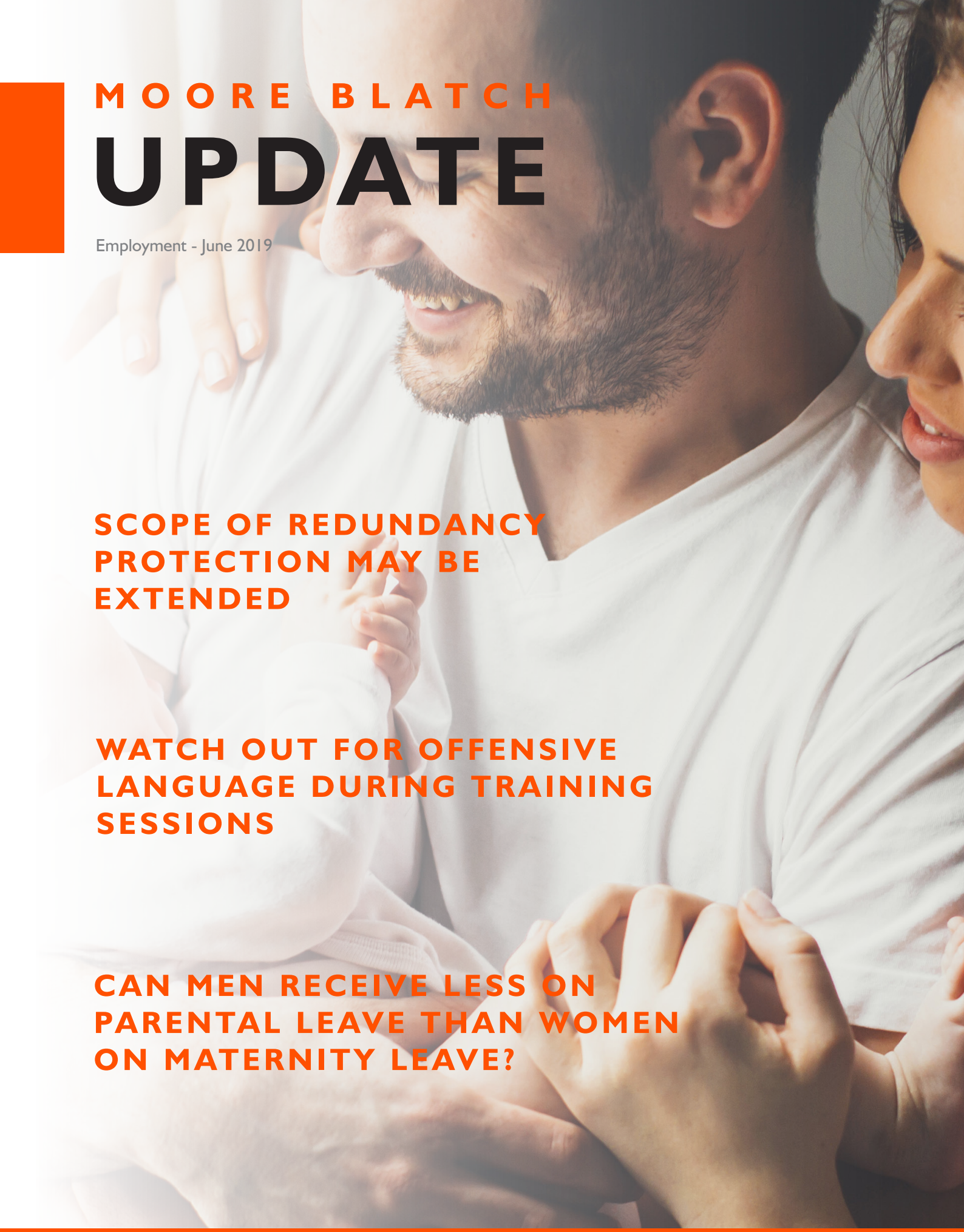
MOORE BLATCH

UPDATE

Employment - June 2019



SCOPE OF REDUNDANCY PROTECTION MAY BE EXTENDED

WATCH OUT FOR OFFENSIVE LANGUAGE DURING TRAINING SESSIONS

CAN MEN RECEIVE LESS ON PARENTAL LEAVE THAN WOMEN ON MATERNITY LEAVE?

WELCOME TO JUNE'S EMPLOYMENT LAW UPDATE

Discussing shared parental leave, redundancy protection for new parents and a guest article from our Immigration team.

This month's update covers the possible extended redundancy protection for new parents, how a training session resulted in a successful racial harassment claim and the COA's ruling that men on shared parental leave need not be paid as much as women who are on enhanced maternity pay.

Our June issue also features a guest article from our immigration team giving useful pointers for employers to ensure that they are compliant with rules relating to overseas workers.

You may have seen the recent announcement of Moore Blatch's 10 key promotions this year. We are delighted for our very own Emma Edis who has been promoted from associate to partner – well done!

Katherine Maxwell
Partner and head of employment
023 8071 8094
katherine.maxwell@mooreblatch.com

QUICK NEWS: SCOPE OF REDUNDANCY PROTECTION MAY BE EXTENDED

On 20 May, a 10-minute Rule Bill was introduced in the House of Commons to extend redundancy protection for women and new parents.

This is further to the publication of the Women and Equalities Select Committee (WESC) support for the proposal on 1 May.

The bill seeks to extend the six-month protection from redundancy to begin from the day a mother returns from maternity leave, and not when an employer is first notified in writing of the pregnancy.

The bill goes further as it also seeks to encompass women who experience a stillbirth or miscarriage – they too would be protected six months from the end of their pregnancy or any leave entitlement. We will keep you updated on further developments.

Katherine Maxwell
Partner and head of employment
023 8071 8094
katherine.maxwell@mooreblatch.com

QUICK NEWS: PARENTAL BEREAVEMENT LEAVE EXPECTED TO COME INTO FORCE IN 2020

The government has confirmed its intention to introduce parental bereavement leave and pay.

This legal right is expected to come into force in April 2020 and will apply to all employed parents and primary carers who lose a child under the age of 18, or suffer stillbirth from 24 weeks of pregnancy.

The proposals include giving bereaved primary carers the option to take - within 56 weeks from their child's death - either two weeks leave, two separate periods of a week each, or just a single week of leave.

If you would like more information as to how best to prepare for this change, please do get in touch.

Stephanie Bowen
Solicitor
023 8071 8185
stephanie.bowen@mooreblatch.com

HMRC LOSES ANOTHER IR35 APPEAL TO ITV LOOSE WOMEN PANELLIST

Atholl House Productions Ltd v HMRC.

Kay Adams is best known for her appearances on ITV's Loose Women and the BBC's Kay Adams Show. This dispute concerned Kaye's work for the BBC which she provided via her own personal service company, Atholl House Productions Ltd. HMRC argued that Kaye was a BBC employee and not a freelancer, and therefore challenged her tax assessments over a two year period.

They did this under IR35 - tax legislation designed to tackle tax avoidance by employees who disguise themselves as "self-employed" in order to make tax savings.

The first-tier Tribunal held that IR35 did not apply to Kaye Adams. Some of the reasons for this included:

- The terms of the agreement did not match what actually happened in real life. For example:
  - first call on the presenter's time and control over her other engagements, but neither party were aware of these terms; and
  - that although there was an express right of substitution, this was not practical because it was her show, and so was discounted; and
- The presenter's long history of freelance work, lack of access to BBC systems to perform BBC work from home, and the fact that the BBC's formal processes, such as reviews, did **not** apply to Ms Kaye.

Legal opinion

Coming only a month after Lorraine Kelly won her IR35 case against HMRC, this is another high-profile loss for HMRC. The case is a reminder of the importance of ensuring that the terms of a contract reflect the situation in practice.

It is important to bear in mind that when determining a worker's status, that determination must be based on facts. Additionally, be wary of drawing conclusions from cases which may appear similar but in fact may be very different.

Naomi Greenwood
Partner
020 3274 1006
naomi.greenwood@mooreblatch.com

WATCH OUT FOR OFFENSIVE LANGUAGE DURING TRAINING SESSIONS

Theresa Georges v Pobl Group Ltd.

Ms Georges worked as a cleaner at Pobl Group when, at a diversity training course, the trainer wrote the N-word and P-word on flipchart and asked attendees to shout the most offensive terms they know.

Ms Georges, the only black person in the room, claimed that shouting the 'N word' three times was racial harassment. She also said she felt pressured to say the 'N word', though said another word instead.

The incident left Ms Georges so distressed that she requested annual leave before the end of the training, which was refused. The following day she did not return to work.

Ms Georges subsequently raised a grievance with her employer about the training, but it was not upheld. She later brought the case to the employment tribunal, arguing that the use of the 'N word' in the training environment amounted to racial harassment - the tribunal agreed with Ms Georges.

Legal opinion

Employers must consider carefully how training courses are conducted. The above training session was obviously ill-thought through, but even well-intended sessions can be found to be discriminatory.

This case is also a reminder to employers that they can be held liable for their staff's behaviour if it is deemed discriminatory.

If you would like advice on the law and best practices, please do get in touch.

Emma Edis
Partner
020 8071 8872
emma.edis@mooreblatch.com

REQUESTING PROFESSORS TO RETIRE AT 67 MAY NOT BE DISCRIMINATORY

The Employment Tribunal (ET) has ruled that it is not unlawful to compulsory retire professors, if their retirement helps to boost diversity.

A senior professor, who had worked at Oxford University for three decades, was required to retire at 67 under the University's Employer-Justified Retirement Age (EJRA) policy. As the professor wanted to continue working, he unsuccessfully re-applied for his job. The EJRA policy stated that academics could only work beyond the age of 67 in "exceptional circumstances".

The professor lodged a claim against the University on the grounds of age discrimination and unfair dismissal – both of which were unsuccessful.

Finding the University's EJRA policy not to be discriminatory, the ET noted that it was time to open up senior positions to a more diverse group of academics such as women, the younger generation, people with disabilities, and those from different racial backgrounds.

If you are considering introducing a compulsory retirement age and would like expert advice as to whether your policy is legally compliant, please do get in touch.

Stephanie Bowen
Solicitor
023 8071 8185
stephanie.bowen@mooreblatch.com

CAN MEN RECEIVE LESS ON PARENTAL LEAVE THAN WOMEN ON MATERNITY LEAVE?

A recent ruling by the Court of Appeal (COA) has clarified the differing purposes of shared parental leave (ShPL) and maternity leave.

ShPL is to provide assistance with childcare whilst maternity leave is for the protection of the mother's health and wellbeing, as well as her "special relationship" with her child.

This clarification was part of a recent judgement by the COA which ruled that not enhancing ShPL pay to the level of enhanced maternity pay does not amount to discrimination against male employees.

In this case, employers were offering their female employees enhanced maternity pay. The two fathers who brought the claims had taken ShPL and were paid at the statutory rate – both claiming, unsuccessfully, that this was sex discrimination as their pay was less than their female counterparts on enhanced maternity pay.

Legal opinion

This may be a welcome ruling for many employers for whom making enhanced maternity pay match ShPL pay could prove too costly.

However, this ruling could also mean that women are less likely to receive support beyond financial assistance during their maternity leave. For example, one of the claimants in this case had taken ShPL in order to support his wife who was suffering with post natal depression.

With the pay levels of ShPL placing families at a financial disadvantage, it's not surprising that the uptake amongst fathers since its introduction in 2015 has remained low.

Katherine Maxwell
Partner and head of employment
023 8071 8094
katherine.maxwell@mooreblatch.com

TRIBUNAL PROCEDURE: STRIKE OUT

Mbuisa v Cygnet Healthcare Limited

One of the claims that this case was concerned with was a claim for constructive unfair dismissal for health and safety reasons under s 100 ERA. Mr Mbuisa had raised health and safety concerns, which Cygnet allegedly failed to act upon. These concerns included being subjected to assaults, threats and being asked to do lifting work that he was unable to do due to injury. Shortly after, Mr Mbuisa resigned.

The Employment Tribunal (ET) struck out Mr Mbuisa's claim for not having reasonable prospect of success (on the grounds that it hadn't been stated that Cygnet was in breach of contract due to health and safety concerns raised). However, the Employment Appeal Tribunal (EAT) ruled that the ET should not have struck out the appeal.

Legal opinion

Perhaps the most interesting part of this judgement is the EAT's language when stating that to strike out the claim was a "draconian step".

This case highlights judges' attitudes towards employees bringing a claim – specifically that a case should not be struck out because it was pleaded poorly by the employee.

This case also emphasises the importance of following a fair and proper process when dealing with employee concerns in order to minimise the risks of claims.

Stephanie Bowen
Solicitor
023 8071 8185
stephanie.bowen@mooreblatch.com

EX-EMPLOYEE ENTITLED TO INSURANCE BENEFITS UNTIL DEATH OR RETIREMENT

ICTS Limited v Visram

Eligible employees of ICTS are entitled to permanent health insurance (PHI), a benefit that begins 26 weeks from the start of sickness absence. Importantly the policy wording stated that an employee would be eligible for these benefits until the "earlier date of your return to work, death or retirement".

Following going on sick leave with work related stress and depression, Mr Visram was dismissed by his employer, ICTS, on the grounds of incapacity as he couldn't return to the same work he had been doing previously. Mr Visram subsequently brought a claim for unfair dismissal and disability discrimination and was successful.

When assessing remedy, the Employment Tribunal held that "return to work" meant going back to the work from which he had gone sick. Yet because Mr Visram had been dismissed, he couldn't go back to what he was doing. Therefore, he was entitled to compensation for loss of disability benefits. Notably, this compensation should reflect the loss of benefits until death or retirement, as per the wording in the ICTS's health insurance policy.

An employer's contractual obligation to provide an employee with long-term disability benefits until they "return to work" does not end just because the employee is capable of taking up some form of other paid employment.

Legal opinion

This case highlights the importance of effective contractual terms and knowing its commercial implications. In particular, the words used when classifying and determining which benefits employees are entitled to must be given thorough consideration.

Employers should therefore carefully consider the wording of their PHI policies before going ahead with a dismissal and make sure they know of any on-going benefits post-termination.

If you would like advice on preparing tailored terms of employment, don't hesitate to get in touch.

Emma Edis
Partner
020 8071 8872
emma.edis@mooreblatch.com

EMPLOYERS' KNOWLEDGE OF DISABILITY SCRUTINISED

Baldeh v Churches Housing Association of Dudley and District Ltd.

In this case, Mrs Baldeh was dismissed at the end of her probationary period for poor performance and bad attitude.

Mrs Baldeh appealed this decision, explaining that she had depression which had caused her to behave unusually, say things without thought and suffer from short term lapses in memory. At the time of her dismissal, her employer was not aware that she was suffering from depression.

The Employment Tribunal (ET) accepted that depression amounted to disability, but rejected Mrs Baldeh's claim for disability discrimination for the following reasons:-

1. At the time of dismissal, her employer did not know about her disability;
2. There was no evidence that how she communicated was due to her disability rather than just being her character;
3. There were four other sufficient reasons for her dismissal; and
4. The dismissal was justified.

Mrs Baldeh appealed and the Employment Appeal Tribunal (EAT) overturned the original decision on disability discrimination.

Mrs Baldeh's dismissal could still be discriminatory under s15 of the Equality Act 2010 because when the decision to reject the appeal was made, the employer may have acquired actual or constructive knowledge of her disability.

The ET should have asked whether the matters arising in consequence of the disability had a "material influence" on the decision to dismiss, and not whether there were other causes for dismissal.

The EAT also ruled that it is a balancing exercise when looking to decide if the dismissal was a proportionate means of achieving the employer's legitimate aim (to ensure proper care of vulnerable people by a competent staff).

Legal opinion

Employers are reminded that an appeal is a fundamental part of making the decision to fairly dismiss. All information they know or ought to have known right up to the point that they decide the outcome of an appeal should be taken into account. If not, rejecting an appeal could form part of the unfavourable treatment of the disabled employee.

It's important that employers ensure that they do not punish employees who feel unable or reluctant to disclose their disability until the appeal hearing.

Naomi Greenwood
Partner
020 3274 1006
naomi.greenwood@mooreblatch.com

SPONSORS MUST MAKE SURE THAT THEY ARE COMPLIANT WITH RULES RELATING TO OVERSEAS WORKERS

Immigration compliance

Recent immigration changes have resulted in a greater responsibility for compliance being transferred to employers and sponsors. The Home Office places significant trust in organisations that hold sponsor licences and can take action against those organisations if they fail to comply with their responsibilities as sponsors.

In some cases, this can see the Home Office suspending or revoking sponsor licences, with the potential for significant disruption to the organisation concerned.

Having advised several organisations that have been the subject of Home Office compliance visits, we have seen some key themes emerge.

Job descriptions

The Home Office and decision-making centres overseas have analysed the job descriptions on assigned Certificates of Sponsorship (CoS). It is important to ensure that the job description matches the code that the migrant is being sponsored under.

Compliance visits and visa refusals

A number of compliance visits to UK organisations were prompted by intelligence from the Home Office's overseas enforcement counterparts. In some cases, there was a concern that sponsored non-EEA migrants had not left the UK.

The Home Office guidance states that a report must be made within 10 working days if a sponsored migrant does not turn up for work on their first day, for example if they miss their flight.

A number of sponsors have inadvertently breached sponsor duties, as they were unaware that they should report to the Home Office if a sponsored migrant doesn't arrive at work – no matter what the reason.

Disclosure and barring service (DBS)

Home Office guidance states that if a DBS check is required (for example, for those people carrying out regulated activities with children), the sponsor must ensure that the DBS check is carried out.

Sponsors must firstly assess whether a DBS check is required. If a check is required, one potential hurdle to be aware of is that a UK residential address is required for a DBS check, in some cases it won't be possible to obtain the DBS check until an individual is in the UK.

Be aware that the Home Office now expects sponsors to have control and oversight of DBS checks. Additionally, sponsors should have safeguarding policies in place.

If you would like information and advice on any aspect of sponsorship and your responsibilities as a sponsor, please contact a member of our Immigration team.

Leena Chouhan
Solicitor
020 3274 1006
leena.chouhan@mooreblatch.com

MOORE BLATCH

www.mooreblatch.com