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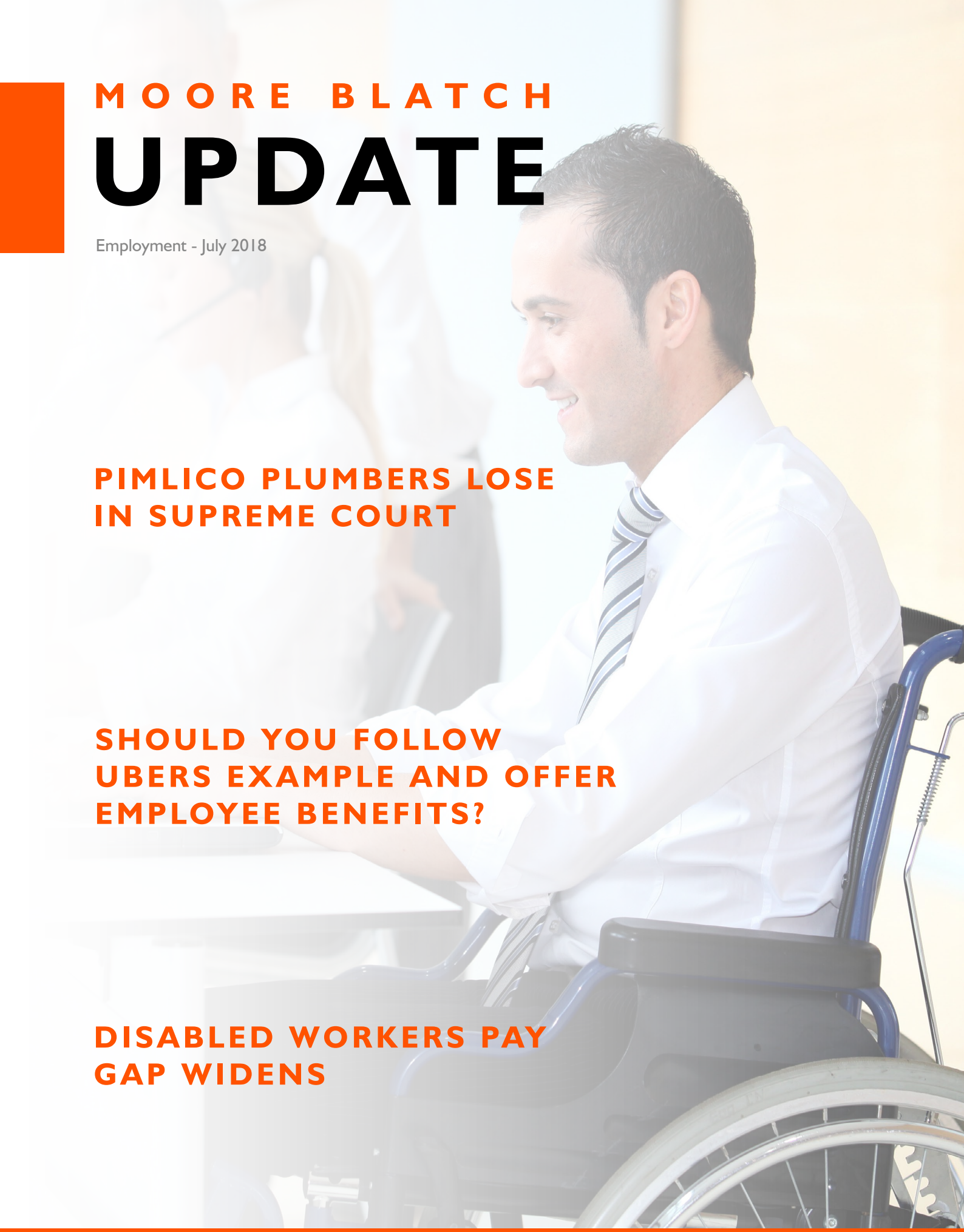
UPDATE

Employment - July 2018



PIMLICO PLUMBERS LOSE IN SUPREME COURT

SHOULD YOU FOLLOW UBERS EXAMPLE AND OFFER EMPLOYEE BENEFITS?

DISABLED WORKERS PAY GAP WIDENS

WELCOME TO JULY'S EMPLOYMENT LAW UPDATE

Dress code policies are difficult to enforce at the best of times, but particularly during one of the hottest summers on record. In this month's newsletter we unravel the government's new guidance on what not to wear in the workplace.

Also in a month when employment issues seem to be dominating the news, we go behind the headlines to explain how these landmark cases will potentially impact on your business. Should you be worried about the aftermath of Pimlico Plumbers case? Does Ubers decision to offer employee benefits signal the end of the gig economy?

And in other news, will the right to itemised pay slips spark an admin nightmare? And what does best practise look like for disabled workers?

Our next newsletter will be in September - so until then enjoy the sun..... while it lasts!

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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PLIMLICO PLUMBERS LOSE IN SUPREME COURT

Self-employed plumber Gary Smith has won his case against his former employer, Pimlico Plumbers. The case concerned whether Gary was entitled to working rights.

Gary Smith, who was employed as a contractor, argued that he was entitled to certain working rights when he was dismissed after six years with the company. Pimlico Plumbers argued he was not classified as an employee or worker. The Supreme Court found that although Smith had not been an employee under a contract of employment, he should be classified as a 'worker' under the Employment Rights Act.

The main conclusions drew upon the fact that Mr Smith had undertaken to personally perform work for Pimlico Plumbers and there was a relationship of subordination.

Legal comment

The judgment adds very little to the existing caselaw on the meaning of 'worker'. The outcome was based very much on the facts of the case.

The ruling should, however, encourage employers who employ contractors to reassess their agreements and evaluate whether on the reality of the relationship, the contractor will be considered a worker. Issues to consider could include specified hours, billing managed by the company, obligatory corporate clothing and equipment and non-compete clauses.

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DRESS CODES AND SEX DISCRIMINATION - WHAT'S NEW?

The Government Equalities Offices has recently published new guidance on Dress Codes and Sex Discrimination.

In summary:

- Dress policies for men and women do not have to be identical, but standards imposed should be equivalent.
- Specification of gender-specific dress codes (such as high heels, make up or manicured nails) is likely to be unlawful.
- Transgender employees should be allowed to follow the organisation's dress code in a way which they feel matches their gender identity.
- Employers should be flexible and not set dress codes which prohibit religious symbols that do not interfere with an employee's work.

Legal comment

The guidance is a useful reminder to employers to ensure they are setting equivalent standards for their male and female staff.

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CONFUSION OVER SHARED PARENTAL LEAVE

In our last monthly update we commented on the case of *Ali v Capita Customer Management Ltd*. This case concluded that it was not discriminatory to pay a woman on maternity leave an enhanced rate of pay, compared to a man taking shared parental leave.

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However, a more recent decision has been made by the Employment Appeal Tribunal (EAT) in the *case of Hextall v Chief Constable of Leicestershire Police*.

The EAT considered that enhancing maternity pay but not shared parental leave pay is potentially indirectly discriminatory towards men.

Legal comment

The Hextall case has been remitted to be reheard by a new tribunal. If the new tribunal agrees with the findings of the EAT then it would open a potential claim against the employer for indirect discrimination. It would then be open to the employer to show that the discriminatory treatment is objectively justified.

During this period of uncertainty, employers that pay different rates for maternity leave and SPL should record their justification for doing so.

Based on the EAT's conclusion in Capita, justification should be easier if the period of enhanced maternity pay is shorter. This is because in the period following birth, a mother is likely to be recovering, and may be breastfeeding, therefore the employer can assert that it does not want her to compromise her health and feel rushed to return to work for financial reasons.

EMPLOYMENT CONTRACTS FAILURE TO DETAIL WHEN NOTICE IS GIVEN

The case of *Newcastle Upon Tyne NHS Foundation Trust v Haywood* considered the matter of when the notice of termination takes effect if an employment contract is silent on when notice is deemed given.

In April 2011, Ms Haywood was told she was at risk of redundancy. She turned 50 on 20 July 2011 and redundancy after her 50th birthday would have entitled her to a considerably more generous pension than redundancy beforehand.

Ms Haywood was contractually entitled to be given 12 weeks' notice, but her contract was silent about how notice was deemed given.

On 19 April 2011, Ms Haywood went on holiday. On 20 April, her employer sent notice of termination by recorded delivery and ordinary post. She read it on her return from holiday, on 27 April.

The Supreme Court case hinged on when notice of termination was deemed effective. If it was deemed effective when the termination notice was sent (i.e. before 27 April), she would have received the lower pension. If it was deemed effective at the time she read it, it would be much higher.

The Supreme Court held the notice was only deemed effective when it was read by the employee, or the employee had reasonable opportunity to read it. So, in this case it was not deemed effective until 27 April and, as a result, she was entitled to the higher pension.

Legal comment

This case highlights the financial ramifications if you fail to draft when notice is deemed given within the employment contract.

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SHOULD YOU FOLLOW UBER'S EXAMPLE AND OFFER EMPLOYEE BENEFITS?

Uber recently announced that it would be providing insurance cover at no extra cost to its drivers over Europe.

It is also giving drivers insurance backed protection when not working (i.e. out of driving hours) such as for sickness, having a baby or jury duty.

The news spurred fellow gig-economy delivery firm Deliveroo to announce that it will offer employees free insurance, and include cover for up to £7,500 of medical expense.

Legal comment:

Gig-economy workers are entitled to rights including holiday pay, national minimum wage and breaks. Providing extra benefits is not compulsory and can seem like a good way to help restore employee relations and possibly take some of the heat out of unfair employer argument.

However, organisations will need to be cautious that the provision of benefits to attract genuine gig workers does not result in them hiring permanent employees 'by the back door'. And, advice should always be sought when giving benefits to gig-economy workers.

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DISABLED WORKERS PAY GAP WIDENS

The pay gap for disabled workers is at its highest since 2013, and disabled workers now earn on average £1.50 less an hour than those without a disability. This is the highest pay gap since the government began publishing comparable data in 2013.

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The TUC has made suggestions to improve this pay gap. The recommendations suggest that employers: consult, improve reasonable adjustments, record time off linked to disability as separate from sick leave, and advertise more jobs on a flexible and part-time basis.

Additionally, and importantly, the TUC would like the government to consider introducing Disability Gap reporting, similar to the Gender Pay Gap reporting which came into force this year.

It would require employers to publish their disability pay gap, along with the steps they will take to close it.

Legal comment

The TUC proposal for similar reporting to Gender Pay is likely to fall on receptive ears within the government.

Ignoring the fact that there is huge general misunderstanding between equal pay and gender pay, the Gender Pay reporting is deemed to be successful.

As always, employers need to be conscious of the above recommendations to ensure they accommodate the needs of disabled workers.

However, there are often very practical considerations that employers need to address when considering issues such as reasonable adjustments in the workplace and encouraging diversity in the workplace. So it's often prudent to assess what best practice looks like elsewhere.

RIGHT TO ITEMISED PAY STATEMENTS TO BE EXTENDED TO ALL WORKERS

With effect from 6 April 2019, every worker will have the right to an itemised pay statement. This must be at or before the time at which any payment of wages or salary is made.

Additionally, where pay received is dictated by time worked, then the statement must contain the total hours worked, either as a single aggregate figure, or separate figures for different types of work or different rates of pay.

Legal comment:

Itemised payslips should increase transparency and enable queries to be resolved far quicker. While in the short term this will likely increase employee queries, in the long term it should lead to fewer problematic disputes that take longer to resolve.

While the requirement does not come into force until 6 April 2019, many employers may want to trial a phased rollout, as this could iron out issues beforehand and prevent a spike in employee queries after the official launch date.

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DISMISSAL FOR MISCONDUCT WITHOUT PRIOR WARNING

The case of *Mbubaegbu v Homerton University Hospital* considered when dismissal for misconduct without prior warning can be reasonable.

It considered whether when multiple issues arise (even if individually they are not gross misconduct) they could collectively be deemed as misconduct.

The Claimant was a consultant surgeon, of black African origin, with an unblemished career. He was dismissed for multiple alleged breaches of internal reporting procedures. His colleagues had also faced similar, less serious allegations yet none were dismissed.

The EAT held the dismissal was fair, and not discriminatory and not wrongful regardless of the fact that there was no single finding of an act of gross misconduct by the Claimant.

The tribunal accepted that trust and confidence had been undermined by the employee's conduct and the tribunal confirmed it could see "no reason why an employer would be acting outside the range of reasonable responses were it to dismiss an employee in whom it had lost trust and confidence in this way".

Legal comment:

This is a very important case as often employers have issues where an employee can frequently over step the boundary of what is acceptable, but those individual instances don't constitute gross misconduct.

This case illustrates that a series of acts of misconduct can, taken together, amount to gross misconduct in some circumstances.

The EAT considered the correct focus was on whether the employee's actions had undermined the relationship of trust and confidence, not whether one act on its own could amount to gross misconduct.

However, employers should always exercise caution before reaching a decision to dismiss an employee with no prior warnings where there is no clear act of gross misconduct.

In this case, the tribunal was entitled to find that dismissal was within the range of reasonable responses open to the employer. But, this will not be so in every case.

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