MOORE BLATCH

UPDATE

Employment - November 2017

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SALARY

WELCOME TO NOVEMBER'S EMPLOYMENT LAW UPDATE

This month, we will be discussing the parameters of the new Vento bands and bringing you a summary of the recent Acas guidance on how employers can support employees with seriously ill, premature or stillborn babies and the development of the apprenticeship levy since its introduction in April 2017.

We will also discuss the recent key cases on monitoring staff internet usage at work and the salary payable to part-time workers who work more than 50% of full-time hours.

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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BREAKING NEWS - UBER

Uber have lost their recent case at the Employment Appeal Tribunal ("EAT"). In short, the EAT held that Uber drivers are to be classed as workers and are therefore entitled to be afforded the same rights, including annual leave, holiday pay and sick pay. A full update on this landmark case will follow in our next update.

ARE YOU UP-TO-DATE WITH THE NEW 'VENTO BANDS'?

Those that are successful in a discrimination claim can be awarded compensation for injury caused to feelings as a result of the discrimination they have suffered. In order to decide how much to award for injury to feelings, tribunals use guidelines known as Vento guidelines to decide how much to award in each case.

Following a recent Court of Appeal decision *(De Souza v Vinci Construction (UK) Ltd)* the Presidents of the Tribunals in England and Scotland have significantly increased the amounts awarded should a discrimination case be successful. In addition, the new bands include the Simmons v Castle 10% uplift (applied subject to whether the employment tribunal is sitting in Scotland), meaning compensation awarded for injury to feelings in employment tribunals is more in line with that awarded in the civil court.

The new Vento bands are as follows:

Lower: £800 - £8,400

For less serious cases, such as a one-off case of discrimination

Middle: £8,400 - £25,200

For cases that are serious, but don't fit into the higher band

Higher: £25,200 - £42,000

The most serious cases of discrimination may be awarded upwards of £42,000.

It is important that as an employer you are aware that this award could be claimed in an employment tribunal. Additionally it is important to understand that there are different levels of award as this can assist in preparing a counter schedule of loss in any proceedings.

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PREMATURE BABIES

GUIDANCE FROM ACAS

ACAS has issued new guidance related to employees who have a baby or babies that are ill or premature.

In the case of a baby being born prematurely, maternity leave should begin the day after the birth. In these instances the mother may be unable to obtain a MATB1 form (which entitles her to statutory maternity pay or maternity allowance). You may want to remind fathers and partners who are eligible for paternity leave and pay that their leave can be taken within 8 weeks of the actual date of birth, or within 8 weeks of the date that the baby was due to be born. Therefore, as an employer, you should consider whether it would be appropriate to chase for this form as it is obviously advisable to act appropriately with regard to what can be a difficult time for the new child's family. It may be appropriate to remind the family of their statutory entitlement regarding maternity and/or paternity pay, as appropriate support from an employer can prove invaluable.

It is important to note that if parents sadly lose an ill or premature baby mothers are still entitled to 52 weeks of maternity leave if she would like to take it, and (if eligible) 39 weeks of statutory maternity pay. The father will also be able to receive paternity leave and pay if the baby is stillborn after 24 weeks, or is born alive but subsequently passes away.

It is advisable to be aware of your responsibilities should you find yourself managing an employee with an ill or premature baby as that can help ensure you manage a sensitive situation in the most appropriate way possible as well as providing suitable support.

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SHOULD A PART TIME WORKER BE PAID 50% OF A FULL-TIME SALARY?

The Part Time Workers Regulations 2000 state that part-time workers cannot be treated less favourably than their full-time counterparts. In a recent appeal to the Employment Appeal Tribunal (EAT) *(British Airways v Pinaud)*, the EAT considered whether a part-time worker working more than 50% of full-time hours, but only paid 50% of a full-time salary was suffering less favourable treatment?

Mrs Pinaud, the British Airways employee at the centre of the case, had varied working hours yet her pay remained the same. To bring a case to the Appeal Tribunal, Mrs Pinaud needed to identify a comparator – a full time employee who can be used as a point of comparison when deciding if treatment has been less favourable or not. In this case, it was found that Mrs Pinaud had worked 53% of the hours of her comparator, yet had only received 50% of the pay.

Despite BA arguing that there was only minimal variation between Mrs Pinaud's hours and her comparator's hours, the EAT found that Mrs Pinaud had received less favourable treatment.

This case highlights the need for consistency in treatment between full time and part time employees. Employers with a number of part time workers should carefully check both shift patterns and pay to ensure there are no breaches of the regulations.

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APPRENTICESHIP LEVY

RULES & REGULATIONS

In April 2017, the government introduced an apprenticeship levy; a tax on UK employers to support the funding of apprentices. Any private or public company with a total wage bill of more than £3 million is required to put 0.5% of their payroll into the levy. Though slightly worryingly, a poll earlier this year for City and Guilds found that a third of employers liable to pay the new levy were not even aware of its existence.

The government hopes the levy will see the spending on apprenticeships double- leading to the creation of three million new apprenticeship opportunities. However, concern has been expressed over the impact the new levy could have on other areas of a business, for example cash flow and existing staff training plans.

Government clarification on how the levy is meant to work would be beneficial, not least as the Apprentice Levy has the potential to benefit a broad range of people, as well as the apprentices themselves.

If you want to know any further information about the levy or whether your business can benefit please contact one of our team.

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SLEEP-IN STAFF

MINIMUM WAGE ENFORCEMENT

Sleep-in shifts have recently hit the news following a leaked report which revealed many council employees were being paid below the minimum wage.

A sleep-in shift is where a worker sleeps in situ whilst giving care in an individual's own home. These are known as 'shifts' as the carer can be woken to deal with anything that may arise during the night.

Previously, employers argued that as sleep-in shifts are not usually salaried hours with carers being paid an average sum, they did not fall under the national minimum wage regulations (NMW).

However, following a campaign by UNISON, from April this year Mencap staff are being paid an average of £7.50 per hour, in line with the National Living Wage.

This is a significant increase of a worker's previous basic right of £25 over a 9-hour sleep-in shift which averages as £2.80 per hour.

The government plans to enforce the NMW for sleep-in shifts, plus ensure sleep-in staff receive any back pay they are due.

However, the government is having to balance the need to pay workers what they are due without any risk of bankrupting the social care sector, and so enforcement plans are currently suspended so the government can put together a "new enforcement scheme" that pays staff what they are due, whilst safeguarding the long-term interests of the healthcare sector.

The enforcement deadline was extended until the end of October and as of yet an update has not been provided.

The government needs to issue clarification on its enforcement proposals as soon as possible so employers can make accurate future cash projections and associated changes to their systems.

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CAN YOU RELY ON PREVIOUS INCIDENTS DURING A LATER DISCIPLINARY INVESTIGATION?

Any employer knows any dismissal on the grounds of misconduct can only occur after a thorough investigation. It is not unusual for the former employee to claim that the investigation, and therefore their dismissal, was unfair. In turn, this has led to more and more thorough investigations being carried out.

However, it seems an investigation can go too far. In the recent case of *NHS 24 v Pillar* the Employment Tribunal found that a nurse working for NHS 24 had been unfairly dismissed.

The nurse in question was dismissed for gross misconduct after failing to diagnose a heart attack and referring the patient to the out of hours GP instead of calling 999.

Because the NHS's investigation into the above incident relied on previous disciplinary incidents that had already been addressed through training, the Employment Tribunal found the nurse had been unfairly dismissed.

The Employment Tribunal's decision was later appealed to the Employment Appeal Tribunal (EAT), who overturned the Employment Tribunal's decision, finding that the nurse had not been unfairly dismissed.

The EAT held that taking into account previous similar incidents that had not involved disciplinary action in the later disciplinary investigation was not unfair dismissal because no expectation either way had been created following the earlier incidents.

Employers are advised to be clear on their disciplinary procedures and investigations and keep clear records of all incidents relating to an employee.

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TRIBUNAL QUARTERLY STATISTICS

APRIL - JUNE 2017

September saw the publication of the employment tribunal statistics from April – June 2017.

Figures show there was a small rise in the number of employment tribunal claims with 4,241 single claims received, an increase of 2% on the same period in 2016. However, the total claim number has risen by around 6% compared to 2015/2016.

In terms of employment tribunal fees, fees requested were down 1% when compared to the same period last year.

Overall, the figures have remained relatively stable. But now that the fees regime for employment tribunals has been scrapped (as of 26th July this year) this could change- so watch this space!

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CHECK YOUR IT USER POLICIES - ARE YOU MONITORING STAFF USAGE APPROPRIATELY?

A recent ruling by the Grand Chamber of the European Court of Human Rights (ECHR) in the case of *Barbulescu v Romania* will mean employers will have to be very clear with staff if they propose to monitor their internet usage. The case – which centred on a Romanian engineer who was sacked for sending messages about his sexual health via a work-related Yahoo messenger account – has set a legal precedent that employers across Europe should be aware of.

The ECHR had previously held that monitoring an employees' internet usage and Yahoo messenger use during disciplinary proceedings was a proportionate interference with the employee's right to privacy and family life, as stated in Article 8.

However, the ECHR subsequently overturned this decision and held that the employee's Article 8 rights had been infringed due to the employer monitoring the content of the employee's correspondence. The Strasbourg appeal court stated that the employer had failed to strike a fair balance between the employee's right to a private life and his employer's right to ensure he was following work rules. As a result, his right to privacy had been violated.

The ECHR judgement said that an employer "cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted as far as necessary."

The judgment is complex but the key principle was that workers have a right to respect for privacy in the workplace, and if an employer is going to monitor their emails and messages, the employer should (exceptional reasons aside) tell the worker that their communications might be monitored. Here, although the employee knew it was forbidden to use work computers for personal purposes, he had not been told that the employer was monitoring his communications.

Following this ruling, employers should thoroughly check IT monitoring policies and make any necessary changes.

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