HRML
Heather Resource Management Limited

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Employment Law UPDATE

Shared Parental Leave

The long discussed changes to maternity and paternity leave have finally come into effect for parents of babies due on or after 5th April 2015 or children adopted on or after this date. Some of the changes are very simple, with the complete removal of Additional Paternity Leave and Pay because it has been replaced by Shared Parental Leave, whereas the actual process for taking Shared Parental Leave is more complex.

So how does an employee qualify?

- The parent wishing to take SPL must be an employee and must have 26 weeks continuous service with their employer by 15th week before the expected week of childbirth and they must have main responsibility for the child's care.
- Mother must be entitled to maternity leave and pay and have served notice to bring her maternity leave to an end for the new rights to be triggered.

And how does it work?

- SPL will be available for a maximum of 50 weeks (less any maternity leave already taken) and must be taken by the child's first birthday
- SPL cannot start sooner than 2 weeks after childbirth (Compulsory maternity leave period)
- SPL must be taken in multiples of complete weeks
- SPL can be taken in one continuous period or up to 3 blocks each
- SPL can be taken consecutively or concurrently
- Shared parental pay (SPP) for 37 weeks – paid at same flat rate SMP
- Rights of adoptive parents same as natural parents

Practical considerations

- It is the responsibility of the employee to confirm that they qualify and pass the relevant qualification tests
- Both parents must give at least 8 weeks' notice of their intention to take SPL
- A notification for continuous leave cannot be refused and therefore an employer will need to decide how the leave period will be covered.
- Each parent may take up to 20 "Shared Parental Leave in Touch" days (plus the mother has 10 KIT days during her maternity leave)

Holiday pay, overtime and commission

Over recent months plenty has been written about changes to the way holiday pay should be calculated and what should be included. This should not be confused with how the amount of holiday individuals are entitled too, the recent decisions only relate to how much people are paid when they are on holiday. So, how might this affect you?

If you pay commission to your employees – you must include commission payments when calculating holiday pay for employees whose pay normally includes an element of commission. Technically this ruling only relates to the 4 weeks' annual leave granted under the EU Working Time Regulations and not to the additional 1.6 weeks granted by the UK to cover bank holidays. However, given the additional administrative burden of calculating holiday pay differently at different times in the year, you may decide to include commission payments for the full 5.6 weeks.

If you pay regular "guaranteed" overtime or other payments e.g. on call/stand by payments – these must also be included in the calculation for holiday pay as above.

If you pay regular individual performance bonuses – these may need to be included, depending on the circumstances.

The reference period for calculating average pay has not been clearly defined but it will be at least the 12 weeks prior to a period of holiday, meaning that holiday pay could fluctuate and needs to be recalculated for every period of holiday.

The hidden danger – back pay. The recent rulings have opened the floodgates for employees to claim unlawful deductions of wages in relation to unpaid holiday back pay. Initially it seemed that employees would be able to claim for back pay right back to the introduction of the right to paid leave in 1999 but the Government have stepped in with Regulations to cap the period of claims to 2 years but this will only effect claims made on or after 1 July 2015

In summary, this is a complex area with far-reaching (and expensive) implications for employers and we would suggest that you speak to one of our employment law experts to consider how these ruling might affect you and what you need to do to comply with this change in the law.

Other changes to Family Friendly Policies

Time off for Antenatal appointments – as highlighted previously, the recent changes to legislation introduced the right for partners of pregnant employees to take time off (unpaid) to attend 2 ante-natal appointments. There is no qualification period so this is a "day one" right for employees.

Parental Leave – in addition to Shared Parental Leave (and not to be confused with it), the right for parents of children up to age 5 (or 18 if the child is disabled) to take up to 18 weeks leave unpaid in blocks of 1 week has existed for some time. Previously any time had to be taken before the child's 5th birthday but now this has been extended to the child's 18th birthday for all children, including those adopted where the right was previously 5 years following adoption or the child's 18th birthday, whichever was sooner.

Adoption Leave – qualification to take adoption leave has been brought in line with maternity leave and the right to take adoption leave becomes a "day one" right in the same way as the right to take maternity leave. The qualification for the leave to be paid remains 26 weeks, also in line with maternity pay.

Changes in right to work checks

Employers have a duty to prevent illegal working and are obliged to carry out prescribed checks on individuals before they commence work to ensure they have permission to work in the UK. The penalties for employing an illegal worker if you have failed to carry out the necessary checks correctly or at all and are found to have employed an illegal worker have increased to up to £20,000 and if you knowingly employ an illegal worker, regardless of whether you have conducted the checks, you could face up to 2 years' imprisonment and/or an unlimited fine.

So, to avoid this situation all employers should check the right to work for every employee and this is best done either at interview or when they first start. The list of prescribed documents is fairly lengthy but the easiest document to request is to see a copy of a passport and whilst all documents with an expiry date must be current, the exception is a passport showing that the holder is a British Citizen, a citizen of the UK and Colonies having right of abode, a national of a European Economic Area country or Switzerland or their family members with permanent residence.

In essence, an expired UK passport would be sufficient to provide evidence of a right to work in the UK but a national insurance number on its' own is not proof of right to work and a driving licence is never proof of right to work in the UK.

Changes to the right to be accompanied to disciplinary hearings

ACAS have updated their Code of Practice on Disciplinary and Grievance Procedures to update and clarify the requirements around the right to be accompanied. Previously there was some flexibility to refuse a request for a companion if it might delay the hearing and there was someone suitable who could attend i.e. because of location, but now the rule has changed to state that an employer must agree to a request to be accompanied by any chosen companion from one of the statutory categories so if you have employees at locations in both Gloucester and the Scottish Highlands and your employee wants to be accompanied by an employee from the Scottish site, unfortunately this is a request that you must grant, regardless of the impact it might have on the timescales for the process.

Case Law

Apprenticeship contracts

The question of whether a group of trainees were true apprenticeships was analysed recently by the Employment Appeals Tribunal in *HMRC v Jones and Ors t/a Holmescales Riding Centre*. The facts related to a group of trainees at a livery stables who claimed they should have been in receipt of the minimum wage relating to their age rather than their status as apprentices. In order to make the decision, the EAT reviewed their contracts of employment to establish whether the primary purpose of their contracts was training and on this occasion, they decided that it was not and therefore they should have received a higher minimum wage.

The EAT very helpfully clarified the issues it considered in reaching this decision:
1. Is training the essential purpose of the contract, with the execution of work for the employer merely secondary?
2. Is the contract for a fixed duration, with an objectively ascertainable end?
3. Is the contract terminable at will?
4. Is the contract labelled "apprentice"?

In addressing the questions above, the EAT found that notice provisions and a power to dismiss for gross misconduct were inconsistent with a contract of apprenticeship. The ruling highlighted the fact that an apprentice, unlike an employee or worker, cannot be dismissed for poor performance or gross misconduct, unless the act of misconduct fundamentally undermined the ability to teach them.

It further found that having no fixed period in an apprentice contract was also contrary to the requirements for a contract of apprenticeship, as was the fact that the work carried out was for the benefit of the employer with training only an incidental aspect.

In light of this case, employers must not assume that workers are engaged under contracts of apprenticeship simply because the contract is labelled as such and the best way to avoid confusion is to use the modern apprenticeship agreement which will include a statement of the skill, trade or occupation the apprentice is training for.

Covert recordings at hearings

In *Punjab National Bank and others v Gosain*, it was held that recordings of disciplinary and grievance meetings were admissible, even where the recordings included the "private" aspects of the meetings, at which the employee was not present. The facts of the case were very specific in that the employee covertly recorded the private deliberations of the panel that included discussion by panel members of how to deliberately avoid the issues raised by the employee's grievance, as well as a graphic sexual slur. The Tribunal therefore held that these conversations were not "deliberations in relation to the matters under consideration" at all and therefore not protected.

Should an employee ask to record a conversation or if you suspect covert recording, it is always best to take precautionary measures, such as expressly stating that employees are forbidden from making a recording, perhaps at the start of meetings and leave the room during your deliberations to ensure that nothing could be recorded covertly. Remember, even if it seems like a good idea to record a meeting because it seems easier than writing notes, recording includes tone as well as what is actually said and this can sometimes prove less helpful in the long run.

Statutory payments and limits – all effective from 6th April 2015

Maximum compensatory limit awarded for unfair dismissal increased to £78,335.
Maximum amount of a week's pay for the purpose of calculating a statutory redundancy payment has increased to £475.
Statutory maternity, paternity and adoption pay will increase to £138.18.
Statutory sick pay will increase to £87.55 per week.

Case Law (continued)

Use of personal twitter accounts

In *Game Retail Ltd v Laws*, Game dismissed an employee for his comments on his personal twitter account. The Employment Appeals Tribunal decided that unlike Facebook (which could be private), twitter accounts are public and although the tweets did not actually refer to Game Retail, the fact that they were offensive and that staff and customers might have read them (because he had 65 followers who were employees or stores of Game Retail) meant that it was a fair reason for dismissal. Game relied on their social media policy which didn't specifically cover personal twitter accounts and their use and the case highlights that despite the fact that Game Retail were ultimately successful, having a social media policy with clear expectations of employees' social media usage both in the workplace and in their private life is important to avoid such challenges in the future. A clear policy which outlines the sanctions that an employee may face if they fail to follow guidelines will support you in the event of a problem and undoubtedly save you time and money..

Is obesity a disability?

In the first case of its kind in the UK, a tribunal has handed down a decision recognising a claimant as disabled as a result of his morbid obesity and upheld his claim for harassment. In *Bickerstaff v Butcher* The employee was morbidly obese with a BMI of 48.5 and he raised a grievance after being subjected to derogatory comments by his colleagues. His colleagues tried to defend themselves that it was just banter but the tribunal found that because his mobility was substantially affected by his size it was a disability and that he had been harassed for a reason relating to that disability.
It is worth keeping in mind that an obese worker is likely to be protected against direct and indirect discrimination and harassment and if employers do not take action or "turn a blind eye" to banter, they are likely to be held liable. This case is also interesting because although the employee settled out of court with his employer, he continued his claim against one colleague, so it may be beneficial to warn employees that they may be held personally liable in a successful discrimination claim against them individually.

Use of e-cigarettes in the workplace

The statutory prohibition on smoking in public places has been around since 2006 and we have all got used to it but the use of e-cigarettes is something that employers are still trying to understand how best to manage. The case of *Insley v Accent Catering* is one of the first tribunal decisions that has addressed this issue, specifically with regards to whether taking disciplinary action against an employee for using an e-cigarette on a client's premises was fair and reasonable.

The facts of the case were that employee was employed as a catering assistant, providing services to a school and the head teacher complained when he saw her smoking an e-cigarette on school premises and in full view of pupils. Their policy on smoking prohibited smoking on school premises but did not specifically state e-cigarettes and the Tribunal gave guidance that if an employer wishes to restrict or ban e-cigarettes they should amend their no smoking policy accordingly and communicate it clearly. Dismissal in the absence of a designated policy may potentially be fair but it is more likely to be fair if an employer can point to a specific policy or rule that has been broken.

For more information or an

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