HRML
HR AND EMPLOYMENT LAW SPECIALISTS

Employment Law
Update

April 2016

Gender Pay Gap Reporting

The Government has recently ended consultation on the Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 and it is anticipated they will come into force from 1 October 2016. Under the Equality Act 2010 public sector bodies with over 150 employees were required to publish annual details of their pay gap and ethnic minority and disability employment rates from 2011. However, outside the public sector, businesses were asked to undertake gender equality analysis and reporting on a voluntary basis and as very few employers took this up, the Government announced in 2015 that they were moving to a compulsory approach.

The new regulations will apply to private and third sector employers who have 250+ employees as at 30th April 2017 and employers will have until 30 April 2018 to publish the required information for the first time. Employers will be required to publish details of the pay gaps on their websites, as well as uploading the information to a government website.

Employers will need to publish the following:

⇒ The mean average of total female pay as a percentage of total male pay
⇒ The median total female pay as a percentage of total male pay
⇒ The mean average total female bonus pay as a percentage of total male bonus pay
⇒ The number of male and female employees in each of four equal pay bands
⇒ The proportion of males and females who receive bonus pay in each band

At present there will be no financial penalty for failure to comply but this may be introduced at a later date, depending on overall levels of compliance. However, the Government are hoping that the potentially negative publicity (and possible equal pay claims) that may result from poor figures being publically available may force employers to take the issue of the gender pay gap more seriously and take action to address the issue accordingly.

Employers who anticipate being over the 250+ cut off by 30th April 2017 should consider starting the audit process now as there is an opportunity to address any gender pay gaps at an early opportunity so that the published figures show a better gender pay position.

National Living Wage

Following the announcement by the Chancellor in his first budget of the new Parliament in July 2015 that he intended to introduce a National Living Wage from April 2016, the time has come for all employees over the age of 25 to receive an increase in their wage to the new minimum of £7.20 per hour from 1st April 2016. Not to be confused with figures put forward by the Living Wage Foundation, who are campaigning for higher wages for everyone, this new rate of £7.20 will be the minimum wage per hour for all those over 25.

The National Minimum Wage will continue for all those under 25, and the Low Pay Commission has recently published recommendations, accepted by the Government to increase the rates from 1st October 2016 to £6.95 per hour for those aged 21-24, to £5.55 for those aged 18-20, £4 per hour for those aged 16-17 and £3.40 for Apprentices.

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For more detailed advice and clarity you are advised to seek further advice from HRML.

What to include when calculating holiday pay

The long running saga between *Lock v British Gas Trading Ltd* took another step closer to resolution in March when the EAT ruled that commission payments should be taken into consideration when calculating holiday pay. Regular readers could be forgiven for thinking that this decision had been made some time ago but although this principle was established by a ruling from the European Court of Justice (ECJ) about what should be included in a "week's pay" under the Working Time Regulations, it is now working it's way through the UK Courts as British Gas appealed the Employment Appeal decision that supported the ECJ ruling.

This means that the decision is now binding, although British Gas may yet appeal so employers should pay particular attention over what to include in holiday pay calculations, including some regular (but not guaranteed) overtime payments and call out payments.

There is still one thorny issue outstanding, which is what is the relevant reference period over which to calculate holiday pay so this issue is not finalised yet – making it difficult for employers to get it right in the meantime!

Statutory payments and limits:

With effect from 6th April 2016 a number of statutory payments will increase as follows:

⇒ The maximum compensatory limit awarded for unfair dismissal increased from £78,335 to £78,962 or a maximum of 12 months salary, whichever is greater.

⇒ The maximum amount of a week's pay for the purpose of calculating a statutory redundancy payment has also increased from £475 to £479.

Consultation on Grandparent leave

In the March 2016 Budget the government announced that it would be launching a consultation in May 2016 on extending shared parental leave and pay to working grandparents. The consultation will also cover options for streamlining the shared parental leave and pay system, including simplifying the eligibility and notification requirements. The government is proposing to bring legislation into force by 2018 so watch this space!

Case Law Update

Dyslexia discrimination

Starbucks received lots of media attention in February when they were found severally lacking in a case involving an employee with dyslexia. The employee's claim arose from Starbuck's failure to make reasonable adjustments for her dyslexia. She also won a claim for victimisation.

Disability under the Equality Act 2010 is a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. When an employer is aware of an employee's disability, and there are 'provisions, criteria or practices' (PCPs) that put that disabled employee at a substantial disadvantage in comparison with those who are not disabled, the employer must take reasonable steps to avoid the disadvantage. It is their responsibility to assess the need for, and nature of, any adjustments irrespective of whether the employee requests them. While dyslexia is not automatically deemed a disability, the prevailing symptoms and their severity do need to be assessed on a case by case basis.

In this case, Starbucks carried out an investigation of data recorded by the employee when she was checking equipment temperatures at the store where she was a supervisor. The investigation found her explanation implausible and led to accusations that she had made up the data. Internal disciplinary proceedings followed.

The employment tribunal accepted that the mistakes the employee made were due to her difficulties with reading, writing and telling the time, and that she had done enough to make her employer aware of her dyslexia and its impact on her. This would require an employer to make an assessment of her suitability to read, check and record data under time pressure in a busy, noisy environment but apparently she was in effect demoted and told to retrain. These are clearly detriments, and the tribunal accepted there were alternative ways for the tasks to be met, either by the employee working with colleagues or by delegating the tasks, and that it would have been reasonable for these to be made.

The critical point here was that at no point did the employee hide the problems she experienced with dyslexia but no-one involved in the decision making process thought to investigate the impact that dyslexia can have on an individual, deciding instead to make their own interpretation of the condition. What they should have done as soon as the issue of dyslexia was raised in the disciplinary proceedings as an explanation the errors, was to consider whether her symptoms amounted to a disability, perhaps by referral for an occupational health assessment and either way to consider how it may have impacted her ability to do her job and what adjustments might be necessary.

Disciplinary/dismissal in absence

The whole process of being involved in a disciplinary can be stressful for all concerned and occasionally an employee will be signed off as unfit to work during the process, leaving the employer confused as to how to proceed. The EAT provided some clarification in the recent case of *Royal Borough of Greenwich v Syed*. In this case, the employee failed to attend numerous meetings, including a disciplinary hearing and the employer finally decided to convene the hearing in his absence, although interestingly his union representative was present. Initially the Employment Tribunal found that the subsequent dismissal was unfair but the EAT upheld the employer's appeal on the grounds that an employer cannot be expected to wait indefinitely for an employee to be well enough to attend a hearing.

The key to the successful outcome in this case for the employer was the amount of time they took before getting to this stage, including giving the employee every opportunity to attend and behaving in a very reasonable manner. You may even want to consider options outside the usual disciplinary process, such as location of the hearing or allowing family members to attend, if this means the employee will feel more comfortable to attend. Another consideration is to seek an independent medical opinion about the employee's fitness to attend a meeting before making the final decision to conduct a hearing in their absence.

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