Myerson Employment Newsletter

January 2016

In this edition of our Employment Newsletter we remind you of the key developments over the past year and take a look at what changes you can expect in 2016.

Key developments in 2015

Holiday pay

This past year has seen further developments to the way in which holiday pay must be calculated for workers. Under the Working Time Regulations, workers are entitled to 5.6 weeks' paid annual leave. Of these 5.6 weeks, 4 weeks derive from the European minimum leave requirements and the remaining 1.6 weeks are an additional UK entitlement.

Case law has established that holiday pay for the 4 weeks' European leave must reflect the income that a worker usually receives if working and that commission should be included when calculating this holiday pay where it is intrinsically linked to the performance of duties.

The case of ***Bear Scotland Ltd & Others v Fulton & Others*** has gone further, and established that payments of non-guaranteed overtime (that is overtime that an employer is not obliged to provide but that an employee is obliged to carry out if it is) must be included within the calculation of this holiday pay. There are likely to be further developments this year, with the trend being towards any "normal" payments having to be included in holiday pay calculations. We will keep you up to date on this evolving area.

Working Time – Mobile Workers

A 2015 case decided by the European Court of Justice involving Tyco Integrated Services has changed the way employers must treat workers who do not have a fixed place of work. In particular, it was held that time spent travelling each day between mobile workers' homes and their first and last customers is "working time" for the purposes of the Working Time Directive.

The ruling means that thousands of employers will need to make changes to avoid breaching the maximum 48 hour working week limit. This could mean ensuring assignments are closer to workers' homes, adjusting working hours, or asking more workers to opt out of the maximum 48-hour working week. It also raises the question as to whether mobile workers are paid enough as it is likely that minimum wage legislation would also apply to this travel time. Therefore hourly rates of pay should also be reviewed.

Shared parental leave and statutory shared parental pay

On 5 April 2015, the shared parental leave (SPL) scheme was introduced. The scheme created a more flexible way for employees who are parents to take leave in the first year of their child's life or in the first year after their child's placement for adoption.

To qualify for SPL:

- An employee must have 26 weeks' continuous employment.
- The mother must be entitled to statutory maternity leave (SML) and/or pay (SMP).
- The employee's partner must satisfy an employment and earnings test.
- The parents must share the main responsibility for the child.

The scheme makes up to 50 weeks of SPL and 37 weeks of shared parental pay available for eligible parents to take or share. A mother is able to end her maternity leave, or commit to ending it at a future date, and share the untaken leave with the other parent as SPL. This enables mothers to return to work before the end of their leave without sacrificing the rest of the leave that would otherwise be available to them. SPL can either be taken consecutively or concurrently, meaning both parents can take time off together, as long as the total time taken does not exceed what is jointly available to the couple. In addition, SPL can be taken in a number of blocks of times.

The scheme also applies to adoption, surrogacy and same sex couples.

Collective redundancies

In 2015, the European Court of Justice finally gave its judgment in the Woolworths and Ethel Austin cases on the meaning of "establishment" for the purposes of determining when collective redundancy requirements apply. It has held that the numbers of dismissals in all of an employer's establishments are not required to be aggregated in order to determine whether the threshold for collective redundancy consultation is met. Consequently, section 188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, which refers to 20 or more dismissals "at one establishment" within a period of 90 days or less, properly implements the European Collective Redundancies Directive.

This decision means that the obligation to consult about proposed redundancies with trade union or

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staff representatives of affected employees will arise less often, particularly in multi-site employers where small numbers of redundancies are proposed at different sites. However, it is still important to check the definition of "establishments" when planning a redundancy process.

The maximum sanction for breaching the obligation to consult collectively remains at 90 days' gross pay for each affected employee, which can add up to a substantial amount.

Whistleblowing

Whistleblowing is the term used when a worker passes on information concerning wrongdoing. A worker will be protected by whistleblowing legislation when making a disclosure if they reasonably believe that they are acting in the public interest.

In 2015, the case of ***Chesterton Global v Nurmohamed*** dealt with the meaning of the words "in the public interest" which were added into the whistleblowing legislation by the Enterprise and Regulatory Reform Act 2013, in order to exclude complaints about breaches of a worker's own contract of employment from whistleblower protection.

In this case, Mr Nurmohamed complained about terms and conditions which affected himself and potentially 100 senior managers at the firm. The Employment Appeal Tribunal held that it is not necessary to show that a disclosure was of interest to the public as a whole, as it is inevitable that only a section of the public will be directly affected by any given disclosure. This group was therefore sufficient to satisfy the "public interest" test and protect Mr Nurmohamed.

This ruling was followed in a subsequent case, which involved a group of only four employees complaining about their terms and conditions. This highlights how widely the public interest test can be interpreted and how careful employers need to be in identifying complaints that could be covered by whistleblowing legislation.

What to expect in 2016

Modern Slavery Statements

Section 54 of the Modern Slavery Act 2015 requires businesses with a global turnover above £36 million to publish a slavery and human trafficking statement each financial year. The obligation applies to financial years ending on or after 31 March 2016 so businesses need to be working on their statements now.

The aim is to ensure that the public, consumers, employees and investors know what steps an organisation is taking to tackle slavery and human trafficking across its business and supply chain.

To ensure that the statement is relevant and current, organisations must report within six months of the financial year end to which the statement relates. Guidance recommends that the statement should be:

- Written in simple language to ensure that it is easily accessible to everyone.
- Succinct but cover all the relevant points and link to relevant publications, documents or policies.
- In English, but may be provided in other languages that are relevant to the supply chain. It suggests that specifying the actions by specific country will help readers understand the context of the steps taken.

If an organisation fails to comply, the Secretary of State may enforce the duty to prepare the statement in civil proceedings by way of injunction. Businesses also need to consider the potential reputational damage that could result from non-compliance.

Trade Union Bill

On 15 July 2015, the Government published the Trade Union Bill 2015-2016, which proposes tighter rules for industrial and strike action in the workplace. When in force, key features will include:

- Industrial action to require a 50% turnout.
- 40% of all eligible voters to be required to vote in favour of industrial action which affects important public services.
- The removal of the ban on using agency staff to cover striking workers.
- A four month limit on a strike mandate, after which another ballot is required.
- More specific requirements for the wording of the ballot paper.
- Increased notice of a strike required to be given to an employer from 7 to 14 days.

We expect these new rules to come into force during the first half of 2016.

Human Rights Act

In its manifesto, the Conservative Party pledged to replace the Human Rights Act 1998 with a British Bill of Rights. A 12-week consultation was expected to start in November or December 2015 with a view to the new law receiving Royal Assent by the summer of 2016. As we write, the consultation is yet to begin, but it is likely that 2016 will bring further developments as this is such a high profile political issue.

Grandparental leave

The Government has plans to extend shared parental leave and pay to working grandparents by 2018 and will consult on this in the first half of 2016. The new system recognises the crucial role grandparents play in providing childcare, and will help support working families. Evidence suggests that nearly two million grandparents have given up work, reduced their hours or taken time off to help cut down childcare costs.

Public Sector Exit Payments

The Small Business, Enterprise and Employment Act 2015 was amended on 1 January 2016 to allow the Government to make regulations requiring employees leaving the public sector to repay some or all of their exit payments if they return to public sector employment within 12 months of their departure.

The draft Repayment of Public Sector Exit Payments Regulations 2016 have also been published, and a further consultation period has been entered into which closed on 25 January 2016. One change since the last consultation in 2014 is that the Government now proposes that the minimum earnings threshold for individuals subject to the recovery provisions should be £80,000, not £100,000 as originally proposed. Another change is the proposal to apply the recovery policy to a return to any part of the public sector, instead of only returns to the same part of the public sector.

Additionally, the Government has published the draft Public Sector Exit Payment Regulations 2016, which seek to impose a cap of £95,000 on the value of exit payments made to most public sector workers.

The cap will apply to:

- Redundancy and voluntary exit payments.
- Payments to reduce or eliminate an actuarial reduction to a pension on early retirement.
- Payments to discharge liability under a fixed-term contract.
- Payments by way of shares on loss of employment.
- Any other payment (whether or not contractual) made in consequence of loss of employment (including payments in lieu of notice).

Therefore, these Regulations have the potential to significantly affect sums due to employees when they leave their employment. It will be possible to waive the cap under certain limited circumstances, but there is little guidance on this point at present.

Zero Hours Contracts

Exclusivity clauses in zero hours contracts were rendered unenforceable in 2015. Now, the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 have come into force on 11 January 2016, and provide a remedy for zero hours workers by giving them the right to compensation if an employer tries to enforce an exclusivity clause. In particular, the Regulations give employees the right not to be unfairly dismissed and the right to not be subjected to detriment for failing to comply with an exclusivity clause.

Employers should undertake a review of their contracts of employment to ensure there are no exclusivity clauses present if using zero hours contracts to avoid potential complaints.

Gender pay gap reporting

The provisional deadline for the Government to introduce Gender Pay Regulations is 26 March 2016.

The proposed regulations require private sector employers with 250 or more employees to publish information relating to differences between the pay of their male and female employees.

It is not yet clear the exact type of information that will be required, but the Government appears to be considering the following options:

- An overall gender pay gap figure based on average male and average female pay in the organisation.
- Gender pay gap figures broken down by full-time and part-time employment.
- Gender pay gap figures broken down by grade or job type.

The Government also indicated late last year its intention to include bonus information within gender pay gap reporting and to extend the obligation to public sector employers.

However, the relevant legislation requiring the Government to introduce the regulations is not yet in force, and until that occurs, the provisional deadline for the introduction of the regulations has no effect. Further progress can be expected during 2016.

National Living Wage

The National Living Wage is a premium which is added on to the National Minimum Wage for all workers aged 25 and over. The National Living Wage is to be introduced on 1 April 2016 and the initial rate of £7.20 an hour has just been set by the Government, based on a review of the National Minimum Wage.

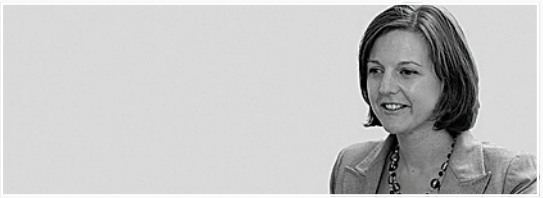
It is anticipated that some organisations may voluntarily pay those of all ages the National Living Wage from April 2016, to avoid potential age discrimination claims or to avoid younger employees from becoming demoralised and thus less productive. In any event, all employers need to ensure the increased wage is reflected in all employees' contracts aged 25 or over by 1 April 2016.

Taxation of termination payments

During 2015, the Government consulted on simplifying the tax and national insurance treatment of termination payments. Proposals include removing distinctions between types of payment, replacing the current tax free £30,000 allowance with an exemption for redundancy at a rate rising in line with length of service, new exemptions for wrongful dismissal, unfair dismissal or discrimination, retaining existing illness, disability and armed forces exemptions, replacing the existing foreign services exemption with the territorial rules applying to employment income, and anti-avoidance provisions. The responses to the consultation are expected to be published in 2016.

This development is to be watched closely, as the tax treatment of termination payments is often key in reaching a negotiated settlement with a departing employee.

Employment Team
Key Contacts



Joanne Evans
Partner & Head of Employment

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard before she joined Myerson in 2007 to head up the firm's team of employment specialists. Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

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Joanne Henderson
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Jo has worked as an employment law specialist for many years at leading commercial firms, after studying Law at the University of Leeds. She joined us in 2009 from Eversheds to strengthen further the high level employment service that we provide to our commercial clients. Jo is an experienced Employment Tribunal advocate and deals with complex, high value claims. She also has extensive expertise in executive arrangements and terminations and has a particular interest in the employment law aspects of corporate and commercial transactions, insolvency, restructuring and redundancy.

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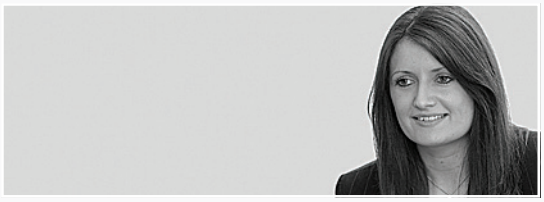

Charlotte Gilbert
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Charlotte is a specialist employment lawyer with over 7 years' experience in providing commercial and practical advice to our clients. She has particular experience in advising employers on all HR issues and processes as well as on more complicated restructuring and TUPE matters. Charlotte is a keen negotiator and in addition to acting for various employers, she advises senior executives and directors in respect of exit strategies and negotiation of termination packages. Charlotte also has a wide range of experience in dealing with Employment Tribunal claims for both employers and senior individuals, ranging from unfair dismissal to more complicated discrimination and whistleblowing claims.

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Helen worked as a specialist employment lawyer at Addleshaw Goddard, after having trained and qualified there in 2010. She joined us in 2012. Helen studied Biomedical Sciences at Newcastle Upon Tyne University before converting to a legal career. She is experienced in supporting HR Managers and In-House counsel, and in dealing with Employment Tribunal claims, Employment Tribunal appeals, employment contracts, policies, handbooks, disciplinary and grievance procedures and settlement agreements.

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