Employment law dispatches

April | 2018

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In this issue

April sees a lot of change in the world of employment law, so we thought we'd issue our bulletin nice and early to address these points. Furthermore, we look at the latest developments around gender pay gap and shared parental leave. We also bring you a round-up of recent case law, exploring topics with a focus on redundancies.

Later this month (19 April) we are delivering an employment law update with the CIPD in Stonehouse (just minutes from junction 13 of M5). There are still a few places left if you'd like to join us (non-members are welcome). *Register to attend here.*

As always, please get in touch if we can be of assistance with any employment law issues within your organisation, or if you would like to find out more about any of the issues explored in this bulletin.

Legislation update

with Matthew Clayton
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The future of work for fathers and mothers

The last few weeks have seen a number of high profile businesses reporting large gender pay gaps in favour of men, as the 6 April deadline looms for larger businesses to report their gender pay gap data.

In most cases these businesses have sought to explain the gap by highlighting the larger proportion of women they have in traditionally lower paid jobs. But this is exactly what the gender pay gap legislation is designed to highlight. It's not really about women being paid less than men in equivalent jobs – that is a different issue, which has been covered by equal pay legislation since 1970. Gender pay gap reporting is instead about flushing out structural inequalities between the sexes in the workforce; its aim is to focus attention on the question "why are there fewer women in higher paid jobs?"

It is a fact of life that women have babies and need to take a certain amount of time out of work for that biological process. It is not a fact of life that women should be the ones who continue to stay away from work and put their careers on hold in order to bring up those children, although that has been the cultural norm over many centuries.

The key to solving structural inequalities in career progression and the 'glass ceiling' experienced by women, which is highlighted by the mandatory reporting of gender pay gap data, lies in changing the culturally accepted status quo around who bears the childcare responsibility, so that those women who want to, are enabled to continue with their career. Resetting these expectations also involves enabling fathers to be carers, if they want to.

The UK government made a step towards addressing this about three years ago by introducing shared parental leave. However the uptake has been woefully low – only about 2% of those eligible have actually taken up the right.

This may be because the system is too complicated, but I suspect the main factor is that there is still prejudice amongst employers against men taking time out of work for family reasons. Men fear the reaction of their employers if they suggest they will take share parental leave or make a flexible working request, even though they are protected in law when they do so. Where both parents are working, all too often it is the woman who is expected to take

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"... he gets right to the point, with meaningful and practical advice."
Chambers UK

> “workplace policies have not kept up with the social changes in people’s everyday lives”

time out of work when the kids are sent home from school sick; the man will encounter resistance from his employer if he suggests he should do it.

On 20 March 2018 the House of Commons cross-party Women and Equalities Committee published a report entitled “Fathers and the Workplace”. Speaking about the report, committee chair Maria Miller said that “workplace policies have not kept up with the social changes in people’s everyday lives.” She described “outdated assumptions” about men’s and women’s roles in relation to work and childcare as a further barrier to change.

It is clear that the younger generations in the workforce have very different attitudes and aspirations as regards work-life balance from what some employers might expect of them. The report refers to research by the charity Working Families, showing that over half of young fathers would like to work less in order to accommodate family life.

The committee recommends a series of changes to make it easier for men to work flexibly, including:

- statutory paternity leave, and the right to time off for ante-natal appointments, to be ‘day 1’ rights
- improved paternity pay
- all new jobs to be advertised as flexible, unless there are solid business reasons not to
- better workplace rights for fathers who are agency or casual workers
- a possible 12 weeks dedicated leave for fathers in the child’s first year
- making ‘paternity’ a protected characteristic under the Equality Act.

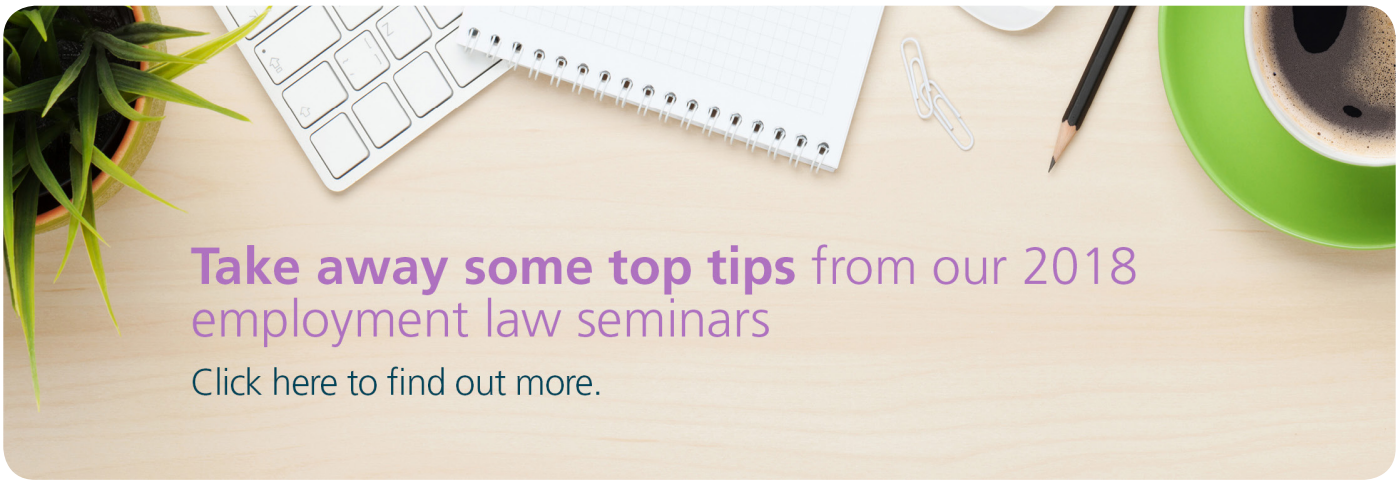
There is clearly some way to go before these proposals become law, and it is by no means certain that they will. Changing demographics in the workforce, and the cultural expectations and desires of those new groups of workers, are likely to push change as much as, if not more than, any legislation will do. But that does not mean that Parliament does not have a role to play in driving and supporting that change, and anything which will improve equality of opportunity between the sexes should be encouraged.

Annual rate increases

Just a reminder that every April various rates connected with employment law cases increase in line with inflation.

This April:

- the cap on a week’s pay for calculating statutory redundancy payments and various other matters increases to £508. This makes the maximum statutory redundancy payment (and basic award for unfair dismissal) £15,240.
- the cap on most unfair dismissal compensatory awards increases to £83,682 or 52 weeks’ actual pay, whichever is the lower.
- statutory maternity pay increases to £145.18 per week. The same rate also applies to statutory paternity pay, statutory adoption pay, maternity allowance and shared parental pay.
- statutory sick pay increases to £92.05 per week.
- National Living Wage (age 25+) increases to £7.83. The standard adult rate of National Minimum Wage (age 21-24) increases to £7.38. The development rate (ages 18-20) increases to £5.90. The youth rate (ages 16-17) increases to £4.20 and the apprentice rate increases to £3.70.



Case law watch

with Helen Howes
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Helen Howes
Paralegal with an employment law masters degree

Holiday pay for term-time only workers

The Working Time Regulations spell out how paid holiday entitlement must be calculated, but do not really make any allowance for non-standard working patterns e.g. term-time only working. In the past, government guidance has suggested that statutory paid holiday entitlement for such workers can be pro-rated to the proportion of the year actually worked, and this approach is used in the holiday pay calculator currently on www.gov.uk.

In the case of *Brazel v The Harpur Trust* the employer (a school) paid holiday pay at 12.07% (i.e. 5.6/46.4) of annual salary. The Employment Appeal Tribunal (EAT) held that this approach is wrong. Holiday pay should be calculated on the basis of a 12-week average of weeks actually worked, ignoring the out-of-term weeks.

The effect of this (assuming a 32-week working 'year') is that holiday should be paid at 46.4/32 x 12.07% = 17.5% of annual salary, thus giving a term-time only worker a windfall by comparison with a 'standard' worker. The EAT said there is no scope within the Working Time Regulations for calculating holiday pay so as to avoid this windfall.

What should I do?

Clearly this will represent an increased employment cost for some employers. It will affect not just term-time only staff, but potentially some casual workers as well.

The additional future costs created by this ruling will need to be assessed, and a revised plan for administering holiday accruals may need to be created. We can assist you with this.

You will also need to think about what liability might exist for arrears of holiday pay - there may be a limit to how far back staff could claim arrears. We can help you with addressing these matters as well.

'Stand-by' time

> "it would be working time when a worker was required to be physically present at a location determined by the employer (even if in their own home) and available for work at short notice"

In *Ville de Nivelles v Matzak,* Mr Matzak was a Belgian volunteer retained firefighter. When he was on stand-by duty he had to remain contactable and within 8 minutes' travelling time of the fire station. Mr Matzak claimed that the amount he had been paid as an allowance for standby shifts was not sufficient for the time spent.

The European Court of Justice decided he was a 'worker' but then had to decide whether stand-by time counted as working time under the Working Time Directive. It rejected the suggestion that the quality of time spent on stand-by was more important than where the worker should be, and held that it would be working time when (as in this case) a worker was required to be physically present at a location determined by the employer (even if in their own home) and available for work at short notice.

What should I do?

If you have workers who are 'on call' or 'on stand-by', then you will need to carefully review the time they spend on such periods, the restrictions on them during that time, and how much they get paid for those periods.

You will need to ensure they are paid at least the National Minimum Wage (or National Living Wage) for such time and that they are equally paid for this time with people of the opposite gender doing equivalent work.

‘Bumped’ redundancies

> “the safest approach is always to document your considerations as to whether bumping might be relevant and appropriate”

‘Bumping’ in the redundancy context means dismissing employee B in order to make room to retain employee A in employee B’s role, where it is employee A’s job which is actually redundant. This can be a fair dismissal of employee B, and if ‘bumping’ is not at least considered, might make employee A’s redundancy dismissal unfair.

In the case of *Mirab v Mentor Graphics (UK) Limited* the employment tribunal had found that the employer had carried out a fair redundancy of Dr Mirab (employee A in the scenario above) and had not been required to consider ‘bumping’ any other employees, because Dr Mirab had not raised the issue in consultation.

On appeal, the EAT said this was wrong; there is no rigid rule either way as to whether an employer must consider ‘bumping’ in a redundancy case. It is for the tribunal to decide on all the facts of the case whether the employer carried out the redundancy in a reasonable manner.

What should I do?

As there is no hard and fast rule either way on whether it is obligatory to consider ‘bumping’, we would recommend that the safest approach is always to document your considerations as to whether bumping might be relevant and appropriate and, if you decide not to pursue ‘bumping’, to document your reasons why not.

Redundancy and collective consultation

An interesting case on collective consultation has come out of the unfortunate collapse of the charity Kids Company in 2015. In June 2015 the charity published a business plan envisaging a restructure involving the possible dismissal of half its staff within a few months, at the same time applying for emergency government funding. A grant was offered on 29 July, but subsequently withdrawn on 3 August, when the allegations surrounding safeguarding issues at the charity came out. The charity closed on 5 August and all its staff were dismissed.

A number of claims for protective awards were made for failure to engage in collective consultation. The EAT upheld the tribunal’s decision that the obligation to consult collectively arose in June 2015, not August, because the business plan envisaged only immediate insolvency or widespread redundancies. It therefore constituted ‘a proposal to dismiss’ under the collective consultation legislation, which therefore required the charity to consult ‘in good time’, which was held to mean ‘promptly’ after the business plan was finalised.

Because of this, the events in August did not constitute a ‘special circumstance’ excusing the charity from the obligation to consult, although they might reduce the size of the award.

What should I do?

When planning a redundancy or restructuring exercise it is important to think at the outset about timelines for consultation. The 30 or 45 day periods for collective consultation are only minimum periods and consultation must always start ‘in good time’ and while the plans are still at the ‘proposal’ stage.

Consultation has to be undertaken ‘with a view to reaching agreement’, which cannot happen if a final decision has already been made.

> “when planning a redundancy or restructuring exercise it is important to think at the outset about timelines for consultation”

Agency worker rights

In *Kocur v Royal Mail,* the EAT has held that agency workers who have worked for an end user for at least 12 weeks and are therefore entitled to the same basic working conditions as the end user's direct employees, cannot be compensated for less holiday or unpaid breaks by receiving a higher rate of hourly pay.

The EAT said that the entitlement under the Agency Workers Regulations 2010 is to the same basic terms and conditions as comparable employees on a 'term-by-term' basis, not by comparing the overall package.

What should I do?

If you have been engaging agency workers on long-term assignments it is important that you compare their terms and conditions on a 'term-by-term' basis with those of your regular staff.

You cannot rely just on comparing the overall package. However, there are other ways of creating parity between specific employment terms. For instance, a lump sum of holiday pay could be paid at the end of the assignment rather than as holiday is taken, or 'rolled up' holiday pay might be provided.

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Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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