Employment law dispatches

September | 2019

Willans LLP | solicitors

In this issue

We've been very busy recently and therefore out of print for a while, so we thought we would relaunch with a round-up of the most significant (in our view) employment law cases of the last few months. Plus there is some up-to-the-minute news and welcome clarification regarding EU immigration arrangements in the event of a 'no-deal' Brexit.

We're also getting ready for our next breakfast seminar in a few weeks' time, on the topic of succession planning for businesses. We hope to see lots of you there for a lively discussion around the biggest legal issues facing businesses when it comes to planning for the unexpected, along with the more predictable.

As always, if you need any more information on any of the topics discussed in this issue, do contact us and we'll be delighted to help you.

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Helen Howes
Trainee solicitor

Immigration update

with Helen Howes

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New 'no-deal' guidance

Following Home Secretary Priti Patel's announcement on 19 August 2019 that there would be an end to free movement after 31 October 2019, there has been uncertainty and concern in relation to what will happen to EU citizens who arrive in the UK for the first time after 31 October 2019 in the event of a no-deal Brexit*.

The Home Office has since issued revised guidance, confirming 'no-deal' arrangements for EU citizens (including citizens of Iceland, Liechtenstein, Norway and Switzerland but excluding Irish citizens) living in the UK before 'exit day', and for those arriving after 'exit day'. The key points are as follows:

- EU citizens resident in the UK before exit day will be able to continue to reside in the UK and will be required to apply under the EU Settlement Scheme for Settled or Pre-settled status before the scheme closes (31 December 2020 in the event of a no-deal or 30 June 2021 in the event of a deal).
- EU citizens arriving in the UK after exit day will effectively still have free movement rights as there will be a transition period running up to 31 December 2020. EU citizens arriving during this transitional period will have the right to work in the UK. If an individual wishes to stay beyond 2020 they will have to apply for a UK immigration status granting them permission to stay further. *(Cont'd overleaf)*

Seminar this month

Succession planning: It's never too late!

Cheltenham | 2 October | 7:30am - 9:15am

Join us for our October breakfast briefing when we will look at the many important aspects of succession planning within your business.

Whether you're preparing for the future retirement of a key director or making sure your organisation can cope with the unexpected departure of crucial personnel, Matthew Clayton, Sophie Martyn and Rachel Sugden will take you through the primary legal issues.

Date: Wednesday 2 October 2019

Venue: National Star College

Time: 7:30am - 9:15am

Price: £18.50 (including VAT & a light breakfast).

How to book: Please click this link to reserve your place via Eventbrite, or call 01242 542931 with any queries.

We look forward to seeing you there!

- **An EU citizen arriving to the UK after exit day also has the option to apply for European Temporary Leave to Remain (Euro TLR).** They can do this via an online application. Euro TLR will give an individual leave to remain for 3 years in the UK, during which time they can work and have access to the NHS. If they wish to stay beyond 3 years, they will need to apply for a different immigration status before their Euro TLR expires. It is anticipated that time spent in the UK under Euro TLR will be able to be counted towards settlement. EU citizens who do not apply for Euro TLR will need to apply for a different immigration status before 31 December 2020 if they wish to remain in in the UK; if they do not, they will have to leave the UK by that date.
- **A new immigration system is expected to be introduced from January 2021.** EU citizens arriving to the UK after this date will need to apply for immigration status under a new system which has yet to be announced. It is expected to be based upon the Australian Points Based System and be a sponsorship system of both EU and non-EU citizens.

Although there are still many unanswered questions, this is good news for employers as they will not, for now, be expected to distinguish between EU citizens arriving in the UK pre and post-exit day when carrying out right to work checks. ■

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**All information is correct at the time of writing but is subject to change.*

Jenny Hawrot
Associate, solicitor

Case law watch

Holiday pay: series of deductions

We've long understood that a gap of three months in a series of deductions in pay would break that series, thus preventing employees from making long-term back pay claims for any sums owed before the break. This was confirmed in the *Bear Scotland Limited* case in 2014 in relation to holiday pay.

However, the Court of Appeal in Northern Ireland (NICA) in Chief Constable of Northern Ireland *Police v Agnew* has ruled this doesn't apply to holiday pay, as it could lead to 'arbitrary and unfair results.'

The NICA found that there is nothing in (Northern Irish) law 'which expressly imposes a limit on the gaps between particular deductions making up a series. We do not consider that there is anything implied … which compels to such an interpretation of a series….we conclude that a series is not broken by a gap of three months or more.'

It found that there would be a 'series' if there was a 'sufficient similarity of subject matter, such that each event is factually linked with the next'.

This case is not formally binding in Great Britain, as it was based on Northern Irish law. However, the wording of the Northern Irish legislation is identical to that of the Employment Rights Act 1996, so future cases on the same point are likely to reach the same conclusion. ■

What should I do?

For the time being, employers in Great Britain will only be bound by the *Bear Scotland Limited* decision, meaning that three months will constitute a break in a series of deductions.

However, as there is likely to be further case law on the mainland following *Agnew*, now is the time to assess your potential historical liability for holiday pay, if you have not already done so, and to make plans for paying it if you are required to.

Jenny Hawrot
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LEGISLATION TRACKER The UK Labour Party has made some radical proposals for shaking up UK employment law if they gain power at the next election, including creating a Workers' Protection Agency and introducing continental-style sectoral collective bargaining. Read more about the proposals. ■

Covert recordings by employees

If an employee covertly records a meeting does this amount to misconduct?

The EAT considered this point in *Phoenix House v Stockman*.

An employment tribunal found that Ms Stockman had been unfairly dismissed by her employer, Phoenix House. When considering compensation, the employer argued that any compensation should be reduced because prior to her dismissal, she made a covert recording, which meant she was guilty of misconduct. Therefore, her compensation should be reduced on a 'just and equitable' basis to reflect her misconduct.

The EAT concluded that it is good practice for an employee or employer to say if they will be recording a meeting, and it is generally misconduct if they do not, except in the most pressing of circumstances. The EAT did, however, note that employers rarely list covert recording as an example of gross misconduct in disciplinary procedures. ■

Jenny Hawrot
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What should I do?

To minimise the risks associated with being covertly recorded, it's best to always conduct yourself as if you are being recorded when dealing with your employees.

You should also consider adding 'making covert recordings' to your list of examples of gross misconduct.

Matthew Clayton
Partner

Working time records

The Working Time Directive was recently considered by the CJEU in *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*. Specifically, it considered whether employers were required to keep records of the actual time worked by employees, each day. Following the opinion of its Advocate General, the CJEU agreed that the Working Time Directive did indeed require employers to keep records of the actual time worked by their employees. Failure to do so would mean it would be 'excessively difficult, if not impossible in practice, for workers to ensure compliance' with the Working Time Directive.

This ruling has implications for the UK as the Working Time Regulations 1998, which transpose the EU Working Time Directive into national law, do not require employers to record the actual hours worked by employees. This means that the Regulations do not properly transfer the Working Time Directive into national law and are in breach of the Directive. ■

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What should I do?

The Working Time Directive does not have direct effect in the UK, so until the government makes changes to the Working Time Regulations to reflect this ruling and properly implement the Directive into UK law, private sector employers will not be in breach of anything.

However, it would be good practice to start considering how you will keep these records, following any amendment made. Of course this is subject to the UK remaining in the EU!

Shared Parental Leave and sex discrimination

Shared Parental Leave (SPL) was introduced to encourage and enable both parents to take time off work to care for their new-born children. Statutory SPL pay mirrors statutory maternity pay, but what happens if you offer enhanced maternity pay to your female staff? Do you have to offer enhanced SPL pay for employees (usually, although, not always, men) who opt to take SPL? Would it amount to sex discrimination not to afford men SPL the same enhanced pay?

The short answer is 'no', according to the Court of Appeal in *Ali v Capita Customer Management Ltd* and *Chief Constable of Leicestershire v Hextall*.

Claims were brought for direct discrimination, equal pay and indirect discrimination all of which failed. In brief, the court concluded that men on parental leave and women on maternity leave are not in comparable positions for the purposes of Equality Act 2010, because women on maternity leave are in a unique position and afforded special treatment, and the claims were specifically excluded under the Equality Act 2010. ■

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What should I do?

If you offer enhanced maternity pay, there is no need to offer equivalent enhanced SPL pay. However, from an employee relations point of view, you may consider mirroring enhanced pay in both circumstances, to demonstrate equality of treatment between men and women.

It's worth noting that the take-up of SPL has been extremely low, so in reality, offering enhanced SPL pay is unlikely to have an impact on most employers.

More news on our website www.willans.co.uk

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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