Employment*Brief*

January 2014

Happy New Year!

We would like to wish all of our friends and clients a Happy New Year and hope you had an enjoyable Christmas break. The New Year brings lots of things to consider in employment law and here is our round up of what to expect in the months ahead.

The Government's proposed amendments to TUPE are expected to come into force in January, as to which see our article on page (3).

April looks set to be a busy month with mandatory pre-claim conciliation to be introduced. Employees will be required to submit details of their dispute to Acas before bringing a claim in the Employment Tribunal. They will be offered pre-claim early conciliation for a period of one month. If it is refused by either party or unsuccessful, the claimant will be then able to proceed with their Tribunal claim.

In addition to this is the introduction of financial penalties for employers who lose in the Tribunal. Tribunals will have the power at their discretion to impose a penalty on losing employers of 50% of any financial award, from £100 with a maximum cap of £5,000. Also in April, discrimination questionnaires under the Equality Act are to be abolished.

Later in the year, the Children and Families Bill should come into force. Amongst other things including shared parental leave and pay (planned to take effect in 2015), this Bill introduces the right to request flexible working for all employees with 26 weeks service, i.e. not just parents or carers. The complicated statutory procedure for dealing with flexible working requests is also to be abolished; with the requirement instead for requests to be reasonably considered. For the current flexible working regime see our article on page (4).

Changes to the sickness absence regime are also due to be introduced in the spring. A health assessment and advisory service is to be set up to provide a state-funded assessment by occupational health professionals for employees who are off sick for four weeks or more. It will also bring in case management for employees with complex needs to facilitate their return to work. At a later date the Government intends to abolish employers' SSP record keeping obligations, with employers to be allowed to keep records in a flexible way.

The Government expects to put a draft Bill before Parliament early in the year following its consultation on apprenticeships.

The aim is that from 2017 new apprenticeships will be based on new standards.

Acas is to amend its Code on handling disciplinaries and grievances in relation to workers' statutory right to be accompanied to disciplinary and grievance meetings following a recent case. Until now, the request had to be reasonable, so for example it would not be reasonable for the worker to ask to be accompanied by a fellow employee if their presence would be prejudicial. However in a recent case, the EAT ruled that there is no requirement for the request to be reasonable, provided the companion falls into one of the approved categories. The approved categories of individuals include trade union officials, union representatives or a colleague. The Code is to be updated this year.

…….And no New Year update would be complete without the obligatory New Year's resolutions, here are our suggestions:

1. Has everyone got an up-to-date employment contract?

Employment contracts are often shoved in a drawer and forgotten, but now is as good a time as any to check that your contracts accurately reflect current terms of employment.

2. How is your Staff Handbook looking?

Do your employment policies comply with recent changes in the law and are there any policies missing? For example, are you equipped to deal with social media in the workplace?

3. Are you ready for a snow day?

These are months when having an adverse weather policy in place is a good idea so that staff know what to expect.

4. How are your sickness records?

Are there any employees on long term sick, or patterns developing with other employees, now is the time to check and put a strategy in place.

5. When did you last have an appraisal?

Appraisals are a good way of reviewing performance and checking staff satisfaction.

QUICK REFERENCE SECTION

Statutory minimum notice periods
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more but less than 2 years.
- One week's notice for each complete year of service for those employed for more than 2 years.
- Once an employee has more than 12 years service the notice period does not extend beyond 12 weeks.

National Minimum Wage
From October 2013

16 – 17	£3.72
18 – 20	£5.03
21+	£6.31
Apprentices	£2.68

Statutory Sick Pay
from April 2013
£86.70 per week

Statutory Maternity/Paternity/ Adoption Pay
Basic rate from April 2013
£136.78

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme at £450.00.

Internships

Internships are becoming increasingly commonplace, probably in part due to the recession. There is no general definition of internship but typically it is a work placement after further education and before entering a profession. Internships allow employers to access young talent and should increase the intern's skillset and employability.

In some cases, organisations pay their interns in order to attract high achievers, but there are other sectors where unpaid interns are the norm. Some argue that unpaid internships should be phased out because they favour the socially advantaged, but is there a right to be paid?

Aside from the legal position, engaging unpaid interns and failing to pay the National Minimum Wage (NMW) in the current climate is not without risk. There has been much media interest in this area with the charge that they are exploitative and a hindrance to social mobility in that they favour the well-connected. Added to which, the Government is actively encouraging employers to pay interns irrespective of whether they qualify for the NMW. As a result of this, those offering unpaid internships should carefully consider whether they are complying with the NMW laws. The Government has recently published guidance for interns about their right to fair pay and employers are also being targeted directly. HMRC is to write to 200 employers that have advertised internship roles, informing them that checks will be carried out to make sure that they are paying the NMW.

Aside from the political situation, the position in law is that interns will only be entitled to be paid the NMW if they are a 'worker' or an 'employee', that is to say if there is a contract of employment or a contract to perform work or provide services coupled with financial remuneration or benefits in kind for providing services. Each internship is different, without a clear-cut legal status. This can make it difficult for employers to be aware of their obligations in a given case. However, if the nature of a particular internship is such that the individual would be deemed to be a 'worker' or an 'employee' then they will be entitled to all of the rights that flow from this, including the NMW.

Failing to pay the NMW can result in being ordered to pay up to six years backdated pay, together with civil and criminal sanctions, employers can also be named and shamed.

In order to try to avoid a contractual situation arising, employers can take the following steps:

- Any payments should be to cover actual expenses and be clearly identified as such, to avoid such payments being construed as a wage.
- Give the volunteer the ability to refuse work and choose when to work rather than having an ongoing obligation to, for example, turn up every day.
- Have an agreement in place that clearly defines the relationship, but note that just calling a person an "unpaid intern" or "volunteer" will not prevent them from qualifying for the NMW if in reality they are a worker.
- Treat volunteers fairly with clear procedures for dealing with problems to reduce the risk of disputes.

Internships can clearly bring many benefits to both an organisation and the intern, but is it important from the outset to have a strategy in place so that both parties understand the full extent of their obligations and this is particularly the case in the current climate.

TUPE CHANGES THE GOVERNMENT'S RESPONSE

TUPE is never the most interesting topic but is one that seems to create the greatest reaction from employers and advisers alike! The Government was intent on pushing back the tide where this particular part of European legislation was concerned but as anticipated all that hot air has come to pretty much nothing. It has abandoned its headline proposal to remove the concept of service provision change, instead choosing to nibble around the edges. At the time of writing, the changes are likely to come into effect in January 2014. The following alterations are being proposed:

- In order for a change in service provider to be a relevant transfer under TUPE the activities carried on after the alleged transfer must be "fundamentally or essentially the same" as those carried on before it.
- The concept of dismissal for a reason "connected with" a TUPE transfer will be removed. Protection against dismissal will only extend to circumstances where the TUPE transfer is the reason for the dismissal.
- The variation of terms and conditions will only be prohibited where the transfer is the reason for the variation.
- Employee liability information will now need to be provided 28 days prior to the transfer rather than the previous 14.
- Redundancies arising from a change in the employee's place of work arising on a TUPE transfer will not necessarily be automatically unfair.
- It will be possible to renegotiate terms that are derived from collective agreements 1 year after a TUPE transfer although only where the changes are no less favourable to the employee overall.
- Transferee employers will only be bound by collectively agreed terms that are in existence on the date of transfer and will not be bound by collectively agreed terms that were negotiated and adopted without their involvement after the date of transfer.
- Micro businesses (those of 10 employees or fewer) will be able to inform and consult directly with affected employees rather than having to elect employee representatives.

Many of these changes have arisen from current case law rather than ground breaking proposals.

Frustration of contract

Frustration of contract is not often used in employment law but it can raise its head from time to time.

As a general rule, if performance of a contract becomes more difficult or even impossible, the party who fails to perform it is liable in damages. An exception to this liability is the doctrine of frustration. This allows the contract to be automatically discharged when a frustrating event occurs so that the parties are no longer bound to perform their obligations. The frustrating event must occur after the contract has been formed and must be both fundamental to be regarded by law as striking at the root of the contract and entirely beyond what was contemplated by the parties when entering it. It must also not be due to the fault of either party and may render further performance impossible or illegal or radically different from that contemplated by the parties at the time of the contract.

For a historical precedent in employment terms we have to look back to a case from 1976 when an employee claimed unfair dismissal after he sought to return to work after a long period of absence only to be told his job had been given to someone else. At the first instance the Tribunal rejected the employer's argument that the contract had been frustrated on the basis they had taken no steps to end it. The Employment Appeal Tribunal however took the view that failure to act did not preclude the contract being frustrated.

More recent case law has identified that as a matter of everyday practical reality employers and employees would expect to deal with issues such as absence, sickness and disability within the framework of the employment relationship rather than general contractual law.

The key issue to remember here is often these cases arise because parties have allowed issues affecting the employee's continued employment to remain unresolved. After an initial period of contact and communication momentum dwindles. Employers should keep a constant eye on what their long term sick are up to and take action to deal with the issue where appropriate.

The *Chambers and Partners 2014* guide has ranked and recommended two of Gullands' staff. Amanda Finn has been endorsed in the Employment sector as an 'associate to watch' and was referenced to be "highly regarded by clients, who say "She is extremely prompt and her response time is always good."

Flexible working requests

A new flexible working regime is expected to come into force next year, when the right to request flexible working is to be extended to all employees with 26 weeks' continuous employment. The statutory procedure for considering requests is to be abolished with a new duty on employers to act reasonably within a reasonable period. This note sets out the current situation.

Who can make a request?

The right is available to employees who have been continuously employed by a business for at least 26 weeks and who care for a child or an adult.

Caring for children

An employee can make a request to care for a child under the age of 17, or under 18 if the child is disabled. The employee must have responsibility for the child's upbringing or be the spouse or partner of the child's parent, adoptive parent, guardian, or foster parent.

Caring for adults

An employee can make a request if they care for, or expect to be caring for, a person aged 18 or over who is in need of care and is one of the following:

- married to, or the civil partner or partner of the employee;
- a relative of the employee; or
- falls into neither of the above categories but lives at the same address as the employee.

Government guidance suggests that care-giving activities are likely to include:

- help with personal care, for example, dressing or bathing;
- help with mobility, for example, getting in and out of bed; or
- giving or supervising medicines.

What kind of change can be applied for?

The employee will need to make a written request for flexible working, setting out their proposed pattern of flexible working, the impact they believe it will have on the business and how they believe the business can accommodate it.

The employee can request:

- To change the hours they work.
- To change the times they work.
- To work from a different location, for example, asking to work from home.

The right to request procedure

Businesses must follow the detailed statutory procedure following a flexible working request. We suggest businesses take legal advice as soon as the request is received to ensure that all obligations to consider the request are complied with.

Rejecting or refusing the request

If the business chooses to refuse a request, it must identify one or more of the following grounds as the reason for doing so:

- It would have a detrimental impact on the quality of the business' products or services.
- There is insufficient work available during the times when the employee wants to work.
- The business is planning structural changes to the organisation of the business.
- The work cannot be re-organised among existing staff.
- There would be a detrimental impact on the business' performance.
- The business is unable to recruit the additional staff that the employee's proposal would require.
- There would be a detrimental impact on the business' ability to meet customer demand.
- The burden of additional costs that would be incurred.

The business should give a notice of refusal in writing, dated and stating which of the above grounds apply, and why. It should also set out the appeal procedure.

Practical guidance for businesses when handling a request

- Follow the statutory right to request procedure and for example train managers, diarise deadlines.
- Demonstrate serious consideration of the request – consult affected colleagues.
- Think about alternatives for the initial request that may work for both parties.
- Maintain consistency, record requests and outcomes
- Explain the decision and the reasons fully and clearly.

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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