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EMPLOYMENT LAW BULLETIN

Spring 2020

Partnering with:

TRAVERS SMITH

WELCOME

Welcome to the Spring 2020 edition of the Hays Employment Law Bulletin which has been produced with the assistance of the London law firm, Travers Smith LLP. It features comprehensive detail on changes to employment law and legislation.

We understand that keeping abreast of changes in employment law can be challenging so we hope you find this instructive and revealing. Your feedback will be most welcome.

Thank you to Travers Smith LLP for their insight.

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COVID-19 WHAT SHOULD EMPLOYERS DO?

The increase in the spread of coronavirus (Covid-19), both in the UK and globally, presents a number of challenges for employers. Below we highlight some of the key employment law issues raised by the outbreak.

Self-isolation and pay

Employers are grappling with issues around pay and sick pay in relation to staff who are self-isolating in accordance with government guidelines. Such staff are now entitled to statutory sick pay if they are unable to work and are self-isolating because they or someone in their household has Covid-19 symptoms. Employers are also encouraged to apply any enhanced company sick pay that would normally be available. Employees who are able to work remotely while self-isolating are of course entitled to their normal full pay.

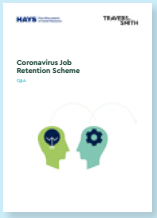
Staff safety and wellbeing

Many employers have put in place measures to ensure the health and safety for those in key service roles who are continuing to work during the pandemic, including additional workplace cleaning, personal hygiene reminders, considering commuting arrangements and compulsory self-isolation for employees who are at risk, may have symptoms or come into contact with others who pose risk. With homeworking also now commonplace, employers must consider how to support and ensure the wellbeing of staff working remotely. Many employers are putting in place measures to combat issues associated with homeworking, such as feelings of isolation and loneliness.

Job retention

Amid the significant economic downturn, many businesses are having to consider ways of reducing costs to avoid redundancies. The government's new Coronavirus Job Retention Scheme now provides funding for 80% of wage costs (capped at £2,500 per month) for up to four months for employees who are retained but who are not working due to Covid-19. This has been welcomed by employers but there remain a number of employment law issues to consider such as how to agree and document the arrangements with staff, and how to select which employees to stand down if others will continue to work or possibly face redundancies. For some employers, other cost cutting measures may still be required such as unpaid leave or sabbaticals, agreeing pay cuts, reducing hours and overtime, or requiring staff to take holiday.

We have produced a Q&A guide to the Coronavirus Job Retention Scheme in conjunction with leading law firm Travers Smith – get in contact to receive your copy.



Redundancy consultation

For some employers, redundancies will remain unavoidable in the current climate. Employers must be mindful of their consultation obligations, which are only relaxed in the most extreme cases. Generally, employers must consult trade union or elected employee representatives where 20+ dismissals are proposed at an establishment within a 90-day period, and consultation must last at least 30 days (for 20+ dismissals) or 45 days (for 100+ dismissals). Even where less than 20 dismissals are proposed, employers must consult with the individuals affected. These consultation obligations present a particular challenge for some with such a rapid and sharp decline in business caused by the Covid-19 outbreak.

Time off for carers and volunteers

With the national closure of schools and childcare facilities, many employees are having to balance childcare and work. Employees have the right to reasonable unpaid time off to deal with disruptions in care arrangements and employers are having to consider how this interacts with homeworking arrangements. Employers are also able to claim wage costs under the Coronavirus Job Retention Scheme for employees who are stood down because they unable to work due to childcare responsibilities. In addition, the government has introduced a new right to emergency volunteer leave for workers volunteering with certain listed public authorities. Employees and workers will be able to take unpaid emergency volunteer leave in blocks of two, three or four weeks, with a UK-wide compensation fund to be established to compensate for loss of earnings and expenses.

COVID-19 IMMIGRATION ISSUES

With more and more countries implementing or extending travel restrictions, the Covid-19 outbreak is having an impact on a number of immigration issues, including:

Visa applications from outside the UK

Visa applications are now being impacted by measures to combat the virus such as mandatory quarantines for new arrivals, travel bans and closure or restricted services at some overseas visa application centres. These have had a knock-on effect on UK visa applications, with many employers now having to delay work start dates and review relocation as well as shipping arrangements for affected new hires.

Visa expiry dates

Non-EU employees whose visas have expired since 24 January or are about to expire, but who cannot leave due to travel restrictions, will now, exceptionally have their visas extended to 31 May 2020. To obtain the extension, affected employees must contact the UKVI Coronavirus Immigration Team (CIT) to provide their details (full name, date of birth, nationality, visa reference number and confirmation of the Covid-19 impact preventing their departure e.g. border closures). Such individuals will also be able to apply for new visas within the UK until 31 May 2020, when they would normally be required to apply from their home country.

Right to work checks for new starters

Employers must normally check original documents in the presence of the individual, but this is proving challenging with most offices closed and many employees working from home. The Home Office has now issued specific guidance to address this. The updated guidance confirms that, during these exceptional times, checks can be carried out over video call using clear scanned copies with the use of the online right to work checking service where possible (i.e. for individuals with biometric residence permits or EU nationals with settled or pre-settled status). Where scanned copies have been checked (rather than original documents) employers must record the date of the check and record that an adjusted check has been undertaken due to Covid-19. A retrospective check must then be undertaken within 8 weeks of the Covid-19 measures ending and the employer must retain evidence of both checks on record.

Sponsor compliance

Employers are required to report changes of circumstances, unauthorised absences and keep records of authorised sickness absence, including sponsored employees who self-isolate. Helpfully, the UKVI have now confirmed that sponsor employers will not be required to report a change of circumstances in relation to sponsored employees now required to work remotely. There are also restrictions on sponsored employees taking unpaid leave and salary reductions which could affect their visas, and which should be borne in mind in any cost-saving measures implemented by employer sponsors.

Tier 2 workers and furlough

The Home Office has provided helpful guidance which, exceptionally, allows sponsored employees to be placed on furlough and have their salaries reduced to 80% or £2,500 per month (whichever is lower). Such reductions must be temporary and must be part of a company-wide policy to avoid redundancies in which all workers are treated the same. Employers will still need to report the reduction, specifying the reasons and the anticipated duration to the UKVI in each case.

OFF-PAYROLL RULES DELAYED: WHAT NOW?

The changes to the Off-Payroll rules, due to come in this April, have been delayed by one year as part of a package of measures announced by the government to ease pressure on businesses in light of the coronavirus outbreak. The delay has been welcomed by clients and contractors alike – both concerned about the financial impact the new rules would have on them. Whilst good news, the government have made it clear that this is a delay and not a cancellation of the new Off-Payroll rules which will now come into effect on 6 April 2021.

> “The government have made it clear that this is a delay and not a cancellation.”

Many clients had already begun to implement the changes with a view to an April 2020 implementation. In the light of the delay, it is worth bearing in mind that:

- contracts that were drafted on the basis that the contractor would be treated as inside IR35 from April 2020 should now have been be amended (e.g. to remove references to deduction of tax and national insurance)
- clients may wish to write to contractors who have already received a status determination statement under the Off-Payroll rules explaining the impact of the delay (if they haven't already done so)
- clients who had decided to move some contractors onto employment arrangements in April 2020 have had to consider whether they go ahead with his now or retain the worker as a contractor, and the implications of doing so.

POST-BREXIT IMMIGRATION SYSTEM

The government has unveiled details of how the immigration system will look from 1 January 2021. In a significant change, employers will need a sponsor licence to sponsor new hires from the EU as well as non-EU employees. Employers who are not already licensed sponsors should therefore consider applying for a licence now to prepare for the changes and avoid delays.

The post-Brexit immigration system from 1 January 2021 essentially replicates the existing Tier 2 sponsored skilled work visa regime and extends this to cover both EU and non-EU nationals. There will, however, be some changes to reflect the widening of the system:

- the resident labour market test will be removed (meaning employers will no longer have to show they cannot find a suitably qualified British candidate)
- the minimum salary threshold will be reduced from £30,000 to £25,600 (but employers will still need to pay the higher job-specific rate for a role set by the Home Office)
- lower salary thresholds will apply to candidates who have a relevant PhD qualification or are filling an occupation where there is a recognised skills shortage (e.g. nurses)
- the minimum skill level required will be reduced from RQF6 (broadly, degree level roles) to RQF3 (broadly, roles requiring an A-level qualification)
- the annual limit on visas (currently 20,700) will be suspended.

Under the new regime, new arrivals from the EU will have to demonstrate a certain level of English language ability, as non-EU nationals do now. The existing visa fees will also apply to EU nationals (currently around £8,830 for a five-year visa), representing significant additional costs for employers. The government has also confirmed there will be no general low-skilled or temporary work route, meaning employers will have very limited ability to recruit EU nationals in lower skilled roles, which is potentially problematic for sectors such as hospitality, retail and manufacturing.

The sponsorship requirement will only apply to new arrivals from the EU from 1 January 2021 – those already in the UK as at 31 December 2020 can continue to live and work here, provided they apply for residence status under the EU Settlement Scheme by 30 June 2021.

Given the requirement to have a sponsor licence for new hires from the EU, employers who are not already licensed sponsors should consider applying for a licence now to prepare for the changes. A spike in applications is likely as we approach January 2021 which could lead to delays.

DISCIPLINARY PROCESS
ROLE OF INVESTIGATOR

The employee in this case was a university professor. He failed to report a sexual relationship he had with a student that he supervised, contrary to the university's policy. Another professor and an HR partner were appointed to investigate. They produced an investigation report, a draft of which was reviewed by the university's inhouse lawyer. The final version of the report left out some findings that would have been favourable to the employee, including an opinion that the employee had not abused his power and that there was nothing immoral or scandalous about his conduct. Following a disciplinary hearing, the employee was dismissed for gross misconduct. He brought an unfair dismissal claim, arguing that the removal of findings favourable to him in the investigation report made his dismissal unfair because the inhouse lawyer had exercised too much influence over the report.

However, the Employment Tribunal ruled that the dismissal was fair and the Employment Appeal Tribunal (EAT) agreed. The Tribunal and EAT said that the purpose of the investigation was simply to identify whether there was a disciplinary case to answer. The findings removed from the draft investigation report were taken out on the advice of the inhouse lawyer because they contained opinions and "evaluative conclusions", which went beyond the scope of the investigation. Accordingly, the dismissal was fair despite the alterations to the report.

This case is a reminder of the role of the investigating manager in a disciplinary investigation. The investigator's role is to summarise the findings of fact and to recommend whether there are sufficient grounds for a disciplinary hearing to be held. It is then for the chair of the disciplinary hearing to decide whether the conduct occurred, whether it amounted to misconduct and what the appropriate sanction is. The investigator should not form a conclusion on the nature of the employee's conduct or suggest a possible sanction, as this could influence the disciplinary chair. For there to be a fair process, the disciplinary chair must come to their own conclusion about the nature of the conduct and the appropriate sanction.

Dronsfield v University of Reading (No.2)

"The final version of the report left out some findings that would have been favourable to the employee, including an opinion that the employee had not abused his power and that there was nothing immoral or scandalous about his conduct."

DISCIPLINARY HEARING DO YOU HAVE ALL THE FACTS?

The employee in this case was dismissed for inappropriate sexual and intimidating behaviour following a work social event. During an evening at the pub, he was seen kissing a university student who was on work placement and the two were also seen entering the disabled toilet. A manager was appointed to conduct an investigation. The student alleged that the employee had followed her into the toilet, locked her in and assaulted her. On the advice of the investigator, she reported the matter to the police. Another manager was appointed to chair an internal disciplinary hearing. Prior to the disciplinary hearing, the investigator learned that the student had withdrawn her complaint to the police but did not pass this information on to the chair of the disciplinary hearing. The disciplinary chair decided to dismiss the employee, and he brought an unfair dismissal claim.

The Employment Tribunal initially ruled that the dismissal was fair. However, on appeal, the Employment Appeal Tribunal ruled the dismissal was unfair. The withdrawal of the police complaint by the work placement student would have been material to the employer's decision to dismiss. The investigator's failure to pass this information on to the decision-maker therefore made the dismissal unfair.

This case highlights the roles of the investigator and decision-maker in an internal disciplinary process. The decision-maker must consider all of the facts relevant to the case before making their decision. If there are material facts known to the investigator which are not passed on to the decision-maker, this could render the dismissal unfair. Employers must therefore ensure that those in the disciplinary process pass on all relevant information that comes to light, including anything that arises after the initial investigation has concluded but before the final decision is made. It would also include any new information which comes to light after the initial disciplinary hearing but before a decision is made on any internal appeal.

Uddin v London Borough of Ealing

> "Prior to the disciplinary hearing, the investigator learned that the student had withdrawn her complaint to the police but did not pass this information on to the chair of the disciplinary hearing."

WHISTLEBLOWING DISMISSAL WHO KNEW?

The employee in this case worked as a media specialist in marketing at Royal Mail. During her probationary period, she blew the whistle to her line manager about suspected breaches of both the company's policies and Ofcom's rules. Her line manager convinced her to retract the allegations and admit she had made a mistake. He then alleged that her performance was inadequate and set up intensive weekly review meetings, ultimately placing her on a formal performance improvement plan with unrealistic targets.

The employee went off sick with stress. Her case was referred to another senior manager, who did not see the original whistleblowing disclosures and was unable to meet with the employee due to her sickness absence. The employee's line manager presented trumped up evidence of the employee's poor performance and covered up the whistleblowing disclosures, describing them as a simple misunderstanding. On that basis, the senior manager reviewing the case decided to dismiss the employee for poor performance. The employee brought an unfair dismissal claim, claiming that she had been dismissed for blowing the whistle.

The case went all the way the Supreme Court, which has now ruled that the employee was unfairly dismissed for blowing the whistle. Although the dismissing manager genuinely believed the employee was a poor performer, this was due to a false picture created by the employee's line manager. In reality, the employee's line manager was trying to get the employee out because she had blown the whistle. He deliberately set her up to fail and kept the details of the whistleblowing from the dismissing manager. In these circumstances, the Court agreed that the real reason for dismissal was the whistleblowing, rather than the employee's performance.

The case shows that an employee can succeed in a whistleblowing claim where the decision-maker is not motivated by whistleblowing but has been manipulated or influenced by another manager who is. The case highlights the role of Human Resources in ensuring the decision-maker has all the available information and documents. The decision-maker in this case was not shown the employee's whistleblowing emails, which may have affected the decision or led to different lines of inquiry. It also highlights the need for the decision-maker to probe allegations of poor performance, and seek specific examples, rather than accepting a line manager's account at face value.

Royal Mail Group Limited v Jhuti

“The employee's line manager presented trumped up evidence of the employee's poor performance and covered up the whistleblowing disclosures, describing them as a simple misunderstanding.”

NEW LAW

National Minimum Wage

On 1 April 2020, the hourly rates of the National Living Wage and National Minimum Wage increased. The new hourly rates from 1 April 2020 are as follows:

- £8.72 for workers aged 25 or over (increasing from £8.21 per hour)
- £8.20 for workers aged 21 to 24 (increasing from £7.70 per hour)
- £6.45 for workers aged 18 to 20 (increasing from £6.15 per hour)
- £4.55 for workers aged under 18 (increasing from £4.35 per hour)
- £4.15 for apprentices under 19 or in the first year of apprenticeship (increasing from £3.90 per hour).

Pay for family friendly leave

On 5 April 2020, the weekly rates of statutory maternity, paternity, adoption and shared parental pay increased from £148.68 to £151.20 per week.

Statutory sick pay

On 5 April 2020, the weekly rate of statutory sick pay increased from £94.25 to £95.85 per week. The government has also amended the statutory sick pay rules so that, with effect from 13 March 2020, workers self-isolating because they or someone in their household has Covid-19 symptoms are eligible for statutory sick pay. The rules were further amended on 16 April 2020 so that anyone who is shielding due to a particular vulnerability in line with government guidance is also covered. The government has also changed the rules so that statutory sick pay is payable from day one of any Covid-19-related absence (rather than the fourth day of absence, as is normally the case).

Unfair dismissal compensation

On 6 April 2020, the maximum compensatory award for unfair dismissal increased from the lower of a year's pay and £86,444 to the lower of a year's pay and £88,519.

Statutory redundancy pay

On 6 April 2020, the maximum amount of a week's pay, for the purposes of calculating statutory redundancy pay (among other things) increased from £525 to £538. The maximum statutory redundancy payment therefore increased from £15,750 to £16,140.

Termination payments

On 6 April 2020, changes to the national insurance due on termination payments took effect. From 6 April 2020, where an ex gratia payment is made on termination of employment (on top of notice pay) the first £30,000 is free of income tax and national insurance but any amount above this is now subject to income tax and employer national insurance contributions. Previously, the amount above £30,000 was taxable but the whole amount was free of national insurance contributions. The change applies where both the termination of employment and the payment are on or after 6 April 2020.

Parental bereavement leave

A new right to parental bereavement leave was introduced on 6 April 2020. Employees who lose a child under the age of 18, or suffer a stillbirth after 24 weeks, are now entitled to two weeks' statutory bereavement leave. The leave can be taken in one block or as two separate blocks of a week each. There is no service requirement for the leave but parents with at least 26 weeks' service will also be paid statutory parental bereavement pay at the same rate as statutory paternity pay (currently £151.20 per week).

Emergency volunteering leave

The Coronavirus Act 2020 introduces a new right for employees to take emergency volunteering leave to assist with the crisis. The key features of emergency volunteering leave are:

- the employee must become certified by the relevant authority to carry out voluntary work in health or social care
- the employee must give 3 working days' notice to the employer to take leave, and produce a copy of the certificate to the employer
- employers cannot prevent employees from taking volunteering leave
- the leave must be taken in one block, which may last for two, three or four weeks.

The leave is unpaid, but a government fund will be established to compensate volunteers for loss of earnings, and travel and subsistence expenses. This right is not yet in force at the time of writing but is due to be implemented imminently.

Compensation for discrimination

Compensation for discrimination and harassment is made up of two elements – the employee's financial loss and injury to the employee's feelings. The "Vento bands" have been created to guide tribunals what to award for the injury to feelings element. On 6 April 2020, the Vento bands were increased, and the current bands are now as follows:

- **Lower band:** £900 to £9,000 (for a low-level, one-off act of discrimination or harassment).
- **Middle band:** £9,000 to £27,000 (for something more serious).
- **Upper band:** £27,000 to £45,000 (for the most serious acts, such as an ongoing campaign of discrimination or harassment).

This Employment Law Bulletin has been produced with the assistance of the London law firm, Travers Smith LLP. If you have any queries about the Bulletin, or employment law generally, please contact Travers Smith LLP employment law specialists:

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