UK: Employment Update

In this month's Update we consider a medley of new employment law provisions that address: applications to postpone Employment Tribunal proceedings, who is liable for the unpaid wages of subcontractors in the construction industry and a new right to take time off to do voluntary work. We also report on the latest holiday pay case which provides no further clarity on continuing areas of uncertainty in relation to holiday pay and on the uncertainty about who is an "employee" for the purposes of the new gender pay gap reporting regime.

Postponing Tribunal proceedings: new rules apply from April

In April new rules will come into effect aimed at reducing the number of postponements in employment tribunal proceedings. Under the new regime:

- a party that has been granted two previous postponements of hearings in the same case, will only be granted any further applications for a postponement in exceptional circumstances.
- any application for a postponement presented less than seven days before the date of the relevant hearing, or made at the hearing, will only be granted in exceptional circumstances.
- Tribunals will be obliged to consider the imposition of a costs order or a preparation time order against a party that is granted a late postponement i.e. where a postponement is applied for less than seven days before the hearing.

Advice and guidance will be available to Tribunal users to help ensure that users are provided with adequate information to understand when a postponement application may be appropriate and understand the potential implications of making repeated or late notice applications.

An application to postpone will not count towards the cap of two: (i) if the application was necessitated by an act or omission of the Employment Tribunal; or (ii) if the parties agree the need for a postponement and the Tribunal considers that it should be granted in order to facilitate a settlement between the parties.

Transitional provisions make it clear that these new postponement rules only apply to proceedings that are presented on/after the commencement date of the new regime. In practice however, even though the new rules do not apply to ongoing cases under the Tribunal's existing case management powers, a Tribunal is already free to refuse applications to postpone and/or to make costs orders in relation to costs arising out of postponement applications whether made in a timely fashion, or at the last minute, so it is questionable how much of an impact the new rules will have.

Key issues

- Postponing Tribunal proceedings: new rules apply from April
- Construction industry workers: main contractor potentially liable for sub contractors' wages bill
- Holiday pay: further developments but no clarification
- On the horizon: new right to take time off to volunteer
- Gender pay gap reporting: Who is an employee?

The Government acknowledges that certain people with disabilities may have an increased likelihood of requiring a last minute postponement and that their reasons may not qualify as exceptional circumstances. Accordingly it proposes to revise the provisions to take account of circumstances where a last minute postponement is requested for reasons of ill health related to an existing long term health condition or disability. This is a common reason for last minute applications to postpone so it is questionable whether the new regime is going to be able to reduce such applications.

[Government Response to the consultation on amendments to employment tribunal postponement procedures can be found here.]

Construction industry workers: main contractor potentially liable for sub contractors' wages bill

Under Government proposals for implementing the Posted Workers Enforcement Directive, contractors in the construction industry will be potentially liable for the unpaid wages of subcontractors' workers.

New regulations applicable to the construction industry will be implemented on/before 18 June 2016. They will give posted workers the right to bring an unlawful deduction of wages claim in the Employment Tribunal against the contractor one up the supply chain from their direct employer.

Where a sub contractor has failed to pay its worker at all, or pays them an amount less than the National Minimum Wage (NMW), the worker will have a choice of bringing a claim against either the employer, or the contractor, but not both. The claim against the contractor will however only be for the NMW amount and not the full rate of pay if it is higher. The Tribunal claim against the sub contractor employer can, however, be for the full amount of pay due if that is more than the NMW. In addition the worker can make a complaint to HMRC against their employer for NMW arrears; the Government suggests that this may well be the most preferable and cost effective route for the individual.

The contractor will have a defence against such unpaid sub contractor wages claims if it can persuade the Tribunal that it conducted reasonable due diligence. Unfortunately, the regulations will not define what is reasonable due diligence, but the Government is expected to produce some sort of guidance. Examples of what might be regarded as reasonable due diligence could potentially include: confirmation of monies held relating to temporary workers' pay, insurance and contracts and checking whether employment claims have been brought against the subcontractor in the preceding five year period. The practicality of such checks remains to be seen.

'Posted Worker' will be defined in the implementing regulations. Drawing on the definition set out in the Directive the definition will reflect the fact that the individual carries out his work for a limited period in the UK instead of the EU Member State in which he normally works. It remains to be seen what will be regarded as a limited period and what anti avoidance mechanisms will be incorporated to prevent practices aimed at removing an individual from the definition of 'worker'.

The Government seems unclear about the extent to which posted workers are, in fact, used in the construction industry or the extent to which such workers do not receive the NMW – so it is unclear whether this new right to pursue NMW claims will be a significant concern for the construction industry.

In principle, the possibility of wages claims being brought by sub contractors' staff may be dealt with via warranties and indemnities with contractors settling claims and then claiming under the warranty. In practice, however, it may be that the potential sums involved are such that the de minimis threshold for suing on any indemnities is simply not attained.

Companies operating in the construction industry may wish to consider:

- auditing their subcontractors' use of posted workers;
- quantifying the potential financial exposure if faced with NMW claims from the subcontractors' workforce;
- what steps may be taken to raise a due diligence defence against such claims; and
- whether there is any commercial merit in including warranty and indemnity provisions in agreements with subcontractors to address NMW claim risks.

[The Government Response can be found here.]

Holiday pay: further developments but no clarification

For the past two years, holiday pay has often frequented the headlines following the ECJ's decision in *Lock v British Gas* that the Working Time Directive requires that workers should receive normal remuneration during holiday and this includes commission payments. In the case of Mr Lock as a salesman the bulk of his remuneration was derived from commission which he did not have the opportunity to earn whilst on holiday.

The Working Time Regulations (WTR) gives workers the right to 5.6 weeks' paid leave; this is comprised of four weeks Directive leave, and, an additional 1.6 weeks 'gold plated' domestic leave. In *Bear Scotland v Fulton* the EAT applied the ECJ's approach and held that holiday pay calculations in relation to the four weeks of Directive leave should take into account non guaranteed overtime payments (i.e. where workers are required to work the overtime if asked but the employer is not obliged to provide overtime) (see our Briefing). It went on to hold that the WTR could be interpreted to give effect to the ECJ holiday pay decisions.

After its reference to the ECJ, Mr Lock's case returned to the Employment Tribunal for it to consider whether it was possible to interpret the WTR in a way which conforms to the ECJ's interpretation of the Directive. The Tribunal held that it could read the necessary words into the WTR following the EAT's decision in *Bear Scotland*.

British Gas appealed the Tribunal's decision on a number of grounds. Its central argument was that the *Bear Scotland* decision should not have been followed in relation to its finding that the WTR could be interpreted to conform to the requirements of the Directive because it was manifestly wrong. The appeal failed.

For the time being then, it is clear that the Employment Tribunal can read words into the WTR to give effect to the ECJ's decision that holiday pay should be calculated by reference to the worker's normal remuneration which we know can include: guaranteed overtime pay, non guaranteed overtime pay, taxable elements of travel time allowances, commission payments linked to the performance of tasks under the contract and remuneration relating to the professional and personal status of the worker.

Unfortunately what this decision does not do is to clarify a number of continuing areas of uncertainty in relation to holiday pay:

- Whether voluntary overtime pay must be included in holiday pay calculations if it is worked regularly?
- Whether team commission payments have to be included in holiday pay calculations?
- What the calculation reference period is for working out the holiday pay (is it the 12 week period immediately prior to the holiday being taken or can another reference period be used such as 12 months?)
- Whether bonuses based on individual and/or team performance have to be included in the holiday pay calculation?

[British Gas Trading Company v Lock]

On the horizon: new right to take time off to volunteer

BIS has recently published a corporate report setting out its departmental plan for 2015 to 2020. Amongst the items included in its 'Labour markets' objectives is the stated intention that employees of large employers and public sector employers will be entitled to take three days leave each year in order to volunteer. At this stage no further indication has been given on the timing of the introduction of this new right or indeed any of the detail in terms of the process for exercising it, whether leave will be paid and the nature of any protection afforded to employees in the event they are subjected to a detriment for exercising the right or are prevented from doing so.

The BIS single departmental plan report can be found here.

Gender Pay Gap Reporting: Who is an employee?

Last month the Government published details of the proposed Gender Pay Gap Reporting regime alongside draft regulations. Our briefing can be found here. The draft regulations have already generated some considerable debate, particularly in relation to which "staff" have to be covered by an employer's Gender Pay Gap Report (GPG Report). The draft regulations refer to "employees" but it is unclear whether this is a reference to employee in a narrow sense of an individual engaged under a contract of employment or "employee" in the wider sense as defined in the Equality Act 2010, i.e. an individual engaged under a contract personally to do work as well as under an employment contract. It is now being reported that the Government Equalities Office has clarified that the intention is to use the broader definition of employee. If that is correct then companies may be brought in-scope of the GPG Reporting regulations by virtue of having to include some self-employed contractors, and, in the case of LLP's its members in the headcount when determining if they have 250 or more "employees" on the relevant date. If they are in scope then such employees' pay data will have to be included in the GPG Report. The drafting of the regulations is arguably far from clear, it is to be hoped therefore that this uncertainty is clarified so that companies know where they stand.

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com