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CHANCE

Briefing Note – April 2018

UK: EMPLOYMENT UPDATE

Welcome to the first newsletter of the new financial year; naturally this brings new statutory rates which are set out below. In addition, this Briefing also examines recent case law on: the calculation of holiday pay for workers with term time working arrangements and an employer's obligations to consider 'bumping' other employees as part of a redundancy consultation exercise. Finally we consider the implications of Brexit on European Works Councils.

Key issues

- Calculating holiday pay for atypical workers
- Redundancy: do you have to 'bump'?
- European Works Councils post Brexit
- New financial year: new rates
- Discrimination: revised compensation bands

Calculating holiday pay for atypical workers

Employers are increasingly amenable to a greater diversity of flexible working arrangements including term time working for parents with childcare responsibilities. A recent EAT decision on how employers should calculate holiday may mean that employers of term time workers and perhaps operating other atypical working arrangements should review, and where necessary amend the way in which holiday pay is calculated.

B was a teacher who worked irregular hours during the school year, which varied between 32 and 35 weeks. To date it has been a relatively common approach (endorsed by ACAS) for employers to calculate leave entitlement by calculating 12.07% of the number of hours the employee worked and then multiplying by the hourly rate of pay. This calculation is premised on the fact that the 5.6 weeks statutory holiday entitlement represents 12.07% of a working year of 46.4 weeks (i.e. 52 weeks minus 5.6 weeks).

B's employer took this approach; it calculated her holiday pay entitlement at the end of each term as 12.07% of the hours B worked in the preceding term. B's holiday pay was 'rolled up' and added to her pay at the end of each term. B argued that her employer should have applied the formula in the Employment Rights Act 1996 which requires that a week's pay should be calculated on the basis of average pay over the 12 weeks immediately preceding the holiday, ignoring any week in which no pay is received. This approach would give her an entitlement to holiday pay of around 17.5% of her earnings for the term.

The employer argued that a part-time worker who only works part of the year should have their 5.6 weeks' holiday entitlement pro-rated to reflect the weeks actually worked; otherwise this would result in full-time workers being treated less favourably and the term time workers receiving a 'windfall'. For example, an employee who works full time for only 12 weeks of the year would be entitled to 5.6 weeks' paid holiday.

The Employment Appeal Tribunal (EAT) overturned the employment tribunal which agreed with the employer. It held that there was no basis for pro-rating the 5.6 week's statutory holiday/holiday pay entitlement of part-time employees or disapplying the statutory mechanism for calculating a week's pay. Part-time workers have the statutory right not to be treated less favourably than a full-time worker but there was no reciprocal right for full time workers.

The EAT acknowledged that the result was effectively a windfall for those who work fewer weeks during the year compared to those who work the full number of weeks. A part-time worker who works for 20 hours for only 32 weeks of the year is entitled to the same holiday pay as a worker who works 20 hours throughout each week of the year (assuming each is paid at the same rate). In the case of the term time employee this would represent 17.5% of annual pay as compared to 12.07% of annual pay of the employee working throughout the year.

Employers who engage employees on a term time basis or that operate some sort of seasonal working arrangements should consider whether their holiday pay arrangements need to be revisited in light of this decision.

[Brazel v The Harpur Trust]

Redundancy: do you have to 'bump'?

As part of a fair redundancy process an employer is required to consider whether there is any suitable alternative employment that the redundant employee can be offered. To what extent is an employer obliged to consider 'bumping' another employee out of their role in order to offer it to the redundant employee? The EAT has recently provided some clarity on this issue.

C held the position of sales director which his employer, R, no longer had a need for. R had looked for suitable alternative roles for C but had not identified any. As part of that process R did not consider whether any other employee working in a more junior role should be 'bumped' and their post offered to C.

The EAT held that there is no general rule that an employer need only consider bumping during a redundancy consultation process if it is raised by the 'at risk ' employee. Equally the EAT held that there is no rule that an employer must always consider 'bumping' in order to dismiss fairly in a redundancy case.

Unhelpfully from an employer's perspective, the EAT confirmed that it is a question for the employment tribunal to determine on the facts of each case whether what the employer did in terms of considering bumping, or not, fell within a reasonable range of responses in the context of the redundancy dismissal process.

In circumstances where moving the at risk employee into a role occupied by another employee would result in a demotion and/or significant pay cut, it may well be reasonable for the employer not to give active consideration to bumping, particularly if the employee has give clear indications that he or she would not countenance a pay cut or demotion.

An employer might be prudent to consider bumping if it is expressly raised; if a significant pay cut and/or demotion would not arise and/or in circumstances where the at risk employee is very long serving and the candidates for bumping have short service.

[Mihrab v Mentor Graphics]

European Works Councils post Brexit

At the end of March, the European Commission issued a notice to stakeholders to remind them that they need to prepare for the potential legal repercussions of Brexit on European Works Council (EWC) arrangements; stressing that absent any agreement to the contrary the European Works Council Directive will cease to apply to Great Britain. This will accordingly give rise to a number of potential issues including: whether an undertaking comes within the scope of member state EWC legislation if UK employees are no longer taken into account when assessing whether the threshold of 1000 employees has been attained, and, where central management of the undertaking was previously located in the UK who will become the central management's representative.

The precise impact of Brexit on EWC arrangements will be dictated by a number of matters including whether the EWC agreement is a voluntary arrangement or one resulting from the formal legislative process being triggered and, of course, what the final Brexit agreement looks like. Companies that currently operate EWC arrangements do need to consider the potential ramifications giving thought to the following:

- Is the EWC agreement a voluntary arrangement or one that has evolved out of the legislative process being triggered?
- Is central management currently based in the UK?
- If so, in which EU country would the central management's representative agent be located post Brexit?
- Is the EWC agreement governed by English law?
- Would the EWC threshold employee numbers be achieved if the UK workforce is excluded?
- Does the EWC agreement have any 'adaptation' provisions allowing for amendment of the EWC agreement and EWC composition in the event of corporate structural/other change?
- Is the (non UK) European workforce likely to have an appetite to trigger a new EWC negotiation process post Brexit?

Stakeholders Notice:
https://ec.europa.eu/info/sites/info/files/notice_to_stakeholders_brexit_works_councils_final.pdf

New unfair dismissal and redundancy award limits: applicable to dismissals on/after 6 April 2018

	2017	2018
Maximum amount of a week's pay*	**£489**	**£508**
Maximum statutory redundancy pay/basic unfair dismissal award	**£14,670**	**£15,240**
Maximum unfair dismissal compensatory award	**The lower of £80,541 (or 12 months pay)**	**The lower of £83,682 (or 12 months pay)**

*** For the purposes of calculating a statutory redundancy of unfair dismissal basic award**

2018 Statutory Maternity, Paternity, Adoption, Shared Parental Leave and Sick Pay Rates

	2017	2018
Standard rate maternity/paternity/adoption and shared parental leave pay: applicable with effect from 1 April 2018	**£140.98**	**£145.18**
Statutory sick pay: applicable with effect from 6 April 2018	**£89.35**	**£92.05**

Discrimination compensation: new injury to feelings bands

In the event of a successful discrimination claim the Employment Tribunal may award compensation for past and future financial loss, injury to feelings and personal injury (injury to health such as psychiatric injury). There are three broad bands of compensation for injury to feelings (known as the Vento bands). These bands are considered, and as appropriate, revised by the President of the Employment Tribunal.

Revised Vento bands will apply to claims lodged on/after 6 April 2018 as follows:

- Lower band: £900 to £8,600
- Middle band: £8,600 o £25,700
- Upper band: £25,700 to £42,900

In exceptional cases a tribunal can award above £42,900.

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