

HR & EMPLOYMENT LAW QUARTERLY NEWSLETTER

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IN THE NEWS

On 23 November the Government announced plans to make **radical employment law reforms**. This story is covered in this issue in our article at page 2.

Agency Worker Regulations 2011 are now in force. All those affected should ensure they are familiar with the regulations and the obligations they impose.

BIS is seeking views on the effectiveness of the TUPE Regulations and how they might be improved, if at all. Details of the consultation can be found at <http://www.bis.gov.uk> and responses can be submitted through the same website.

Government delays pensions auto-enrolment for small and medium sized businesses. Firms with 50 employees will now have until after the next election in May 2015 (12 months later than the original deadline of April 2014) to enrol their staff into a pension scheme.

RECENT DEVELOPMENTS

Acas Guidance for employers on workplace issues over the winter months

Acas has recently issued some helpful guidance on how to deal with issues commonly faced over the winter months, including: dealing with adverse weather conditions, absence due to winter colds and flu, holiday entitlements over the Christmas period and wellbeing in the workplace.

To see the guidance in full go to <http://tiny.cc/gfcsb>

Statutory annual leave cannot be carried over indefinitely

The European Court of Justice has recently confirmed (in *KHS AG v Schulte*) that EU law does not require national governments to allow the indefinite carry over of annual leave by a worker who takes several consecutive periods of sick leave. While workers are still entitled to have the opportunity to take annual leave, they will not be entitled to an indefinite accumulation of leave without limit.

The question is how long workers should be able to carry-over accumulated leave. The Court did not specify any particular time period but said that the carry-over period must be sufficient to ensure that the worker can have staggered rest periods that can be planned in advance. The worker will be entitled to a period that is "substantially longer" than the annual leave reference period. For example, for holiday entitlement accrued over 12 months, it may be that the worker should be allowed around 18 months to take that leave.

Reference fair despite unproven allegations

In the recent case of *Jackson v Liverpool City Council*, the Court of Appeal held that a reference given about an employee will not necessarily be unfair simply because it contains unproven allegations about the employee's performance.

The case concerned a Council employee (J) who was initially given a favourable reference on leaving his employment. Soon after J started working for a new employer, issues with his record keeping at his former post came to light. However, his former employer did not investigate the matter as J no longer worked for them. A year later, J applied for a different post and the Council was asked for a reference.

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A reference was provided and in it the Council noted that there has been "issues" with J's record keeping. In a subsequent telephone call, the Council confirmed to the recipient of the reference that no investigation was carried out and, therefore, it was simply not able to answer certain questions about J, either positively or negatively.

The judge who initially heard the case held that, although the reference was true and accurate, it was not fair. In his view, it was not fair to include an "unanswered, uninvestigated, un-particularised, unspecified allegation" in the reference that implied J was an unsuitable candidate. The Court of Appeal disagreed and held that the Council could not be criticised for providing a reference which referred to unproven allegations as it had made it clear to the new employer that the allegations had not been investigated.

This case highlights the need for employers to be cautious when providing references. Employers have no general legal duty to provide references for their employees unless required to do so under the contract of employment. If an employer does provide a reference, care should be taken to ensure that it is factually accurate and that there is a proper basis for any opinion given. The reference must also not present an unfair or misleading impression of the employee. If any unproven allegations are to be included, the employer should ensure that it makes clear to the intended recipient that the allegations have not been investigated or proven.

Employment Tribunal adopts new policy for dealing with unfair dismissal claims

The Employment Tribunal has now adopted a new policy that will see standard unfair dismissal claims proceed from issue of the claim to a final hearing within 16 weeks. The new policy will only apply to standard, stand-alone unfair dismissal claims; if other claims are made by the employee, such as claims for discrimination, the usual policy will be followed. When a standard unfair dismissal claim is issued, the tribunal will now issue the parties with a standard set of directions. Those directions will create a strict timetable for the parties to follow (covering things like the exchange of documents and witness statements) to ensure the claim progresses as quickly and efficiently as possible. Employers and employees are both likely to welcome the new policy which will see cases concluded sooner, allowing all parties to put the dispute behind them and move on.

ARTICLES

Employment Law Reforms

The rising rate of unemployment is worrying for all of us at the moment and the Government is busy searching for ways to reverse, or at least halt, the trend. As part of the process, the Government has been going through the existing employment law regime with a fine-toothed comb; wide ranging and dramatic reforms to employment law are proposed.

On 23 November 2001, Vince Cable gave a speech in which he said that the Government's proposed reforms are intended to "safeguard workers' rights while deregulating to reduce the onerous and unnecessary demands on businesses." The media and those with an interest in this area are now vigorously debating the reforms and the extent to which they are likely to have the desired effect.

Employee groups are naturally concerned that the reforms will

create an environment of job insecurity in which people are constantly fearful of losing their jobs. Trade unions have argued that there is no evidence that deregulation will help the jobs market. The TUC General Secretary, Brendan Barber, has said: "Reducing protection for people at work will not save or create a single job. It's not employment laws holding firms back, it's the tough economic climate and the problems many companies are having getting the banks to lend to them that's to blame."

It is not only employees who should be worried. Daniel Barnett, one of leading employment law barristers, has warned that employers are also likely to suffer and refers to the proposed reforms as an "own goal". Mr Barnett argues that the qualifying period for bringing claims is simply not an issue for employers and those starting up businesses. Therefore, an increase from 1 to 2 years' service before a claim for unfair dismissal can be made will benefit no-one. Mr Barnett also points out that the introduction of fees is likely to negatively impact employers and is unlikely to deter employees who, in most cases, genuinely believe they have a legitimate claim. Employees are simply going to want to recover tribunal fees paid out as part of any settlement deal and the cost of claims for employers will increase as a result.

On 25 November, The Guardian reported that the British labour market is already one of the most flexible in the world and that there is no evidence of any link between employment protection law and levels of unemployment. It remains to be seen what changes will make it through and which will end up on the cutting room floor.

So what reforms are proposed? The main changes are as follows:

- Increasing the unfair dismissal qualifying period to 2 years
- Requiring all claims to be submitted to Acas for conciliation before they can be submitted to the Employment Tribunal
- Consultation on introducing "protected conversations" to allow employers to have open and frank discussions with their employees on poor performance and retirement without fear of later reprisal in a tribunal.
- A call for evidence on the reducing the minimum period for redundancy consultation to 60, 45 or 30 days.
- Introducing a "rapid resolution scheme" to allow early settlement of claims.
- A review of employment tribunal rules of procedure to be conducted by the outgoing tribunal President, Mr Justice Underhill.
- Consultation on the introduction of fees for bringing employment tribunal claims.
- Consultation on the introduction of compensated no-fault dismissals for micro-businesses.
- Consultation on simplifying the use of compromise agreements which most will agree have become unnecessarily complicated.

The Government's official Response to the Consultation "Resolving Working Disputes" can be viewed in full at <http://tiny.cc/19y6o>

Health and Safety Laws Reform

Along with general reforms to employment laws, changes to health and safety laws are also currently on the Government's agenda. Again, the impetus behind the review is the desire to improve the job market and to get rid of any laws that are hindering business start-ups. Thus, the Government has been looking into cutting "health and safety red tape". The thought process behind the move is that, if the burden of compliance on employers is reduced, businesses will attract more investors and get more done.

Another reason for the review is a perceived "compensation culture" that is said to have arisen in the UK. It is suggested that employees are not taking personal responsibility for their own health and safety and that employers bear an unfair burden in this respect.

On 28 November, the Löfstedt Review into health and safety legislation was published and the Government quickly accepted its recommendations. From January 2012, the Government will begin the process of cutting the volume of health and safety regulations by one half and the process will continue for the next 3 years.

It is also proposed that self-employed people carrying out low risk work will be exempt from health and safety law by 2013. The role of the Health and Safety Executive will be strengthened and, from January 1, a new "challenge panel" will allow businesses to get wrong decisions of health and safety inspectors overturned immediately.

Employers will also welcome the Government's plans to review health and safety provisions that impose strict liability. Minister for Employment, Chris Grayling, said: "It cannot be right that employers are responsible for damages when they have done all they can to manage the risk."

As with all reforms under consideration by the Government at the moment, it remains to be seen which proposed changes will eventually see the light of day. An additional consideration to take into account here is that the ability of the Government to change health and safety legislation is ultimately limited by EU Law.

However, there is some room to manoeuvre and the Government is keen, as noted by Mr Grayling, to "put common sense back at the heart of health and safety." Employees and their representatives will no doubt have a lot to say about this and we will be watching this space for some time yet.

OUR NEWS

R&R Plant Hire (Peterborough) Limited v Bailey

We recently successfully represented a local employer, R & R Plant Hire (Peterborough) Limited, in a case which is attracting a lot of attention across the country. R&R Plant Hire applied to the Court of Appeal for leave to appeal a decision made by the Employment Appeals Tribunal and, last month, leave was granted. Our Trainee Solicitor, Kim Hurley, has had an article published by the Law Society Gazette in relation to that case. The article is entitled "A Worrying Precedent" and it discusses the extent to which an employer is obligated to advise its employees on the law.

To see the article in full go to <http://tiny.cc/ft3wc>

New Solicitor to join department

We will be welcoming a new solicitor into our ranks in January 2012. Mrs Janet Norris is an experienced litigator and qualified solicitor and she will be joining our King's Lynn team. We look forward to drawing on her years of experience and expertise.

We are also proud of...

...our Conveyancing Department which has recently secured membership to the Law Society's Conveyancing Quality Scheme (CQS), the mark of excellence for the home buying process. The firm underwent a rigorous assessment by the Law Society in order to secure CQS status, which marks the firm out as meeting high standards in the residential conveyancing process.

If you would like to discuss any aspect of this newsletter which may affect you or your business. Do not hesitate to contact one of our team.

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