Birketts

WELCOME TO THE DECEMBER 2018 UPDATE OF

Employment Law

IN THIS ISSUE

Welcome to the December 2018 edition of Employment Law Update.

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The final issue of 2018 is published at a time of heightened political and economic insecurity and uncertain future prospects. The New Year might bring us a new Prime Minister, possibly a new Government and (almost certainly) a new relationship with Europe, making future developments in employment and immigration legislation very difficult to predict. However, as we go to press the Government has published its '*Good Work Plan*', which it claims to be the biggest package of workplace reforms for over 20 years.

This month we cover two Employment Appeal Tribunal decisions on different aspects of disability discrimination: termination for incapacity and excluded conditions. We also look at an employment tribunal decision where the employee was dismissed for failing a drugs test.

Our 'Quick fire' round up of recent employment law developments includes the Government's proposed increases to statutory rates of pay for 2019, as well as our usual immigration update.

Don't forget to book your place at one of our free Early birds seminars in February, which will be focussing on the topic of 'some other substantial reason' dismissals. For more details see www.birketts.co.uk/events. We look forward to seeing you there.

In the meantime, the Birketts Employment Team wishes all of our clients and contacts a very happy Christmas and a successful 2019.

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Workplace reforms announced

The Government has just announced a large number of proposed legislative changes, which it claims to be the biggest package of workplace reforms for over 20 years.

The proposals are set out in the *Good Work Plan*, which is the latest Government response to the recommendations in the 2017 Taylor Review and also to the UK Labour Market Enforcement Strategy, published in May 2018.

Key proposals announced include:

- giving zero-hours workers the right to request fixed working hours, after working for a minimum of 26 weeks on a non-fixed hours basis
- giving all workers the right to a written statement of their rights, including entitlements to sick leave and pay and other types of paid leave such as maternity and paternity leave, from day one (rather than within two months, as currently applies to employees)
- removing the 'Swedish derogation', which currently allows agency workers to be paid at lower rates than permanent staff if they have a contract of employment with the agency and are paid between assignments
- extending the holiday pay reference period from 12 to 52 weeks under the Working Time Regulations 1998
- extending the period necessary to break continuity of service with an employer from one week to four weeks
- increasing the penalty awarded against employers that are found by an employment tribunal to have engaged in aggravating conduct, from £5,000 to £20,000
- new 'name and shaming' scheme for employers who fail to pay employment tribunal awards, which takes effect in relation to tribunal awards registered on or after 18 December 2018
- lowering the threshold for employees to make a request for a formal information and consultation arrangement with their employer from 10% to 2% of the undertaking's workforce
- various increased protections for low paid and vulnerable workers, including proposals for a single enforcement body.

The Government has issued draft regulations in relation to some of these proposed changes, with an implementation date of 6 April 2020 applying to the new rules on issuing a statement of terms to workers and the extended reference period for calculating holiday pay. Amendments to the Agency Workers Regulations 2010 to remove the Swedish derogation, and the new threshold for requesting an information and consultation agreement, will also take effect on the same day.

It is likely that the right for zero-hours workers to request fixed working hours will operate in a similar way to the existing statutory right to request flexible working, with a set procedure and statutory grounds for refusing such a request. This does not yet have a timetable for implementation and is likely to be the subject of further consultation.

The Government has also committed to taking legislative measures to clarify the tests applicable to determining employment status, and to align these as far as possible with the tax framework. There are no firm proposals yet for how this will be achieved; instead the Government has commissioned further independent research on those with uncertain employment status before it brings forward detailed proposals.

Dismissal for failing drugs test

An employment tribunal has considered whether a bus driver was fairly dismissed for failing a routine drugs test.

Ball v First Essex Buses Limited, ET 3201435/2017

Facts

Mr Ball, a 61 year-old diabetic bus driver, was dismissed for failing a routine drugs test after over 20 years of unblemished service.

The employer, First Essex, had a drug and alcohol testing policy which allowed it to carry out random testing. A saliva test carried out on Mr Ball showed positive for cocaine. Mr Ball denied ever using cocaine and suggested that the sample may have been contaminated, perhaps through the handling of bank notes. He arranged for his own independent test to be conducted; a hair follicle test which did not detect any cocaine in his system. This test was disregarded by First Essex as it was not carried out by the company's approved tester. The first saliva sample was sent to a second drug testing agency, which confirmed the presence of cocaine.

Following a disciplinary hearing, Mr Ball was dismissed for gross misconduct. Two internal appeals against his dismissal failed. The testing laboratory indicated to the appeal manager that the transfer of cocaine from bank notes to hands and then saliva was highly unlikely to cause a positive result.

Mr Ball brought claims against First Essex for wrongful and unfair dismissal.

Employment tribunal decision

> *First Essex had not acted within the range of reasonable responses...*

The employment tribunal upheld Mr Ball's claims, finding that First Essex had not acted within the range of reasonable responses both when carrying out its investigation and applying the sanction of dismissal.

The company had failed to take into account the results of the independent hair follicle test, claiming that it was not its policy to do so, when in fact the drugs and alcohol policy was silent on the issue. The disciplining manager had adopted a blinkered view towards the evidence and had ignored Mr Ball's offer to take another test. Mr Ball was not informed of what further investigations were conducted nor given the opportunity to comment. The appeal manager questioned the integrity of the hair follicle test without

any basis for doing so. In addition, failing the drugs test was treated as sufficient evidence of gross misconduct but this was not listed as an instance of gross misconduct under the disciplinary policy. Failing the test did not equate to being under the influence of drugs, which First Essex had indicated was the reason for the dismissal.

According to the tribunal, a reasonable employer would have re-tested the employee. As a long standing employee, with an unblemished record, facing a career-ending decision, it was outside the band of reasonable responses not to conduct further inquiries. In addition, the disciplining manager and appeal manager did not appear to hold a genuine belief in Mr Ball's guilt but indicated that they were bound by the terms of the company's policy.

Mr Ball was awarded ongoing unfair dismissal losses for a period of three years and his claim of wrongful dismissal was also upheld by the tribunal.

"According to the tribunal, a reasonable employer would have re-tested the employee.

Consequences

As a first instance decision of an employment tribunal, this decision has no binding effect but provides a good illustration of how a dismissal for failing a drug testing policy will be examined by an employment tribunal. The key message is that a positive drugs test cannot be treated as a 'black or white' situation, and employers should not adopt a rigid approach either to the evidence or to the terms of their own policy.

QUICK FIRE

Voluntary reporting on disability, mental health and wellbeing

The Government has published a new framework, *Voluntary Reporting on Disability, Mental Health and Wellbeing*, to assist and support employers. It is aimed at larger employers (250 or more employees), but can also be used by smaller employers who are seeking to improve transparency within their organisations. The framework recommends that employers produce a narrative to explain what actions they have taken to recruit and retain disabled employees, including the percentage of individuals who consider themselves disabled, and what actions have been taken to support the mental health and wellbeing of their employees.

The framework follows the recommendation in the 2017 Stevenson/Farmer review of mental health and employers, *Thriving at work*, that employers should report more information about their actions on workplace mental health.

"The framework recommends that employers produce a narrative to explain what actions they have taken to recruit and retain disabled employees...

Disability discrimination: tendency to steal

The Employment Appeal Tribunal (EAT) has considered whether an individual dismissed for shoplifting, which he claimed to be a manifestation of his post-traumatic stress disorder, had been subjected to disability discrimination.

Wood v Durham County Council, UKEAT/0099/18

Facts

Mr Wood was employed by the Council as an Antisocial Behaviour Officer. He was dismissed after an incident where he was caught shoplifting.

As his role involved working in close partnership with the police, Mr Wood was subject to clearance at Non-Police Personnel Vetting (NPPV) Level 2. He was also subject to the Council's code of conduct, which requires its employees to act with honesty and integrity.

Mr Wood was stopped by a security guard after leaving a shop without paying for several items. The police were called and Mr Wood was issued with a fixed penalty notice for disorder (PND). He had not informed the police that he worked for the Council, and he did not disclose the incident to the Council. His NPPV application was later refused and the incident came to the attention of his employer. Following a disciplinary hearing, Mr Wood was dismissed due to criminal conduct outside the workplace, withdrawal of NPPV clearance and the risk of reputational damage to the Council.

Mr Wood brought claims for disability discrimination on the grounds that he suffered from severe depression, post-traumatic stress disorder and associative amnesia.

Mr Wood brought claims for disability discrimination on the grounds that he suffered from severe depression, post-traumatic stress disorder and associative amnesia. He argued that his amnesia meant that he had forgotten to pay for the items in the shop. The employment tribunal rejected Mr Wood's claims, accepting the Council's argument that the behaviour for which he was dismissed (theft) was a manifestation of a tendency to steal, which was an excluded condition for the purposes of disability discrimination. Mr Wood appealed to the EAT.

EAT decision

The EAT dismissed Mr Wood's appeal. It agreed with the tribunal's conclusion that the evidence suggested a tendency to steal rather than merely a tendency to memory loss and forgetfulness. This conclusion was supported by the statement he signed admitting to the theft of the items and also the fact that he had attempted to conceal the truth from the Council.

Consequences

"Is a one-off incident enough for the behaviour to amount to a 'tendency', or does it have to be a course of conduct?

This case provides a useful example of the circumstances where it is not the underlying condition that has resulted in the treatment complained of (the dismissal), but instead the excluded condition – even though this was, apparently, caused by the underlying disability. It also raises the question of what is meant by a 'tendency to steal'? Is a one-off incident enough for the behaviour to amount to a 'tendency', or does it have to be a course of conduct? There has been little in the way of any guidance on this point. It seems that the EAT accepted in its decision that the single incident which resulted in the individual's dismissal was sufficient to show a tendency to steal, but this might be disputed in a future case.

QUICK FIRE

Payslips

The Government has published guidance on the new legislation in force from 6 April 2019, requiring all employers to provide payslips to all workers (not just employees), and to show hours on payslips where the pay varies by the amount of time worked.

The guidance makes it clear that payslips can be provided in either a physical or electronic format. For workers whose pay varies depending on the number of hours they have worked, the number of hours paid at that rate must be shown. For example, if they have a fixed salary but work additional hours of overtime for additional pay, the hours of overtime need to be shown on the payslip.

The guidance also includes a number of illustrative examples to show how the new right applies in practice.

Recommendations in the report include ensuring that all internships are advertised...

QUICK FIRE

Interns and work trials

A recent report has highlighted that many employers are continuing to offer unpaid internships. The Sutton Trust report, *Pay as you go?*, reveals that 70% of internships are unpaid, and over a quarter of graduates (27%) have completed at least one unpaid internship. Over half of unpaid placements were over four weeks in length and 11% were over six months. The report also reveals a significant amount of confusion on the part of both employers and individuals on the legality of unpaid internships.

Recommendations in the report include ensuring that all internships are advertised, rather than offered through informal networks, with fair and transparent recruitment practices based on merit. It also calls for interns to be paid at least the national minimum wage.

Meanwhile, the Government has revised its guidance on calculating the national minimum wage to include unpaid work trials. The revised wording is aimed at employers who use unpaid trial periods as part of a recruitment process to decide whether a candidate has the right skills for the job. The guidance sets out the factors that should be taken into account in deciding whether or not the trial should be paid, with a number of example scenarios. The length of the trial and the nature of the work carried out will be relevant considerations. In the Government's view, an individual participating in a trial period of more than one day is likely to be entitled to be paid the national minimum wage in all but very exceptional circumstances.

Disability discrimination: long-term disability benefits

The Employment Appeal Tribunal (EAT) has ruled on whether an individual was fairly dismissed while entitled to long-term disability benefits.

Awan v ICTS UK Ltd, UKEAT/0087/18

Facts

The employee, Mr Awan, was on long-term sickness absence with depression. He had a contractual entitlement to a long-term disability benefit plan which would pay two-thirds of his base annual salary until the earlier of his return to work, retirement or death. The policy, with Legal and General, provided that the entitlement would only continue while the individual was employed by American Airlines.

Following a TUPE transfer to ICTS, the disability benefit was provided by Canada Life but they refused to accept liability for any employees already on sick leave when the policy commenced, including Mr Awan. Legal and General would not continue to pay the benefit on the grounds that Mr Awan was no longer employed by American Airlines. ICTS made equivalent monthly payments to Mr Awan without admission of liability, until the situation could be clarified. It subsequently terminated his employment for capability reasons, on the basis that he had been off sick for over two years and there was no prospect of him returning to work.

Mr Awan brought claims for unfair dismissal and disability discrimination. The tribunal held that there was no implied term preventing ICTS from dismissing Mr Awan for incapability while he was entitled to receive long-term disability benefits. It was satisfied that the company had acted reasonably in dismissing Mr Awan for incapacity, rejecting his claims for unfair dismissal and discrimination arising from disability.

EAT decision

The EAT has allowed Mr Awan's appeal, finding that ICTS had acted in breach of an implied term of the contract. His contract did not state that his entitlement to the disability benefit was dependent on the rules of the policy or the rules of a particular insurance provider. There was a contractual obligation on the company to pay the benefits

> *"There was a contractual obligation on the company to pay the benefits under the disability plan regardless of whether the insurer paid out under the policy or not.*

under the disability plan regardless of whether the insurer paid out under the policy or not. In dismissing Mr Awan, the company had acted in breach of an implied term of the contract that it would not dismiss on the grounds of incapacity once the employee became entitled to the payment of the disability benefit.

"This decision highlights the importance of ensuring that the contractual provisions for any type of insurance benefit are very carefully drafted..."

Consequences

This decision highlights the importance of ensuring that the contractual provisions for any type of insurance benefit are very carefully drafted, making it subject to the terms and conditions of the insurance policy and rules imposed by the insurer. It is also important to retain the express right to dismiss an employee who might be in receipt of such benefits, although employers should exercise caution and seek advice before relying on such a provision.

QUICK FIRE

New statutory pay rates for 2019

"The Government has published its proposed new statutory pay rates for 2019/2020..."

The Government has published its proposed new statutory pay rates for 2019/2020, which will take effect from April 2019.

The rate of statutory maternity, paternity, adoption and shared parental leave pay, as well as the maternity allowance, will increase from £145.18 to £148.68 per week.

The rate of statutory sick pay (SSP) will increase from £92.05 to £94.25 per week.

The lower earnings limit for the purpose of National Insurance contributions will increase from £116 to £118 per week.

In addition, the Low Pay Commission has published its 2018 report on its recommendations for increases to the National Minimum Wage, which were originally announced in the October 2018 budget.

From April 2019, the following rates will apply:

- Apprentices: £3.90 per hour (up from £3.70)
- 16-17 year olds: £4.35 per hour (up from £4.20)
- 18-20 year olds: £6.15 per hour (up from £5.90)
- 21-24 year olds: £7.70 per hour (up from £7.38)
- National living wage (workers aged 25 and over): £8.21 per hour (up from £7.83).

Immigration update

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"A twelve month 'cooling off' period is being introduced for Tier 5 Religious Workers and Charity Workers.

Right to work checks

On 14 December 2018 the Government announced a new online right to work checking service.

This service is designed to be used to check the right to work of individuals who have settled or pre-settled status under the new settled status scheme for EU nationals. However, it can also be used to check the right to work of other migrants if they have a biometric residence permit.

It works in a similar way to checks on driving licences, in that the migrant will register and obtain a special code, which they then share with their (prospective) employer. The employer uses the code and the individual's date of birth to check their right to work status.

The announcement says that it *"will also make it simpler for UK nationals without British passports to demonstrate their citizenship by enabling them to use short birth or adoption certificates, which they can get for free, instead of the long versions"*. However the right to work check guidance for employers has not yet been updated to confirm this.

For more information see: www.gov.uk/government/news/online-right-to-work-checks.

Changes to the Immigration Rules

A statement of changes to the Immigration Rules was published on 11 December 2018, with most of the changes coming into effect on 10 January 2019. Some of the main changes include:

Tier 5 (Religious Workers) and Tier 5 (Charity Workers)

A twelve month 'cooling off' period is being introduced for Tier 5 Religious Workers and Charity Workers. This means that migrants who have previously held one of these visas will need to spend a minimum of twelve months outside the UK before returning in either category. According to the Home Office, this will prevent migrants from *"applying for consecutive visas, thereby using the routes to live in the UK for extended periods."*

Tier 5 Religious Workers will no longer be able to do 'preaching and pastoral work' or take the role of 'minister of religion'. This change will prevent migrants from using the Tier 5 Religious Worker route to fill positions as ministers of religion, and instead they will need to be sponsored as Tier 2 (Ministers of Religion) migrants.

The Tier 1 Exceptional Talent visa is being widened further to include those in the field of architecture.

Tier 4 (General) and Tier 4 (Child)

The rules have been amended to clarify that Tier 4 applicants who rely on student loans or funds from official financial sponsors are not required to demonstrate that the funds have been held for a period of 28 consecutive days.

Tier 1 (Exceptional Talent)

The Tier 1 Exceptional Talent visa is being widened further to include those in the field of architecture. The applicants will be assessed by the Royal Institute for British Architects operating within the endorsement remit of Arts Council England.

Additionally, the grants of entry clearance in this visa category have been amended to include an additional four months, meaning that a migrant requesting one year entry clearance, for example, will be granted one year and four months.

The definition of 'professional sportsperson' has been amended.

Professional sportsperson

The definition of 'professional sportsperson' has been amended. This is important because most types of visas prohibit working as a professional sportsperson. This is designed to ensure that sportspersons can only get a visa for the UK if they meet the tough criteria required under the Tier 2 (Sportsperson) category.

The list of factors is much wider than most people would expect. The new definition is *"someone, whether paid or unpaid, who:*

- *is currently providing services as a sportsperson, playing or coaching in any capacity, at a professional or semi-professional level of sport*
- *is currently receiving payment, including payment in kind, for playing or coaching that is covering all, or the majority of, their costs for travelling to, and living in the UK, or who has done so within the previous four years*
- *is currently registered to a professional or semi-professional sports team, or who has been so registered within the previous four years. This includes all academy and development team age groups*
- *has represented their nation or national team within the previous two years, including all youth and development age groups from under 17's upwards*
- *has represented their represented their state or regional team within the previous two years, including all youth and development age groups from under 17's upwards*
- *has an established international reputation in their chosen field of sport*
- *engages an agent or representative, with the aim of finding opportunities as a sportsperson, and/or developing a current or future career as a sportsperson, or has engaged such an agent in the last 12 months; and/or*
- *is providing services as a sportsperson or coach at any level of sport, Unless they are doing so as an 'amateur' in a charity event."*

Models

A new code of practice has been introduced regarding models in the fashion industry.

Introduction of the new seasonal workers scheme

As reported in our September 2018 update, the new seasonal agricultural workers pilot scheme will enable fruit and vegetable farmers to employ non-EU migrant workers for seasonal work for up to six months. This small-scale pilot will test the effectiveness of the UK's immigration system in alleviating seasonal labour shortages during peak production periods.

"... the new seasonal agricultural workers pilot scheme will enable fruit and vegetable farmers to employ non-EU migrant workers for seasonal work for up to six months.

The scheme will be open to applicants over 18 years old. Successful applicants will be granted leave as a Tier 5 Seasonal Worker, starting 14 days before the beginning of the period of engagement and ending 14 days after that period. It will not be available for longer than six months in any twelve month period and the migrant will not be allowed to undertake any other work than the work they are sponsored to do.

The formal date of implementation for this pilot will be announced in due course.

Shortage occupation list – MAC call for evidence

The Migration Advisory Committee (MAC) issued a call for evidence on 9 November 2018 in respect of the shortage occupation list.

Employers wishing to sponsor Tier 2 migrants for roles included on the list are not required to undertake the Resident Labour Market test, or meet the five-year salary threshold for settlement (currently £35,500). Shortage occupation roles are also given priority when deciding who should be awarded restricted Certificates of Sponsorship.

In June 2018, the Government commissioned the MAC to carry out a full review of the shortage occupation list and to report in spring of 2019. The MAC is changing its approach for this review and has announced that it will focus on specific job titles rather than broader occupations.

The list is currently limited to roles that are skilled to RQF level 6 or above. However, the MAC is inviting evidence regarding all occupations and job titles at RQF 1 and above, to ascertain more widely what national shortages there are within the UK, in case the Government is minded to accept their previous recommendation to widen the Tier 2 visa scheme to jobs at RQF level 3 and above.

"the MAC will use both national data and evidence submitted by stakeholders.

In order to assess which occupations and job titles should be retained on the list and which further ones should be added to the list, the MAC will use both national data and evidence submitted by stakeholders.

The MAC asks that all respondents to this call for evidence complete an online form by 11:45pm on 6 January 2019. See: www.gov.uk/government/consultations/shortage-occupation-list-2018-call-for-evidence.

... even if there is no deal, EU citizens and their family members who are resident in the UK by 29 March 2019 will be able to stay...

What happens if there is a 'no-deal' Brexit?

The Department for Exiting the European Union has published a policy paper on citizens' rights in the event of a no deal Brexit.

This has provided reassurance that, even if there is no deal, EU citizens and their family members who are resident in the UK by 29 March 2019 will be able to stay and carry on with their lives here. However this guarantee does not extend to those who arrive after this date.

The EU Settlement Scheme will still operate for those who are resident in the UK by 29 March 2019. However, applications would need to be submitted 31 December 2020, rather than 30 June 2021.

The Government will honour their promise that anyone who acquires settled status will be able to leave the UK for up to five years without losing that status.

While EU citizens would have the right to challenge a refusal of their status under the EU Settlement Scheme by way of administrative review and judicial review, there would be no appeal procedure to the Court of Justice of the European Union.

EU citizens with settled status who want to bring family members to the UK would need to do so by 29 March 2022. After this date they would have to meet the requirements of the UK Immigration Rules.

The UK deportation threshold (which is stricter than the EU one) would apply to any crimes committed after 29 March 2019.

... the UK could unilaterally rescind its Article 50 notice...

Article 50: European Court of Justice says UK can cancel Brexit

The European Court of Justice (ECJ) has ruled that the UK could unilaterally rescind its Article 50 notice without the consent of the remaining 27 member states. This means that the rest of the EU does not have to agree if the UK were to decide 'no-Brexit' before 29 March 2019.

The ECJ stated that the UK would be able to stay in the EU on the same terms it has now. The decision to stay must follow a democratic process in accordance with national constitutional requirements. As the Supreme Court previously ruled that a vote of Parliament was required to trigger Article 50, it is likely this would also apply to a decision to revoke Article 50. Politically that is unlikely to happen unless there had been a second referendum in favour of doing so. Therefore, the judgment is theoretical, but it has given hope to those arguing for another vote.

... a change in the rules may happen at any time...

Tier 1 (Investor) visa

The Tier 1 (Investor) visa route has long been the subject of concerns about the source of funds being used by investors. It was reported on 6 December 2018 that the route was going to be suspended without notice, until new rules are put into place sometime in 2019, as part of a clampdown on financial crime.

However, in a surprising but welcome U-turn, this has not taken effect and the latest Immigration Rules do not include any changes to this route. At the time of writing, the Tier 1 (Investor) route remains open and unchanged. Of course potential investors are now on notice that their applications are likely to be subject to a high level of scrutiny and they need to be prepared for the fact that a change in the rules may happen at any time, so it would be prudent to submit any planned application as soon as possible.

As a reminder, the Immigration Health Surcharge is expected to double from 19 December 2018.

Immigration Health Surcharge to double

As a reminder, the Immigration Health Surcharge is expected to double from 19 December 2018. The cost of the surcharge will double from £200 to £400 per year of visa. Students and those the youth mobility scheme will continue to pay a discounted rate but this will also double from £150 to £300 a year.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team.