Birketts

WELCOME TO THE MAY 2019

Employment and Immigration Law Update

IN THIS ISSUE

Welcome to the May 2019 edition of Employment and Immigration Law Update, our monthly newsletter for HR professionals.

Liz Stevens
Professional Support Lawyer
01603 756474
liz-stevens@birketts.co.uk

This month we cover an important ECJ decision on employers' obligations to keep records of their workers' working time. We also look at a couple of interesting EAT decisions on disability discrimination: one concerning an employer's knowledge of the individual's disability and another on the issue of reasonable adjustments.

We examine plans that have recently resurfaced to cap public sector exit payments, as well as a number of other recent employment law developments. Our regular immigration update is also included.

Don't forget to sign up for your free place at one of our forthcoming Early Birds seminars, on the topic of recruitment. Further details of the dates and locations of the seminars are available on our website: www.birketts.co.uk/events.

The Birketts Employment Law Conference 2019

This popular event is back for 2019. Our conference will be taking place on 15 October 2019 at the Rowley Mile, Newmarket. A must-attend event for HR practitioners, it will include our annual update, a range of break-out sessions for delegates to choose from and an exciting guest speaker. Save the date and look out for further details very shortly.

Cambridge | Abigail Trencher
abigail-trencher@birketts.co.uk
01223 326622 | 07983 385842

Chelmsford | Kevin Palmer
kevin-palmer@birketts.co.uk
01245 211254 | 07771 517547

Ipswich | Catherine Johnson
catherine-johnson@birketts.co.uk
01473 299174 | 07786 265654

Norwich | Jeanette Wheeler
jeanette-wheeler@birketts.co.uk
01603 756427 | 07983 519812

IN THIS ISSUE

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Recording working time

The European Court of Justice (ECJ) has ruled that to comply with the EU Working Time Directive 2003/88 (WTD), employers are obliged to record actual daily working time for individual workers.

Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE C-55/18

Facts

A Spanish workers' union brought an action against Deutsche Bank, seeking a declaration that the bank was obliged to record the actual number of hours worked by its staff in order to check that working time limits were properly adhered to. Following a reference by the Spanish court, the ECJ considered whether there was any such obligation on the employer under either the WTD or EU Charter of Fundamental Rights.

> *...in order to ensure the effectiveness of these rights, Member States must require employers to set up an objective, reliable and accessible system...*

ECJ decision

The ECJ noted that EU Member States are under an obligation to implement the measures necessary to ensure that workers benefit from the rights to maximum working hours and daily and weekly rest periods. Without a system in place to measure the duration of time worked each day, the ECJ considered that it was not possible to objectively and reliably determine the number of hours worked and when that work was done, or the amount of overtime worked. In consequence, it would be excessively difficult for workers to ensure that their rights were complied with.

According to the ECJ, a national law that did not make provision for such records to be kept failed to guarantee the effectiveness of the rights conferred by the Charter and the WTD, and could compromise the WTD's objective of protecting workers' health and safety. It held that in order to ensure the effectiveness of these rights, Member States must require employers to set up an objective, reliable and accessible system to enable the duration of time worked by each worker to be measured.

Consequences

Currently, the Working Time Regulations 1998 (Regulations) require employers to keep 'adequate records' to show that weekly working time limits and night work limits are being complied with. Such records must be retained for two years. These record-keeping requirements do not cover daily or weekly rest breaks, or require all hours of work to be recorded. It therefore appears that the Regulations as currently drafted do not comply with the WTD following the ECJ's judgment in this case. The Regulations will need to be amended in order for the UK Government to avoid any claim that they have failed to properly implement the WTD. Whether or not this is actually done will depend on the UK's continued membership of the EU.

Enforcement of the record-keeping requirements under the Regulations is through the Health and Safety Executive (HSE), which means that an individual worker does not have the right to pursue a claim against his or her employer for a failure to keep adequate working time records. However, without the 'objective and reliable data' provided by a record of all hours worked, employers may find it harder to defend a claim that working time limits and minimum rest breaks have not been complied with.

> *...employers may find it harder to defend a claim that working time limits and minimum rest breaks have not been complied with.*

QUICK FIRE

Digitisation of employment tribunals

An implementation plan has been published on the reform of tribunals, including the digitisation of employment tribunals, following on from a strategy report published in January.

Work has already started on introducing a new standard case management platform to replace existing case records and files. This will allow judges and panel members, as well as tribunal users, access to a digital case record. Judges will be able to manage cases online and digitally record case management decisions. Case officers who are authorised to act will also be able to perform certain functions on the digital file. From June 2019, it is expected that template orders, notices, standard letters and documents will be available to be generated through the digital platform.

During 2019, an assessment of digital evidence presentation and live video evidence requirements will be carried out, with the necessary equipment to be rolled out in all hearing centres. It is also intended that all hearings will be recorded, with recording facilities being introduced this year following a pilot that has taken place in the Cardiff employment tribunal.

Employer's knowledge of disability

In this case, the Employment Appeal Tribunal (EAT) considered an employee's claim for disability discrimination, when the employer was not aware of the disability at the time of dismissal but was told about it at the appeal hearing.

Baldeh v Churches Housing Association of Dudley and District Ltd [2019] UKEAT/0290/18

Facts

The claimant was dismissed by her housing association employer at the end of her six-month probationary review, following a number of concerns about her performance. One area of concern included her communication style and how she related to her colleagues and her manager. The claimant appealed against her dismissal and at the appeal hearing she disclosed that she suffered from depression, which sometimes affected her behaviour and caused her to suffer short-term memory lapses. The appeal was unsuccessful and she brought a claim for discrimination arising from disability (s15 Equality Act 2010).

The claim was rejected by the employment tribunal, which found that the employer had no actual or constructive knowledge of the claimant's disability at the time of the decision to dismiss.

EAT decision

"The employer arguably had actual or constructive knowledge of the disability before it made the decision to reject the claimant's appeal...

The EAT upheld the claimant's appeal and remitted the case to be reheard by a new tribunal. The employer arguably had actual or constructive knowledge of the disability before it made the decision to reject the claimant's appeal against the decision to dismiss her. In the EAT's view, the outcome of an appeal against dismissal is "integral to the overall decision to dismiss". The tribunal should therefore have considered the appeal decision in deciding whether the dismissal was discriminatory on the grounds of the claimant's disability. The appeal was also upheld on other grounds, including the tribunal's failure to properly consider the issue of justification.

... the appeal hearing should be viewed as an integral part of the decision to dismiss...

Consequences

Employers should always take into account any knowledge or further evidence that comes to light after a decision to dismiss, in considering whether or not to uphold an employee's appeal against that decision. As the EAT has demonstrated in this case, the appeal hearing should be viewed as an integral part of the decision to dismiss. It might be that an employer can still uphold the decision to dismiss but needs to demonstrate that it has taken into account the effects of the claimant's disability before reaching this decision. In the same way that mistakes in the dismissal procedure can often be rectified at the appeal stage, rendering a dismissal fair, a failure to take into account new information at the appeal stage can result in a finding that the dismissal is unfair and/or discriminatory.

Was a dedicated parking space a reasonable adjustment?

The EAT has considered whether a tribunal had adopted the correct approach in determining whether a failure to offer a disabled employee a dedicated parking space amounted to a failure to make reasonable adjustments.

Linsley v Commissioners for Her Majesty's Revenue and Customs UKEAT/0150/18

Facts

The claimant suffered from ulcerative colitis, a fluctuating condition that can be aggravated by stress and causes an urgent need to use the toilet. HMRC has a national policy regarding use of its car parks, with priority given to those staff who require a parking space as a reasonable adjustment. The claimant was provided with a dedicated parking space from 2012 to 2015 following an occupational health report. When she moved site in 2015, she was once again provided with a space. In 2016, she requested a dedicated parking space in advance of a move to a new role in a different location. She was instead allowed access to a certain parking space but only if she failed to secure her own space near the building on a first come, first served basis. Alternatively, she could park in an unauthorized zone for which the penalty would be waived, but she would have to move her car later in the day.

An adjustment recommended in the employer's own policy will generally be regarded as a reasonable adjustment...

The claimant was unhappy with these options and went off sick with stress, which had exacerbated her symptoms. She later brought a claim for disability discrimination, including a claim for failure to make reasonable adjustments. The employment tribunal held that HMRC was not in breach of its duty; the alternative arrangements at the new site constituted reasonable adjustments, even though HMRC had failed to follow its own policy on parking space allocation (which the tribunal had noted were discretionary). The claimant appealed.

EAT decision

The EAT allowed the appeal and remitted the case to be reconsidered. An adjustment recommended in the employer's own policy will generally be regarded as a reasonable adjustment to make, unless the employer can provide cogent reasons for departing from the policy. The relevant managers' apparent ignorance of the policy was not a good reason for failing to apply it. It is not necessary for a policy to have contractual effect in order for it to be relevant in determining the reasonableness of an adjustment. The tribunal should have taken into account the additional stress the claimant experienced in having to search for a parking space, and the effect of this stress on her condition.

Consequences

This case demonstrates the approach employers should take to determining what reasonable adjustments should be made for a disabled employee. The focus should be on the disadvantage suffered by the employee in order to determine reasonableness. In particular, it highlights the importance of an employer's own policies and how these should be interpreted in terms of making reasonable adjustments. Such policies should not only be drafted very carefully, but also properly communicated to managers and staff.

Capping exit payments in the public sector

Proposals to restrict the level of payments made to departing public sector workers have resurfaced and will apply to the majority of public sector employees and office-holders.

Back in 2015, the Government first announced its intention to end "six-figure exit payments" for public sector workers. The power to impose a £95,000 cap on termination

payments was introduced by the Enterprise Act 2016 (see our previous article). Draft regulations setting out the detailed provisions were published in November 2015 but were not brought into force and disappeared off the legislative radar.

The regulations have now resurfaced in an amended form, and a further consultation has been issued. Alongside the draft regulations, draft guidance has been published to explain how relevant public sector employers are expected to implement the legislation. The consultation closes on 3 July 2019. No implementation date has yet been announced.

"The cap will eventually apply to the whole of the public sector, but with exemptions for certain sectors...

Which public sector employers are covered?

The cap will eventually apply to the whole of the public sector, but with exemptions for certain sectors such as the armed forces and security services. The Government is planning to adopt a phased implementation of the cap, but in effect most public sector employees will be covered in the first stage: the civil service, NHS, academy and maintained schools, local government (including the fire service) and police forces. A full list of the bodies in scope of the regulations is set out in Schedule 1 to the draft regulations.

Which payments are included in the cap?

The cap applies to payments made *in consequence of the termination of employment or office*, whether or not a contract of employment is in place. It applies to the following payments, whether made to employees or office holders:

- redundancy payments, whether statutory or contractual (an individual is entitled to receive their full statutory redundancy payment but this counts towards the cap)
- payments to reduce or eliminate an actuarial reduction to a pension on early retirement ('pension strain' payments)
- payments of compensation under a COT3 or settlement agreement (but see below for circumstances when the cap can be relaxed in respect of such payments)
- any severance or ex gratia payment
- payments in the form of shares or share options
- any payment on voluntary exit

The cap imposed under the regulations will take precedence over existing contractual agreements, regulations and other schemes already in place ...

- payments in lieu of notice (unless such payment does not exceed one quarter of salary)
- payments to extinguish any liability under a fixed term contract
- any other payment in consequence of termination of employment or loss of office.

The cap imposed under the regulations will take precedence over existing contractual agreements, regulations and other schemes already in place that make more generous provision for exit payments. that make more generous provision for exit payments.

Exempted payments and relaxation of the cap

Payments in respect of accrued but untaken annual leave and in respect of death in service or for incapacity as a result of accident, injury or illness are excluded, as well as payments made pursuant to an order of any court or tribunal.

In calculating whether the cap applies, employers must take into account all exit payments received by the individual within a 28 day period, including payments from another public sector employer. However, an individual is entitled to receive a statutory redundancy payment from a second relevant authority, even if this means the total amount exceeds the £95,000 cap.

The regulations also include a power for the cap to be relaxed by a Minister of the Crown (or a delegated authority) in accordance with HM Treasury Directions. Importantly, these Directions provide for a mandatory relaxation of the cap in certain circumstances, including where payment is made as a result of TUPE and where payment is made to settle a whistleblowing or discrimination complaint (provided the employer is satisfied that the claim would be upheld). Discretionary relaxation of the cap is also permitted in exceptional circumstances, subject to prior approval from HM Treasury. Public sector bodies are required to publish information about any decisions to relax the cap, which the guidance suggests should be included in their annual accounts.

What will be the impact of these changes?

The cap was originally intended to put a stop to large exit payments being made to so-called 'fat cats' in the public sector. In practice, the cap will potentially apply to a broad range of public sector employees, particularly if payments are required to ensure unreduced pension benefits on early retirement. However, the exclusion of payments for incapacity and payments to settle whistleblowing or discrimination complaints will be significant, in view of the potentially unlimited compensation awarded in such cases.

QUICK FIRE

Injury to feelings awards in discrimination claims

Last month, the Presidents of the Employment Tribunals in England and Wales and Scotland have jointly issued amended guidance on the '*Vento* bands', which set the levels of injury to feelings awards in discrimination and whistleblowing claims. In making such awards, employment judges have to decide in which band the case properly falls, according to the seriousness of the discrimination suffered by the claimant. For all claims presented on or after 6 April 2019, the increased Vento bands are as follows:

- Lower band: £900-£8,800
- Middle band: £8,800-£26,300
- Upper band: £26,300-£44,000.

Immigration update

Clare Hedges
Senior Associate - Head of Immigration
01223 326605
clare-hedges@birketts.co.uk

Janice Leggett
Immigration Consultant
01245 211277
janice-leggett@birketts.co.uk

EU Settlement Scheme update

According to the Home Office it is generally taking one to four calendar days to process applications for settled or pre-settled status under the new EU settlement scheme. However, they have warned that it may take longer if:

- a caseworker needs to request more information from you
- you are applying as a minor and your application is not linked to an adult
- you submit a paper application
- you have a relevant criminal record
- you are a non-EEA or non-Swiss citizen and are applying based on a relationship you haven't relied on in a previous application to the Home Office.

... it is generally taking one to four calendar days to process applications for settled or pre-settled status under the new EU settlement scheme.

Individuals who are unable to complete the ID check through the app and so need to post their passport to the Home Office should expect them to hold it for around three days (plus posting time), although this is not guaranteed.

The alternative is to attend one of the ID scanning locations. The latest list of locations can be found here: www.gov.uk/government/publications/eu-settlement-scheme-id-document-scanner-locations

Anyone who paid a fee under the scheme before this cost was removed should now have had it refunded, directly back to the card they paid with. If this has not happened applicants should contact the EU Settlement Scheme Resolution Centre.

The guidance on how to apply under the scheme has now been translated into various European languages.

Over 200 'assisted digital locations' have been set up where applicants can get assistance. This is aimed at those who "do not have the appropriate access, skills or confidence to complete the form" and does not include immigration advice or completion of the ID check.

In addition 57 organisations have been awarded funding specifically to help vulnerable or hard to reach EU citizens with their applications. They include community organisations and disability and homeless charities, who will be expected to gain appropriate accreditation with the Office of the Immigration Services Commissioner before providing advice.

Since 20 May 2019, visitors from Australia, Canada, Japan, New Zealand, Singapore, South Korea and the US have also been allowed to use ePassport gates.

More nationalities using ePassport gates

UK and EU nationals with a chipped passport have long been able to use the ePassport gates to enter the UK. Since 20 May 2019, visitors from Australia, Canada, Japan, New Zealand, Singapore, South Korea and the US have also been allowed to use ePassport gates. This is designed to speed up the entry process for nationals of countries which are deemed to be low-risk.

English language tests

The list of approved English language tests and providers has been updated. Before booking a test to support a UK visa application, migrants should check this list to ensure their test is approved.

Reviews of Home Office practice

Alleged fraud in English language tests

The National Audit Office is carrying out a review of how the Home Office handled allegations of fraud in English tests administered by ETS. Incidents of fraud were originally uncovered in 2014 by the BBC Panorama programme. The Home Office launched a probe and it is estimated that 35,000-36,000 student visas were cancelled as a result. However, many students have complained they were wrongly accused.

Whilst clearly fraud needed to be stamped out, it has been suggested that, as in the case of Windrush migrants, the Home Office may have gone too far and innocent people may have been affected. We will provide further updates once the report is published.

"...it has been suggested that, as in the case of Windrush migrants, the Home Office may have gone too far..."

Prevention of illegal working

The Independent Chief Inspector of Borders and Immigration has carried out a review of the efficiency and effectiveness of the Home Office's approach to preventing illegal working.

The report found significant efforts from Immigration Enforcement to develop strategies and to encourage partnerships and collaborations with other government departments and with large employers and employer groups in particular sectors. But there were no metrics in place to measure success and it seemed little had changed in practice on the ground.

The report is critical of the fact that: "teams were still largely reliant on allegations received from members of the public as the main source of operational leads, and almost half of all illegal working deployments were to restaurants and fast food outlets, and concentrated on a few nationalities, essentially those believed to be removable. Bangladeshis, Indians, Pakistanis and Chinese made up almost two-thirds (63%) of all illegal working arrests."

Recommendations include "developing effective intelligence collection and assessment capabilities at local/regional level, and aim to widen the deterrent effect of the risk of an ICE visit by deploying more frequently to other employment sectors."

"... the Windrush scandal "has created both an opportunity and an imperative" for review of the approach to illegal working..."

Inevitably the Windrush scandal "has created both an opportunity and an imperative" for review of the approach to illegal working and other "compliant environment" measures. There is a need to consider not only effectiveness, but also whether it is appropriate. However, the report found that as at the end of 2018 there was little evidence that the Home Office's approach had been reconsidered. It has been agreed that an updated action plan and strategy should be drawn up.

The Home Office has said it is already looking to broaden its enforcement efforts into other sectors. All employers need to be prepared for a potential inspection by the Immigration Enforcement team, which may be announced or unannounced. If you would like to arrange a mock audit, or a Right to Work Checks Masterclass for your HR team and/or managers, please contact Clare Hedges, Head of Immigration.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team. Law covered as at May 2019.