Birketts

Clear Legal Advice

WELCOME TO THE AUGUST 2020

Employment and Immigration Law Update

IN THIS ISSUE

Welcome to the August 2020 edition of Employment and Immigration Law Update, our monthly newsletter for HR professionals.

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This month we review a decision from the Court of Appeal on the 'material factor' defence to an equal pay claim and a recent Employment Appeal Tribunal decision on the dismissal of a senior employee without following any procedure. We also look at the latest decision on the employment status of cycle couriers, following a change in contractual terms with the express aim of avoiding worker status.

As the Government's furlough scheme starts to wind down, with employer contributions starting from the beginning of this month and increasing until the scheme ends on 31 October 2020, we look at recent reports of 'furlough fraud' by employers and the mechanism for repayment of grants under the Coronavirus Job Retention Scheme (CJRS). We also look at the latest amendments to statutory sick pay, in light of revised Public Health England guidance, and a new HR1 form for employers to use if they are proposing 20 or more redundancies in a period of 90 days or less.

Our immigration update this month includes an extensive COVID-19 update.

Don't forget to sign up for a free place at our webinar on the topic 'Homeworking - the new norm', taking place on 2 September 2020. This webinar will consider the employment law, health and safety and data security issues that should be taken into account when exploring homeworking as a permanent arrangement.

This year we are holding our Annual Employment Updates as webinars on 7 and 14 of October, as well as an update on the new Immigration system on 21 October. We need your help to confirm what time would suit you best, either 9:30am -11:30am or 12:00pm-2:00pm. If you are able to let us know by voting here, your feedback would be appreciated. We will begin advertising the webinars in due course, so keep an eye on our website for more details.

IN THIS ISSUE

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Equal pay: material factor defence

In this case, the Court of Appeal has considered how long a 'material factor' defence to an equal pay claim continued to apply.

Walker v Co-operative Group Ltd and another [2020] EWCA Civ 1075

Facts

The claimant was promoted to the position of Chief Human Resources officer in around February/March 2014. The company was at that time in a financially precarious position. The Executive Committee were regarded as essential to its survival, and so they were offered enhanced salaries. The claimant's salary was lower than other members of the committee. The following year a job evaluation study was carried out and showed that the claimant's work was at least equivalent, and/or of equal value, to that of the male committee members.

"The employer argued that a 'material factor' defence applied on the basis that there were a number of justifications for setting the claimant's pay at a lower level...

When the claimant was dismissed, she brought a claim for equal pay. The employer argued that a 'material factor' defence applied on the basis that there were a number of justifications for setting the claimant's pay at a lower level than that of her comparators, which were not related to her sex. This included factors such as regarding the HR function as being less critical to others on the committee and the claimant's lack of previous executive experience. The employer's case was that these justifications persisted despite the results of the job evaluation study.

"The employer's case was that these justifications persisted despite the results of the job evaluation study.

The employment tribunal accepted that the material factor defence was established by the employer in 2014, but by the time of the job evaluation study the 'historical explanations' for the pay differential were no longer applicable. The Employment Appeal Tribunal (EAT) upheld the employer's appeal, finding that the material factor defence continued to operate until a further decision (or omission to decide) in relation to the claimant's pay could be identified. Previous case law had established that the results of a job evaluation study do not have retrospective effect. The claimant's identification of a period of time (between 2014 – 2015) where the employer's material factor defence ceased left the starting point of the claimant's claim unclear, and if upheld would have meant that there would have been broad scope for the matter to be re-litigated in a subsequent hearing to decide the correct amount of compensation. The claimant appealed to the Court of Appeal.

... it was not a question of whether the difference in experience justified the difference in pay...

Court of Appeal decision

The Court has dismissed the claimant's appeal, upholding the EAT's decision. The tribunal had overlooked the fact that in respect of each of the comparators, at least one material factor continued to apply. This meant that the employer's original explanation for the pay differential had not ceased to be relevant, notwithstanding the results of the job evaluation study. In relation to the claimant's lack of executive experience, it was not a question of whether the difference in experience justified the difference in pay; for the purposes of the material factor defence the question was whether it explained the difference.

This decision is likely to be helpful for employers in defending a potential claim for equal pay.

Consequences

This decision is likely to be helpful for employers in defending a potential claim for equal pay. The material factors relied upon by the employer had not ceased to exist by the time of the job evaluation study. It also confirms that the material factor defence will continue to apply until such time as there is a further decision, or an omission to decide, in relation to pay. The company had not undertaken a pay round in the intervening period and so it had not failed to address the pay discrepancy.

As a result, anyone isolating in accordance with the revised PHE guidance will be deemed incapable of work and ... will be entitled to receive SSP for the duration of that period ...

QUICK FIRE

Further amendments to SSP Regulations

As a result of the updated guidance from Public Health England, and the increase in the minimum self-isolation period for COVID-19 from seven to ten days, the SSP Regulations have been further amended.

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 5) Regulations 2020 came into force on 5 August. As a result, anyone isolating in accordance with the revised PHE guidance will be deemed incapable of work and, subject to fulfilling the usual criteria, will be entitled to receive SSP for the duration of that period without the usual three day waiting period. This will apply to:

- Anyone who has symptoms of COVID-19 (who must self-isolate for at least ten days);
- Those who have tested positive for COVID-19 (who must self-isolate for at least ten days); and
- Anyone living in the same household as an individual with symptoms or a positive test result (who must self-isolate for a minimum of 14 days).

For more information, see the latest PHE guidance.

A fair dismissal with no procedure?

The Employment Appeal Tribunal (EAT) has ruled on whether an employer had unfairly dismissed a senior employee when it followed no procedure and without offering a right of appeal.

Gallacher v Abellio Scotrail Limited [2020], UKEATS/0027/19

Facts

The claimant, a senior manager for the respondent, was dismissed by her line manager at an appraisal meeting in April 2017 following a breakdown in trust and confidence between them. Her role was regarded as pivotal at a critical time for the business and her line manager considered that the situation was irrecoverable. Having discussed the situation in advance with the HR Director, who did not consider the matter to be one of conduct or performance management, where following a process would help manage the situation, the decision was made to terminate her employment. She was not offered the right of appeal and was paid in lieu of her notice entitlement.

Her role was regarded as pivotal at a critical time for the business and her line manager considered that the situation was irrecoverable.

The claimant brought claims for unfair dismissal, disability, sex and age discrimination. The respondent denied that it had knowledge of the disability relied upon by the claimant, which were symptoms connected with the menopause and depression.

An employment tribunal rejected the claimant's discrimination claims, and found the dismissal to be fair for some other substantial reason due to a lack of trust and confidence between two employees at senior level. It accepted the respondent's submission that an irretrievable breakdown in trust and confidence, particularly between two senior managers at a critical time, did not naturally fit into any internal policy. The tribunal did not consider that any procedure would serve any useful purpose and if anything, would have worsened the situation. It found no evidence that the claimant was interested in retrieving her relationship with her line manager, and it considered any appeal would have been "going through the motions". In the particular circumstances of this case, the decision to dismiss was substantially and procedurally fair. The claimant appealed to the EAT.

It accepted the respondent's submission that an irretrievable breakdown in trust and confidence, particularly between two senior managers at a critical time, did not naturally fit into any internal policy.

... in rare circumstances ... procedures may be dispensed with because they are reasonably considered by the employer to be futile.

EAT decision

The EAT dismissed the appeal, upholding the tribunals decision. It noted that in rare circumstances, such as this one, procedures may be dispensed with because they are reasonably considered by the employer to be futile. On both sides, the working relationship had broken down and there is no rule of law that the absence of any procedure necessarily renders a dismissal unfair. However, such dismissals will be subject to extra caution on the part of the tribunal before being considered to fall within the band of reasonable responses.

... in the majority of cases an employer would be expected to follow at least a minimum procedure before making the decision to dismiss.

Consequences

The circumstances of this case are clearly rare, and in the majority of cases an employer would be expected to follow at least a minimum procedure before making the decision to dismiss. It was significant here that the employee concerned was senior, showed no inclination to retrieve the situation and that the business was at a particularly critical time. The decision does support an argument that in cases where there is an irretrievable breakdown in trust and confidence, it might be appropriate to dismiss without following any procedure. Such a strategy is not without risk, however, and we would caution employers to seek advice before adopting this approach to a dismissal.

A failure on the part of an employer to notify the Secretary of State of a proposal to make collective redundancies is a criminal offence ...

QUICK FIRE

Collective redundancy: revised HR1 form and guidance

A revised HR1 form has been issued, for employers to notify the Secretary of State of their intention to make 20 or more employees redundant within a period of 90 days or less.

The new form is intended to be shorter and more straightforward to complete. The accompanying guidance notes have also been updated.

A failure on the part of an employer to notify the Secretary of State of a proposal to make collective redundancies is a criminal offence, which can result in an unlimited fine being levied against the employer. Individual directors can also be prosecuted and found liable, if the offence has been committed with the consent or connivance of, or attributable to neglect on the part of, such individual.

For more information on making redundancies during furlough leave, see our recent article.

Worker status of cycle couriers

In this case, an employment tribunal considered whether cycle couriers were self-employed or 'workers', in the context of a claim for holiday pay.

O'Eachtiarna and others v CitySprint (UK) Ltd [2020], ET/2301176/2018

Facts

This was a group of five lead cases from a larger holiday pay claim brought by cycle couriers. In a previous case, a tribunal had held that a courier engaged under a previous contract was a worker within the meaning of the Employment Rights Act 1996, meaning that she was entitled to receive holiday pay.

City Sprint changed their contractual terms in November 2017, with the intention of clarifying the rights and flexibilities available to its 'self-employed couriers'.

City Sprint changed their contractual terms in November 2017, with the intention of clarifying the rights and flexibilities available to its 'self-employed couriers'. However, the couriers claimed that as very little had changed in relation to their working arrangements in practice, they should still be regarded as workers.

Tribunal decision

The tribunal did not accept the couriers' submission that since CitySprint had conceded worker status prior to November 2017, and that little had changed in practice since then, they should necessarily be regarded as being 'workers'. The contractual provisions were important and should not be overlooked.

... the contractual right of substitution was only a theoretical right; it had never been exercised.

The tribunal considered that most of the contractual terms reflected reality and were clear. However, the contractual right of substitution was only a theoretical right; it had never been exercised. The dominant feature of the contract remained personal performance. Most of the couriers did other work, but did not work elsewhere as a cycle courier. The tribunal therefore concluded that the couriers were 'workers' whilst engaged in work for CitySprint and were entitled to receive holiday pay.

Changing contractual terms without a corresponding change in operational procedures was insufficient to defeat a claim of worker status.

Consequences

It was well-publicised back in 2017 that CitySprint were seeking to establish self-employed status of its couriers by introducing new contractual terms. Following this decision and subject to any appeal, this strategy has failed to succeed. Changing contractual terms without a corresponding change in operational procedures was insufficient to defeat a claim of worker status.

A provision in the contract stating that any fees paid would be deemed to include holiday pay (at the minimum statutory rate), if the couriers were found to be entitled to holiday pay, also failed to succeed. No specific sum had been identified as holiday pay and the contract provided no mechanism for the calculation of holiday pay, meaning that the contractual provision was not sufficiently transparent or comprehensive to be valid. The tribunal is due to determine the appropriate remedy at a later hearing.

It also provides a strong reminder to employers that the dismissal of employees who are required to self-isolate should be a last resort...

QUICK FIRE

New guidance on self-isolating

The Government has published new guidance for employers and employees on the rules relating to self-isolation after returning to the UK.

The guidance covers those who are returning from a country without a quarantine exemption. The list of those countries that are exempt has recently been changed with Belgium, the Netherlands and France no longer on the list as well as a number of other countries including Spain.

The guidance briefly sets out the possible options available to employees who are required to self-isolate after a period abroad, including working from home or taking a period of annual or unpaid leave. It also provides a strong reminder to employers that the dismissal of employees who are required to self-isolate should be a last resort, and states that employment tribunals will consider all the relevant facts around a dismissal, which could include public health guidance on coronavirus.

... as many as two thirds of employees have continued to work for their employer in contravention of the CJRS rules ...

EHMRC retains the right to retrospectively audit claims and has the right to claw these back through income tax assessments.

QUICK FIRE

Furlough fraud figures

According to recent news reports, HMRC has reported that by 7 August 2020, it had received 7,791 reports of 'furlough fraud', an increase of around 77% since the end of June. The first known arrest for furlough fraud was reported by the BBC in July.

A recent study has also found that as many as two thirds of employees have continued to work for their employer in contravention of the CJRS rules, while the employer has claimed for their wages under the scheme. The study suggests that men were significantly more likely than women to work while on furlough, particularly if their wages were topped up by their employer.

Employers are being encouraged to audit claims they have submitted under the Government's Coronavirus Job Retention Scheme (CJRS) to uncover any inadvertent errors. HMRC are also encouraging individuals to report cases of coronavirus relief scheme fraud through their Fraud Hotline telephone service or online portal. Towards the end of August, HMRC will issue 3,000 'nudge' letters to employers who they believe have over claimed through the CJRS, and it is anticipated they will contact 27,000 organisations in total (just 2% of those that claimed) although it is reassuring those contacted that it will not be "seeking out innocent errors and small mistakes for compliance action".

Employers who have over-claimed a grant can correct the amount by adjusting their claim for the following month, or must contact HMRC to arrange for a repayment of the over-claimed sum. In accordance with the provisions of the Finance Act 2020, an employer that has over-claimed a grant and not repaid it must notify HMRC within 90 days of the date it was received, or by 20 October 2020, whichever is later. HMRC retains the right to retrospectively audit claims and has the right to claw these back through income tax assessments. It can also charge penalties in the case of deliberate non-compliance.

Further information on what employers should do if they have over-claimed is available in the HMRC guidance.

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... there is a temporary concession until 30 November 2020, which allows you to submit your application and enrol your biometrics in any country, where you can meet that country's entry clearance requirements.

In the UK Sopra Steria is hoping to re-open more sites through the autumn...

Immigration update

COVID-19 update

Biometric appointments

Visa application centres around the world continue to re-open. But unfortunately we are finding that sudden closures are also happening, due to local lockdown restrictions. For the latest information on which centres are open, you should check the VFS and TLS websites.

Remember there is a temporary concession until 30 November 2020, which allows you to submit your application and enrol your biometrics in any country where you can meet that country's entry clearance requirements. You do not have to be resident there.

In the UK Sopra Steria is hoping to re-open more sites through the autumn, including Cambridge in w/c 14 September. There is limited availability and you do need to be prepared to travel to an appointment. At the moment slots have been released up to 28 September 2020. For the latest information on re-openings see the UKVCAS website.

It is still a case of waiting for an invitation before you can book an appointment. Invites are currently being sent to those who applied between 1-14 August 2020.

Anyone who applied on or after 15 August needs to wait for UKVI to assess their eligibility to use the new IDV app, instead of attending a biometric appointment. They will then be asked to choose which route they wish to take to enrol their biometrics.

IDV app

Sopra Steria and UKVI have developed a new UKVCAS Identity Verification (IDV) app as a response to the delays caused by COVID-19. The IDV app was approved for use this month and roll out started on 17 August 2020.

UKVI will assess if applicants are eligible for their biometric reuse policy and if so, they will be invited to use the IDV app to submit their information without requiring a biometric appointment.

Sopra Steria and UKVI have developed a new UKVCAS Identity Verification (IDV) app ...

Invitations to use the IDV app are being sent out in waves, depending on when you applied for your visa. The hope is to process up to 4,000 applications per day once fully up to speed. The roll out plan aims to send invites by 7 September 2020 to those who registered up to 31 July 2020 and then by 14 September 2020 for August applicants.

Sopra Steria has produced some FAQs which include more information about the IDV app and a video.

We will of course be providing appropriate support to any of our clients who have opted to use the IDV app rather than attend a biometric appointment, so if you have any further questions please speak to your normal contact in our Immigration Team.

Exceptional assurance

...the Government has said it will not provide any more automatic visa extensions...

As set out in our last update, the Government has said it will not provide any more automatic visa extensions. This means a significant number of people are now expected to leave the UK by 31 August 2020, or apply for a new visa if they wish to stay.

If you intend to leave the UK but are just not able to do so by 31 August 2020, you may request additional time to stay, also known as 'exceptional assurance', by contacting the coronavirus immigration team. But this will not be 'leave', it is just an agreement that you will not be prosecuted for overstaying. It is unclear whether you would be permitted to work during this time, further clarification on this point is being sought from the Home Office.

To apply for the exceptional assurance you must complete an online form...

To apply for the exceptional assurance you must complete an online form. You will then be invited to submit evidence to explain why you cannot leave the UK at this time.

If you would like assistance with an application, then please contact a member of our Immigration Team.

Concessions for students

Students who are undertaking distance learning are considered to be in term time and are restricted to the work hours stated on their visas.

Updated guidance for Tier 4 sponsors is now available on the government website. Some of the COVID-19 concessions have now ended. For example, where English language test centres have re-opened, that concession can no longer be used. Also the Academic Technology Approval Scheme (ATAS) concession has finished. The guidance also states that the concession allowing visitors or those with short-term study visas to switch to the Tier 4 Student Route only applies to those who arrived in the UK on or before 31 July 2020.

However, other arrangements have helpfully been extended. It is now possible to have distance learning for the whole of the 2020/21 academic year. Students who are undertaking distance learning are considered to be in term time and are restricted to the work hours stated on their visas.

The concession that allows students to apply for further leave in the UK has also been extended until the launch of the new Student Route in January, i.e. it is no longer limited

to those whose leave expires on or before 31 August 2020. The period during which a new course must start after current leave expires has also been extended until 31 December 2020 and students may downgrade to a lower level of an integrated course within the UK.

Quarantine

"The list of travel corridors remains subject to regular review. There is now a pattern of removing countries from the list with effect from 4am on a Saturday.

The list of travel corridors remains subject to regular review. There is now a pattern of removing countries from the list with effect from 4am on a Saturday. Apparently this time has been chosen as very few flights arrive in the UK around then.

Andorra, The Bahamas and Belgium were all removed from the list from 4:00am on 8 August 2020. Aruba, France, Malta, Monaco and the Netherlands as well as the Turks and Caicos Islands were all removed from 4:00am on 15 August 2020. Austria, Croatia and Trindad and Tobago were all removed from the list from 4:00am on 22 August 2020. Anyone entering England from one of those countries after the cut-off time is required to complete 14 days of quarantine.

However, some countries have been added to the list, meaning you are no longer required to quarantine if you visit them and return after the list has been updated. Note anyone returning prior to this will still need to complete the quarantine period that had been imposed on them.

Travel corridors between England and Brunei and Malaysia have been in place since 4:00am on 11 August 2020 and with Portugal since 4:00am on 22 August 2020.

For the latest information regarding travel corridors and quarantine requirements see the government website.

Save the date

The Brexit transition period will end on 31 December 2020 and from 1 January 2021, we will have a new immigration system. EU nationals arriving in the UK will require visas and as a result many more employers will need to obtain a Home Office sponsor licence. Are you ready for the new system?

Our Immigration Team will be delivering a webinar on 21 October 2020 to help you understand how the new system will affect your organisation and what you should do to prepare. Further details will follow, so keep an eye on our website for more information and to book your place.

For further information on any of the matters above, please contact Clare Hedges or Janice Leggett in our Immigration Team. Law covered as at 26 August 2020.