EMPLOYMENT NEWSLETTER - DECEMBER 2018

1. Autumn 2018 Budget

The Autumn budget included the following matters of interest to employers:

National Minimum Wage (NMW)
From April 2019 the NMW will be increased to the following rates:

- Apprentices: £3.90 an hour
- 16-17 year olds: £4.35 an hour
- 18-20 year olds: £6.15 an hour
- 21-24 year olds: £7.70 an hour
- Aged 25 and over: £8.21 an hour

Income tax
The income tax personal allowance will increase to £12,500 and the higher rate threshold will increase to £50,000 from April 2019. These thresholds will remain at the same level in 2020-21 and thereafter will rise in line with the consumer prices index.

Apprentice levy
From April 2019, businesses liable to pay the apprenticeship levy will be able to invest up to 25% of the levy to support the training of apprentices in their supply chain. For smaller employers who are not liable to pay the apprenticeship levy, the "co-investment rate" for apprenticeship training will be reduced from 10% to 5%. This means that smaller employers will contribute 5% towards the cost of apprenticeship training, and the Government will pay the balance.

National Insurance
The introduction of employer Class 1A National Insurance contributions on termination payments over £30,000 has been delayed until April 2020.

Payroll and IR35
The public sector off-payroll working rules will be extended to the private sector from 6 April 2020. The rules will only apply to large and medium-sized businesses, with the existing IR35 rules continuing to apply to small businesses. The Government intends to use similar criteria to define small businesses as those found in the Companies Act 2006.

2. Holiday pay entitlement is not automatically lost if worker does not seek to take holiday

The European Court of Justice (ECJ) has held that workers do not automatically lose the right to payment in lieu of holidays on termination, or at the end of the holiday year, if they did not seek to take the holiday (even though they could have done so).

What does this mean?
The ECJ held in these German cases that a worker does not automatically lose accrued but untaken annual leave entitlement on termination, or at the end of the holiday year, on the basis that the worker failed to seek to exercise their right to annual leave. However, the holiday entitlement will be lost if the employer can show that it

had enabled the worker to take the holiday before the end of the reference period, particularly through the provision of sufficient information. The employer has the burden of proof in this respect.

What should employers do?

This case is potentially significant because it states that holiday cannot automatically lapse at the end of the holiday year and must be carried over unless the employer can show that it enabled the worker to take their holiday entitlement. It will be interesting to see if this case will generate any litigation in the UK.

In the meantime, employers should make sure that workers have an effective opportunity to take the annual leave owing to them. They should encourage workers to take their holiday and inform them accurately and in good time of the risk of losing that leave at the end of the holiday year. Employers should also keep evidence that this has been done.

Case references: Kreuziger v Berlin; Max-Plank-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu

3. Addison Lee drivers were 'workers'

The Employment Appeal Tribunal (EAT) has held that Addison Lee drivers were workers for the purposes of the Employment Rights Act 1996, Working Time Regulations 1998 and the National Minimum Wage Act 1998.

What does this mean?

The EAT held that, despite the drivers' contracts describing them as independent contractors and stating that nothing in the contract would render them an employee, worker, agent or partner of Addison Lee, the reality of the situation was that they were workers. They were not genuinely self-employed independent contractors.

There was an overarching contract between the parties and the drivers were deemed to be available and willing to provide work (and therefore workers) at any time that they were logged into the Addison Lee computerised system. This defined their working time as they were at the company's disposal even if they were not actually carrying passengers at the time. The drivers were notified of a job via the system which they then had to accept forthwith. If they did not do so they had to give an acceptable reason and a sanction might follow. In reality, there were regular offers and acceptances of work and the drivers worked pretty much continuously.

What should employers do?

This case follows a similar decision that Addison Lee's cycle couriers are workers. The issue of employment status is the subject of a Government consultation which may change the existing employment status tests, given the lack of clarity and uncertainty surrounding them.

In the meantime, employers should assess their workers to establish whether they are employees, workers or genuinely self-employed.

Case reference: Addison Lee Limited v Lange and others

4. Dismissal for failing drugs test was unfair

An Employment Tribunal has held that the dismissal of a bus driver who failed a routine drugs test was unfair.

Background

Mr Ball was a 61 year old diabetic bus driver. He had high blood pressure and had to check his blood sugar levels every two hours via a prick test to his finger. His employer carried out random drugs testing and, following a saliva test, Mr Ball showed positive for cocaine. He protested his innocence and speculated that the test might have been contaminated. He argued that he handled money and also licked his fingers when they were sore so the saliva could have been contaminated in this way.

Mr Ball also provided his own drugs test (a hair follicle test) which did not detect any cocaine in his system. This was ignored by the company because the test had not been carried out by its approved tester. Mr Ball was dismissed for gross misconduct. On appeal, the company's laboratory stated that the transfer of cocaine from money onto hands and then saliva was highly unlikely to give a positive result and that the amount of cocaine in the saliva sample may not have been enough to show up in the hair follicle.

Mr Ball's appeal was dismissed and he subsequently

brought a claim of unfair dismissal in the Tribunal, which he won.

What does this mean?

The Tribunal held that the company had not acted within the range of reasonable responses when carrying out its investigation or when deciding to apply the sanction of dismissal. A reasonable employer would have at least re-tested the employee given his medical condition and his long and unblemished service.

The investigative process was flawed because:

- When rejecting the hair follicle test, the company mistakenly told Mr Ball that it was not within its policy to recognise alternative drugs tests. In fact, the drugs and alcohol policy was silent on the issue. There was also a reference in the policy to a donor being able to challenge a positive result, but this was not drawn to his attention.
- The company acted in breach of its own disciplinary procedure, which provided that it would carefully consider any evidence submitted by the employee.
- During the disciplinary hearing, the relevant manager adopted a blinkered view towards the evidence, refusing to be drawn into arguments about cross-contamination of the saliva sample, as well as arguments about mitigation, namely Mr Ball's long and unblemished service.
- At the appeal hearing, the case of First Bristol Limited v Bailes, in which arguments about contamination of bank notes with cocaine were accepted, was brought to the attention of the company but to no avail. Mr Ball's offer to undertake another test (in addition to the saliva and hair follicle test) was ignored.
- When further investigations took place during the appeal process, Mr Ball was not informed of what these were or given the opportunity to comment.
- At the appeal stage, Mr Ball submitted a further hair follicle test but, apart from the points that had already been made in relation to this, the relevant manager questioned the integrity of the test when there was no basis for doing so.
- The appeal manager appeared to regard the decision as to whether to dismiss for a positive drugs test as "black and white".
- The dismissal letter cited gross misconduct as the reason for dismissal, although the letter itself did not elaborate further. In evidence, the company said that the misconduct consisted of Mr Ball being on duty under the influence of drugs. Failing the drugs test was treated as sufficient evidence for gross misconduct but was not of itself an instance of gross misconduct under the disciplinary policy.

What should employers do?

Employers should not treat the results of a drugs test as black and white or incontrovertible evidence, even in a sector where public safety is at stake. Employers should not shut their mind to evidence and it may be necessary to go behind a failed drugs test and investigate further. They should consider any evidence being presented by the employee, act in accordance with any drugs policy they may have and take a common sense approach. The employer in this case conflated failing the drug test with being under the influence of drugs, when the two should have been kept distinct.

Case reference: Ball v First Essex Buses Limited

5. Acas advice on performance management

Acas has published new advice on performance management systems and treating staff fairly which can be found here.

The new advice recommends that employers actively consider workforce diversity and Equality Act provisions when assessing performance management arrangements. For example, employers should be proactive in making reasonable adjustments for employees with disabilities if the organisation's performance measures disadvantage these employees. The guidance also suggests discussing and addressing problems as they arise and offers tips for avoiding favouritism.

6. Guidance on employing people with a disability or health condition

The Department for Work and Pensions has published new guidance on employing people with a disability or health condition which can be found here.

This practical guide is aimed at helping line managers recruit, manage and support people with a disability or health condition. The guidance takes the form of a "quick and easy reference tool" which seeks to improve the knowledge and confidence of line managers in managing members of staff with a disability or long-term health condition. For example, it helps identify ways in which line managers can make appropriate reasonable adjustments where necessary and also offers tips on how managers can create an inclusive working environment.

7. Failure to comply with a contractual obligation to offer a trial period in a redundancy situation is likely to be unfair

The Employment Appeal Tribunal (EAT) has held that a redundancy dismissal is unlikely to be fair in circumstances where the employer, in breach of contract, has failed to offer a trial period for an alternative role.

What does this mean?

The employee in this case, upon being made redundant, was offered a more junior alternative role but was not offered a trial period. There was undisputed evidence about the potential benefit to her of having a trial period (i.e. trialling whether she would be able to work for someone who had been junior to her).

The EAT decided that the failure to offer a trial period was likely to render the dismissal unfair even though the Tribunal had found that the employee had not complained at the time about this failure and, even if she had a trial period, she would have still rejected the alternative role.

What should employers do?

In this case, there was a contractual obligation on the employer to offer a trial period. However, even if there is no contractual obligation, employers should nevertheless consider offering one as any failure to agree to a trial period for an offer of alternative employment could render a dismissal unfair.

Case reference: George v London Borough of Brent

8. Gender pay gap data published

The Government Equalities Office has published a summary of the 2017/2018 gender pay gap data provided by both public and private sector employers to comply with their reporting obligations.

Some of the key findings in the summary were:

- While 57% of employers have more women than men among their lowest paid employees, only 33% have more women than men among their highest paid employees.
- 40% of employers said it had been "very easy" or "easy" to make the gender pay gap calculations, while 17% said it had been "difficult" or "very difficult".
- As of May 2018, 48% of employers had published an action plan outlining how they plan to tackle their gender pay gap.

Find out more

Please contact us to discuss your requirements or to find out more.

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