EMPLOYMENT NEWSLETTER JANUARY 2019

1. New employment legislation has been published

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 have been published. These regulations, which come into force on 6 April 2020, amend the Employment Rights Act 1996 to provide that a written statement of terms must be given on or before the first day of employment, rather than within two months of the employment starting. The regulations also add to the information that must be given in the written statement.

The regulations also amend regulation 16 of the Working Time Regulations 1998 to increase the reference period for determining an average week's pay (for the purposes of calculating holiday pay) from 12 weeks to 52 weeks, or the number of complete weeks for which the worker has been employed.

The draft Employment Rights (Miscellaneous Amendments) Regulations 2019 have also been published. These increase the maximum penalty for an "aggravated" breach of employment law from £5,000 to £20,000. This is due to come into force on 6 April 2019. The regulations also extend the right to receive a written statement of terms to all workers, and lower the threshold required for a request to set up information and consultation arrangements from 10% to 2% of employees, subject to the existing minimum of 15 employees. These measures are due to come into force on 6 April 2020.

The draft Agency Workers (Amendment) Regulations 2019 have also been published. These are due to come into force on 6 April 2020 and amend the Agency Workers Regulations 2010 to remove the "Swedish Derogation" which allows employment businesses to avoid giving agency workers pay parity with comparable direct recruits if they have an employment contract which gives them a right to pay between assignments.

2. New ICO guidance has been published

The Information Commissioner's Office (ICO) has published detailed guidance on controllers and processors:

Click here to view the guidance

This guidance will help organisations decide if they are acting as a controller, processor or joint controller when processing personal data. It contains lists of the decisions which can only be taken by controllers and decisions which may be taken by processors in relation to data processing. In certain circumstances, where allowed for in the contract, a processor may have discretion over how the processing takes place using its own expertise. The ICO recognises that it can be difficult to apply the definition of processor to the complexity of modern business relationships. The key is to determine each party's degree of independence in determining how and in what manner the data is processed as well as the degree of control over it.

The ICO has also published detailed guidance on contracts and liabilities between controllers and processors:

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Please click here to view the guidance.

This takes a practical approach to end of contract provisions recognising that it may not be possible for data in backups or archives to be deleted immediately upon contract termination. The guidance includes examples of the considerations controllers should have when assessing prospective processors, including compliance with industry standards.

3. Dismissal while entitled to long-term disability benefits was in breach of an implied term

Background

Mr Awan was employed as a security agent at Heathrow airport and was entitled to six months' full sick pay and thereafter 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. However, the insurance policy behind the benefit plan provided that Mr Awan was only entitled to such a benefit as long as he remained in employment.

Mr Awan was signed off sick with depression in October 2012 and dismissed for capability reasons in November 2014. He claimed unfair dismissal and discrimination arising from disability. He lost his case and appealed to the EAT.

What does this mean?

The EAT held that the employer had acted in breach of an implied term of the employment contract not to dismiss for capability reasons while Mr Awan was entitled to disability benefits and remitted the case to the Tribunal.

This case suggests that it would be risky for an employer to rely on a termination clause which expressly reserves the right to terminate for incapacity where there is also a contractual right for the employee to receive disability or permanent health insurance (PHI) benefits.

What should employers do?

In this case, Mr Awan's contract did not refer to an insurance policy or state that his entitlement to disability benefits was dependant on the rules of the scheme. Employers wishing to provide such benefits should ensure that the insurance policy is incorporated into the contract by reference, so that the employer is not exposed if the insurer pays out less or nothing at all under the policy. Any significant limitations under the policy should be specifically drawn to the employee's attention to ensure they are incorporated into the contract

In addition, any termination clause in the contract should specifically include the right to terminate for incapacity notwithstanding the benefits clause, albeit that this may not be enforceable following this case.

Case reference: Awan v ICTS UK Limited

4. Employee who had a tendency to steal was not protected by the Equality Act

The Employment Appeal Tribunal (EAT) has held that (on the facts of a particular case) where an employee had been caught shoplifting, his behaviour amounted to a "tendency to steal", not forgetfulness or dishonesty resulting from post-traumatic stress disorder (PTSD).

Background

Mr Wood was employed by Durham County Council as an antisocial behaviour officer. As such, he worked closely with the police and was required to act with honesty and integrity at all times. He suffered from severe depression, PTSD and associated amnesia.

In August 2015, Mr Wood left a branch of Boots having failed to pay for several items. He concealed his Council ID and lied about what he did for a living. He then signed an admission that he had no intention of paying for the items and was given a fixed penalty notice for disorder (PND). He should have informed both the Council and the police about the incident but failed to do so.

Mr Wood was subsequently refused Non-Police Personnel Vetting clearance due to his PND, which meant he could not do his job. When questioned about this, he initially denied knowing anything. He then admitted that he could remember the incident but said that it was not his fault and it was due to a disorder affecting his memory. After a prolonged disciplinary process, Mr Wood was dismissed.

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Mr Wood claimed that his PTSD and associated amnesia caused him to suffer forgetfulness and this would include forgetting to pay for items when leaving a shop. The Council accepted that Mr Wood's PTSD meant that he was disabled under the Equality Act 2010 but stated that he had been dismissed for a tendency to steal, which is specifically excluded from the protection of the Equality Act.

What does this mean?

Mr Wood argued that he did not have a "tendency to steal" and that he had simply walked out of the shop without paying in a dissociative state caused by his disability. The EAT did not accept this and agreed with the Tribunal's finding that he had acted with dishonesty, particularly as he had signed a statement admitting to theft, his behaviour in the following days and his self-serving selective memory when interviewed by his line manager. He was therefore not allowed to pursue his claim for disability discrimination.

What should employers do?

This case illustrates the difficulty when a person suffers from an impairment which manifests itself in such a way that it could be categorised as an excluded condition under the Equality Act. It is only where the reason for the treatment complained of is the excluded condition (here a tendency to steal) that the individual loses the protection against disability discrimination.
Case reference: Wood v Durham County Council

5. Advantageous treatment was not unfavourable

Under section 15(1) of the Equality Act 2010, "discrimination arising from disability" occurs where both:

- A treats B "unfavourably" because of something arising in consequence of B's disability.
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

In a recent case, the Supreme Court has confirmed that, broadly speaking, advantageous treatment will not be "unfavourable", merely because it could have been more advantageous.

Background

In this case, Mr Williams took ill health retirement due to his disability and became entitled to an enhanced pension. However, the pension was based on the part time salary he received in the period leading up to his retirement, after the company had reduced his working hours to accommodate his disability. He argued that the pension should have been calculated on the basis of his full time salary not his part time salary.

What does this mean?

The Supreme Court said that section 15 of the Equality Act 2010 appears to raise two simple questions of fact:

- What was the relevant treatment?
- Was it unfavourable to the claimant?

When considering whether the treatment was unfavourable, the Court said that, in most cases, including this one, little is likely to be gained by seeking to differentiate between the word "unfavourably" and analogous concepts such as "disadvantage" or "detriment" found in other provisions of the Equality Act.

In this case, the relevant treatment was the award of a pension based on the employee's actual final salary at retirement and there was nothing intrinsically "unfavourable" or disadvantageous about that. The only basis on which the employee was entitled to any award was by reason of his disabilities. Had he been able to work full time, the consequence would have been, not an enhanced entitlement, but no immediate right to a pension at all.

The Court therefore concluded that Mr Williams' trement was not in any sense "unfavourable" and nor could it reasonably have been so regarded. He therefore failed in his disability discrimination claim.
Case reference: Williams v The Trustees of Swansea University Pension and Assurance Scheme and anothe

6. New NMW guidance includes unpaid work trials

The Department for Business, Innovation & Skills (BIS) has updated its guidance on calculating the National Minimum Wage (NMW) to include unpaid work trials.

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To view to guidance click here.

When considering whether a candidate should be paid during a work trial the following factors should be taken into account:

- whether the trial is genuinely for recruitment processes;
- whether the trial length exceeds the reasonable amount of time that an employer would need to assess the individual's ability in the role;
- whether the tasks carried out add value to the employer beyond testing the candidate; and
- the extent to which the individual is observed during the trial.

The longer a trial period continues, the more likely it is that it will result in a contract to provide work meaning that the NMW is due.

7. "Right to work" checks to be modernised

As an alternative to requesting and retaining right to work documents from prospective employees, the Home Office's Employer Checking Service **Click here to find out more** will be updated to enable employers to use an online checking service to check a prospective employee's right to work in the UK and, subject to receiving a positive confirmation, will establish a statutory excuse to a civil penalty for illegal working.

This new service was launched on 28 January 2019. However, employers should note that initially the service will only be available for verifying the right to work of some non–EEA and non-Swiss nationals, so it will not replace conventional right-to-work checks completely.

The service will only initially be able to check the right to work for prospective employees who are either:

- Non-EEA nationals who hold biometric residence permits or biometric residence cards; or
- EEA or Swiss nationals who have been granted settled status under the EU Settlement Scheme.

EEA nationals who have not been granted settled status under the scheme will still need to demonstrate their right to work through the appropriate documents, such as their national passport.

The new online right to work checking service is not mandatory and employers can elect to continue to request and retain documents if they prefer.

Find out more

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

Clive Dobbin

Partner
023 8048 2370
clive.dobbin@parissmith.co.uk

David Roath

Partner
01962 679 774
david.roath@parissmith.co.uk

Claire Merritt

Partner
023 8048 2112
claire.merritt@parissmith.co.uk

Charlotte Farrell

Associate
023 8048 2134
charlotte.farrell@parissmith.co.uk

Tabytha Cunningham

Associate
023 8048 2135
tabytha.cunningham@parissmith.co.uk

© 2019 Paris Smith LLP

Jane Biddlecombe

Associate
023 8048 2374
jane.biddlecombe@parissmith.co.uk

Andrew Willshire

Solicitor
023 8048 2160
andrew.willshire@parissmith.co.uk

Sarah Hayes

Solicitor
023 8048 2219
sarah.hayes@parissmith.co.uk

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