Welcome to the RBA Autumn 2016 Newsletter.

As we approach 100 days since the UK has voted to leave the EU we are no clearer in knowing what will be the main changes for employment legislation. The now notorious Article 50 will need to be triggered, there are some 40 plus years of UK Acts of Parliament and Statutory Instruments that will need to be revised and repealed before the impact of inevitable change. So at the moment it is business as usual but we anticipate that there will be much to report upon in future newsletters.

The new rates for the minimum wage (see page 3) will come into force on 1st October. Many questions are being asked about future changes to the new "living wage" introduced on 1st April 2016. What will the new rate be? To what level will it rise and when will changes come into force? The answer at the moment is that we just don't know.

## NEWS AND VIEWS

### Changes to Compensatory Awards

Discrimination, harassment and victimisation claims can lead to an employer having to pay an award for "injury to feeling". In 2003 the Court of Appeal set out three bands of awards that could be made for injury according to the level of seriousness. In 2010 the courts had to consider whether or not the bands should be increased for inflation and whether these increases would apply in employment cases. The recent EAT case of AA Solicitors Ltd and anor v Majid has confirmed that the 10% increase used in 2010 is applicable when it considered an award of £18,000.

- Lower Band increased from £500 - £5,000 to **£500 - £6,000**
- Middle Band increased from £5,000 - £15,000 to **£6,000 - £18,000**
- Upper Band increased from £15,000 - £25,000 to **£18,000 - £30,000**

In practical terms where a wrongful act from an employer, or one of their employee's, leads to an employee's employment ending, case law guides a tribunal towards an award of at least £6,000 for injury to feelings in addition to any other award i.e. a basic award (related to service) and compensatory loss (based on net lost income).

### Changes to Taxation of Termination Payments

HM Revenue & Customs has published draft legislation changing the taxation of termination payments, intended to come into force April 2018. The main changes are:-

- make all PILONs (payments in lieu of notice) taxable, even if they are non-contractual
- require payment of employer NICs on sums over £30,000 (not currently payable);
- ensuring payments for injury to feelings are subject to tax (there is currently a conflict of judicial authorities on this point)

The precise wording of the draft legislation is open for consultation until 5 October.

### Gender Pay Gap Reporting

The duty to report information on the difference in pay between male and female employees will apply to employers with 250 or more employees.

The Government published the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 on 12 February 2016, setting out the detail of the gender pay gap reporting duty. The Regulations have been the subject of consultation and the Government has said that the final version of the Regulations will be published later in 2016 and, subject to parliamentary approval, should come into force in early 2017.

Employers will be required to publish information on their gender pay gap and gender bonus gap on an annual basis. The pay information must be based on data from a specific pay period every April, beginning in April 2017. The bonus information must be based on the preceding 12-month period, beginning with the 12 months leading up to 5 April 2017. Employers will have 12 months in which to publish the information, meaning that first publication will be required by 4 April 2018.

Although this is coming into force for larger employers at present, it could be extended in due course.

### Trade Union Act 2016

The first action of the current Conservative government was to draw up the TU Act. This will come into force before the end of the year. The act is designed to be more onerous for a trade union to instigate industrial action and sets a requirement for a minimum 50% turnout in industrial action ballots, a minimum level of support of 40% of eligible voters to authorise strikes in public services and a fixed period of time for acting after a ballot result. A further statutory instrument is expected to deal with the issue of an employer being able to hire agency works to cover strikers.

The question is whether or not the legislation will prevent strikes? Of 158 strikes studied by the Salford Business School in August 2015 only 85 would have met the 50% participation requirement. Even if the majority vote in favour of striking the participation level may be difficult to achieve. As for the 40% support threshold for public services, the threshold would not have been met in 35 out of 90 Ballots in these services. Junior doctors, teachers and the underground staff, however would have met the criteria.

## LEGISLATION UPDATE

### National Minimum Wage Changes

On 1st April the new National Living Wage became compulsory, entitling workers aged 25 and over to a wage of £7.20 per hour. Please note the other NMW increases below effective from 1st October 2016.

There was no increase to statutory adoption, maternity, paternity or shared parental pay rates in April 2016.

## CURRENT RATES

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| **Statutory Sick Pay** | **£88.45 p.w.** (from 6th April 2016) | |
| **Statutory Maternity and Adoption Pay** | **6 weeks at 90% of average earnings** | |
| | **then 33 weeks at £139.58 p.w.** (from 6th April 2016) | |
| **Statutory Paternity Pay** | **2 weeks at £139.58 p.w.** (from 6th April 2016) | |
| **Shared Parental Pay** | **£139,58 p.w.** (from 6th April 2016) | |
| **Week's pay for statutory redundancy** | **£479 p.w.** (from 6th April 2016) | |
| **NI Contributions Lower Earnings Limit** | **£112 p.w.** (from 6th April 2016) | |
| **Minimum annual paid holiday** | **5.6 weeks (28 days for 5 day week)** | |
| **Guarantee Pay** | **£26.00 per day** | |
| | **£130 for 5 workless days** (from 6th April 2016) | |
| **Minimum Wage (from 01.10.15)** | **Age 21 – 24** | **£6.70** per hour |
| | **Age 18 – 20** | **£5.30** per hour |
| | **Age 16 – 17** | **£3.87** per hour |
| | **Apprentices** | **£3.30** per hour |
| **Minimum Wage (from 01.10.16)** | **Age 21 – 24** | **£6.95** per hour |
| | **Age 18 – 20** | **£5.55** per hour |
| | **Age 16 – 17** | **£4.00** per hour |
| | **Apprentices** | **£3.40** per hour |
| **National Living Wage (from 01.04.16)** | **Aged 25+** | **£7.20** per hour |

## RECENT CASES OF INTEREST

### Disabled employee was dismissed for angry outbursts over lack of wheelchair access.

The Equality Act 2010 states that discrimination occurs where an employer treats an employee less favourably because of something arising in consequence of their disability, unless the employer can show its treatment is a proportionate means of achieving a legitimate aim.

In the case of Risby v London Borough of Waltham Forest, the council decided to stop using

external venues for workshop events in order to save money. Risby, a risk and insurance manager, was due to attend a workshop which had its venue swapped from an external one with wheelchair access to the basement of a council-owned assembly hall with no wheelchair access. The change angered Risby, who was a wheelchair user. He shouted at a junior colleague, saying in a loud voice, which other staff could hear, that the council "would not get away with this if they said that no f******g n*****s were allowed to attend".

The colleague, who was of mixed race, believed this comment was directed at her and was close to tears. Later, when the workshop organiser spoke to Risby, he told her in the hearing of another employee that he was being treated "like a n****r in the woodpile". Following a disciplinary hearing, he was dismissed without notice for using offensive and racist language twice and behaving unacceptably towards colleagues. He claimed unfair dismissal and disability discrimination.

**Tribunal**

An employment tribunal found there was no direct link between Risby's physical disability and his angry behaviour and rejected his claims. Risby appealed, arguing that it was not necessary for a claimant's disability to be the cause of the employer's action in order for a discrimination claim to succeed.

**EAT**

The EAT subsequently upheld Risby's appeal. It is not necessary for there to be a direct link between employees' disabilities and their conduct for the Equality Act protections to apply. All that has to be established is that the employee's disability was the cause of the behaviour. If Risby had not been disabled, he would not have been angered by the decision to hold the workshop in a venue he could not access. His misconduct was the result of indignation caused by that decision. His disability caused that indignation and so his dismissal arose out of his disability.

They further ruled that the error by the tribunal also affected the dismissal decision. The tribunal had acknowledged that if the claimant's conduct was a consequence of disability, then some sanction other than summary dismissal may have been appropriate. The claims were sent back to the tribunal to decide whether dismissal was a proportionate way of achieving a legitimate aim and reasonable in the circumstances.

**RBA Comment**

The Equality and Human Rights Commission code of practice (paragraph 5.9) states that the 'consequences' of a disability include anything which is the result, effect or outcome of the disability. In this case, Rigby's indignation arose as an effect of his disability – the lack of wheelchair access meant he could not attend a meeting.

However, while his exasperation maybe understandable, the manner in which he made his annoyance known crossed the boundary of acceptable behaviour. So, although such conduct may be a consequence of disability, an employer may be able to defend any alleged unfavourable treatment by showing that it had a legitimate aim, there was no other sanction available given all the circumstances, and the benefits to the organisation as a whole outweighed the discriminatory impact.

# Acas code does not apply to ill-health dismissals

## EAT clarifies when employers could face an uplift in a tribunal award

In the case of Holmes v Qinetiq, the Employment Appeal Tribunal (EAT) had to decide whether the Acas Code of Practice on Disciplinary and Grievance Procedures applies to ill-health dismissals.

Failing to follow the code can make a dismissal unfair and can also result in an increase of 25 per cent to any unfair dismissal award.

The confusion arises from the code's wording. It states that it applies to "disciplinary situations", and explicitly includes misconduct and poor performance, and explicitly excludes dismissals for redundancy or the non-renewal of fixed-term contracts. The code does not specify whether it applies to other dismissal situations.

The Holmes case is the first to finally determine that the code does not apply to an ill-health dismissal.

### Tribunal

Holmes, who was disabled, worked for Qinetiq as a security guard from 1996. He had a number of extensive absences because of pain in his back, legs and hips and was dismissed on the grounds of ill health in 2014. The employer conceded it was an unfair dismissal because it had failed to obtain an up-to-date occupational health report on his ability to attend work after an operation that effectively resolved the pain he had been experiencing.

He was awarded compensation for unfair dismissal and unlawful discrimination, but argued that this should be increased by 25 per cent increase for the employer's failure to follow the code.

The EAT disagreed and held that in genuine ill-health dismissal cases, the code will not apply. The EAT decided there must be some form of "culpable conduct" on the part of the employee, such as misconduct or poor performance requiring correction or punishment, for the code to apply. Here, there was no suggestion of any culpability (such as malingering) on the employee's part and so it did not apply.

### RBA Comment

This case provides helpful clarification. In terms of procedure, however, arguably little has changed. Although employers are not bound to follow the Acas code, they should still continue to apply those elements that are relevant. Employers dismissing employees for genuine ill-health have to show they have followed a fair process and compliance with relevant elements of the code will help to demonstrate this.

Employers should also bear in mind that the Acas code, and potentially the 25 per cent compensation uplift, will continue to apply in ill-health dismissals where there is some element of misconduct or poor performance on the part of the employee which would otherwise lead to disciplinary action.

# HR's Role in the Disciplinary Process

A recent Employment Appeal Tribunal (EAT) case, Dronsfield v University of Reading, highlights the difficult line which HR must tread when dealing with disciplinary matters.

Dronsfield was a professor at Reading University, and was bound by the university's policies and procedures, one of which dealt with personal relationships between staff and students. The guidance provided that any member of staff in a personal relationship with a student should inform the university in order that it could make arrangements to ensure that the assessment of the student in question would be unbiased. Dronsfield failed to comply with this guidance and did not disclose a sexual relationship with a student. As a result, after being subjected to a disciplinary process, he was dismissed summarily (in other words, without notice). He claimed unfair dismissal.

## Tribunal and EAT

An employment tribunal found that his dismissal was fair but this conclusion was overturned on appeal by the EAT. This was partly because the EAT found that an investigatory report produced as part of the disciplinary process had been heavily influenced and amended by the university's HR and in-house legal departments. The EAT held that the final version of the investigatory report omitted various findings which were favourable to Dronsfield and that these alterations were made following the HR and in-house legal teams' involvement.

Although the author of the report had signed it off, the EAT felt that standards of objective fairness had been compromised and that the employment tribunal had failed to consider properly why the author had changed his view on Dronsfield to the employee's detriment. The case was sent back to the employment tribunal to decide whether it was reasonable to dismiss Dronsfield.

## RBA Comment

RBA often provide detailed support and guidance to clients and their line managers who have been asked to handle disciplinary investigations and hearings. There is nothing improper about this from a practical perspective. It is important to remember, however, that any decisions or recommendations that the manager handling the investigation or disciplinary hearing makes must be his or her own.

There has been other recent case law on the topic of HR's remit in disciplinary procedures, in particular the decision in Ramphal V Department of Transport. In that case, the EAT reaffirmed its view that HR's role should be limited to matters of law and procedure in disciplinary matters. It should always be for the investigating manager to make up his or her mind about the appropriate action in any given case and care should be taken to ensure that any report demonstrates the independence of the manager's decision.


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