Welcome to the RBA Summer 2017 Newsletter.

As we enter the middle of summer there's one thing that is certain: things are set to remain uncertain and for some time to come!

For the last four years we have had employment tribunal fees. Within 6 months of their introduction claims had fallen from around 250,000 to circa 65,000 claims a year. Commentators at that time said that some genuine claimants were being denied access to justice. Trade Unions took up a legal argument to show the government had acted unlawfully. Unfortunately for the unions in the beginning they failed to provide any actual evidence of any real cases. As time went on it was difficult for anyone to deny the impact of fees. The government said that they would review, consult and amend. Last week the government paid the price for their inaction. The supreme court arrived at their ruling (see below). Tribunal fees to be refunded and the original order introducing fees immediately revoked.

Only a couple of weeks ago, a government sponsored report, the Taylor report announced its findings into worker terms of engagement. The high profile case of Sport Direct and their use of contracts to effectively shift all employment risk to zero hour workers (desperate for work, but with no guarantees and little protection) from the employer (free to hire and fire at will). Historically, Conservative governments have supported what they consider to be a flexible labour market, free to expand and contract with minimum intervention into this "market". Since 2008 there has been a growth in part-time employment, some have said this provided workers with more choice. Technology has created the "GIG" economy – a way of workers signing up to many short term assignments.

Who is a worker? Who is an employee and who may be labelled as a "dependent contractor"? The prime motivation for a legislative change here seems to be Tax and NI revenues, no real mention of any principled strategy for post Brexit employment. (see below)

As usual we continue to provide some updates on recent and important cases and what these may mean for the employer in practice.

NEWS AND VIEWS

Employment Tribunal Fees

There has recently been a shock ruling regarding Employment Tribunal fees. The Supreme Court has ruled Employment tribunal fees are unlawful because they prevent access to justice.

Since July 2013, workers in the UK have been charged a fee to bring an Employment Tribunal claim and this has seen a 70% reduction in tribunal applications. Following their introduction, Unison sought to have employment tribunal fees ruled unlawful and appealed a final time to the Supreme Court.

Unison argued that fees made it "virtually impossible or excessively difficult" for some individuals to exercise their employment rights. Unison also argued that the fees regime indirectly discriminates against some groups. For example, the union said that claimants required to pay the highest fees, including £1,200 for a discrimination claim that goes to a hearing, are disproportionately female.

The Supreme Court, which handed down its judgment on 26 July 2017 has ruled unanimously that employment tribunal fees are unlawful.

The Supreme Court judges accepted that the effect of employment tribunal fees has been a dramatic and persistent fall in the number of claims, in particular claims of lower value and claims without a financial remedy.

According to the Supreme Court, employment tribunal fees are not reasonably affordable for households on low to middle incomes. The court further ruled that the fees are indirectly discriminatory on the basis that they place women at a particular disadvantage.

The Supreme Court decision means that the Government can no longer require claimants to pay a fee to bring an employment tribunal claim, and will have to repay an estimated £32m to claimants who have already been charged a fee.

With immediate effect, the Employment Tribunal Service will have to re-write the Tribunal rules and re-programme the online claim form system to remove the obligation to pay fees prior to the claim being accepted by the Tribunal or a waiver of fee being accepted.

Inevitably the removal of fees in their entirety will make access to justice easier but there may be confusion for all concerned in the intervening months until the Government can legislate further.

The Taylor Review

The Taylor review into modern working practices has now been published and the employment law proposals in the review – there are about 30 of them – have at their centre a new approach to the question of who qualifies for employment law protection.

The review calls for a "significant shift in the quality of work in the UK economy" and makes a significant number of recommendations for how employment law could adapt to support this.

The review proposed dropping 'worker' status for that of 'dependent contractor', in a bid to distinguish more clearly between those who are genuinely self-employed and those who are not. Individuals who fall into this category should receive employment protections, and that those who "control and supervise" their workers should pay a range of benefits, including national insurance. There are still some concerns that this does not go far enough in terms of the gig economy workers.

Zero-hours workers could request a more regular schedule. The review suggested the creation of a right that would allow those who have worked on a zero-hours contract for 12 months or longer to request fixed hours from their employers that better reflect the hours they have actually been working. Much like the zero-hours contracts right, the Taylor review also suggested a right that would allow agency workers who have been placed with the same hirer for at least 12 months to request a direct contract of employment. The hirer would be obliged to treat any such requests seriously.

It should become a statutory requirement for employees and dependent contractors to receive a written statement of employment particulars on day one of their job. Employees or dependent contractors should be able to bring a claim for compensation against an employer who fails to provide a written statement.

The review also called for businesses that don't pay awards from tribunal rulings within a reasonable timeframe to be named and shamed.

These are just a selection of the proposals and some are more easily implemented than others and there will be all sorts of issues to be addressed over the coming months.

The Issues of Covert Employee Surveillance

We are often asked if an employer can use surveillance to investigate false sickness absences. In today's world of social media employers are often made aware of an employee signed off as unfit for work appearing to be in good health and enjoying their "time off". It is tempting to rush in with an investigation so the worker "pulling a sickie" can be punished.

You need to think carefully before implementing covert surveillance. The legal risk in this scenario is that the employment relationship is based on mutual trust and confidence; going down a path of covert surveillance, without reasonable and proper cause, is highly likely to undermine that trust and could trigger a constructive dismissal claim. Sometimes these issues also arise from disgruntled work colleagues telling tales of what they have seen a sick employee doing.

You need to consider if there really is evidence of a clear discrepancy between the employee's ill-health and what they have been observed doing – being signed off work for stress or anxiety does not prevent an employee from looking to enjoy their social life and activities. It will usually be very difficult for employers to second guess what they have been advised in medical fit notes and occupational health reports. If there is evidence of wrongdoing, the Employment Practices Code issued by the Information Commissioner's Office (ICO) provides guidance based on the need to comply with data protection law. It states that covert monitoring will rarely be justified and should be undertaken only in exceptional circumstances, such as where criminal activities or equivalent malpractice are suspected. The code says any surveillance should be strictly targeted, take place within a set timeframe and be carried out under a contract with a private investigator, with legally compliant provisions for the collection and use of information. Clear rules should be set for access to and disclosure of any information obtained, with any irrelevant material being deleted. And covert surveillance should not take place in areas such as private offices or toilets, unless serious criminal activity is suspected.

If surveillance does provide evidence of wrongdoing, this will usually be admissible before an employment tribunal. In the case of McGowan v Scottish Water, dishonesty was established using covert surveillance, and the resulting dismissal was found by the Employment Appeal Tribunal not to be unfair or in breach of any right to private life. Nevertheless, employers face both legal and reputational risk if they spy on their staff, and should tread carefully. In all cases it is advisable to carry out a privacy impact assessment to assess whether or not the surveillance is justifiable. This should consider the business aim in question, the impact on the individual being investigated and whether the same objective can be met in a less invasive way. This exercise is likely to prove useful should there be any subsequent challenge made by an employee, and should help ensure that surveillance is justified and does not backfire on the employer.

Statutory Paid Leave to Grieve

Most employers would deal sensitively with any employee who has suffered the death of a child. However, under a new bill introduced to Parliament in July, parents who have suffered the death of a child will receive statutory paid leave to grieve.

The Parental Bereavement (Pay and Leave) Bill seeks to ensure grieving parents in employment receive paid leave to grieve away from the workplace, which the Government says delivers on its pledge to "enhance rights and protections in the workplace".

Currently under the Employment Rights Act, employees have a day-one right to take a "reasonable" amount of unpaid time off work to deal with an emergency involving a dependant, including making arrangements following the death of a dependant.

What is "reasonable" depends on circumstances but, in practice, the length of time off is agreed between the employer and employee. Further consultation will be taken to better understand the needs of bereaved parents and employers. The Bill is expected to have its second reading in the autumn.

Consultation on Vento Bands

Vento Bands are what employment tribunals refer to in determining the level of damages to be awarded to a claimant in respect of injury to feelings resulting from a successful discrimination claim under the Equality Act 2010.

A judicial consultation exercise has recently been launched by the President of the Employment Tribunals seeking views on increasing the Vento bands in line with the RPI. The bands were last formally updated eight years ago, in 2009.

The proposed new bands for injury to feelings are

* lower band: £1,000 to £8,000;

* middle band: £8,000 to £25,000; and

* upper band: £25,000 to £42,000.

LEGISLATION UPDATE

National Minimum Wage Changes

On 1st April 2017 the new National Living Wage increased further to £7.50 per hour. Please note the other increases below effective from April 2017

CURRENT RATES

Statutory Sick Pay	**£89.35 p.w.**
Statutory Maternity and Adoption Pay	**6 weeks at 90% of average earnings**
	then 33 weeks at £140.98 p.w.

Statutory Paternity Pay	**2 weeks at £140.98 p.w.**	
Shared Parental Pay	**£140.98 p.w.**	
Week's pay for statutory redundancy	**£489 p.w.**	
NI Contributions Lower Earnings Limit	**£113 p.w.**	
Minimum annual paid holiday	**5.6 weeks (28 days for 5-day week)**	
Guarantee Pay	**£27.00 per day**	
	£135 for 5 workless days	
Minimum Wage	**Age 21 – 24**	**£7.05** per hour
	Age 18 – 20	**£5.60** per hour
	Age 16 – 17	**£4.05** per hour
	Apprentices	**£3.50** per hour
National Living Wage	**Aged 25+**	**£7.50** per hour

RECENT CASES OF INTEREST

1. Tribunal win for man whose ex- employer provided a discriminatory reference

Clients are reminded to take care when providing references for ex-employees following the recent case of Mefful v Citizens Advice Merton and Lambeth Limited, in which Mefful claimed that he had suffered victimisation and discrimination arising from a reference his former employer provided to a prospective employer. His claim arose because he alleged that the content of the reference led to the prospective employer withdrawing a job offer they had made to him.

Mefful had worked for Citizens Advice from 2004 until his employment was ended in 2012 because of redundancy. During his employment, he had two lengthy periods of absence, the first occurred in 2009 as a result of his partner losing a baby and the second in 2012 because of a shoulder injury and hearing loss he had suffered.

When he was originally dismissed Mefful made a claim of unfair dismissal and discrimination to the Employment Tribunal and the employer subsequently conceded that the dismissal had been unfair, although the disability discrimination element of the claim is still ongoing.

In 2015, after 3 years of unemployment, Mefful was offered another job and the prospective employer applied to his former employer for a reference. Upon receipt of the completed reference the offer of employment was withdrawn by the prospective employer.

In the reference, Citizens Advice stated that they would not re-employ Mefful and they later informed the second tribunal that this comment was linked to his sickness absence.

However, the tribunal discovered that the details about the sickness absence given in the reference were exaggerated to a significant degree and the potential employer had been provided with inaccurate figures. Furthermore, during the hearing Mefful claimed that he had performed well in his job and that was not challenged by the employer.

Citizens Advice contended that the reference had been "true, accurate and fair", even though it did make mention about Mefful's sickness absence. They also claimed that the reference had no connection with either discrimination or the earlier tribunal case.

However, the tribunal ruled that Citizens Advice had "failed to provide any favourable information about Mefful personally or about his performance… This amounted to a detriment and it created what appeared to be an entirely false and misleading impression of his successful eight-year career."

RBA Comment

This case raises several interesting points. Firstly, the giving of references can be a risky exercise because any misleading information can give rise to liability long after the employment has ended. One way around this would be to establish a policy of replying to all employment reference requests by confirming only very basic information such as dates of employment, role(s) undertaken etc. However, such a policy would not allow you to give glowing and flowing references to some ex-employees and basic information about others – any such policy must apply to everyone.

Secondly, any information given in a reference must be factually correct. They should give balanced and accurate information about the ex-employee and, even if specifically asked, personal opinions should be avoided. For example, if a person has had 10 day's sickness absence in their last year with you, give them that particular information and let the person receiving the reference decide whether that is good, bad or indifferent, rather than you making the judgement call.

Finally, unless there is a statutory requirement for you to provide an employment reference (in which case that is usually stated in the request itself) you are not legally obliged to provide a reference for an ex-employee at all. However, should you adopt this stance then, once again, it cannot be used selectively whereby one of your more highly regarded ex-employee's is given a reference and another one is not.

2. Medical Practice Manager wins constructive dismissal claim

An over-promoted practice manager has recently won a constructive dismissal claim against her former employer. Williams worked as a receptionist at the north-west Wales surgery for 10 years before being promoted to practice manager in 1996. Although she was not a trained or experienced practice manager at the time she was promoted, the judgment noted she was "well thought of" by the doctors there at the time.

From around 2009, the practice went through what were described as challenging circumstances including financial difficulties and the retirement of two of the partners.

The judgment noted Williams was not highly regarded and considered to have been over-promoted by the doctors who made up the practice at the time she resigned. One of the doctors at the practice, Dr Smits, was described as direct, brusque and blunt at the tribunal and would question, challenge and shout at Williams.

In 2014, Williams was called into a meeting with the surgery's partners to discuss her performance, although she was not offered training or professional management guidance at this point.

Towards the end of 2014, the practice manager asked the partners whether she could be made redundant. Despite their reservations about her performance, they were concerned they may not be able to recruit a suitable replacement. Instead, an experienced practice manager was then seconded part time to assist Williams.

However, in July 2015, Williams had a difficult meeting with the partners, which included Dr Smits raising his voice and banging his hand against a door in frustration. Williams took sick leave not long after the meeting. Although the other doctors were aware of the strained relationship between the two, the judgment noted they valued Dr Smits as a partner more than the claimant as an employee, and they closed ranks to support him.

The practice manager wrote to the local health board complaining of bullying the following month. She returned to work in September 2015 on a phased basis before working full time again in October and submitting a formal written grievance to the partners outlining specific examples of Dr Smits' behaviour towards her a month later.

However, the tribunal determined the investigation into her grievances was not conducted thoroughly, as those appointed to carry out the investigation had been unduly influenced by the partners. Two days after receiving the outcome letter from the grievance procedure, Williams resigned, stating her trust and confidence had "completely broken down".

The tribunal found Williams was constructively unfairly dismissed and the doctors had failed to manage Williams' performance for some time before she resigned.

In reaching this decision the judge concluded that the claimant's performance could have been better but the partner's mismanaged and bullied her; despite this there had been signs of improvement. Williams had not been given a fair chance to improve.

RBA Comment

The central issue of this case was not the fact that Williams had been over-promoted in the first instance, it was about how the practice went about dealing with her under-performance. Had the practice followed a proper procedure in dealing with the performance issue, then the likelihood is that the situation would either have improved to an acceptable level or the dismissal would have become a fair outcome.

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