Welcome to the RBA Autumn 2017 Newsletter

This Autumn's newsletter comes at a time when a great deal of parliamentary time is being consumed by Brexit.

The Taylor Review was commissioned by the Government and published in July 2017. The review was headlined as looking at current working practices such as zero hours contracts and the possible abuse of power by employers in the employment relationship (see article below).

The courts have been busy addressing the 'GIG' economy and whether a person is self-employed, a worker or an employee. The UK government was required to amend the Work Time Regulations back in 2015 to ensure workers were not deterred from taking annual leave by losing earnings. The courts have been called upon to determine what is included in 'a week's pay' for calculation purposes. This should now include voluntary overtime.

Just as I write, the Autumn Budget Statement has set out that the National Living Wage will rise to £7.83 and National Minimum Wage up to £7.38. Personal tax allowance will also be increased from April 2018.

NEWS AND VIEWS

The Taylor Review

You will no doubt have continued to read countless reports about the Taylor Review published recently and we made mention of it in our Summer Newsletter. The following are a few of the recommendations being made:

1. A written statement of particulars should be provided to all workers on day one of employment.
2. Where hours aren't guaranteed by contract, the NMW rate should be increased for the additional hours worked.
3. Individuals should have the option for holiday pay to be paid on a rolled-up basis.
4. After 12 months, those on zero-hours contracts should be given the right to request guaranteed hours and similarly agency workers should have a right to request a direct contract.
5. The burden should be on an employer in a tribunal to prove that the claimant is not an employee/worker.
6. A naming and shaming scheme should be established for employers who do not pay tribunal awards within a reasonable time.
7. Statutory sick pay should be made available to all workers but it should accrue based on length of service.
8. Individuals should have the right to return to work after long-term sickness absence.

At the moment these are of course only recommendations. We don't expect new legislation to be rushed through, given that the Government has its hands rather full with Brexit preparations.

The review also proposed exchanging '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. This is a continuing area of concern for gig economy workers. There have been a number of high profile cases looking at this area:

Uber appears at the Employment Appeal Tribunal (EAT) in September to appeal last year's decision on the employment status of its drivers.

The Supreme Court last month granted Pimlico Plumbers permission to appeal against February's Court of Appeal decision that a plumber who signed an agreement with the company describing him as self-employed was in fact a worker.

An employment tribunal has ruled that a group of Addison Lee drivers were workers and therefore entitled to rights such as holiday pay and the national minimum wage.

Overall, the Taylor Review acknowledged the importance of flexibility in the workplace, as well as the need to ensure the labour market remains dynamic enough to adapt to new business models. But it does seem that the gig economy business model is under review, with Theresa May's comments on the implications for PAYE and NI contributions.

Christmas Period

Christmas is a time of celebration for many and employers can help the festivities by planning ahead for holiday requests, shut down periods, managing absences and Christmas events.

A company's annual leave policy should give guidance on how to book time off. The key is for both parties to try and come to an agreement and to plan as early as possible while being fair and consistent with all staff. In the absence of any agreement, the notice period should be at least twice the period of leave to be taken. So, for example, if a week's leave is requested then two weeks' notice should be given.

Some employers may need to restrict annual leave over the Christmas period. This must be stated in the contract of employment, implied from custom or practice, or incorporated into individual contracts from a collective agreement. This can take many forms, but some of the most common are:

- shutting down for certain periods while workers have to use their annual leave entitlement
- nominating particular dates as days of closure when workers are expected to take annual leave
- determining the maximum amounts of leave that can be taken on any one occasion and also the periods when leave may be taken
- determining the number of workers who can be off at any one time.

It would be wise to remind employees now in advance of what the company plans are over the Christmas period.

Everyone wants to have a good time at a Christmas party, and it should be enjoyed by all who attend and be free from any potentially embarrassing incidents.

Employers should have clear guidance for employees on behaviour at work-related events and set out the possible implications of their actions. Managers may want to remind staff before any Christmas party what the employer's policy states, in order to avoid behaviours that could be viewed as harassment or misconduct.

Where an employee is sick or absent from work the day after a work Christmas party, normal sickness policies and procedures would apply.

Parental Bereavement Leave Bill

There is currently no legal requirement for employers to provide paid time off for grieving parents, although many do. 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, which could include making arrangements following the death of a dependant.

The Government has today published a bill that will offer two weeks' paid leave for bereaved parents. It will give a day-one right to parental bereavement leave for any employed parent who loses a child under the age of 18. Employees with a minimum of 26 weeks' continuous service will be eligible for statutory parental bereavement pay, for which employers will be able to reclaim some or all of the cost.

The bill's second reading was on 20 October, with the ambition of it becoming law in 2020.

LEGISLATION UPDATE

Voluntary overtime must be included in holiday pay say EAT

Voluntary overtime should be treated in the same way as other forms of paid overtime and must be included in holiday pay, the Employment Appeal Tribunal (EAT) has ruled.

The case: Dudley Metropolitan Borough Council v Willetts (and others)

Holiday pay claims were brought against the council by a group of 56 employees responsible for the repair and maintenance of council houses. They worked a set number of hours per week, which counted as their 'normal working hours'. In addition, once in every four or five weeks they were on an on-call register and worked additional voluntary hours. However, these voluntary payments were excluded from their holiday pay and the workers argued that this was contrary to the Working Time Regulations 1988.

Their claims were initially successful, and the council appealed to the EAT on the basis that purely voluntary overtime should be treated differently from overtime workers had to perform.

EAT decision

This is the first occasion the EAT has heard cases relating to purely voluntary overtime and its decision is binding on employment tribunals. The EAT stated that workers should not be deterred from exercising their rights to take paid annual leave and any reduction in salary is presumed to act as a deterrent.

The EAT held that, where the pattern of work extends for a sufficient period of time on a recurring basis to justify the description “normal”, voluntary overtime pay must be included in holiday pay.

The decision provides further clarification for employers that, while compulsory overtime must be included in holiday pay, regular voluntary overtime should also be included. Previous case law has strongly hinted that regular voluntary overtime should be included in holiday pay, but it is important that employers now have this clear guidance from the courts.

RECENT CASES OF INTEREST

1. Employee suspended following accusation of serious misconduct wins High Court claim on basis that her suspension breached the implied term of trust and confidence

The case of *Agoreyo v London Borough of Lambeth* demonstrates why it is important to carefully consider all the circumstances before suspending an employee, whatever the allegation.

Ms Agoreyo, a teacher, was accused of three instances of using unreasonable force towards two children in her class, who had a history of exhibiting difficult behaviour.

An initial investigation was carried out into two of the three allegations and concluded that she had used no more than reasonable force. However, Agoreyo was then suspended and a letter was sent to her stating that the suspension was a 'neutral act' and not a disciplinary sanction. It also stated that the purpose of the suspension was to allow further investigation into the allegations to be conducted fairly.

Agoreyo immediately resigned from her employment and brought a claim in the County Court for damages for breach of contract. She argued that, in suspending her, the council had breached the implied term of mutual trust and confidence. Although the claim was initially unsuccessful, the teacher appealed to the High Court who upheld her claim. The High Court made several criticisms of the council’s handling of the case, including:

- Agoreyo was not asked for her version of events before being suspended;
- the initial investigation concluding that the previous allegations were unfounded was overlooked;
- no alternatives to suspension were considered;
- no explanation was given as to why further investigation could not be carried out fairly with Agoreyo remaining at work.

As a result, the High Court held that Agoreyo’s suspension was largely an impulsive reaction and, therefore, amounted to a breach of trust and confidence.

RBA Comment

This decision demonstrates that careful thought must be given to any decision to suspend an employee. Failure to do so could lead to a claim of constructive dismissal, which would be difficult to defend following the outcome of this case.

Risk can be reduced by ensuring the following questions are considered in deciding whether suspension is necessary:

- Would the employee's presence hinder an investigation?
- Is there a risk of the employee interfering with witnesses or evidence?
- Is there a risk to the safety of other employees, customers or service users?
- Are there suitable alternatives?
- Is suspension reasonable in the circumstances?

This is not to say that suspension should never be used. It is important to bear in mind the nature of the allegations against the employee. However, caution must be exercised to ensure that suspension is not seen as the automatic option, even in cases involving potential gross misconduct.

Having an express right to suspend in the disciplinary procedure is good practice but does not avoid having to undertake a detailed consideration of whether it is appropriate in all of the circumstances. Risk can be reduced by including in the letter of suspension an explanation about why it has been considered necessary, so it can be shown that the decision has been carefully thought through.

2. Employees win case over their dismissal following their refusal to accept revised contractual terms regarding holiday entitlement

Imran Yousaf and Ying-Nan Wang were employed by Merrill Corporation, who provide back office services to financial sector companies. Both employees worked 12-hour shifts on Friday, Saturday and Sunday nights.

In January 2015, the company began work on updating its terms and conditions of employment to make them consistent across the business. Following this exercise new contracts were sent out to weekend workers in February 2016.

Yousaf and Wang received their new contracts, with a note stating that they contained no material changes. However, Yousaf's noticed that the new contract included a reduction in the number of public holidays he could take, from eight days to five, because the days were now being pro-rated.

Yousaf complained that he had previously received full entitlement to public holidays, but the company responded saying that this was only because the rules regarding public holidays had been applied inconsistently in the past.

Both Yousaf and Wang refused to sign their new contracts and were invited to a consultation meeting to discuss the situation in June 2016. After this, the company admitted that there had been a change to public holiday allowance, but proposed to implement the new five-day allowance from January 2017 anyway, with the added amendment that the pair would not be required to work a bank holiday if it fell on a day they should be working.

Merrill Corporation then issued another contract, which Yousaf and Wang also refused to sign. They were called to a further consultation meeting in August 2016, but were warned beforehand that one course of action the company had open to them was to dismiss them under their current contracts and offer to re-hire them under the new ones.

After a third consultation meeting in September 2016, the company gave both workers notice to terminate their current contracts and an offer to re-engage them under the new terms with continuity of service. Both employees appealed the decision, but neither was successful.

Of the five members of Merrill's part-**time weekend team, Yousaf and Wang were the only two not to accept the reduction in holiday and be dismissed. The other three accepted the reduction in days.**

Allowing the claims for unfair dismissal, the tribunal decided that the company had failed to prove that its rationale given for dismissing the pair – fairness and consistency across the company – were sound business reasons, and its business case had not been properly established.

"The conclusion of the tribunal is that this was not a substantial reason justifying dismissal," the judgment read "A reasonable employer would not have sought to remove a week's holiday from the weekend workers in the interests of fairness across the board."

RBA Comment

It is possible in certain circumstances for an employer to unilaterally enforce a change to an employee's terms and conditions of employment. However, any such variation needs to be for a **substantial business reason that effectively outweighs the existing contractual relationship between the employer and the employee. Enforcing any such change exposes the employer to potential claims of constructive unfair dismissal and breach of contract.**

In all cases it is preferable in the first instance to consult with employees in the hope that they will voluntarily agree to any proposed change. The consultation should include:

- **Explaining the changes to the employee**
- **Discussing the underlying reasons for the changes**
- **The consequences of not implementing the changes**
- **Providing the opportunity for the employee to raise any concerns or counter-proposals**

It may be necessary to offer some sort of incentive to employees to agree to a proposed change i.e. a financial incentive or an enhancement of another employment benefit.

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