## Welcome to the RBA Winter 2018 Newsletter

As we approach the New Year, we could be forgiven for thinking that this last year of uncertainty will be replaced by some definite and decisive action in relation to the national economy and employment policy. At the time of writing it appears that nothing can be taken as decided as Britain is scheduled to leave the EU on 29th May.

A no-deal Brexit seems unthinkable, but then is the alternative a postponement of the leave process? We will just have to wait and see what the next months bring.

A consequence of the parliamentary time spent on the Brexit issue is that very little legislation has been debated. There is however new legislation for supporting parents in the workplace who have suffered a bereavement (see below). The budget statement, as always, has thrown up a few employment related issues. These will take effect from April 2019 or the year after. Significantly for employment status, the full PAYE taxation for a worker who is a dependent contractor seems almost certain from April 2020. However, it seems that there will be a potential small employer exemption although this is yet to be defined.

All that remains is for all of us at RBA to wish you all the best for the festive period and the year ahead.

## NEWS AND VIEWS

### The Festive Season

It's the season to be merry and jolly and that means a word of warning from your HR advisors about the company Christmas party. It's advisable to issue a statement to employees in advance of a Christmas party or similar work-related event reminding employees of conduct matters, including the dangers of excess alcohol consumption, and behaviours that could be viewed as harassment. It would be wise to remind your employees that whilst the event is intended to be fun, it is an extension of the workplace and similar rules will apply.

The Equality Act 2010 makes employers liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of employment, unless they can show that they took reasonable steps to prevent such acts. In *Chief Constable of the Lincolnshire Police v Stubbs and other*, a police officer complained of sexual harassment by work colleagues in a pub outside working hours. The

Employment Appeal Tribunal held that social events away from the police station involving officers from work either immediately after work, or for an organised leaving party fell within the remit of "course of employment".

Furthermore, in October, a recruitment company was held vicariously liable for the actions of its boss when he punched a colleague on a Christmas night out. In *Bellman v Northampton Recruitment*, a "significantly inebriated" managing director caused a sales manager brain damage at a post-party drinks gathering. The ruling is of interest because technically the incident did not occur at the company event. However, because of the seniority of the staff member, the fact he was asserting his authority, and that the company had paid for alcohol and the taxis to the after-party, there was a strong enough link for vicarious liability. Our advice is to plan your party carefully and remind all those attending of expected standards of behaviour

Employees can be disciplined for misconduct after a Christmas party if the incident is sufficiently closely connected to work to have had an impact on the working situation.

In *Gimson v Display By Design Ltd*, the employer was found to have fairly dismissed an employee for a brawl after the end of a Christmas party. However, you need to be careful where more than one employee is involved in the same incident. Where the circumstances are truly parallel, employees must generally be treated the same. Establishing "who is to blame", however, can be difficult where memories are blurred by alcohol and the evidence is unclear.

In *Westlake v ZSL London Zoo*, two zoo keepers got into a fight at London Zoo's Christmas party as a result of which Ms Westlake was dismissed and the other zoo keeper, Ms Sanders, was issued with a final written warning. Given the lack of clear evidence as to who started the fight, the employment tribunal found Ms Westlake's dismissal to be unfair. The tribunal observed that the employer could have legitimately dismissed them both or issued both with final written warnings.

Another issue that often crops up is what if an employee fails to come to work or arrives late the day after the Christmas party? If disciplinary action is to be taken for lateness or non-attendance after the Christmas party, employers should ensure that staff are informed that this is a possibility in the advance statement or company work events policy.

Where an employee does not attend due to illness, the employer should follow its attendance management policy and procedures.

## Pension Contributions to Increase

From the new tax year in April 2019, there are changes to auto-enrolment pension contributions.

Employers will need to contribute 3% (up from 2%) of their employee's pre-tax salary to their pension pot, and employees need to contribute 5% (up from 3%) themselves.

## Payslips For All Your Workers

If you are not doing this already, from 6th April 2019 all workers will be entitled to get a payslip on or before every payday. That'll include agency, bank, casual, and zero-hours staff too. Payslips will also need to include the total number of hours worked if they don't consistently work the same hours.

Now is the time to check with whoever does your payroll to make sure this is in hand and ready for April.

## New Bereavement Leave Entitlements

The Parental Bereavement (Leave and Pay) Bill received Royal Assent in September, becoming the Parental Bereavement (Leave and Pay) Act 2018. Under the Act, employees will be entitled to two weeks' leave following the death of a child which, subject to the relevant qualifying criteria, will be paid at the statutory rate.

Bereaved parents will be entitled to at least two weeks' leave following the death of a child under the age of 18, or if they suffer a stillbirth from 24 weeks of pregnancy. This is a day one right – there are no qualifying criteria.

Employees who have sufficient service and earnings will be entitled to statutory parental bereavement pay (the specific eligibility criteria mirrors that of paternity pay). The Government guidance states that the rate of pay will be the same as that of statutory paternity and shared parental pay. It is expected that the right will come into force in 2020.

In the meantime, employees will continue to have a statutory right to unpaid time off to deal with an emergency, which would include the death of a dependant. Many employees will also be entitled to paid time off following the death of a child under their employer's compassionate leave policy.

## Equal Pay for Equal Work

Throughout 2019, we're expecting separate tribunal decisions involving Tesco, Asda, Morrisons and Sainsbury's around how much they pay their staff and the issue of equal pay. However, equal pay isn't just an issue for large companies. Smaller companies have also been challenged by female staff who consider they aren't being paid as much as their male colleagues for work of similar value.

If you require any help with reviewing your pay structures or assistance with a job evaluation process we have access to the UK's most comprehensive online salary database which can produce surveys and reports to ensure you are not at risk of an equal pay claim.

## Self- Employed Workers

IR35 is a tax rule designed to stop freelancers and companies sidestepping tax through disguised employment. It is relevant with regards to the issues around the gig economy right now.

Last year a requirement under IR35 was introduced for public sector organisations to deduct tax and national insurance from contractors. Now, it's been announced that from 2020 private sector firms employing more than 250 people will be responsible for checking their contractors' status and deducting the appropriate tax. And if they get it wrong, they will be liable for tax fines.

So IR35 is starting to affect the SME market more and more. We regularly talk about the importance of getting the status of your workers correct in contracts at the outset, and this development only heightens the importance. If you need any assistance in reviewing your self-employed workers and the type of contracts you need for your business then please do get in touch with your consultant.

## Can You Ever Give a Bad Reference?

What happens when you receive that dreaded reference request for the employee who was lousy at their job or had a poor attitude? There's no legal obligation to respond.

If you are inclined to provide a reference, it can include information detrimental to their cause – as long as it's accurate and fair. This means it should not include subjective opinion and should be backed up with facts.

Your former employee can ask to see a copy of the reference. If they felt it was inappropriate, they could claim damages if they could prove it was inaccurate and that they suffered loss.

It's helpful to have a policy for responding to references, especially if more than one manager may be providing them. This ensures they're all handled consistently and efficiently.

## LEGISLATION UPDATE

Please note the following rates effective from April 2018

### CURRENT RATES

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|---|---|
| **Statutory Sick Pay** | **£92.05 pw (£94.25 pw April 2019)** |
| **Statutory Maternity and Adoption Pay** | **6 weeks at 90% of average earnings** |
| | **then 33 weeks at £145.18 pw (£148.68 pw April 2019)** |

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| **Statutory Paternity Pay** | **2 weeks at £145.18 pw (£148.68pw 4/19)** |
| **Shared Parental Pay** | **£145.18 pw (£148.68pw April 2019)** |
| **Week's pay for statutory redundancy** | **£508 pw** |
| **NI Contributions Lower Earnings Limit** | **£116 pw** |
| **Minimum annual paid holiday** | **5.6 weeks (28 days for 5 day week)** |
| **Guarantee Pay** | **£28.00 per day** |
| | **£140 for 5 workless days** |

| | | | **From April 2019** |
|---|---|---|---|
| **Minimum Wage** | **Age 21 – 24** | **£7.38** per hour | £7.70phr |
| | **Age 18 – 20** | **£5.90** per hour | £6.15phr |
| | **Age 16 – 17** | **£4.20** per hour | £4.35phr |
| | **Apprentices** | **£3.70** per hour | £3.90phr |
| **National Living Wage** | **Aged 25+** | **£7.83** per hour | £8.21phr |

## RECENT CASES OF INTEREST

### Can an employee be unfairly dismissed having been denied the opportunity to postpone their disciplinary hearing, even though their conduct could potentially justify dismissal?

Yes, according to a recent decision by the Employment Appeal Tribunal in the case of Talon Engineering v Mrs V Smith: UKEAT/0236/17/BA.

Mrs Smith, who had been employed by Talon Engineering Ltd for over 20 years, was found to have sent a series of emails to a customer using insulting and offensive language about a colleague. Smith was suspended, and a disciplinary hearing was convened. However, this initial hearing was postponed due to Smith's sickness followed by some pre-booked annual leave.

After returning from leave Smith was invited by her employer to a rearranged disciplinary hearing. However, her trade union representative could not attend on the date in question and she requested a postponement of a further 2 weeks. The employer turned down the request, saying they had the right to reject the request because the union rep couldn't attend within 5 days.

The employer then proceeded to hold the meeting which Smith did not attend. The employer made the decision to dismiss Smith in her absence and she then brought a claim for unfair dismissal.

#### Employment Tribunal

The ET had to decide whether the dismissal was unfair as Smith was not given the opportunity to postpone the disciplinary hearing so that her union representative could attend.

The ET decided that although the employer had shown a potentially fair reason for dismissal, their decision to dismiss was procedurally unfair.

They went on to say “There will be cases where it is reasonable to proceed in the absence of the employee, for example where she is being difficult in trying to inconvenience her employer…or where proceedings have gone on for long enough and a decision must be taken. None of those situations applied here”.

The ET concluded that all reasonable steps should have been taken to allow Smith to attend her disciplinary hearing, including allowing a second postponement, and that “no reasonable employer” would have refused this request.

**Employment Appeal Tribunal**

The employer appealed this decision with the EAT. They claimed that they had not breached the Employment Relations Act 1999, which states that an alternative time for postponed hearings to accommodate the availability of a companion must be “reasonable and fall before the end of the period of five working days”.

However, the EAT rejected this argument because Smith’s claim was for unfair dismissal brought under the Employment Rights Act 1996 for an unreasonable refusal to postpone a disciplinary hearing, not for any breach of the right to be accompanied.

The EAT concluded that the ET were correct to find that the employer had acted hastily and unreasonably in their actions, thus rendering the dismissal unfair.

**RBA Viewpoint**

This case demonstrates the importance of following correct and reasonable procedures when dealing with disciplinary matters. Irrespective of the actual misdemeanour or action the employee is found to be responsible for, if a fair and correct procedure is not followed in dealing with the matter, then any subsequent decision to dismiss risks being found to be unfair on procedural grounds.

## Is the removal of an 'outdated and unjustified' contractual allowance void under TUPE when it comes after a transfer?

No, according to the EAT in Tabberer & Others v Mears Ltd,: UKEAT/0064/17 dismissing the Claimants' appeal.

The Claimants were electricians, formerly employed by Bristol City Council, who had a historic entitlement to an 'Electricians Travel Time Allowance' (ETTA), which dated from 1958, itself replacing a productivity bonus. This entitlement was held to be contractual. With changes in working practices, the employer gave notice to vary the Claimants' contracts to end the entitlement, describing it as an 'outdated and unjustified' allowance. The Claimants argued that the variation was void under Regulation 4(4) of TUPE as it was connected with a transfer.

The tribunal disagreed, accepting that the employer's reason for ending the allowance was not connected with a transfer, but because it was outdated. The EAT held that the

tribunal was entitled to have found that the employers' reason was not connected with a transfer.

The EAT summed up the approach as 'The question to be asked is: what is the reason? What caused the employer to do what it did?

## RBA Viewpoint

Under normal circumstances an employee's terms and conditions of employment are protected following the transfer of an undertaking to a new employer. However, this case highlights that dependent upon the reasoning for the change, employers are permitted to make contractual changes provided that the reasoning for the change is unconnected to the transfer or if in fact they can rely on an economic, technical or organisational (ETO) defence.


| Rob Bryan | Chris Manby | Tracey Cater |
|---|---|---|
| Mob: 07801 223867 | Mob: 07712 484085 | Mob: 07469 703889 |
| rob@robertbryan.co.uk | chris@robertbryan.co.uk | tracey@robertbryan.co.uk |

Rob Bryan Associates Limited

Main Office: 01462 732444

www.robbryanassociates.org.uk