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EMPLOYMENT LAW BULLETIN

MARCH 2022

Welcome to Wrigleys' Employment Law Bulletin, March 2022.

We start this month's bulletin by highlighting the following increases which take place in April:

Increase in the statutory cap on a week's pay
From 6 April 2022, the statutory cap on a week's pay rises from £544 to **£571**. This is relevant for calculating statutory redundancy payments (SRP), taking the maximum SRP to **£17,130**.

It is also relevant when calculating the basic award in unfair dismissal claims, and a number of other tribunal awards, including for a breach of the right to be accompanied, and a failure to provide a written statement of particulars of employment.

Increase in the statutory unfair dismissal compensatory award cap
From 6 April 2022, the maximum amount an employment tribunal can award for the unfair dismissal compensatory award increases to **£93,878**. NB this cap can be exceeded in whistleblowing and health and safety related unfair dismissal claims.

Increase in National Minimum Wage / National Living Wage rates
The following minimum rates will apply from 1 April 2022:

- Age 23 or over: **£9.50** (up from £8.91)
- Age 21 to 22: **£9.18** (up from £8.36)
- Age 18 to 20: **£6.83** (up from £6.56)
- Age 16 to 17: **£4.81** (up from £4.62)
- Apprentice rate: **£4.81** (up from £4.30)
- Accommodation offset: **£8.70** (up from £8.36)

Our first article this month covers the changes to statutory sick pay (SSP) which came into force on 25 March 2022 and mean that staff who are self-isolating because of Covid will no longer be eligible for SSP unless they are actually sick.

We report on the Court of Appeal decision in ***Gwynedd Council v Barratt & Hughes***, which provides helpful guidance on a fair redundancy process, including offering a right of appeal of a redundancy dismissal decision.

We also cover two recent decisions of the Employment Appeal Tribunal. The decision of the EAT in ***Fentem v Outform EMEA Limited*** considers the tricky legal issues where an employee gives notice of resignation but the employer then pays in lieu of notice and brings employment to an end at an

earlier date. In ***Warburton v Chief Constable of Northamptonshire Police***, the EAT clarified the test for detriments in victimisation claims. This decision highlights the risks for employers if they make recruitment decisions connected to discrimination claims against a previous employer.

We hope you can join us for our next free virtual **Employment Brunch Briefing** on 5 April 2022 which covers the tricky topic of managing employees on long term sickness absence. We are also busy planning our annual **Employment Law Conference** which will also be virtual this year and takes place on 16 June 2022. Please book your place using the links below.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

Employment Brunch Briefing

Managing your employees on long term sickness absence

5 April 2022 | 10:00 - 11:15

Speakers: *Sue King, partner, and Michael Crowther, solicitor at Wrigleys Solicitors*

Click here for more information or to book

16 June 2022 - SAVE THE DATE

Wrigleys' Annual Employment Law Conference for Charities

Inclusivity in today's working environment

Confirmed guest speakers: *Robin White, barrister at Old Square Chambers & Lauren Chiren, CEO at Women of a Certain Stage. Plus various speakers from Wrigleys' employment and charities teams*

Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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Statutory Sick Pay no longer payable for Covid-19 self-isolation

Article published on 29 March 2022

Changes to Covid-related sick pay from 25 March 2022.

What has changed?

Two key changes to Statutory Sick Pay (SSP) came into effect on 25 March 2022, with the rules returning to those previously in force before the Covid-related amendments to legislation made in 2020.

From 25 March, staff are no longer eligible for SSP if they are off work because they are isolating due to: a Covid infection; having Covid symptoms; being a close contact of someone with Covid; or medical advice to stay at home before going into hospital for surgery. SSP will now only be payable where the individual cannot work because of sickness or incapacity. Those who have mild symptoms or are asymptomatic but have tested positive will not be eligible for SSP if they are absent from work.

The changes also mean that SSP is now not payable for the first three days of incapacity related to Covid-19 (matching the waiting day rule for incapacity for other reasons). Under transitional arrangements, where Covid-related incapacity started on or before 24 March 2022, SSP will still be payable from day one.

Contractual sick pay

Employers should be aware that employment contracts may include more generous provisions than the statutory scheme. Contractual sick pay rules will continue to apply and employers should check the wording of contracts and policies before making any changes based on the statutory rules.

Controlling Covid risks in the workplace

Employers continue to have a legal duty to protect the health and safety of staff and other individuals they work with, and should consider the on-going risks of Covid-19 in their risk assessments.

Updated Guidance on working safely during covid-19 makes clear that people who test positive or have Covid symptoms are advised to stay at home and avoid contact with other people, even though they are not legally required to do so. The guidance also states that they should not attend work, should inform their employer, and that employers should talk to staff about their options if they cannot work from home. Again, this is guidance only and not a legal requirement.

Many employers have put in place policies to clarify their expectations where staff have symptoms and/or test positive. However, employers should be aware that staff could simply decide not to test or not to inform their employer of symptoms or a positive result. Employers could seek to bring disciplinary action where rules have been put in place and breached by staff. However, this is unlikely to be of much practical help in controlling the risks of a workplace outbreak.

Taking steps to support employees to self-isolate and/or work from home may be a more useful approach to controlling risk. Employers may wish to continue to encourage staff to stay off work if they have Covid symptoms or have tested positive, by choosing to pay sick pay where they cannot work from home or maintain social distancing.

Taking legal advice on any changes to policy and contracts can help to ensure the changes are clear and mitigate the risks, for example if employers may revert to former sick pay provisions in future.

School re-organisation case provides insight into fair redundancy process

Article published on 10 March 2022

What are the hallmarks of a fair redundancy process?

Re-organisation and redundancy processes can be tricky. Part of the issue is that there is no one-size-fits-all fair process which every employer should follow. Unlike disciplinary and grievance processes, there is no statutory guidance to follow in redundancy dismissals. Instead, there are general principles gleaned from decades of unfair dismissal case law. There may also be relevant redundancy and redeployment policies which the employer should follow, and which may be contractual. For academy trusts, these may have transferred across from the local authority on academy conversion.

In this article, we consider some of the hallmarks of a fair redundancy process in the light of a recent Court of Appeal judgment in the context of a school closure and re-organisation.

This article does not cover the additional collective redundancy consultation obligations of employers who are contemplating 20 or more dismissals at one establishment within a 90-day period. If you would like more detail on these and on other aspects of the redundancy process, you may wish to register on our website to access our recorded Employment Law Breakfast Briefing: Redundancy - getting the process right.

Fairness is judged in the round

Before setting out on a re-organisation / redundancy exercise, it is useful to be aware of the way an employment tribunal will approach an employee's claim that their redundancy dismissal was unfair.

The tribunal will focus first on whether there was a fair reason for the dismissal. In redundancy cases, the focus will initially be on whether there was in fact a genuine redundancy situation and whether the dismissal was by reason of redundancy.

Secondly, the tribunal will consider the overall fairness of the dismissal. In doing so, the tribunal will take into account all the circumstances of the dismissal, including "the size and administrative resources of the employer's undertaking" and whether the employer acted reasonably or unreasonably in treating the reason for the dismissal as a sufficient reason to dismiss the employee.

In practice, this means that the tribunal will take evidence on the re-organisation / redundancy process which was followed and assess whether this was fair when taking into consideration the wider context. Employers with considerable resources, such as larger schools and academy trusts, will often be held to a higher standard by tribunals and be expected to carry through a more rigorous process.

Steps a tribunal will expect to see in a fair redundancy process

Although there is no simple checklist for every scenario, case law suggests that the following are markers of a fair redundancy process:

- Consulting with employees and their representatives on the business case for re-organisation /

redundancy, and the proposed timetable and process (including selection pools, processes and criteria);
- A transparent, fair, objective and non-discriminatory selection process;
- Meaningful individual consultation with those at risk of redundancy;
- Serious consideration of alternatives to redundancy, including seeking suitable alternative employment for those who are at risk of redundancy; and
- A right of appeal of any redundancy dismissal decision.

Case details: ***Gwynedd Council v Barratt & Hughes***

The Court of Appeal has recently upheld an unfair dismissal decision in the context of school closure and re-organisation.

The two claimants were P.E. teachers employed by Gwynedd Council to work at a community secondary school (School 1). In 2015, the council decided to re-organise education provision by closing School 1 and nine primary schools in its catchment area, and opening a new community school for pupils aged 3 to 16 (School 2).

Staff were informed that their contracts would terminate at the end of the school year, that they would be able to apply and interview for roles at School 2, and that unsuccessful candidates would be made redundant if they were not redeployed.

The Claimants applied for positions at School 2, but they were unsuccessful and external candidates were appointed to the new roles. The claimants were dismissed on the ground of redundancy. The claimants queried the lack of an opportunity to make representations about the decision and the lack of an appeal process, correctly pointing out this was their contractual right. The chair of the governing body of School 1 apologised but stated that the lack of an appeal did not disadvantage the claimants as an appeal could not have reversed the decision to close the school.

The claimants brought claims for unfair dismissal which were upheld by an employment tribunal.

On appeal, the Employment Appeal Tribunal and subsequently the Court of Appeal both agreed with the tribunal that the dismissals were not fair in all the circumstances.

Key learning points

This case highlights the following useful learning points when planning for redundancy and re-organisation:

- an irreversible business decision (here a decision by the council to close a school) is not the same as an individual redundancy decision being inevitable;
- alternatives to redundancy for the individual should always be considered, and this will usually include giving those at risk of redundancy priority over external candidates for any suitable alternative vacancies;
- asking employees to apply for their existing jobs or equivalent jobs can be found to be unfair in some circumstances;
- employees who are at risk of redundancy should be properly consulted and allowed to make representations; and
- it is advisable to offer a right of appeal in all redundancy dismissals even though there is no statutory right of appeal, and even where there is no contractual right of appeal.

There are some circumstances where it will be appropriate to ask employees to apply for and interview for a role in a redundancy scenario. For example, this could be the case where a number of employees have been selected for redundancy and there is only one suitable alternative vacancy (which is not the employees' current role) available for these employees.

The special protections for those on maternity leave who are selected for redundancy should not be overlooked. For more detail, please see our article from October 2020, Can we make an employee redundant during maternity leave or offer changed terms on her return to work? (available from our website).

Employer who uses a contractual term to bring forward the date of resignation did not dismiss the employee

Article published on 18 March 2022

EAT decision paves way for appeal on tricky interpretation of PILON clauses.

It is commonly agreed that where an employee resigns from their job and the employer then unilaterally terminates the employment before the notice period expires, the employer is, in effect, dismissing the employee. This can include situations where the employer decides to end the employee's notice period early by paying them in lieu of the unworked notice

This seemingly trivial distinction can have important implications as it leaves the employer open to claims arising from that dismissal

However, where the contract specifically provides an option for the employer to bring the termination date forward if the employee resigns, then there is no dismissal by the employer.

A recent EAT case looked at this issue once again.

Case: ***Fentem –v- Outform EMEA Limited [2022]***

Mr Fentem resigned from his position with OEL in April 2019, with his last day to take effect in January 2020. Mr Fentem's resignation letter highlighted his dissatisfaction with his new working arrangements. In December 2019 OEL invoked a clause in Mr Fentem's contract to terminate the contract immediately and pay him in lieu of the month's unworked notice.

Mr Fentem subsequently brought an unfair dismissal claim against OEL on the basis that by terminating his contract early, OEL had, in fact, dismissed him and terminated his employment before the notice period had been completed.

Mr Fentem's contract contained the following provisions:

3.1 This Agreement shall commence on […] and will, subject to earlier termination below, continue unless and until it is terminated by either party giving the other 9 months' prior written notice.

[…]

19.5 Where [Mr Fentem] serves notice to terminate his employment with the Company, the Company shall at any time during the period of notice be entitled to terminate [his] employment forthwith and in full and final settlement of [his] claims under this Agreement by paying to [Mr Fentem], the salary (excluding bonuses) to which he would have been entitled during the notice period or any part of it in lieu of such notice or any part of it.

OEL therefore defended the claim on the basis that the normal rule regarding dismissal for terminating the contract early when the employee resigns did not apply because they had a contractual right to bring the termination date forward and pay in lieu of unworked notice.

OEL directed the Employment Tribunal to the leading case on this issue – the EAT's decision in *Marshall (Cambridge) Limited v Hamblin [1994]*. Ultimately, the tribunal found it was bound to

follow that precedent and Mr Fentem's case dismissed.

Mr Fentem appealed to the EAT where he tried to argue that the decision in *Marshall* should not be followed because *it* was 'manifestly wrong'.

The EAT noted that there were arguments both for and against the decision in *Marshall* which would not be the case if the decision was clearly wrong and unjust as Mr Fentem argued. For that reason, the EAT concluded it was bound by the precedent and Mr Fentem's appeal was dismissed.

Comment

The arguments of this case have revisited a number of the critiques of *Marshall*. Key factors in the debate are that (1) an employee cannot insist on remaining in employment once they give notice, and (2) the wording in s.95 Employment Rights Act 1996, which makes clear that a dismissal includes where the contract of employment is 'terminated by the employer'.

In Mr Fentem's case, there is clearly an argument to say that, regardless of what his employment contract provides, if OEL chose to end the contract early then OEL was dismissing him. The counterargument set out in *Marshall* is that a contractual right to bring the termination date forward and pay in lieu of notice means that OEL only changed the date of the termination and the contract was therefore not 'terminated by the employer'.

Whilst PILON clauses are fairly common, it is unusual to see the type of contractual right that OEL had in Mr Fentem's contract. There would always be uncertainty caused by an employer using it inadvertently leaving themselves open to unfair dismissal claims and certainly it would be sensible for employers to take specific advice if faced with this situation. Employers can avoid forcing the issue by seeking the employee's agreement to terminate early and pay in lieu of unworked notice. However, there may be situations, such as Mr Fentem's, where an employee and employer are unable to agree on severance payments where issues such as commission and bonuses are a factor.

It is suggested that Mr Fentem may appeal, which will allow further scrutiny of the Marshall principles by the Court of Appeal.

Victimisation: was a recruitment decision connected to an applicant's discrimination claim against a former employer a detriment?

Article published on 31 March 2022

EAT finds that Tribunal failed to apply the 'reasonable worker test'.

Victimisation can be a deceptively difficult issue to determine. On the face of it, the Equality Act 2010 provides a simple definition for victimisation:

A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

A 'protected act' is defined in elsewhere in the Act and includes making a claim or complaint of discrimination. However, 'detriment' for these purposes is not defined in statute and courts and tribunals have interpreted it widely in this context. Case law indicates that a detriment need not result in economic or physical harm or loss. In determining whether a claimant has been subjected

to a detriment, tribunals should apply the 'reasonable worker test' as established in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003]*, namely:

Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

Note that this does not mean all reasonable workers would have to take the view the treatment was to their detriment, it would be enough that one singular reasonable worker would do so.

There is therefore a three-step process to determine a victimisation claim:

1. Has the individual done a protected act?
2. If yes, might the employer or potential employer's proposed action be viewed as a detriment by a reasonable worker or applicant?
3. If yes, was the detriment suffered because of the protected act?

A recent EAT decision highlights how an Employment Tribunal erred in their approach the question of whether the claimant has suffered a detriment.

Case details: *Warburton v Chief Constable of Northamptonshire Police*

Mr Warburton applied to be a police officer with Northamptonshire Police (NP). In his application he referred to proceedings he was bringing in the Employment Tribunal against another police force (his former employer) for unlawful discrimination and that he had several grievances outstanding against other police forces.

Following an interview, Mr Warburton was offered a position by NP on condition that pre-employment checks were completed. However, NP subsequently informed Mr Warburton that the vetting process could not be started, as NP were obliged to seek checks with Mr Warburton's former employers and that police force would not provide the information whilst there were ongoing employment claims and grievances against them. NP informed Mr Warburton that once the outstanding claims and matters with other police forces were resolved, he would be free to apply to NP again.

Mr Warburton subsequently brought a victimisation claim in the Employment Tribunal against NP on the basis that the failure to process his application was a detriment visited on him because of a protected act, namely that he had brought claims against a former employer under the Equality Act 2010.

First instance and EAT decision

NP did not dispute that Mr Warburton's claims against former employers amounted to a protected act. The ET dismissed Mr Warburton's victimisation claim on the basis he had not suffered a detriment 'because of' his protected acts, stating that the decision not to proceed with his application was rather 'because of' the other police forces' decision not to provide the information needed by NP to proceed with his vetting, which was in line with NP's policies and guidance.

Mr Warburton appealed this decision, partly on the basis that the wrong test had been applied by the ET to determine if a detriment had in fact been suffered.

The EAT confirmed that the correct test for determining a detriment in Equality Act claims is the 'reasonable worker test', as per *Shamoon*. As noted above, the relevant question is whether one singular reasonable worker would, or may, take the view that they had suffered a detriment. By skipping this test and simply considering if NP's actions were 'because of' Mr Warburton's protected acts, the Tribunal had incorrectly substituted its own view that Mr Warburton's treatment was not detrimental.

The EAT concluded that there was not enough evidence to clarify that the ET had properly determined the detriment issue when striking out Mr Warburton's claim and subsequently ordered the case be remitted back to the ET for consideration on this point.

Comment

This case highlights the risks employers face making recruitment decisions when taking into account complaints against former employers, which may amount to a protected act. This type of situation puts potential employers in a very difficult position and care will be needed in deciding how to manage it. In particular, employers should consider whether their recruitment process is robust enough to deal with situations where a job applicant discloses they have claims ongoing against a former employer and to mitigate the risks of a victimisation claim.

Many employers will not need to make enquiries about any ongoing disputes with former employers, but employers in certain sectors (e.g. those working in schools) may be more likely to find out about such disputes as a result of prescribed vetting or safer recruitment procedures, such as in the above case.

It is important to note that the 'reasonable worker test' is a relatively low bar to meet, so in most cases the question of an employer's or potential employer's liability for victimisation will rest on whether or not the detriment was suffered because the protected act was carried out.

Employers would be well advised to keep good records of the recruitment process and to seek legal advice before making any definitive decisions.

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