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EMPLOYMENT LAW BULLETIN

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Welcome to this January edition of the employment law bulletin.

In this edition, we take a look at some of the legislative changes and case law decisions which are likely to impact on employers this year. We also report on changes to the right to work check regime which have come into force this month.

As larger employers gear up for the second round of gender pay gap reporting, we consider the Equality and Human Rights Commission recommendation that employers make more of the opportunity to publish a gender pay gap report narrative and action plan.

We also consider in detail two recent decisions in the EAT. The case of *Chatfeild-Roberts v Phillips and Universal Aunts Ltd* sheds light on the sometimes unclear employment status of carers paid directly by a family member of the person being cared for. The case of L*amb v The Garrard Academy* is a helpful reminder of when an employer will be expected to know about an employee's disability.

Finally, may I remind you of our forthcoming events:

- **Annual TUPE Update**
  Breakfast Seminar, Leeds, 5th February 2019
  For more information or to book

- **An Update on Handling Disciplinary issues**
  Breakfast Seminar, Leeds, 16th April 2019
  For more information or to book

- **Employment Law Update for Charities**
  A full day conference, Hilton City Leeds, 18th June 2019
  For more information or to book

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

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Welcome to 2019: What's coming up in employment legislation and case law?

A look ahead to some of the key changes impacting on employers planned for 2019/20

Although there is considerable uncertainty for employers about the terms on which the UK will leave the EU and the timetable for Brexit, there are some legislative changes impacting on employers which are planned for this year and next. There are also a number of interesting cases due to be heard later this year. We set out here some of the expected highlights of the upcoming employment law year.

Some key legislative changes in 2019 and beyond

- From 6 April 2019, all workers will have the right to an itemised pay statement which must show the number of hours which have been paid for where the worker is paid by the hour.
- Companies with 250 or more employees must include in the directors' report an annual statement of engagement with employees (for accounting periods beginning on or after 1 January 2019). This statement must include a summary of how the directors have engaged with employees, how they have had regard to employee interests, and the effect of that regard, including on the principal decisions taken by the company during the financial year.
- Draft legislation following on from the Good Work Plan, the Government's response to the Taylor Review, is expected to be brought into force in April 2020. This includes: the right for workers on zero hours contracts to request a more stable and predictable contract; the right to a written statement of terms for all workers and employees from day one; changing the reference period for calculating holiday pay for those with variable hours from 12 weeks to 52 weeks; increasing the period required to break continuity of employment from one week to four weeks; extending the rights of agency workers to earn the same pay as permanent staff to those workers who are employed by the agency and have guaranteed pay between assignments (this will involve repealing the "Swedish Derogation"); and making it easier for workers to request an information and consultation arrangement with their employer.
- From April 2020, the public sector off-payroll working rules will apply to large and medium-sized companies in the private sector.
- A day-one right to two weeks' leave and statutory pay for employees if they lose a child under 18 is expected to come into force in April 2020.

Possible future legislative developments

- The Equality and Human Rights Commission is expected to develop a statutory code of practice on sexual harassment in the workplace which may include restrictions on the use of non-disclosure agreements in sexual harassment cases.
- Evidence given to the House of Commons Justice Committee indicates that the Ministry of Justice is developing a new regime for employment tribunal fees which will strike a balance between helping to fund the tribunal system and being "proportionate and progressive". Permanent Secretary Richard Heaton stated: "We have to get the fee level right. I can see a scheme working that is both progressive and allows people out of paying fees where they can't afford to."
- Regulations were drafted in 2016 to enable the clawback of exit payments from public sector workers in some circumstances. These have not yet come into force and there is no set timetable for this legislation.

- No announcements have been made concerning the proposed extension of shared parental leave to grandparents (originally planned to take effect in 2018).

Key employment law cases to be heard in 2019

- Agoreyo v London Borough of Lambeth: the Court of Appeal will consider whether the suspension of a teacher was a repudiatory breach of contract.
- Chief Constable of Norfolk v Coffey: the Court of Appeal will consider whether an employee was directly discriminated against on the basis of a perceived, rather than actual, disability.
- Bamieh v Foreign and Commonwealth Office: the Court of Appeal will consider whether an employment tribunal had jurisdiction to hear the claimant's whistleblowing claims against two overseas colleagues.
- Egon Zehnder Ltd v Tillman: the Supreme Court will consider whether a restrictive covenant preventing a former employee from being concerned or interested in a competing business (including holding any shares in a publicly quoted company) was valid.
- Uber BV and others v Aslam: the Supreme Court will consider whether Uber drivers are workers.

Changes to simplify right to work checks

Two changes to the right to work check rules, intended to simplify the checking process, come into force on 28 January.

What are the consequences of employing an illegal worker?

Employers have a duty to prevent illegal working. Those who employ someone without the right to work in the UK can face a civil penalty (a maximum fine of £20,000 for each illegal worker). If an employer carries out the correct right to work checks, it will have a "statutory excuse" against liability for that civil penalty.

The details of employers who have received a civil penalty for illegal working are placed on a public register. A civil penalty can also impact on an employer's ability to sponsor migrant workers on Tier 2, 4 or 5 visas. The latest Home Office guidance for employers on right to work checks is available here.

There is no statutory excuse if the employer knows or has reasonable cause to believe it is employing an illegal worker. In that case, the employer will commit a criminal offence and could face a five year prison sentence and/or an unlimited fine.

What changes are being made to right to work checks?

An online Right to Work Checking Service has been available since April 2018, but the current rules mean that employers must also check paper documents in all cases. From 28 January 2019, employers will in some cases be able to rely solely on the online check without having to also check paper documents. This change will only apply where the employee has an immigration status which can be checked using the online service. This includes non-EEA nationals who hold biometric residence permits or biometric residence cards and EEA nationals who have been granted settled status under the EU Settlement Scheme.

An employer using the online service will be excused from a civil penalty for employing an illegal worker if the online check confirms that the employee is allowed to work in the UK and perform the work in question. The employer will still need to satisfy itself that any photograph on the online right to work check is of the employee and to retain a copy of the online check for

at least two years after the employment ends.

There is no compulsion for either employers or individuals to use the online checking service.

A further change will allow UK nationals without passports to demonstrate the right to work by producing a National Insurance number and a short birth or adoption certificate (which can be obtained without charge) rather than the full certificate.

The draft updated Illegal Working Code of Practice is available here.

Other checks to make when recruiting

Readers will be aware that the right to work checks are just one of a number of background checks which should be made before taking on a worker. These include, for example, checks on safeguarding concerns, criminal record, references and restrictive covenants which should be covered as part of the recruitment process. An offer of employment should be made conditional on the employer being satisfied of the outcome of any relevant checks.

Equality and Human Rights Commission (EHRC) : More employers should publish gender pay gap narratives and action plans

In December, EHRC published a report on the first round of gender pay gap reporting, focusing on explanatory narratives and action plans.

EHRC's gender pay gap report - what did it tell us?

The EHRC analysed the pay gap reports of 440 employers and noted that only around half of these included a narrative to explain the reasons or context behind the figures. Furthermore, only one in five of these employers had produced an action plan setting out steps to narrow their gender pay gap and only one in ten had set targets for improvement which could measure progress year on year.

The report highlights the opportunity for employers in publishing a narrative and action plan along with their statistics. For example, publicly demonstrating their commitment to addressing the gap can improve an organisation's recruitment and retention and help to build a reputation for being fair and progressive. A survey of employees working in firms which have published their gender pay gap data revealed that over 60% of women surveyed would be more likely to apply for a job with an employer with a lower pay gap and that over half would feel demotivated if they worked somewhere with a gender pay gap. The survey, undertaken for the EHRC, is available here.

Recommendations to employers

The EHRC report includes examples of good practice in addressing the gender pay gap and recommends the Government guidance in this area.

The National Council for Voluntary Organisations (NCVO) recommended last year that all voluntary organisations should consider publishing their gender pay gap statistics even if they have fewer than 250 employees and so are not required to report. The NCVO considers that publishing this data is "a way to reflect on any gender pay differences and to demonstrate a commitment to transparency and accountability".

How you can have your say

The Government is currently consulting on the possibility of bringing in mandatory ethnicity pay gap reporting. The consultation document and link to respond online are available here. The deadline for response is 11 January 2019. We will report separately on Wrigleys' response to the consultation later this month.

Was a "self-employed" live-in carer supplied by an agency an employee of the client?

The EAT has upheld the decision of an employment tribunal that a live-in carer was an employee of the client even though she contributed to tax & NI.

What is an employee?

A tribunal will consider, amongst other things, the following key questions when deciding if someone is an employee:

- Does the individual have to provide personal service (or can they send someone else to do the work when they are unwilling to do it)?
- Is there "mutuality of obligation": an obligation on the employer to provide work and an obligation on the individual to accept it?
- Does the employer control to a high degree what work is done and how it is carried out?

A tribunal will consider the reality of the working arrangements to answer these questions where there is no clear documentation setting out the identity of the employer and/or the employment status of the individual, or where the documents which do exist are found not to reflect the intentions of the parties.

The case examined below explored just such an undocumented arrangement where a carer was introduced by an agency but paid and controlled by a family member of the person being cared for.

Case: Chatfeild-Roberts v Phillips and Universal Aunts Ltd

Ms Phillips worked as a live-in carer for a retired colonel for a total of three years. She was introduced to Mr Chatfeild-Roberts, the colonel's nephew, by Universal Aunts Ltd, an agency supplying carers. The colonel paid for her services for the first year. It was then decided that Mr Chatfield-Roberts would pay for Ms Phillip's services, given that it was anticipated that he would be a beneficiary under the colonel's will.

Universal Aunts' brochure was confusing as to the employment status of the carers. It stated: "our workers become your employees for their time with you" but also that the carers were "self-employed".

Usually, carers worked only for short periods and moved every 3 or 4 weeks to a new client. However, in the case of the colonel, the family wanted to have consistency of care and asked that she work with him for at least 6 months.

The claimant's duties included assisting the colonel with his catheter, contacting a doctor if he became unwell, giving the colonel his medication, cooking and shopping. She was also required to organise and accompany him to his medical appointments. Items required for personal care were paid for and provided by the colonel himself or by his nephew.

Mr Chatfield-Roberts regularly used terms which suggested that the Claimant was his employee. For example, when there was conflict as to whether Ms Phillips should be taking instructions from the colonel, Mr Chatfeild-Roberts stated: "I am your employer and what I say

goes". He also expressed dissatisfaction when Ms Phillips undertook tasks on her own initiative.

On the claimant's day off, when she took leave, and when she was on jury duty for a period, other carers provided by Universal Aunts attended on the colonel. In order to guarantee that cover could be provided, Mr Chatfield-Roberts paid an agency fee of £125 per month. The claimant made arrangements for this cover but it was Mr Chatfield-Roberts who paid the substitute carers.

The claimant submitted invoices in the first year, but after that she received payment from Mr Chatfield-Roberts, without submitting invoices, directly into her bank account. The claimant accounted for her own tax and national insurance contributions. On one occasion Mr Chatfield-Roberts described this payment as "salary".

The Claimant rarely took holidays but when she did she was paid her normal remuneration. Mr Chatfield-Roberts stated that these payments were as a gesture of goodwill.

Following the period of jury duty, Mr Chatfield-Roberts began to have concerns about the standard of care provided by Ms Phillips. He terminated the engagement, citing a failure in her obligations to provide a good standard of care.

The employment tribunal decision

The Claimant brought a claim of unfair dismissal to an employment tribunal. As a preliminary matter, the tribunal considered whether she was an employee or worker of the agency and/or Mr Chatfeild-Roberts. It found that she was not an employee or a worker of the agency but was an employee of Mr Chatfeild-Roberts.

The employment judge found that there was mutuality of obligation between the claimant and Mr Chatfeild-Roberts from the start of her engagement. In other words, there was an obligation for the employer to provide work and for the employee to accept it. He noted that Mr Chatfield-Roberts came to rely on the claimant and assumed that she would supply consistent care for his uncle.

The judge found that the claimant was required to provide personal service. He noted that the claimant's actions in approaching Universal Aunts to provide a substitute carer were not the same as the claimant providing a substitute herself.

Ms Phillips was subject to control by Mr Chatfeild-Roberts sufficient to make him her employer. The judge found that the language used in the termination letter indicated that Mr Chatfield-Roberts considered himself an employer who had control over the Claimant's performance.

The EAT decision

The EAT upheld the decision of the tribunal that the claimant was an employee. This was on the basis that there was mutuality of obligation, a requirement for personal service and a significant degree of control over the claimant's work.

On appeal, the EAT noted that there was very limited documentation which could be scrutinised in order to examine the contractual relationship. In fact there was nothing other than the Universal Aunts brochure. The employment judge therefore had to make findings from evidence put before the tribunal by the parties, including written correspondence between them and witness evidence.

Although being able to send a substitute to do the work is a marker of self-employment, the EAT agreed that, in this case, the claimant was not providing the substitute. While Ms Phillips made the call to the agency, it was Mr Chatfeild-Roberts and not the claimant who had the standing cover arrangement with the agency, paid the agency fee and paid the replacement carers.

The EAT noted that the level of control exercised by Mr Chatfeild-Roberts decreased over time as he came to trust the claimant, but this did not detract from the finding of control made by the employment tribunal. The EAT commented that an employee whose duties are decreasingly supervised because she is increasingly trusted should not thereby lose her employment status.

Comment

The outcome of this case is not surprising as it follows the recent trend of case law in finding employment status where there is an expectation that work will be provided and accepted, personal service and a high degree of control. However, it is an interesting application of the employment status tests to a case involving a live-in carer.

People who directly engage carers introduced to them by an agency should note that they may become the employer of the carer, particularly if there is no employment relationship between the agency and the carer. It is advisable to have in place clear written documents setting out the intentions of the parties and not to assume that a carer is self-employed or the employee of the agency. It is of course when things go awry in the relationship that carers may claim employee rights, including the right to statutory notice, redundancy pay and the right to be fairly dismissed or workers' rights, including National Minimum Wage, statutory holiday and rest breaks, and pension auto-enrolment.

When will an employer reasonably be expected to know about a disability?

Academy should have known teacher with reactive depression and PTSD was disabled and made reasonable adjustments

Case: Lamb v The Garrard Academy

Ms Lamb, a teacher at The Garrard Academy, commenced a period of long term sick leave in February 2012, citing reactive depression (following her aunt's death) and alleged bullying in the workplace. Shortly after she went off sick, she raised a grievance about two incidents concerning the deputy head.

Ms Lamb's grievance was initially upheld. However, the academy's chief executive considered that the grievance report was inadequate. She did not read the supporting evidence supplied with the report and set the report aside.

In July 2012, Ms Lamb met with the chief executive and disclosed that she had post-traumatic stress disorder (PTSD) due to experiences in childhood and that her condition could be triggered by difficult situations. Ms Lamb was then assessed by occupational health (OH) in November 2012. The report stated that Ms Lamb's symptoms of reactive depression may have begun in September 2011 and that it was likely she would fully recover if her grievance was resolved. It did not mention her PTSD.

A new grievance investigation was commenced in September 2012. The grievance outcome was provided in January 2013.

The employment tribunal decision

Ms Lamb brought disability discrimination claims to an employment tribunal. She argued that the academy should have made reasonable adjustments by: reading the initial grievance report and its supporting documentation with a reasonable degree of care; taking action following this

report by the end of July 2012; and disclosing the initial report to the claimant.

The academy conceded that the claimant was disabled due to PTSD, triggered by reactive depression and alleged workplace bullying. The tribunal found that the academy had a duty to make reasonable adjustments only from the date of the OH report (November 2012). Although the academy had actual knowledge of her PTSD from 18 July 2012, the tribunal found that, at that stage, the PTSD was not long term enough to qualify as a disability. The tribunal also determined that some of the adjustments requested were not reasonable.

The EAT decision

The EAT did not agree and substituted its own findings.

It held that the academy had actual knowledge of her disability by 18 July 2012 (when Ms Lamb disclosed her PTSD to the chief executive). The EAT commented that the tribunal's finding that the academy actually knew about the claimant's PTSD in July 2012 was irreconcilable with its finding that the academy could not reasonably have known she was disabled until November 2012. The EAT considered that a finding that the academy knew that Ms Lamb's PTSD went back to childhood experiences carried with it, implicitly, a finding that the impairment was known to be long term.

The EAT held that the academy also had constructive knowledge of disability in July 2012. This was because Ms Lamb had been off work with reactive depression for four months; her grievance remained unresolved and was unlikely to be resolved before September 2012. The EAT stated that the tribunal should have asked itself: "What would OH have reasonably concluded if a referral was made then?" The EAT considered that it was very likely that OH would have concluded that her impairment could last for another three months until September 2012 (that is 12 months from the date of onset of her symptoms).

The EAT also decided that the academy should have, as reasonable adjustments, read the initial grievance report with care, and built on this report to complete the grievance investigation before the end of the summer term. It did not uphold the claimant's argument that this initial report should have been disclosed to her as a reasonable adjustment. This was because the initial report had been set aside and a new investigation superseded this report. Disclosing the original report would have been confusing and unhelpful to the claimant.

Comment

Employers should be aware that claims for a failure to make reasonable adjustments and for discrimination arising from disability can be successful even when the employer does not actually know about the disability. Only direct discrimination claims can be defended on the basis of a lack of actual knowledge of the disability. If the employer should reasonably have known about the disability, but for example unreasonably failed to seek an OH report, constructive knowledge of the disability may be found. In this case, the employer was found to have enough information to be obliged to make further enquiries. It is therefore important that employers make reasonable efforts to find out about an employee's condition by referring the employee to OH and/or seeking information from a medical professional.

www.wrigleys.co.uk

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101