CHILTERN HR

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1. Guidance on calculating the national minimum wage

BIS has published guidance on calculating the national minimum wage. The guidance provides practical advice explaining what counts and does not count as pay and working hours for minimum wage purposes. It also explains who is eligible for the minimum wage, how to calculate the minimum wage, how the government will enforce it and contains a number of helpful examples.

A full copy of the guidance can be found here
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248737/bis-13-1184-calculating-the-minimum-wage.pdf

2. Indirect discrimination 'cured' through appeal

The Employment Appeal Tribunal has ruled that an employee had not suffered indirect sex discrimination when her flexible working application, which was initially refused, was subsequently accepted on appeal, albeit on a trial basis, before her return to work from maternity leave.

What does this mean?
The employee, in this case, had not suffered a disadvantage or detriment because, on appeal, her part-time working request had been granted. The fact that she was still on maternity leave and had not returned to work when the internal appeal was allowed were crucial facts because the appeal remedied any detriment she would have suffered as a result of the initial decision before she actually returned to work. Had the timings been different the case may have been decided differently.

What should employers do?
If as an employer you are concerned that a member of staff has been discriminated against you should obtain legal advice to see if matters can be resolved before they escalate.

Reference: Little v Richmond Pharmacology Limited

3. Employer should have paid for private medical treatment

The Employment Appeal Tribunal has held that where an employer's psychiatrist recommended the employer to pay for an employee to have further sessions with him and additional sessions with a clinical psychologist to help facilitate her return to work, the employer should have funded such sessions as a reasonable adjustment to facilitate their employee's return to work.

What does this mean?
Employers should note that the decision relates to the payment of a specific form of private medical treatment to enable the employee to return to work and cope with work-related stress, rather than the payment of private medical treatment in general.

What should employers do?
An employer is required to make reasonable adjustments to facilitate a disabled employee's return to work. In deciding what amounts to a reasonable adjustment an employer should take into account any recommendations by medical practitioners as well as obtaining specific legal advice.

Reference: Croft Vets Limited & others v Butcher

4. Age discrimination was justified

The Court of Appeal has held severance payments based on a person's age discriminated against younger workers but the difference in payments could be justified.

What does this mean?
In this case lesser payments to younger workers were justified because the aim of the compensation scheme was to provide a proportionate financial cushion until alternative employment was found, or as a bridge to retirement; the staged scheme was an appropriate and transparent one; to pay everyone the sum paid to older employees would be a substantial burden on the public purse; statistics supported the view that younger employees suffer unemployment for a shorter time and have fewer family and financial responsibilities; the scheme facilitated workforce recruitment and planning; the employer had established cogent business aims, and a proportionate means of implementing them, which outweighed the discriminatory effect of the measures; and because the unions had not argued that the scheme was discriminatory, or sought to challenge it.

What should employers do?
Employers should ensure that any redundancy scheme paying more than the statutory minimum is proofed against the risk of discrimination challenge, if necessary by taking specific legal advice.

Reference: Lockwood v Department of Work and Pensions and another

5. Surrogacy and maternity leave

Two Advocates General of the European Court of Justice have given opinions in separate cases on whether intended mothers who have babies through surrogacy arrangements are entitled to maternity leave.

In the first case the Advocate General expressed the opinion that an intended mother who receives a baby via a lawful surrogacy arrangement has the right to maternity leave under the Pregnant Workers Directive if she takes the child into her care. The compulsory two

weeks' leave must be granted to both the natural and the intended mother, but, apart from that, a surrogacy arrangement cannot result in a doubling of the maternity leave entitlement arising from a child's birth so the leave taken by the surrogate mother (apart from her first two weeks) must be deducted from that of the intended mother and vice versa. The Advocate General also expressed the opinion that, although an intended mother has the right to maternity leave, her employer's denial of that right will not amount to sex or pregnancy discrimination under the Equal Treatment Directive since she has not been pregnant, has not suffered a detriment as a result of taking maternity leave and has not suffered a detriment in comparison with male colleagues because of her sex.

In the second case the Advocate General's opinion was that a woman who became a mother under a surrogacy arrangement was not discriminated against when her employer refused her request for paid maternity leave. This was on the basis that the purpose of the Pregnant Workers' Directive is to protect a woman's biological condition in the vulnerable period before and after she actually gives birth, although the Advocate General did recognise that, in previous cases, the European Court of Justice has also attached importance to the special relationship that develops between a woman and her child. The Advocate General was of the opinion that it is not sex discrimination under European law for an intended mother's employer to deny her the right to paid leave on the child's birth because the employer would have treated a male parent of a child born via surrogacy in the same way.

What does this mean?
The Court is not bound to follow either of the Advocate Generals' opinions and the law in this area will remain uncertain until the Court makes its decisions in the two cases, which is still likely to be some months away.

What should employers do?
Whilst it is currently unclear whether an intended parent under a surrogacy arrangement has any maternity rights it is important to remember that they may still have the right to take parental leave and that a birth mother has the same maternity rights as any other pregnant employee.

References: C-D v S-T-C and Z v A Government Department and the Board of Management of a Community School

6. Employees who agreed to work reduced hours were entitled to guarantee pay

The Court of Appeal has held that employees, who had agreed to a temporary reduction in their working hours during a period of economic downturn, were entitled to guarantee payments for the days they did not work.

What does this mean?
Where an employee is 'normally' required to work on a particular day and work is not provided, that day will be classed as a workless day for which they will be entitled to statutory guarantee payments. It is immaterial whether the reduced hours are covered by an agreement which expressly varies the contract of employment as the reduced hours will be a departure from the 'norm'.

What should employers do?
Employers who are considering placing their employees on short time working should first check that they have the right to do so and, if they do, budget for guarantee payments.

Reference: Abercrombie and Others v Aga Rangemaster Limited

7. Automatic enrolment is to be simplified

Legislation has been passed to simplify the process of automatically enrolling eligible jobholders into workplace pension saving. Most provisions in the new Regulations come into force on 1 November.

What does this mean?
The changes will be particularly important to smaller businesses who have not yet reached the staging dates when they will have to automatically enrol their staff into a pension scheme.

The legislation makes changes to the current automatic enrolment process by:

1 Providing an alternative definition of a pay reference period for the purpose of assessing whether a jobholder has earnings over the threshold that require automatic enrolment into pension saving. This will allow employers to use a pay reference period aligned with when the worker is paid;
2 Providing an alternative definition of a pay reference period for the purpose of assessing whether an occupational money purchase or personal pension scheme can be used for automatic enrolment. This will allow employers to align the pay reference period used for determining the quality standard for such schemes with the periods already used by payroll, thus making it easier to be certain that a scheme has received the minimum contributions for a qualifying scheme;
3 Introducing consistent contribution payment deadlines for everyone joining a pension scheme. This means that in the future the time limit will be the same for all new joiners, whether the member joined a pension scheme as a result of automatic enrolment or otherwise, such as under their contract of employment ;
4 Clarifying the form and content of the notice jobholders submit if they want to opt out of pension saving. This will allow a flexible approach to be taken;
5 Extending the window employers have to enrol eligible job holders into a pension scheme from one month to six weeks. This will help employers avoid inadvertently breaching their duties;
6 Implementing minor changes to the quality requirements defined benefit pension schemes have to meet if they are used for automatic enrolment.

What should employers do?
Employers should familiarise themselves with their obligations well in advance of their staging date and keep an eye out for the updated detailed guidance that the Pensions Regulator is expected to publish shortly.

Reference: The Automatic Enrolment (Miscellaneous Amendments) Regulations 2013

8. Non-solicitation covenant was reasonable

The Court of Appeal has held that a post-termination restrictive covenant was valid when it prohibited a director for 6 months after termination from soliciting anyone who was a customer or client at any point during his employment.

What does this mean?
The enforceability of a restrictive covenant will depend on the facts of a particular case. In this case a non-solicitation clause was held to be reasonable because the purpose of the clause was to place a key employee who was the ‘face’ of the business ‘out of bounds’ for a limited period of only six months to counter the diversion of customers who would have been realistically available to him through his employment. He had had dealings with all of his ex-

employer's customers since he had taken on the role of director and 98 out of the 106 customers that his ex-employer had had during his employment were customers at the time of his departure.

What should employers do?
Employers should always take specific legal advice if in doubt about the enforceability of a restrictive covenant.

Reference: Coppage and another v Safety Net Security Limited

9. Resignation was unambiguous

The Employment Appeal Tribunal has held that an employee who wrote to her employer stating 'I have no alternative but to resign my position' resigned at that stage.

What does this mean?
The fact that there had been subsequent correspondence suggesting a 'cooling off' period and the employer had stated that her employment would terminate at the end of the four week notice period provided by her contract did not change the effective date of termination. The words 'I have no alternative but to resign my position' were said to have the same meaning as 'I am resigning now'. There was no question; in this case, of the employee having taken a decision in the heat of the moment or of being pressurised into a decision by the employer and this was not a case of the employer refusing to accept the employee's decision to resign. This was a constructive dismissal case.

What should employers do?
Employers should always take specific legal advice when an employee resigns following a breakdown in the employment relationship.

Reference: The Secretary of State for Justice v Hibbert