

Employment Newsletter April 2021

COVID-19

The Coronavirus Job Retention Scheme (CJRS) is being extended until the end of September 2021. Furloughed employees will continue to receive 80% of their salary for hours not worked but employers will be required to contribute towards the cost of unworked hours of 10% in July and 20% in August and September. The Self-Employment Income Support Scheme (SEISS) is also being extended with a fourth grant covering the period February to April 2021 and a fifth and final grant covering May to September 2021.

The Chancellor also announced investment in a Taxpayer Protection Taskforce to combat fraud within COVID-19 support packages, including the CJRS and SEISS. There will be temporary continuation of tax exemptions for COVID-19 tests and home office expenses, and of the Statutory Sick Pay (SSP) Rebate Scheme while sickness levels remain high.

From 1 April 2021, people who were in the clinically extremely vulnerable category will no longer be advised to shield and will not be eligible for Statutory Sick Pay (SSP). The government is also considering legislating to require care workers to be vaccinated against COVID-19, this comes as a poll by CMI revealed that 58% of managers think vaccines should be mandatory.

Employment Tribunal Road Map

Leading Employment Judges have predicted that virtual hearings will become a regular feature of the employment tribunal even once coronavirus restrictions are lifted. In a road map jointly published this week, Judge Barry Clarke and Judge Shona Simon, presidents of the employment tribunals in England and Wales and Scotland respectively, said that reverting to face-to-face hearings would not be enough to tackle the outstanding caseload. In England and Wales, the backlog of outstanding cases was 51,614 at the end of February, an increase of 45% compared to pre-covid figures. The road map sets out the default arrangements for hearings depending their type, with all but standard and open track hearings defaulting to telephone or video hearings. The road map also sets out a number of forthcoming developments for 2021/22, including the launch of a 'virtual region' in April 2021, which will be able to hear remotely cases generated in any of the ten current regions in England and Wales.



Constructive Dismissal

In a case considering constructive dismissal, *Gordon v J & D Pierce (Contracts) Ltd* UKEATS/0010/20 the EAT held that an employee did not affirm their employment contract by engaging in their employer's grievance procedure. The EAT concluded that there was no anomaly in holding a contract as being terminated for some purposes and not for others, and it would be unsatisfactory if an employee was unable to accept a repudiation because they wished to seek a resolution by means of a grievance procedure.

Uber Drivers are Workers

This month, in a keenly anticipated judgment, *Uber and others v Aslam and others* [2021] UKSC 5 the Supreme Court unanimously upheld an employment tribunal decision that Uber drivers were workers for the purposes of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998. The key factors in this decision were the degree of subordination and control to which the drivers were subjected. The court also confirmed that the drivers' working time includes any period when they are logged in to the Uber app within the territory in which they are licensed to operate and ready and willing to accept trips. The case will now return to the employment tribunal to determine the compensation due to the drivers in respect of their claims for holiday pay and unlawful deductions from wages. Following the Supreme Court ruling Uber announced that its drivers will now be receiving the National Living Wage, holiday pay and pension contributions.

Stale Equality and Diversity Training

As previously reported, in *Allay (UK) Ltd v Gehlen* UKEAT/0031/20 the EAT upheld a tribunal's finding that an employer had failed to take all reasonable steps to avoid an employee being racially harassed by another, and could not rely on "stale" equality and diversity training.

Whistle Blowing

In *Dobbie v Felton t/a Feltons Solicitors* UKEAT/0130/20 the EAT overturned an employment tribunal's finding that two disclosures made by a consultant solicitor about

alleged overcharging by the firm for which he worked, had not, in the solicitor's reasonable belief, been made in the public interest, and so were not protected disclosures under the whistleblowing legislation. This is a clear, well-reasoned judgment which underscores the importance of the *Chesterton* guidelines in interpreting and applying the public interest test in whistleblowing cases.

Sleep in Shifts and National Minimum Wage

In *Royal Mencap Society v Tomlinson-Blake* [2021] UKSC 8, a case concerning care workers and their sleep in shifts, the Supreme Court decided that the claimants would only be entitled to the national minimum wage (NMW) in respect of hours in which they were required to be awake for the purposes of working. They could not be described as actually working during periods when they were expected to sleep. This was in keeping with the 1998 recommendations of the Low Pay Commission.

Equal pay for Supermarket Employees

The Supreme Court handed down another significant decision in *Asda Stores Ltd v Brierley and others* [2021] UKSC 10, an equal pay claim involving around 35,000 supermarket employees. The Supreme Court upheld the decisions of the tribunal, the EAT and the Court of Appeal that a group of predominantly female retail employees could compare themselves to a group of mainly male distribution employees for the purposes of the claim. These claims can now move on from this preliminary issue to those which are substantive in the case; whether the work was of equal value and whether there was a genuine material factor defence.

Health and Safety Detriment Protection to be Extended to Workers

The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 is due to come into force on 31 May 2021 and will extend the rights currently conferred under section 44(1)(d) and (e) of the Employment Rights Act 1996 not to be subjected to a detriment in certain health and safety cases to workers.

Changes to Immigration Rules

On 4 March 2021, the government published a Statement of changes to the Immigration Rules: HC1248, most of which come into force on 6 April 2021. The statement includes revisions to the UK's shortage occupation list, including the addition of eight occupations in the health and care sectors. It introduces a new minimum

hourly rate to the Skilled Worker category. It also formalises the introduction of the new Graduate route which opens on 1 July 2021, allowing international students to stay in the UK and work, or look for work, at any skill level for up to two years after they successfully complete a course at a UK higher education provider (three years for those awarded doctorates). Also, in the Budget delivered by the Chancellor on 3 March 2021, reform to the Global Talent and Innovator categories and the introduction of new elite points-based and Global Business Mobility visa routes in 2022 were announced.

National minimum wage increases from April 2021

The national living wage and national minimum wage rates from 6 April 2021 are as follows:

- Age 23 and over - £8.91 (National living wage);
- Age 21 to 22 - £8.36;
- Age 18 to 20 - £6.56;
- Age 16 to 17 - £4.62;
- Apprenticeship rate - £4.30; and
- Accommodation offset £8.36 per week.

Increases to statutory benefits

The following rates apply from 4 April 2021:

- The weekly rate of statutory sick pay is £96.35;
- The weekly rate of statutory maternity pay, statutory paternity pay, statutory parental pay and statutory adoption pay are all £151.97.

From 12 April 2021 the weekly rate of maternity allowance will be £151.97.

Gender Pay Gap Enforcement

Finally, in light of the continuing effects of the COVID-19 pandemic, the Equality and Human Rights Commission (EHRC) has confirmed that gender pay gap enforcement action for the reporting year 2020-21 will be suspended until 5 October 2021.

If you have any queries regarding this communication or need employment advice please contact a member of the Employment Team on employment@rowberrymorris.co.uk or by telephone on 0118 951 6621 or 0118 958 5611.

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