



### Job Retention Bonus

The Job Retention Bonus ('JRB') is a taxable one-off payment of £1,000 for every employee that an employer claimed for under the Coronavirus Job Retention Scheme (CJRS) and who remains employed until 31 January 2021.

### Job Support Scheme

With the furlough scheme ending at the end of this month the Chancellor announced the Job Support Scheme ('JSS') to safeguard viable jobs in those business facing a downturn over the coming months. The scheme will start on 1 November 2020 and continue for six months. The main points are:

- All small and medium sized business will be eligible. Larger business can be eligible if their turnover has fallen and they have not made any capital distributions;
- The JSS will be available to all UK employers that have a UK bank account and UK PAYE scheme, they do not have to have used the furlough scheme;
- If employers retain staff on shorter hours, they will be able to claim under both the JSS and the Job Retention Bonus;
- Employees will need to work and be paid for at least one third of their normal hours (33%). For the employee's remaining hours (67%), one-third (22%) is paid by the employer and one-third (22%) is paid by government;
- The level of the government's contribution will be calculated based on the employee's usual salary, capped at £697.92 per month. This means an employee will receive at least 77% of their pay unless caught by the cap.

### Vicarious Liability

In April the Supreme Court held that Morrisons Supermarkets was not vicariously liable for the actions of one of their employees. The employee had, without authorisation and in a deliberate attempt to harm his employer, uploaded confidential payroll data to the internet using his home computer, *Wm Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12. In another case the Supreme Court held that Barclays Bank was not vicariously liable for the acts of a self-employed medical practitioner who was alleged to have committed

sexual assaults whilst conducting medical assessments of the bank's prospective employee's on the bank's instructions, *Barclays Bank plc v Various Claimants* [2020] UKSC 13.

### Average Holiday Pay

We previously reported that the Working Time Regulations 1998 were amended to increase the reference period for determining an average week's pay (for holiday pay purposes) from 12 weeks to 52 weeks effective from 6 April 2020. The government has updated its guidance on the calculation of holiday pay for workers without fixed hours or pay. The law surrounding holiday entitlement and pay for workers without fixed hours or pay remains a minefield, however the updated guidance will hopefully provide a useful starting point for employers.

### Confidentiality Clauses in COT3 and Settlement Agreements

In *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 (QB) an employer was paying the agreed settlement sum in instalments. On finding that their former employee had divulged the contents of the agreement to another former employee they stopped making the payments citing breach of contract. The High Court found that the confidentiality clause was a generic clause rather than a fundamental clause of the agreement and therefore the employee was not in breach and was entitled to the remainder of the payments. Employers looking for increased protection can specify that the clause is a condition and make provision in the agreement itself for what should happen if there is a breach of confidentiality.

### Law Commission Report on Employment Tribunal Hearings

The Law Commission has published its report on employment law hearing structures, following a consultation paper that was published in September 2018. The Law Commission sets out 23 recommendations which include the extension of the time limit to bring a claim to six months, raising the contractual damages limit in the employment tribunal from £25,000 to £100,000 and allowing breach of contract claims

to be brought. The Law Commission has no power to change the law, but its recommendations are expected to be considered by the government with a full response within one year.

### **Constructive Dismissal – The ‘Last Straw’**

In *Williams v Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19. The Employment Appeal Tribunal (‘EAT’) found that a constructive dismissal claim can succeed in circumstances where the ‘last straw’ is entirely innocuous but can tip the employee into resigning. The EAT said that the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to that. Employers should be cautious as even reasonable and seemingly innocuous acts on their part may revive an earlier fundamental breach of contract, provided that the employee has not already affirmed that breach.

### **Employment Tribunals National User Group Meeting**

Minutes of the England and Wales employment tribunals’ national user group meeting held on 30 June 2020 have been published. The meetings recorded the adverse effects of the COVID-19 pandemic on the tribunal service and the steps that have been taken to mitigate those effects, including recruitment of new judges and lay members and the increased use of remote hearings by the HMCTS Cloud Video Platform (CVP). Remote hearings although convenient are not always an effective replacement for in person hearings especially where witness evidence is crucial, such as in discrimination claims. Hybrid hearings with some attendees attending remotely and others in person maybe a good alternative. There was already a substantial backlog of claims at the beginning of March. It has increased due to the pandemic and is expected to increase again when the Coronavirus Job Retention Scheme ends at the end of this month.

### **Discrimination Arising From Disability**

In *Department of Work and Pensions v Boyers* UKEAT/0282/19 the EAT said that the first instance tribunal should have conducted a balancing exercise between the needs of the employer and its accepted legitimate aim and the discriminatory effect on the employee when considering if discrimination arising from disability was objectively justified.

### **Workplace Support for Survivors of Domestic Abuse**

In June, business minister Paul Scully launched a review of ways in which employers and the government could better support domestic abuse survivors in the workplace. The deadline for consultation submissions was 9 September 2020 with a report expected by the end of 2020.

### **Furlough, Returning to Work and Mental Health Issues for Employers**

The Centre for Mental Health has published its prediction that up to 10 million people, nearly 20% of the population will need help with a new or existing mental health condition as a direct consequence of the Covid-19 pandemic. The following are some practical tips for employers:

- Maintain regular communication with all employees so they are informed about how the business has been affected;
- Make provision for employees to work from their usual place of work if it would benefit their mental health;
- For employees returning to work after a long period on furlough hold ‘returning to work meetings’ or refresher training, and share risk assessments and health and safety measures put in place to protect employees whilst at work to give them confidence;
- Consider having mental health champions who are trained to provide support;
- Encourage employees to continue to take annual leave; and
- If an employee makes a new disclosure of a mental health condition treat it sensitively and implement a support plan.

**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](mailto:employment@rowberrymorris.co.uk) or by telephone on 0118 958 5611.**

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