

Employment Newsletter April 2022

COVID-19

On 21 February 2022, the Prime Minister set out the government's strategy for living with COVID-19 in England, in a statement made to the House of Commons. This confirmed that all remaining domestic legal restrictions will be removed.

In March following a short consultation, the government revoked the statutory requirement for mandatory vaccination for health and social care workers in England.

On 25 March 2022, the *Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2022 (SI 2022/380)* came into effect and revoked the "deemed incapacity" provisions that had entitled those self-isolating or shielding due to COVID-19 to SSP. Going forward, to be eligible for SSP, an individual must now actually be sick or incapable of work. Employees who are asymptomatic or have very mild COVID-19 symptoms will no longer be eligible for SSP even where they test positive.

Employers will need to decide how to manage employees with COVID-19 or symptoms in circumstances where COVID tests are no longer available free of charge and SSP is not payable. Will they pay employees who have tested positive or have symptoms to stay away or take the risk of infected employees coming into work anyway?

Latest Gig Economy Case

In *Smith v Pimlico Plumbers* [2022] EWCA Civ 70, the Court of Appeal held that the right to paid annual leave under the Working Time Directive is a "single composite right", rather than a right to leave and a separate right to payment for that leave. A worker who had taken unpaid leave, having been told that he had no right to paid leave, but who had not invoked his right to payment until after his contract terminated, was entitled to bring a claim in respect of all unpaid annual leave accrued throughout his engagement, both taken and untaken.

Rare Injunction

In *USDAW and others v Tesco Stores Ltd*, the High Court granted a rare injunction preventing the supermarket from "firing and rehiring" employees to circumvent their entitlement to a contractual benefit.



Agency Workers and Vacancies

In *Kocur v Angard Staffing Solutions Ltd and another* [2022] EWCA Civ 189, the Court of Appeal endorsed the EAT's analysis of regulation 13 of the Agency Workers Regulations 2010 (SI 2010/93), that it confers on an agency worker the right to be notified of vacancies but does not extend to a right to apply for and/or be considered for the post.

Unlawful Deduction of Wages?

The judgment delivered in the case of *Abellio East Midlands Ltd v Thomas* [2022] EAT 20 found that the claimant's quantum meruit claim could not be brought as an unlawful deduction from wages claim in an employment tribunal. The claim did not fall within the definition of "wages" in section 27 of the Employment Rights Act 1996 as it was based on work done by an employee that was outside of the scope of their contract.

Use of PILON Clause

In *Fentem v Outform EMEA Ltd* [2022] EAT 36, the EAT considered the decision in *Marshall (Cambridge) Ltd v Hamblin* that invoking a PILON clause after an employee's resignation to bring forward their dismissal does not amount to a dismissal under section 95(1)(a) of the ERA 1996. Despite misgivings about the reasoning in that case, the EAT held that it was bound to follow *Hamblin* because the judgment was not manifestly wrong.

TUPE

In *Clark v Middleton and another* [2022] EAT 31, the EAT held that a transferee was not liable for its failure to provide information to the transferor under regulation 13(4) of TUPE on measures it proposed to take in connection with the transfer because the claimant had withdrawn her claims against the transferee following an Acas-conciliated settlement. An email to the tribunal advising that the claimant's claims against the transferee were being withdrawn and stating there was no objection to the dismissal of "all claims" against the transferee was wide enough to encompass the transferee's liability for failure to provide the information required by regulation 13(4).

Redaction and Anonymisation

The EAT remitted *Frewer v Google UK Limited and others* [2022] EAT 34, to an employment tribunal since, when granting orders for anonymisation and redaction of documents, the tribunal had erred by failing to properly consider the open justice principle, including the importance of names being used in judgments. This case gives a helpful summary of the principles applicable when applying for redaction and anonymisation in the employment tribunal. It contains clear, practical advice about the relevant ET Rules and authorities, and will assist those making and responding to such applications.

Open Justice

In *Guardian News & Media Ltd v Rozanov and EFG Private Bank Ltd* [2022] EAT 12, the EAT upheld an appeal from a tribunal's refusal to order a respondent to provide copies of skeleton arguments, witness statements and documents requested by a journalist. As the EAT noted, it is important for parties to remember when drafting skeleton arguments and witness statements that such documents can generally be inspected at hearings, and may be provided thereafter. They should also bear in mind that the bundle of documents will generally be open for inspection at or, in appropriate circumstances, after a hearing. This might prompt parties to ensure that the documentation provided in bundles is limited to that relevant, in the sense of supporting or being adverse to a party's case, and necessary to determine the issues in dispute.

Pay Transparency

On 8 March 2022, to mark International Women's Day, the government announced a pay transparency pilot scheme which aims to tackle pay inequality by requiring participating employers to include information about salaries on job adverts and refrain from asking applicants about their salary history during the recruitment process.

Harassment Free Workplaces

Also on 8 March 2022, the UK ratified the International Labour Organisation's Violence and Harassment Convention which recognises that everyone has a right to a workplace that is free from violence and harassment.

Ethnic Minority Pay Gap

The government published its response to the Commission on Race and Ethnic Disparities report on 17 March 2022. The report confirmed that ethnic minority pay gap reporting will not be made mandatory, although should employers

choose to publish their data, there will be an associated requirement to publish a diagnosis and action plan.

Increase in National Insurance

The Government has introduced a Health and Social Care Levy to meet increased health and social care costs. From April 2022 the rate of national insurance most employees will increase by 1.25%. In April 2023 it is expected that the rates of national insurance will return to normal and the 1.25% increase will become the Health and Social Care Levy.

Increase to National Minimum Wage

From 1 April 2022 the rates are as follows:

- National living wage £9.50 (was £8.91)
- 21-22 year old rate £9.18 (was £8.36)
- 18-20 year old rate £6.83 (was £6.56)
- 16-17 year old rate £4.81 (was £4.62)
- Apprentice rate £4.81 (was £4.30)
- Accommodation offset £8.70 (was £8.36)

Increase to Family – Friendly Payments

The Department for Work and Pensions have announced new rates for a number of family – friendly payments effective from 11 April 2022 as follows:

- Standard rate for Statutory Maternity Pay and Statutory Adoption Pay (which applies after 6 weeks of leave) will increase from £151.97 to £156.66 per week (or paid at 90% of the employee's weekly earnings if that amount is lower)
- Statutory Paternity Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay will also increase from £151.97 to £156.66 per week (or paid at 90% of the employee's weekly earnings if that amount is lower);
- Maternity Allowance will increase from £151.97 to £156.66 per week (or paid at 90% of the individual's weekly earnings if that amount is lower); and
- Statutory Sick Pay will increase from £96.35 to £99.35 per week.

If you have any queries regarding this newsletter and its contents or need employment advice please contact a member of the Employment Team on employment@rowberrymorris.co.uk or by telephone on 0118 951 6621. www.rowberrymorris.co.uk