

## Employment Newsletter January 2021

### COVID-19

The Government announced that the Job Support Scheme which was originally due to replace the furlough scheme from 1 November 2020 had been postponed. Instead the Coronavirus Job Retention Scheme ("CJRS") was extended initially until 31 March 2021 and later to 30 April 2021. The CJRS will initially mirror the level of support available in August 2020, with the government paying 80% of wages for hours not worked up to a cap of £2,500 a month for claim periods until 31 January 2021. Since 1 December 2020 employers have been unable to claim under the CRJS for employees under notice. Employers will need to cover employer NIC's and employer pension contributions on all amounts paid to an employee (including those amounts covered by the CJRS). Full details of how the scheme will operate after 1 February 2021 have yet to be announced.

### Employment Tribunal Statistics

The Ministry of Justice ("MOJ") has published the Employment Tribunal quarterly statistics for the period April to June 2020. During this period, single claims and caseload outstanding rose by 18% and 31%. The mean age of cases at disposal decreased to 32 weeks. Annual compensation and costs awards figures have also been published for the employment tribunals and the EAT. A total of 160 discrimination cases were awarded compensation in 2019/20; the highest award was for disability discrimination (amounting to nearly £266,000). Age discrimination claims received the largest mean average award (£39,000) compared to other discrimination jurisdictions. No awards for religion or belief discrimination were recorded. Unfair dismissal mean average awards decreased to £10,812, from £13,704 in the previous annual figures. The MOJ commented that the increase in the single claims was likely to be due to the rising unemployment and changes to working conditions during the Covid-19 pandemic, noting that this was "the highest level of single employment tribunal claims since 2012/13". Looking ahead the number of cases concerning redundancy, employment terms and contractual issues surrounding pay and benefits are almost certain to reach new highs. Employers can minimise the risks of employment tribunal claims by getting advice earlier on, a much cheaper option than defending a claim.



### Indirect age discrimination justification

In *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487 the Court of Appeal held that the need for the probation service to reduce staff costs in order to balance its books during a public sector pay freeze was a legitimate aim capable of justifying indirect age discrimination. This did not offend the rule that discrimination cannot be justified where the reason is solely in order to save costs. The probation service had introduced a new pay policy which had a disproportionate impact on younger employees. Known as the 'costs-plus' rule employers need to be able to show that "costs" was one of several factors weighted in the balance. Turning to proportionality the court said the first instance tribunal had been correct to take into account that the policy was a temporary measure.

### Employment Tribunals can cap costs awards

In *Kuwait Oil Company v Al-Tarkait* [2020] EWCA Civ 1752, the Court of Appeal held that an Employment Tribunal had been entitled to cap the costs that might be awarded to a respondent at the sum equal to the compensation and costs awarded to claimant. The Court said that when reading the Employment Tribunal rules the Tribunal is able to have regard to the party's ability to pay as a reason to limit the costs awarded.

### Agency workers' rights

In another long running agency worker case (*Angard Staffing Solutions Ltd and another v Kocur and another* UKEAT/0105/19 and UKEAT/0209/19), the Employment Appeal Tribunal ("EAT") decided that regulation 13 of the Agency Workers Regulations 2010 (SI 2010/93) does not provide agency workers with a right to be entitled to apply, and be considered, for relevant vacancies with a hirer or to work the same shift lengths as comparable directly recruited employees. The EAT noted that flexibility is at the heart of the relationship between hirers and agency workers, and that agency workers enable hirers to respond to fluctuating workforce demands in a way that a permanent workforce does not.

## Indirect age discrimination

In *Ryan v South West Ambulance Services NHS Trust* UKEAT/0213/19, the EAT has held that an employee was indirectly discriminated against on grounds of age on the basis that she was excluded from applying for a promotion because, while it was open to her to apply, she was not in the employer's "talent pool". The pool had been established as a quick way of finding talented employees to fill vacancies at short notice and without having to advertise externally. The employee established that there was a group disadvantaged as the statistics showed that there was a reduced likelihood, due to age, of employees aged 55 and above from being in the pool.

## Post termination restrictions in contracts of employment

In *Quilter Private Client Advisers Ltd v Falconer and another* [2020] EWHC 3294 (QB), the High Court found that non-compete, non-solicitation and non-dealing clauses in a financial adviser's employment contract were an unreasonable restraint of trade. This case highlighted the difficulty of using a "one size fits all" contract without giving proper thought to whether any post termination restrictions included within it are appropriate to the employee's role and status.

## The effect of the Brexit deal on Employment rights

Under the agreement the UK government will be allowed to change EU derived employment rights. Whilst most employers feel that the UK has the right balance in terms of employment regulations a number of employers would like to see the Working Time Directive and the Agency Workers Directive reviewed.

Employers will need to be aware that free movement of people between the UK and the EU ended in December and any EU national coming to the UK will be subjected to the same points based system as other nationals. Conversely if employers need to send staff to EU countries they will be subject to the local immigration requirements of the jurisdiction they are sending them to.

## BEIS consultations

BEIS launched two consultations in December 2021. The first consultation will consider measures to extend the ban on exclusivity clauses in employment contracts to cover those earning under the Lower Earnings Limit, currently £120 a week. This is a response to the disproportionately negative impact of the COVID-19 pandemic on low earners and seeks

to prevent employers from contractually restricting low-earning employees from working for other employers. The second consultation seeks views on proposals to require employers to continue paying compensation to employees for the duration of a post-termination non-compete clause, requiring employers to confirm in writing to employees the exact terms of a non-compete clause before their employment commences, introducing a statutory limit on the length of non-compete clauses, or banning the use of post-termination non-compete clauses altogether. Both consultations close on 26 February 2021.

## National minimum wage increases from April 2021

The UK government has accepted in full the Low Pay Commission's recommended increases to the national living wage and national minimum wage rates, to apply from 6 April 2021 as follows:

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

## Increases to statutory benefits

The Department for Work and Pensions (DWP) has published its proposed increases to a number of statutory benefit payments. The following rates are expected to apply from 4 April 2021:

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

**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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