EMPLOYMENT NEWS HEADLINES JAN-FEB 2016 ISSUE 1

GENDER PAY GAP REPORTING

The Government has now published draft regulations on the *Gender Pay Gap Information Regulations 2016*, ("the Regulations") consultation on these Regulations closes on 11 March 2016. There is unlikely to be much change to the draft as it stands. Key highlights which employers should be aware of are:

- The Regulations will come into effect on 1 October 2016 with the first reporting period in April 2018. Although this may seem a long way off, employers will need to start preparing the data with the first pay snapshot required by April 2017.
- The Regulations apply to employers in the UK with 250 or more employees which excludes workers but will include those 'ordinarily' working it the UK or working under a UK contract of employment.
- The reporting requirements include publication on the employers website of information on:
  - The difference between men and women of the "mean" and "median" overall pay rates;
  - The difference between men and women with respect to bonus pay outs in the preceding 12 months to each April and the proportion of men and women receiving bonuses in that period;
  - The number of men and women working in each pay band quartile.
  - The definition of 'pay' will include basic salary, paid leave, maternity and sick pay, allowances and bonuses (see separate reporting requirements above) but will exclude benefits in kind, overtime and expenses.
- The publication of this information will be an annual requirement and must remain on the employers' website for 3 years. There will also be a requirement to submit the information to a government website where the data may be published in a league table of naming and shaming employers with wide gender pay gaps. There are no plans at the moment for other enforcement measures.

THE NATIONAL LIVING WAGE

The new mandatory *National Living Wage* ("NLW") comes into force from *1 April 2016*. This will impact certain sectors of industry more than others with the retail and hospitality sectors to be most affected. The new NLW means that the hourly rate in the relevant reference period for those workers who are 25 years of age or over will change as follows:

- Current rate under the national minimum wage regulations - £6.70 per hour
- From 1 April 2016 under the NLW it will increase to £7.20 per hour
- It is expected that by 2020 this will increase to £9.00 per hour.

Enforcement provisions will be similar to those already in place under the current national minimum wage arrangements as follows:

- HMRC can issue a notice of underpayment to the employer for non-compliance.
- An HMRC enforcement officer or the individual worker can take action against the employer via the Employment Tribunal system.
- Where an employer is guilty of non-compliance with the NLW requirements, it will be ordered to pay the arrears and be issued with a financial penalty of up to 200% of unpaid wages capped at £20,000 per worker.

The penalties for breach of the NLW requirement is considerable and it is important, therefore, for employers to prepare now by assessing which workers will be affected and adjusting the company payroll system accordingly. All workers affected by the change should be notified in writing. It would also be advisable to have a process in place to monitor the age of workers to ensure the change is made for those 25 years and over.

HOLIDAY PAY AND COMMISSION – LOCK V BRITISH GAS

The Employment Appeal Tribunal ("EAT") has upheld the status quo in the key case of *Lock v British Gas* which concerned the question of whether the Working Time Regulations can be interpreted to conform to EU law with respect to holiday pay. The EAT has followed the earlier decision in *Bears Scotland* on the issue of whether non-guaranteed overtime should be included for the purpose of holiday pay calculations where it found it should. Although the EAT is not bound by its earlier decisions, it concluded that *Bears* is correct in the absence of it being "manifestly wrong".

It is expected that British Gas will appeal to the Court of Appeal so this is not the end of the story. We will keep you updated as the case progresses.

PENALTY CLAUSES IN CONTRACTS – MAKDESSI V CAVENDISH

The Supreme Court in the case of *Makedessi v Cavendish* has reversed the Court of Appeal ruling on penalty clauses and the general accepted position that where the clause is a genuine pre-estimate of loss and compensatory in nature, known as a liquidated damages clause, it is enforceable. Whereas a

provision which is "extravagant and unconscionable" with respect to damages and designed to act as a deterrent to a breach is a penalty clause and, therefore, unenforceable.

The Supreme Court disagreed. It made a distinction between provisions relating to a primary obligation (e.g., to do or not do something specified) and a secondary obligation (e.g., to pay or forfeit a sum or payback a sum due to the breach of the primary obligation). The Court assessed the true test on enforceability of a provision to be only acceptable where the secondary obligation truly protected the 'legitimate business interests' of the innocent party in the enforcement of the primary obligation. It said where "it was out of all proportion" to any legitimate business interests of the innocent party, it was unenforceable.

The practical consequences for employers of this case, is to ensure when drafting employment terms, such as restrictive covenants, that careful consideration and thought is given not only to the commercial rationale and genuine business interests to be protected by the provision (which may or may not have a number of primary conditional obligations) but also the proportionality of the detriment and the potential loss caused by the breach in order to avoid any suggestion of a penalty clause.

MODERN SLAVERY AND HUMAN TRAFFICKING

The *Modern Slavery Act 2015* ("MSA") came into force on 29 October 2015. It sets out a number of compliance requirements for employers in the UK in a step towards promoting ethical business practices and tackling "modern slavery" which exists as much in developed countries such as the UK as in under developed countries of Asia, Africa and elsewhere. The reporting requirements are specific and will first affect businesses with a financial year end of 31 March 2016 with respect to their financial year 2015-16. The key points for affected businesses and the main requirements are summarised below:

- It will affect all businesses, wherever incorporated, who carry on all or part of their business in the UK and who have an annual global turnover of £36 million, it will, therefore, affect international businesses and their subsidiaries wherever they are situated.
- A key aspect of the MSA is to ensure transparency right throughout the supply chain, for employers, this means a requirement under s.54 of the MSA to provide an "accurate and credible" slavery and human trafficking statement. The government has produced guidance on the transparency in supply chains.
- The statement must be produced annually and published on the company website. Where the business is multinational, it will be acceptable for the parent company to publish the statement on its website. It is expected the statement should be published as soon as reasonably practicable after the financial year end but businesses should aim to do this no later than 6 months after the end of financial year.
- The statement will require businesses to set out the specific steps it has taken to ensure there is no slavery or human trafficking in any part of its supply chain or indeed if any steps have been taken at all.

- The statement must be in English and any other relevant languages of the business and supply chain. It be must easily accessible and must be signed off by senior management before publication.

At present there is no specific enforcement action although it would be open to the government to seek an Order to enforce the requirement, however, reputational and long term financial damage to the business if it does not comply is more likely to be a motivator.

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