EMPLOYMENT NEWS HEADLINES JAN-FEB 2020 ISSUE 25

CORONAVIRUS (COVID-19) PANDEMIC- ADVICE FOR EMPLOYERS

The news is flooded with information and opinion on the potentially fatal spread of the virus Covid-19, a virus most likely transmitted from animal to human with no known cure. Below are the key highlights for employers to considered when dealing with this disruptive pandemic.

- Travel restrictions – decisions globally are already being taken on limiting air travel and unnecessary journeys be that crossing borders or the daily commute to work. Wherever possible, employers should look to minimise the spread of the virus by cancelling or delaying international business or holiday travel, looking at systems and arrangements that allow for working from home and business continuity via remote access and asking any employees that have recently travelled back from high risk zones to self-isolate or seek medical guidance as advised by the Government and Public Health England, as necessary;
- Measures in the workplace – as a part of the employers' duty to provide a safe place of work under health & safety and employment laws, there is extensive information and advice already available to employers where employees are not able to work remotely from home and need to be at work. These include:
  - Questionnaires or forms for employees and other visitors to the premises relating to recent illness, international travel to high risk countries in the previous 14 days or contact with those who have travelled, including, with known cases of coronavirus and preventing access, if appropriate. Note: This information should be treated in accordance with your Data Protection Policies;
  - Clear information relating to hygiene including frequent handwashing and use of hand sanitiser, how to cough or sneeze to prevent spread and contact with other humans e.g., no handshaking, social distancing in public places etc., as well as other common-sense measures which can help to minimise transfer of the virus;
  - Some employers are also stepping up activities relating to deep cleaning and the type of anti-bacterial agents used in cleaning the work place and work equipment;
  - Postponement or cancellation of training events or conferences where there would be a mass gathering of people;
  - Carrying out risk assessments with regard to vulnerable employees, for example, pregnant employees, those with asthma or other underlying health conditions which place them

into a high-risk category and wherever possible make on-site or remote working adjustments for them;

- Where employees have concerns about coming into work or simply refuse to due to potential exposure to the virus, there are options for employers to grant annual leave, unpaid leave or sick leave depending on the circumstances.

- Statutory Sick Pay (SSP) – The Government has passed a new regulation the *Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020* only in the past week. This provides for the following:
  - employers' with less than 250 employees will be entitlement to recover SSP for employees off work due to sickness or self-isolation for up to 14-days quarantine period;
  - SSP will commence from day 1 rather than day 4 after the three 'waiting' days under the normal SSP regulations;
  - Medical certificates for employee self-isolating so as to prevent infection or contamination of others with the coronavirus can be obtain from the national health service (NHS) by dialling 111 and will be valid for the purpose of SSP entitlement under these new regulations.

New information is constantly being issued around the world by governments and medical agencies such as Public Health England, Scotland or Wales and the World Health Organisation amongst others. Employers are advised to keep up-to-date with this information and follow any new guidance as the situation unfolds. There is no advice at the present time to close places of work.

"WORKERS" PROTECTED UNDER TUPE – DEWHURST V REVISECATCH LTD T/A ECOURIER (ET)

The case of *Dewhurst v Revisecatch Ltd* is one that will open up huge debate amongst lawyers as to the extent and level of protections afforded under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to a "worker" as opposed to a genuine employee working under a traditional contract of service. The current position is that employees are protected under a TUPE transfer where they are part of an organised grouping when a business is sold or a service is either outsourced or insourced.

This case relates to cyclists who were found to be 'workers' claiming they should have been considered under TUPE when the firm, CitySprint lost its service contract to Revisecatch Ltd. The claims specifically related to unpaid holiday pay and a failure to inform and consult in relation to the transfer.

The Employment Tribunal considered the question of whether workers should be included under the TUPE wording which states it applies to employees defined "*as any individual working under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services*". The Tribunal found that the wording "or otherwise" did intend to cover the category of individuals who hold the status of "worker". Regular readers of Maxlaw Global employment news will be aware there has been a substantial amount of case law in relation to what constitutes a 'worker' in recent years. Workers have limited but not all employment rights such as the right to national minimum wage and holiday pay.

The Tribunal found this second limb of 'workers' defined under the Employment Rights Act 1996 as "*an individual who performs services personally for a third party which is not a client or customer of a*

profession or business undertaking operated by them", who is neither an employee nor a genuinely self-employment contractor working in business on their own account, would be covered under the "or otherwise" definition for the purpose of TUPE.

As a first instance decision this outcome is not a binding decision but is more than likely to be appealed. Depending on how this case develops, it is possible that employers will now need to consider those with "worker" status in the following aspects of their obligations under TUPE:

- Due diligence and provision of employee liability information;
- Electing representatives and wider duties to inform and consult about the transfer; and
- Indemnity and warranty drafting in sale and purchase or service sourcing agreements.

A failure to include workers could expose the business to a risk of a claim for protective awards for failure to inform and consult which is up to 13 weeks' actual pay, one of the claims being considered in *Dewhurst v Revisecatch Ltd.* That said, 'workers' do not have unfair dismissal rights or change to terms and conditions protections as these are expressly limited to employees under a contract of service under current UK law. The question then is, is this about to all change? We will update you further when and if this case is appealed.

IS VEGANISM A PROTECTED CHARACTERISTIC UNDER THE EQUALITY ACT 2010? – CASAMITJANA V THE LEAGUE AGAINST CRUEL SPORTS (ET)

Readers may be aware that the case of *Casamitjana v The League Against Cruel Sports* received a fair amount of media attention despite being another first instance ruling and therefore non-binding.

The case related to determining whether veganism would be a protected belief under the Equality Act 2010, ironically, Mr Casamitjana was dismissed for gross misconduct due to his attempts to influence his colleagues in relation to pension fund investments by his employer in companies that carried out animal testing. The Tribunal determined that veganism could be a protected belief provided it was ethical veganism i.e., more than just diet but a serious conviction against the immoral or unethical exploitation of animals. To satisfy this test, the conviction must:

- Be more than just a viewpoint or general opinion but a serious belief impacting the individual's way of life (as was the case with Mr Casamitijana);
- Be a genuinely held belief;
- Be a weighty and substantial aspect of human life and/or behaviour;
- Have a level or status similar to a religious belief in terms of cogency and importance;
- Be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with the fundamental rights of others.

Based on the particular facts of this case, Mr Casamitijana did satisfy these conditions. The courts will now consider whether he was dismissed for his belief or for some other reason to determine if there was any form of discrimination. Mr Casamitijana did not have the requisite tenure to qualify to bring an unfair dismissal claim. We will update readers on the outcome, however, please note that not all types of veganism will satisfy the test above and will not, therefore, be protected. At the same time, where there is no dispute about the employee's belief, employers should not be too hasty to act without further examination of the motives and intention behind an employee's behaviour before they move to terminate as this may later be found to be unlawful.

APPEAL TO SUPREME COURT REFUSED – CHIEF CONSTABLE OF LECEISTERSHIRE POLICE V HEXTALL (UPDATE)

In Issue 21 of Maxlaw Global employment news we reported on two cases regarding correct comparators in discrimination claims in *Ali v Capita Customer Management Ltd* and *Hextall v Chief Constable of Leicestershire Police*. Both cases were unanimously dismissed by the Court of Appeal. The Supreme Court has now refused to grant leave to appeal in the *Hextall* case. Readers are referred to Issue 21 on the ruling of the Court of Appeal which remains good law.

NEW RATES AND KEY CHANGES FROM 6 APRIL 2020 – A REMINDER

Regular readers of Maxlaw Global employment news will be aware that the Government generally introduce employment law changes and statutory pay and award rates to align with the new tax year on 6 April. This year's rates are as follows:

- *National Living Wage (hourly rates of pay from 1 April 2020)*:
  - Age 25 years + increased from £8.21 to £8.72
  - Age 21-24 years increased from £7.70 to £8.20
  - Age 18-20 years increased from £6.15 to £6.45
  - Age 16-17 years increased from £4.35 to £4.55.
- *Unfair Dismissal* compensatory cap on an unfair dismissal award increases from £86,444 to £88,519. The unfair dismissal basic award will rise from £15,750 to £16,140 (see below for week's pay rate increase).
- *Statutory Sick Pay* separate from the new regulations specific to the Coronavirus outbreak, the annual SSP rates will increase from £94.25 per week to £95.85 per week.
- *Redundancy pay* the limit on what constitutes a 'week's pay' will go up from £525 to £538.
- *Statutory maternity and shared parental leave* rates increase from £148.68 to £151.20 per week.

In Maxlaw Global employment news (Issues 17, 19 and 21) we reported on a number of potential changes that were passing through Parliament with a target date of 6 April 2020 for the laws to come into force. The following changes will be come into effect from this date.

- The requirement to provide employees *and* workers with expanded written statement of terms from day one of employment;
- Extension of the holiday pay reference calculation period from the current 12 weeks to 52 weeks;
- An end to the "Swedish derogation" rule which meant that some agency workers could be paid less than if the end-user had hired them directly;
- The introduction of two weeks paid bereavement leave for parents who lose a child under the age of 18 years.

Important Note: IR35 – the new tax regime which places liability on the end-user where contractors are operating through a personal service company (PSC) and are captured under Her Majesty's Revenue & Customs (HMRC) rules for tax and national insurance purposes and were expected to be subject to income tax and national insurance deductions by the end-user as of 6 April 2020 has been

postponed for one year by the Government to ***6 April 2021*** in light of current global events and economic uncertainty. This announcement was made by the UK Government on the evening of 17th March 2020 just as this newsletter was being finalised for issue.

Other good work plan recommendations have not yet been finalised and will take time to come into force as recommended by the Taylor Review.

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