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**Employment Law Update**

**September 2017**

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**RECENT DEVELOPMENTS**

**Tribunal fees are now unlawful**

**R (on the application of Unison) v Lord Chancellor 2017**

*In a surprising judgment based on the principle of access to justice, the Supreme Court has declared employment tribunal fees to be unlawful. Following confirmation from the Government, the immediate consequence is that tribunals will no longer charge fees and those who have paid fees over the past four years will be entitled to a refund. This is unprecedented.*

**Background**

Before 29 July 2013, no fees were required to issue a claim in the Employment Tribunal or Employment Appeal Tribunal. This was in contrast to the civil Courts where fees are payable, based on the value of the claim.

Partly due to pressure from employer organisations to reduce spurious tribunal claims, fees were introduced on 29 July 2013. The stated aims in the Tribunal Fees Order 2013 were to (1) transfer part of the costs of tribunals from the taxpayer to tribunal users, (2) deter unmeritorious claims and (3) encourage earlier settlements.

There were two types of fees: type A claims - covered breach of contract and unlawful deduction of wages (total £390) and type B claims – unfair dismissal, equal pay and discrimination - £1,200 (total). The fees were payable in stages being £160 for the issue of a type A claim and £250 for the issue of a type B claim. The balance of the fees was paid when the case was listed for a hearing.

The Order did provide for a remission system in which claimants whose income was below a certain amount would not be required to pay the fees or if exceptional circumstances applied. In practice, the remission income level was set too low and very few people qualified.

The fees were subject to immense criticism, not least as there was no sliding scale relating to the value of the claim, making it difficult for those on low incomes to bring claims. The Government did conduct various reviews of the fees, but the only changes it agreed to make in January 2017 were in relation to the remission system so that more people would qualify.

Since the fees were introduced, there has been a substantial reduction in the number of claims brought before Tribunals.

In 2013 and 2014 the trade union Unison brought two judicial review proceedings against the Government arguing that the making of the Fees Order was unlawful as it prevented access to justice both under UK law and EU law. It also meant that individuals were also unable to enforce their employment rights which had been granted to them by Parliament and in particular, discrimination rights. They relied on the substantial reduction of tribunal claims in support of their arguments.

Unison’s arguments were rejected by both the High Court and the Court of Appeal. By contrast, the Supreme Court accepted all Unison’s arguments and declared the fees to be unlawful.

Comment

Whilst the fees were undoubtedly unfair, the Supreme Court Decision is surprising given that most of the evidence was rejected in two cases before the High Court and subsequently the Court of Appeal. The latter,

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whilst sympathetic to Unison’s arguments, did not consider the evidence provided to be a safe basis for concluding that the fees order was unlawful.

There is, of course, nothing to stop the Government bringing in new tribunal fees at reasonable levels but this would have to be debated in Parliament and it seems unlikely that there would be any political will to do so at present. The fact that the Government has ordered tribunals to stop charging fees and agreed to issue refunds confirms this.

The introduction of fees is not, however, the sole reason for the decline in tribunal cases. Other changes introduced in 2013 have also had an impact. These include increasing the qualifying period for unfair dismissal claims from one year to two years, giving the tribunal increased powers to strike out hopeless claims at an early stage and requiring payment of a deposit of up to £1,000 to allow a weak claim to proceed together with a costs warning.

If fees are no longer required for tribunal cases, then there will almost certainly be an increase in claims, but perhaps with the current safeguards in procedures, the system will be more balanced between employers and employees.

**Good Work: the Taylor Review of Modern Working Practices**

**New Dependent Contractor Status**

*The Review of Modern Working Practices by Mathew Taylor was commissioned by the Government in November 2016 following various challenges to self-employment status by gig economy workers together with concerns about zero hours contracts and new models of working. The report was published in July 2017 and recommends improvements to existing law to provide greater clarity on rights and status, rather than fundamental changes. The review is due to inform the Government’s industrial strategy.*

The main recommendations are as follows:

* Retain the three employment categories of employees, workers and self-employed but rename workers as ‘dependent contractors’.
* Simplify the test for self-employed/dependent contractor status with more emphasis on control rather than what is stated in the contract.



* Dependent contractors should be entitled to holiday pay and statutory sick pay (SSP) (subject to specified length of service). There should be stronger incentives for companies to treat them more fairly including a written statement of terms on day one of their job.
* Higher rates of the national minimum/living wage (NMW) should be paid to workers who are employed on zero hours contracts. This means employers would retain flexibility but would have to pay more for this right.

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* Agency workers should have the right to request a direct contract of employment after 12 months with the same hirer which the hirer would be obliged to consider reasonably. Similarly zero hours workers should be entitled to request a contract that guarantees hours which better reflect the actual hours worked after 12 months.
* In order to improve access to holiday pay for seasonal, casual and zero hours workers, the pay reference period should be increased from 12 to 52 weeks.
* With regard to enforcement of employment rights, the review recommends that HMRC which currently has responsibility for enforcing the right to NMW and SSP should also enforce the right to holiday pay for low paid workers.
* The review recommended a waiver of fees so that individuals can apply to Tribunals to have their employment status determined by a Tribunal without having to pay a fee. However, in view of the Supreme Court decision this point is now obsolete.
* The review also calls on the Government to make the process of enforcing Tribunal awards simpler by making the Government responsible for enforcement without requiring the employee worker to fill in extra forms, pay an extra fee or inflated additional Court proceedings.
* The Government should also establish a ‘naming and shaming’ scheme for those employers that do not pay Tribunal awards within a reasonable time.

Comment

The Taylor review is a balanced report which is aimed at compromise by improvements to existing law rather than fundamental changes. Many of its recommendations follow existing Tribunal decisions on challenges to self-employment status which confirm that workers in the gig economy should be entitled to holiday pay and statutory sick pay together with the NMW. The report has not, however, been well received by either unions or businesses.

There seems to be little political will to implement the Taylor Report which would require new regulations so, at present, there are no pending changes to legislation.

However, perhaps due to the widespread publicity of the various challenges to self-employed status and zero hours’ contract, some employers are now starting to take a different view including offering some form of sick pay for self-employed workers and limited guaranteed hours for workers on zero hours’ contracts.

With the abolition of Tribunal fees, it is also easier for unions/individuals to issue claims challenging self-employment status on behalf of their members.

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**BBC’s Gender Pay Gap Reporting – A Lesson for other Companies?**

****Publication of gender pay gap information for large companies (250+ staff) is now required by April 2018. Such companies must make the following calculations in four groups based on lowest to highest pay.

1. The average gender pay gap as a mean average

2. The average gender pay gap as a median average

3. The average bonus gender pay gap as a mean average

4. The average bonus gender pay gap as a median average

5. The proportion of males receiving a bonus payment and proportion of females receiving a bonus payment

The report must be published on the company’s website as well as on a designated Government website. Thereafter companies will be required to report on an annual basis.

There are no financial penalties for failing to comply. However, it is the ‘naming and shaming’ by publication on Government websites or league tables which will be most damaging for a company if their figures do not look good, regardless of any explanation.

Although not legally required to publish its gender pay gap until 2018, the BBC was under political pressure to do so as part of the negotiations for its licence renewal.

The widespread criticism which the BBC received following publication of, not only its gender pay gap, but the vast differences in salary of its male and female staff in comparable roles, shows the damage which can be done to a company’s reputation.

Some companies may have valid reasons for gender pay differences, particularly at senior level. However, most people will not be interested in a company’s explanation or justification. If companies want to avoid being ‘named and shamed’ then they should be taking corrective action now to address any gender pay gap disparity.

**CURRENT RATES**

**National Minimum Wage and National Living Wage**

The national minimum wage provides a minimum hourly rate of pay for workers between ages 16-24. The national living wage applies to workers aged 25 and over. The rates for the NMW and the NLW are now increased in parallel from April 2017 (previously the NMW was increased in October). The rates increased on 1 April 2017 and are as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **Apprentices** | **16 and 17** | **18 – 20** | **21 – 24** | **25+** |
| National Minimum Wage | £3.50 | £4.05 | £5.60 | £7.05 |  |
| National Living Wage |  |  |  |  | £7.50 |

The penalties for failing to pay the NMW and NLW are high and can be up to £20k per worker.

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**Employment Protection Awards**

The maximum limits on employment protection awards are increased in April each year. From 6 April 2017 the rates are as follows and apply to all dismissals after this date:

|  |  |
| --- | --- |
| **Award** | **Current Rate**  **(applies to dismissals from 6 April 2017)** |
| Unfair dismissal compensatory award (maximum) | **£80,541**  (maximum – or 12 months’ pay, whichever is lower) |
| One week’s pay for statutory redundancy pay and basic award | **£489** |
| Maximum statutory redundancy payment and basic award | **£14,670** |

Awards for discrimination claims have no maximum limit.

**Maternity and Paternity Pay**

Statutory Maternity Pay and Statutory Adoption Pay are payable for a period of 39 weeks. Statutory Paternity Pay is payable for a period of two weeks following the birth. Under the shared parental leave scheme, it is possible for parents to share up to 37 weeks of the mother’s maternity pay.

The rates are increased in April each year and from 6 April 2017 are as follows:

|  |  |  |
| --- | --- | --- |
| **Type of Payment** | **Current Rate from 6 April 2017** | **Payment Period** |
| Statutory Maternity Pay and Statutory Adoption Pay (higher rate)  Statutory Maternity Pay (basic rate) | 90% of normal  weekly earnings  £140.98 per week\* | First 6 Weeks  Next 33 Weeks |
| Statutory Paternity Pay | £140.98 per week\* | Up to 2 Weeks |

\*or 90% of normal earnings, if lower.

**Statutory Sick Pay**

Statutory Sick Pay is payable if an employee is incapable of work for 4 or more consecutive days. The entitlement starts from the 4th qualifying day up to a maximum of 28 weeks. From 6 April 2017, the SSP rate is **£89.35** per week.

**Disclaimer**

This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.

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**EMPLOYMENT TEAM AT GSC SOLICITORS LLP**

Members of the employment team are: Tessa Fry (Partner), David Nathan (Partner), Ross Waldram (Solicitor) and Mark Richardson (Solicitor).

**[](http://www.gscsolicitors.com/profiles/show/id/8)Tessa Fry** is Head of GSC’s employment team. She has practiced as a solicitor since 1989 and joined GSC in 2005. Tessa specialises in employment law and business immigration.

Tessa has considerable experience in advising companies (ranging from multi-nationals to SMEs) and individuals on all aspects of employment law from appointment to dismissal and employment tribunal proceedings. This includes employment contracts, termination of employment, sickness absences, disciplinary procedures, transfer of undertaking regulations, settlement agreements and family friendly policies. She has also handled numerous employment tribunal claims relating to unfair dismissal, race, sex, disability and age discrimination, unlawful deduction of wages and appeals to the Employment Appeal Tribunal.

Tessa has represented clients in various High Court actions for breach of contract including injunctions to enforce restrictive covenants, actions for breach of copyright and confidentiality and claims for non-payment of bonuses.

Tessa has also lectured on employment law and related topics, most recently in an international webinar on the ‘legal aspects of executive coaching’ for the ACEC. Publications include articles in the Guardian online, People Management, Reward, the Recruiter and Corporate International. The Guardian online article on equal pay can be found at: <http://www.theguardian.com/women-in-leadership/women-leadership-blog/2014/jan/24/equal-pay-case-birmingham-city-council-fallout>. Media work includes 3 interviews on the Workplace at Resonance FM. The latest interview can be found at: <https://www.mixcloud.com/Resonance/the-workplace-9th-february-2017/>

**David Nathan** qualified as a solicitor in January 2001 and joined GSC in 2005. David specialises in employment and company/commercial law and became a partner at GSC in 2013.

David advises companies and individuals on all aspects of employment law including drafting employment contracts, service agreements, staff handbooks, settlement agreements, disciplinary and grievance procedures, redundancy procedures, unfair dismissal, wrongful dismissal, discrimination claims, employee benefits and the employment law aspects of mergers and acquisitions. David also advises on shareholders agreements and share purchase agreements.

David has represented clients in employment tribunal and employment appeal tribunal matters.

**Ross Waldram** trained at GSC and qualified as a solicitor in October 2009. Ross specialises in intellectual property as well as advising on employment law.

Ross’ employment experience includes advising companies and individuals on employment law issues, including terminations, disciplinary and grievance procedures and settlement agreements. He also handles employment tribunal claims and has particular expertise on the protection of copyright/intellectual property within the employment relationship.

**Mark Richardson** trained at GSC and qualified as a solicitor in September 2011. Mark specialises in Intellectual Property, Litigation and Employment law.

Mark’s experience includes advising both employers and employees in respect of employment law issues such as disciplinary and grievance procedures, settlement agreements and employment contracts. Mark has assisted in the representation of clients at employment tribunals and has experience in the preparation of tribunal documents and witness statements.

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