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October 2016 Employment Newsletter

Welcome to the latest edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do let the employment team know.

ACAS guidance for managers

ACAS has published new guidance on managing people. The guide advises managers about their role and provides guidance on how to approach situations that may arise. To access the guide, go to: http://www.acas.org.uk/media/pdf/9/t/Managing_people.pdf

Employers fail to grasp recruitment laws

The results of a recent survey undertaken by the Equality and Human Rights Commission (EHRC), suggests employers are ill-informed of the current law on recruitment. According to the report, less than half of employers checked employees had the right to work in the UK prior to hiring them, while 9% of employers believed that foreign workers were not entitled to the same wage as British ones.

In light of the survey, the EHRC has vowed to send a report to businesses reminding them of their legal recruitment responsibilities. In the same week a company has faced criticism for advertising for a personal assistant with a "classic look, brown long hair with B-C cup". The approach has been labelled by the EHRC as "appalling, unlawful and demeaning to women".

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An early conciliation certificate extends to a claim of constructive dismissal where resignation occurred after the certificate was issued

The Employment Appeal Tribunal (EAT) has confirmed that a complaint of unfair constructive dismissal was validly accepted where the employee's resignation postdated the early conciliation certificate but was connected with the facts and allegations which prompted the claimant to first register a potential claim with Acas.

The EAT held that the employment tribunal had correctly concluded that the employee's resignation, triggered by breach of the implied duty of trust and confidence and a failure to consider her grievance properly, was connected with the facts and allegations which led to the referral to Acas under the early conciliation procedure. The mandatory obligation on a prospective claimant with regard to early conciliation was not limited to referring individual causes of action or specific claims to Acas.

Compass Group UK & Ireland Ltd v Morgan UKEAT/0060/16.

Indirect discrimination 'up in the air'

An employment tribunal has held that easyJet's roster practices were indirectly discriminatory towards two breastfeeding employees on the grounds of sex. This arose through easyJet's refusal to allow the employees (who were crew members) to have bespoke roster arrangements. The employees had requested not to be rostered for shifts longer than eight hours.

The tribunal awarded compensation and made recommendations.

McFarlane and another v easyJet Airline Company Ltd ET/1401496/15 & ET/3401933/15.

Statutory holiday pay must include a representative element of results-based commission

Mr Lock was employed by British Gas Trading Ltd as an internal energy sales consultant. He received a basic salary plus commission on the sales he achieved. The commission made up approximately 60% of his remuneration and was based on results only; it did not depend on how much work was done.

During a period of statutory annual leave, Mr Lock was paid his basic salary plus the commission from previous sales that happened to fall due during the period. As Mr Lock had normal working hours his holiday pay only included basic salary and not commission. The commission he received in the months after a holiday would therefore be lower because he had not secured sales generating commission while he was on holiday.

Mr Lock brought a claim in an employment tribunal, arguing that the reduced income amounted to a breach of the Working Time Regulations (WTR) 1998. Mr Lock's claim was selected as the lead claim for a large number of results-based commission cases (60 claims in the East Midlands region and 918 claims in the rest of the country). His case was referred to the European Court of Justice (ECJ) to gain clarity on the position between holiday pay and commission, where commission is paid on a regular basis. The ECJ held that the holiday pay of workers like Mr Lock should not be calculated based on basic salary alone, but should also include an amount that reflects the commission element of his pay; the requirements of the Working Time Directive (WTD) are that a worker receives 'normal remuneration' during their four weeks leave.

The case then reverted back to the Tribunal to decide, on the facts, whether British Gas had adequately factored in commission payments when calculating Mr Lock's holiday pay and suggested that commission should form part of 'normal pay' and must be factored in when calculating holiday pay.

British Gas appealed however the Employment Appeal Tribunal (EAT) followed the Tribunal decision and ruled in favour of Mr Lock, stating that UK laws can be read so as to comply with the requirements of the WTD. The EAT also followed their earlier decision in Bear Scotland v Fulton which held that overtime should also be included in the calculation for holiday pay.

It is understood that British Gas intends to seek leave to appeal to the Supreme Court. In the meantime, the Court of Appeal's decision on the 7th October 2016 does not unfortunately progress this long-running saga much further. Employers are left wrestling with the same practical difficulties in calculating the commission element of statutory holiday pay as previously.

British Gas Trading Ltd v Lock and another [2016] EWCA Civ 983

Gig economy hit by Uber Employment Tribunal ruling by Steven Eckett

The Employment Tribunal's decision to class these particular Uber drivers as 'workers' rather than 'self-employed' will have repercussions throughout the gig industry and is highly likely to lead to a rethinking of the employment status of these workers and with it, a

clarification of their employment rights. It is also likely to impact on Uber drivers in the EU who are also bound by the Working Time Regulations.

Decision sheds clarity on definition of worker

The gig economy has thrived on companies using a pool of self-employed or freelance workers rather than directly employing them but this has, at times, led to a misunderstanding amongst various businesses over who is classed as self-employed and who is classed as a worker. The difference has a significant impact because workers in law have a range of employment rights that they are able to enforce.

People are classed as workers when there is a mutuality of obligation on the part of the business to provide work that these workers are obliged to undertake, with a degree of control by the business as to where, when and how the work is to be carried out. This contrasts with genuinely self-employed contractors who usually are free to accept or decline work.

Greater cost to the 'gig' industry and consumers

The employment tribunal's decision today certainly sheds clarity on the employment status of this new breed of 'freelancer' currently fuelling the growth of the UK gig economy. However, consequences of the judgment is likely to result in increased costs to the gig industry in order to comply with the new employment laws, and it's probable that these will be passed on to the consumer, such as through higher fees, delivery rates and prices for goods and services. The service industry like couriers, fast food delivery companies and portable cleaning operators are likely to be hit the hardest.

Workers, not to be confused with employees who have greater employment rights in law, are also entitled to minimum legal rights. These include for example, the right to claim unfair dismissal, to receive statutory sick pay maternity, paternity and parental rights; to be paid the national living or minimum wage depending if they are aged 25 or more; to have working time rights such as not to be forced to work more than 48 hours per week, regular rest breaks and night working health and safety standards; to receive a statement of terms and conditions of employment.

Further, Uber will need to have a qualifying auto-enrolment pension scheme in place and backdate any pension contributions.

There is also the issue of immigration. If those you hire are classed as workers then the burden to vet them will be on the business to ensure that all those individuals have the right to live and work in the UK. Failure to do so can lead to fines and ultimately criminal sanctions against the business and also the individual, not to mention the risk of bad publicity should the business fail to compile to any minimum legal employment rights.

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Take action

Businesses concerned as to how this ruling may affect them should seek timely legal advice on their recruitment policies and procedures to ensure compliance with the law. It is also imperative that they issue written terms and conditions to these workers clarifying pay rates, hours of work, role and responsibilities, sickness provisions, holiday entitlement and health and safety and equal opportunity policies. It is also no good having a succession of fixed term contracts either to get around the law as after the fourth renewal of a fixed term contract it will be deemed to be permanent.

For information, the judgment on the case can be found here.

We hope this newsletter has been helpful and gives you peace of mind with practical advice. Please contact Michelle Morgan on m.morgan@gardner-leader.co.uk with any questions or feedback. Click here for information on the employment team.