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Employment Newsletter - July 2017

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.

The Taylor Review – "Good Work"

The long awaited Taylor Review of modern employment practices was published on 11th July 2017. The report, which was commissioned by Theresa May towards the end of 2016, seeks to undertake a wide-ranging review of employment legislation and practice in light of recent changes in the modern workplace including the so-called "gig economy".

The review calls for a "significant shift in the quality of work in the UK economy" and the full recommendations can be found here

The review focuses on several key recommendations intended to address the low quality work in the flexible contractor market, reduce exploitation of these workers and to address the tax dodge associated with this work:

1) **Employment status: addressing the power balance.** We already have employees, workers and self-employed contractors as distinct ways of working; a key recommendation is the introduction of a fourth kind – the dependent contractor. This category would catch those working for companies such as Deliveroo and Uber and ensure that they are entitled to sick pay and holiday pay.

This recommendation picks up the suggestion from the previous report from the Work & Pensions Committee that those engaged on such terms should be workers by default, which would entitle them to holiday pay.

A new kind may well help to maintain the flexibility currently valued by so many, but this additional category could simply increase disputes and the additional costs will be a heavy burden for employers so even if implemented, this is unlikely to be a quick fix.

2) **Potential earnings calculator: not a guaranteed minimum wage.** One of the more unusual recommendations appears to have been inspired by "piece work" as used in the agricultural sector. The new "dependant contractors" should be able to have access to a payment system that tells them how much work they have to complete in order to be paid at least the minimum wage. This will also require that they work when there is high demand, but will give the option of working at other times during which the individual can choose whether they are prepared to work for lower pay.

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3) **National Insurance:** The review continues to suggest that self-employed individuals should have to pay the same level of national insurance as employed workers. Currently two people doing exactly the same job but on different employment contracts would pay entirely different levels of NI and the report recommends that this should change.

4) **Zero hours contractors: survive scrutiny.** Many expected the review to recommend the abolition of zero hours contractors, however, instead the review recognises that many actually value the flexibility these arrangements allow. Instead, the sensible recommendation is that those on zero hours contracts are given the right to request fixed hours. This would appear to be supported by industry, particularly given the recent experience of McDonalds who offered all their zero hours employees the option to move onto fixed contracts and only 20 per cent of them took up the opportunity.

So what next?

15% of the workforce is now self-employed which has led to a large number of positive developments and opportunities for workers, employers and the wider UK economy, as well as the 'explosion' in the gig economy. The recently elected Government must think carefully before making any significant changes to employment rights. Any regulation changes must be equally fair to both the individual contractors and employers and continue to offer the flexibility and opportunities that all parties are currently benefiting from.

Employers concerned as to how these recommendations may affect them should review their recruitment policies and procedures to ensure compliance with the law, paying particular attention to issues that may arise from taxation; whether that be as a result of IR35 or in fact not paying national insurance contributions due to confusion over whether the person is self-employed or actually an employee.

It is also imperative that employers 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 a permanent employee.

Lastly, the report also states that will be no material change in the Employment Tribunal fees which were recently introduced. The decline in the number of Employment Tribunal applications has suggested a perceived balance of power to employers. The report states that the Government should keep it under review.

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Acas Early Conciliation: Getting the Employer's Name Right

If a director was named on the ACAS Early Conciliation form and the company on the Claim Form, should the claim be allowed to proceed (as this was a minor error)?

No, held the EAT, in Giny v SNA Transport Ltd.

The Claimant brought several claims, including constructive dismissal, against his former employer. When he was initially unrepresented, he contacted Acas for Early Conciliation and named the director, Shakoor Nadeem Ahmed, as the prospective Respondent. He then instructed solicitors to prepare his Claim Form which correctly named the Respondent as his employer, 'SNA Transport Limited'. The employment tribunal rejected his claim as the Respondent had not been correctly identified on the Early Conciliation Certificate. His solicitors applied to the tribunal to reconsider that decision on the basis that the use of the director's name was a "minor error", which (under the rules) allows a tribunal to overlook it.

The employment tribunal rejected that application. Confusing the director with the company was not a minor error, and it had been right to reject the claim. The Claimant appealed.

The Employment Appeal Tribunal, although sympathetic, rejected the Claimant's application. It said that a two stage test should be applied. Firstly, was it a minor error? If not, the claim would be rejected. Secondly, if it was, the tribunal should go on to consider whether or not it was in the interests of justice to allow the claim to proceed. Although in principle the distinction between a natural and a legal person could amount to a minor error, in this case it did not. Each case should be considered on its facts, and as there was no error in the tribunal's Judgment, the Claimant's appeal was dismissed.

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.