Price Bailey
LEGAL SERVICES

Spring 2016

Employment Law Times

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Welcome to the Spring quarterly e-bulletin!

We all know that the profitability of any business is of paramount importance to business owners, and as a result there is a drive for continuous growth or internal efficiency savings but this often comes at the detriment of compliance.

No one likes to hear the 'C' word, but it might be surprising to know how profits can flourish with the right infrastructure in place. The articles in this edition of Employment Law Times will guide you through recent changes in the law, and how you can use these to boost the performance of your business.

The first section walks you through some recent legislative changes regarding Class 1 NICS, National Living Wage, and modern slavery.

We will then highlight some key cases that may impact on the day-to-day issues that arise in the workplace and how you can manage your team and avoid any issues around discrimination.

You will see how the Bribery Act 2010 can have huge consequences on a business if not considered when building business relationships. Similarly, a recent case has changed the way holiday pay is accounted for. Read our articles to find out what these changes mean to your business.

As a final note, our Tax Advisor, Richard Grimster, looks at the changes to the rules around travel and subsistence, in his article "The Last Few Miles".

If you would like to discuss any matters included in this edition of the Employment Law Times then please contact Victoria Pratley or Anna Harvey.

We would also like to take the opportunity to welcome a new team member, Lisa Wignall. Lisa is a Business Advisor and qualified Commercial Mediator. She has helped a number of businesses grow through project implementation and leadership development. Having worked with many entrepreneurs, she understands the commercial balance of productivity, profitability and the workforce.

Legislative changes from 6 April 2016

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Apprentices can boost your bottom line.

There have been changes to Class 1 NICS. From 6 April, employer's National Insurance contributions will not be payable in respect of individuals under the age of 25 who are on a statutory apprenticeship scheme and earning less than £827 per week (£43,000 a year). It's part of the Government's push to create more opportunities for people to access high quality apprenticeships and to support youth employment.

Apprenticeships can be extremely beneficial to smaller businesses and are becoming an increasingly popular way for young people to enter the workplace.

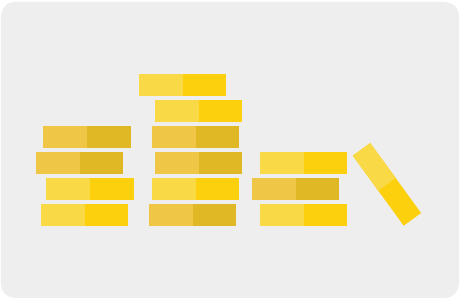
There are many advantages to hiring an apprentice. Not least that they bridge a skills gap, bring a fresh perspective and help to create a dedicated workforce, but can also improve the bottom line performance of a business; the initial outlay of hiring an apprentice is often smaller than companies expect due to government investment and they are also paid a reduced wage.

Find out more about the government apprentice schemes here:

www.greatbusiness.gov.uk/taking-on-an-apprentice/

Please speak with us or Price Bailey's Payroll Specialists if you have any concerns or want more information.

Introduction of the National Living Wage



The changes to legislation around National Living Wage (NLW) will come as no surprise to anyone with the regulation being so well publicised but how well prepared have you been when reviewing your payroll? As you'll see below, there are penalties for non-conforming and chances are you could be named and shamed too!

From 1 April 2016 the NLW entitles workers aged 25 and over to a minimum wage of £7.20 per hour. That's 50p more than the existing National Minimum Wage (NMW), which will continue to apply to under-25s.

Take note of these rates. Strict penalties apply where employers haven't paid the amounts they should have. Expect a fine of 200% of the underpayment of the NLW or NMW (reduced if you pay up quickly), up to a maximum of £20,000 per worker. There's also the possibility of director disqualification.

Modern slavery in your supply chain?

From the end of March 2016, big companies (those with an annual turnover of £36 million or more) have been required to file information on modern slavery. They'll have to publish an annual statement that sets out what they've done in their last financial year to make sure that slavery and human trafficking isn't happening (a) in any part of their business, and (b) in their supply chains.

It is this second category that could affect smaller businesses. If you're not in the £36m category, you could still be a player in those businesses' supply chains or, indeed, in their suppliers' supply chains. You should keep information about what you're doing to make sure that slavery and trafficking isn't happening in your organisation. Those you supply will need this in order to comply with their legal obligations to provide modern slavery statements. And they'll probably thank you for being on the ball.

Some employers will see this as a formality, but it's something that needs to be taken very seriously. And remember that it's not just the slavery issue itself that you'll need to think about. You'll be handling and passing on information (data) and so will need to make sure you are compliant with the Data Protection Act. Take time now to put some plans and systems in place and get to grips with exactly what the new rules will mean for you.

With legal obligations changing, the implementation of a new system or process is inevitably a challenge for any business. The critical step is to get the planning right; understand exactly what changes will take place and how these will occur. When you're dealing with matters of compliance, you must ensure you engage the team, communicate the new requirements and allow a sufficient time frame for the team to test and adapt the process to make it work for the business.

Our suggestion with any new regulation is to map out the new process with the team. Draw a flow diagram and consider who will need to be involved, who will be responsible for signing off documentation, and who will lead the project and update the team on any future changes.

You may also find the Modern Slavery Act link below a useful reference tool on this topic. Please get in touch with us if you are unsure of your obligations.

Click here to view the Modern Slavery Act 2015 article.

Rates rise

There has been a rise in rates for dismissal claims that will apply from 6 April. These rates include:

- a week's pay, used to calculate unfair dismissal basic awards and statutory redundancy payments, rises from £475 to **£479**
- the unfair dismissal maximum award also goes up to **£78,962** (previously £78,335).

But there's no change to maternity, paternity, adoption, shared parental leave, and sick pay limits.

There are penalties for non-payment if you don't pay up following a tribunal award against you, you could find yourself having to pay the government another 50% of the unpaid amount, up to a maximum of £5,000. The same applies to non-payment of settlement sums agreed via Acas.

Changes resulting from case law

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The following articles and cases highlight key day-to-day issues that may arise in your business and how you can handle these.

Letter to sick employee led to trouble
Private Medicine Intermediaries v Hodkinson

Our February edition of Employment Law Times highlighted that workplace wellbeing is crucial for the success of your business. Engaging your employees should have a direct impact on the reduction of sick leave taken by staff. However, where instances of absence occur, be mindful of how you communicate and correspond with the individual.

Dealing with employees who are on sick leave presents a host of potential pitfalls for employers. In the case below, getting things wrong resulted in constructive dismissal.

Ms Hodkinson was disabled; she had thyroid dysfunction and cardiac arrhythmia. She went on sick leave with what she said was depression and anxiety caused by bullying and intimidation by managers in the business. While she was off work, the employer wrote to her, the letter proposed a meeting. It also set out some areas of concern that the employer wanted to discuss with her and these were not serious or pressing issues.

Ms Hodkinson resigned, claiming that the employer had breached the implied terms of trust and confidence and that she considered herself to have been unfairly constructively dismissed. She also claimed, alongside some other disability-related claims, that the correspondence amounted to harassment.

The Employment Appeal Tribunal (EAT) upheld the tribunal's constructive dismissal finding. The employee was ill, and the letter did not need to be sent. But this didn't amount to harassment. It hadn't been established that the employer's action in sending the letter related to her disability, or that it created an intimidating, hostile, degrading, humiliating or offensive environment for her.

This shouldn't stop you from communicating with employees who are on sick leave, in fact, it's important to stay in touch. But make sure that you judge each communication carefully. If something can wait, hold off until the employee is better.

Monitoring employees' messages Barbulescu v Romania

The need to ensure and enhance employee productivity is a reality no business can ignore, but however hard you try, it's inevitable that you'll encounter factors that may weaken or extinguish employee motivation and dampen productivity.

The key to getting the balance between taking a relaxed approach to non-work online messages and a very strict approach with no personal freedom is having a very clear, well communicated and documented policy. We are able to assist you with the drafting of this should you require assistance.

The case below highlights what is and is not acceptable in the workplace when it comes to personal messages.

Mr Barbulescu was dismissed for breaching his employer's rules on the personal use of the internet at work. On his work-related Yahoo account were found to be messages to his brother and fiancée about his health and sex life.

Was it right for the employer to have accessed those messages and for them to have been used in the disciplinary and subsequent court proceedings? Mr Barbulescu argued that there had been a breach of his right to respect for private life and correspondence.

The case went to the European Court of Human Rights which found against Mr Barbulescu. Although workers have a reasonable expectation of privacy at work, this isn't absolute. The employer had a total ban on the private use of work equipment, and this was an important fact. It had accessed Mr Barbulescu's Yahoo account (set up for work purposes) believing that it contained business-related messages only, and for the purpose of checking that Mr Barbulescu was fulfilling his work duties. This was a proportionate interference with his rights. The employer hadn't accessed other data and documents stored on the computer, and the monitoring was therefore limited in scope and was proportionate.

So, far from living up to some of the headlines it generated, this case really came down to basic rules about monitoring and data protection. Yes, employers are entitled to check that their employees are fulfilling their working duties, but only if done properly and it's proportionate. Making clear what your position is on private communications at work is the first step. Then it's about having a clear monitoring policy that's communicated and carried through.

Exaggerated injury, fair dismissal Metroline West Ltd v Ajaj

Supporting employees that are not fit to work is costly for any business, but what can you do when you suspect an individual may be exaggerating their injuries?

The Employment Appeal Tribunal (EAT) has made it clear that a worker, who dishonestly claims to be unfit for work, breaches the trust and confidence that an employee and employer must share.

Mr Ajaj, a bus driver, said he slipped and fell at work, injuring himself to the extent that he was unable to do his job. Surveillance evidence showed that he was more mobile than he said he was. A gross misconduct dismissal followed.

Unfair dismissal, held the tribunal. Even though Mr Ajaj had exaggerated his inability to walk, there was no evidence that he had exaggerated his inability to do his job. But the Employment Appeal Tribunal (EAT) overturned that decision. Whether or not someone is fit to do their job goes to capability, not conduct. Mr Ajaj had exaggerated the effects of his injury and that was culpable and misleading. Dismissal for gross misconduct was the obvious sanction, and certainly a reasonable one. So Metroline's decision to dismiss Mr Ajaj was fair.

Employer liability extended
Mohamud v Morrisons Supermarket
Cox v Ministry of Justice

This case should present itself as a caution to employers that you cannot merely wash your hands of a situation that happens outside the workplace (particularly if on the business forecourt!) or if an individual involved is not an employee.

Two important Supreme Court cases have been decided on the issue of vicarious liability. The effect is that employers may now be liable for the acts of employees (and others) in more situations than before.

In the Mohamud case, a claim was brought against Morrisons by a customer who had been assaulted by one of its employees on the forecourt of a Morrisons petrol station. The employer was held to be liable for the actions. There was a close enough connection between the employee's actions and their employment. It was the employee's job to attend to customers, and Morrisons was liable for his abuse of his position.

Cox v Ministry of Justice put a different slant on liability again. A prisoner, working in the prison kitchen, injured a catering manager by dropping a heavy bag of rice on her. The Ministry of Justice was liable, even though there was no contract of employment between it and the inmate. It was significant that the prisoner was an integral part of the Ministry of Justice's business. Also that he was placed by the prison service in a position where there was a risk that he might commit a variety of negligent acts.

The key thing for employers to take from the widened scope of vicarious liability is to make sure that you take all reasonable steps to stop incidents happening. Policies and training of these policies is a useful indicator of your commitment to this.

We can assist you in both the preparation of these policies and in delivering training.

Anna Harvey, Senior Employment Lawyer
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Discrimination considerations

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Discrimination in the workplace is always a hot topic. The articles below highlight what you should, and shouldn't do to prevent discrimination issues within your business.

Dyslexia at work

In light of improving work place wellbeing, studies suggest that dyslexic employees face particular challenges at work and often experience work-related stress. It is crucial for employers to understand the signs of dyslexia.

The two stories regarding dyslexia below focus on two completely different angles.

Fraud or Dyslexia?

The first was about a dyslexic member of staff at Starbucks who had mistakenly entered the wrong information into a duty roster. She was accused of falsifying the documents, was demoted and told to retrain.

She won her disability discrimination case. According to reports, Starbucks hadn't seemed to properly understand equality issues and it should have made reasonable adjustments to take account of the dyslexia.

Dyslexia as a positive?

Also in the news was an advert for a job that was open only to people with dyslexia. "We are simply looking for the best innovative thinkers and they are usually dyslexics", the marketing firm's founder is reported to have said.

Controversial, maybe, but favouring someone who has a disability isn't prohibited by the Equality Act. And the ad is an interesting take on dyslexia; one that really shouts about its positive aspects.

Employers should take note and make sure that they can recognise the characteristics. According to the British Dyslexia Association, about one in 10 people have dyslexia, and not all have been formally diagnosed. It can mean that dyslexic employees are not properly understood, not treated fairly, and their strengths are not fully played to at work.

Knowledge of disability
Gallop v Newport City Council

An employer can only be guilty of disability discrimination if they knew, or should have known, that an employee was disabled. But in what circumstances will they be taken to have known?

The Employment Appeal Tribunal (EAT) in Gallop v Newport City Council considered whether, if appointed occupational health advisors knew that an employee was disabled, the employer effectively did, too.

You can't imply that knowledge, said the EAT. Where a sole decision-maker is alleged to have discriminated, it is their motivation, intention and knowledge that counts, and not the state of mind of those who gave them information.

Instruction to speak English wasn't discriminatory
Kelly v Covance Laboratories

It can take a brave employer to ban the use of certain languages in the workplace. But in this case, the employer was found to have a legitimate reason for insisting on English-only.

Russian-born Ms Kelly worked at a lab that carried out animal testing. After being told that she was not allowed to speak Russian at work, she brought claims including race discrimination against her employer.

The reason this claim failed at tribunal and at the Employment Appeal Tribunal (EAT) was because the instruction to not speak Russian at work was not about race or national origin; it was about security. Covance had been the subject of unpleasant attention from animal rights activists and was concerned by Ms Kelly's behaviour. She used her mobile phone at work, disappeared into the bathroom with her phone for excessive periods and spoke on her phone in Russian. There were fears that she might be an animal rights infiltrator and it was felt necessary that English-speaking managers in the business could understand conversations that were taking place.

Although it can be discriminatory to impose certain language requirements at work, in this case another employee in similar circumstances, speaking another language (apart from English), would have been treated in the same way as Ms Kelly. There was no discrimination.

Her harassment claim failed on the same basis: the instruction to not speak Russian wasn't given because of Ms Kelly's race or national origin. It was because of her behaviour in the context of her employer's operations and the risks it faced. In addition, the instruction didn't have the effect or purpose of violating Ms Kelly's dignity or creating an adverse environment for her (essential elements of harassment).

Treat this case with some caution. You'd need a really good business reason that justifies a restriction or ban on the use of certain languages at work. And you'd need to apply your language requirement fairly across your workforce, underpinned by a clear policy.

And finally, don't forget....

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Fine for bribery

The Bribery Act came into force in 2010 and brought with it many changes but lots of employers are yet to take it seriously. It is now among the strictest legislation internationally on bribery and the penalties are huge. The only defence is to have 'adequate procedures' so now may be a good time to review your approach to the risks in your business of bribery and corruption.

Recently, a PLC is reported to have become the first UK company to be convicted for failing to prevent bribery. The penalty? The business was ordered to pay £2.25m.

It goes to show that the Bribery Act is alive and kicking. If you haven't already got in place good policies and procedures designed to prevent breaches, now's the time. And make sure that they extend to all parts of your business, including those that are based outside the UK.

Changes to holiday pay rules

You may be aware that there have been some interesting discussions around how employers treat holiday pay since late 2014. The subject has re-emerged in the recent Lock v British Gas appeal case where the court served a surprising judgment.

The key message from Europe is that a worker should not be placed at a financial disadvantage when taking statutory annual leave as this could deter a worker from exercising the right to use their holiday entitlement.

So, what does this mean for employers?

Effectively, the Employment Appeal Tribunal tried to resolve all the questions surrounding this message. They decided that 'normal remuneration' should be paid during periods of holiday for those with normal working hours, and what should be included in normal remuneration was defined as follows: 'Normal remuneration is where there is an intrinsic or direct link between the payment and the work a worker is required to carry out.'

So, the recent case confirmed that holiday pay should include commission, guaranteed or compulsory overtime, and performance based or attendance bonuses, as they are likely to be intrinsically linked to the performance of the tasks required under a contract.

The treatment of voluntary overtime and annual discretionary bonuses is less clear and will depend on the circumstances of the case.

As always, the devil is in the detail and we expect to see further litigation in the Court of Appeal which is likely to take place in 2017 – we will of course keep you updated with all developments. But in the meantime, it is a decision we feared as it creates complications for how holiday should be calculated and potential risk of facing large back dated holiday pay claims (although claims cannot go back more than two years).

The initial panic when the first judgment came out seems to have died down but this case does illustrate the need for us to check holiday pay is being calculated properly and clients are not at risk of large back claims.

Tax Corner

This article was written by **Richard Grimster**, Senior Manager.

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Welcome to this quarter's Tax Corner.

The Last Few Miles

Travel and Subsistence, Generally

In January 2014 the Office of Tax Simplification (OTS) issued a paper on the complexities of the travel and subsistence rules. Some two years later we have had two rounds of consultation papers and some progress on the matter.

It is widely thought that the current rules allow most employees visibility and certainty. An example of this would be the vast majority of people in the UK who might travel from their home to a factory, depot, or office (a fixed place of work) safe in the knowledge that they bear the cost of doing so. Any further travel from their base of work in the performance of their duties is most likely to be reimbursed by their employer or tax deductible if not.

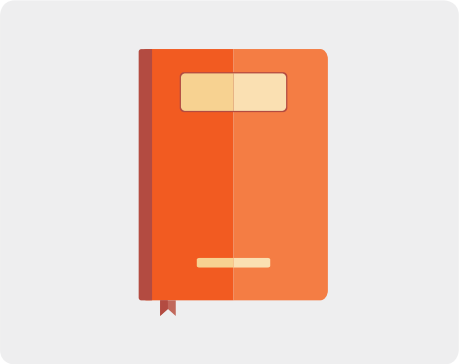
Fortunately for most, there are no significant changes to the current rules, as concluded on 25 March 2016. The overarching message determined by HMRC as part of the consultation process was that addressing specific parts of the rules would be better than the wider changes proposed.

There will continue to be more complex cases where the rules are difficult to apply and where the booklet 490 issued by HMRC does not provide clarity. If you come across these, professional advice should be sought.

Employment Intermediaries

Clearly the problems with complexity can be overcome, but the government is turning its attention to perceived tax avoidance more urgently.

Issues arise because the rules allow for significant tax planning in certain scenarios. Buried within Finance Act 2016 is the insertion of a few clauses which completely restrict the availability of travel and subsistence tax relief for any person who is under the 'Supervision, Direction and Control' of the end-client.



The new rules cover 'Employment Intermediaries' but we will look here at personal service companies under the IR35 rules which had historically allowed for tax advantages which are systematically being withdrawn.

This seeks to address situations where an individual essentially 'works for' the end user but provides their services either through their own personal service company or under an umbrella company arrangement. That seems quite fair, as permanent employees do not have the advantage of doing so either.

Personal Service Companies

HMRC are increasingly interested in these arrangements especially with regards 'IR35' which are rules on the taxation of personal service companies. The rules apply to a contract for personal service with an end user and where IR35 is not being applied there is a risk that it should be in many instances.

IR35 seeks to find scenarios where a person diverts what is economically employment income into a company which they own to benefit from extra tax deductions (such as travel from home, for example) and better marginal rates of tax (corporate tax at 20% and income tax on dividends from their company). This avoids NIC altogether in many instances.

Whether or not IR35 applies to a contract depends entirely on the commercial reality of a situation and there are a number of factors HMRC will consider when reviewing a case.

We consider this to be a hot topic in tax at the moment with the tightening of the anti-avoidance rules on the solvent liquidation of a personal service company which used to unlock a 10% tax rate for individuals taking cash out of their company (see our previous article 'Changes on the horizon, of Capital importance!') and the restriction of travel and subsistence in this manner.

From 6 April 2017 public sector organisations will be required to operate PAYE as if the intermediary did not exist for IR35 companies; this removes a cash flow advantage gained by undertaking work through a personal service company.

Expanding this to all entities would be a significant shift of risk onto the private sector end users and we believe will deliver a large blow to the use of these types of arrangement where currently the PSC or umbrella entity bears the tax risk.

It would seem that the tank is rather low if you're operating through a personal service company vehicle, and you might consider adopting an alternative structure or working arrangement.

Employment Law

IR35 is of course only a tax rule, to combat perceived avoidance which would otherwise be possible, and the law (as far as employment rights are concerned) does not necessarily follow this tax rule. End users and people who provide a personal service via one of the above arrangements should look to review their obligations and rights under employment law.

Please contact us if you would like to consider the legal, HR or taxation aspects of personal service companies either as an end user or an individual.

Why chose Price Bailey Legal Services LLP

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Lexcel accredited

Our excellence in practice management and client care has been formally recognised by the Law Society.

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We are experts in delivering employment law and HR advice to a variety of clients in different industries and sectors from all sizes and backgrounds. We understand how different types of companies operate and can advise accordingly.

Professional, personable and accessible

Providing peace of mind that employers can pick up the phone and talk to us at any time, and know that they will receive pragmatic advice delivered in a personable manner.

Commercial focus

We provide tailored advice in every situation by navigating clients through the law, balancing the need for commercial solutions with legal risks and obstacles.

If you have any questions or queries, please give us a call and we will be happy to discuss your requirements.

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