

August 2010

Employment Law Newsletter

SUMMER JOBS

Over the summer months many employers are approached by young people, particularly university students, who are looking for work for a short-term period. Many businesses are relaxed about accommodating such requests. However it is important that employers are aware that there may be legal implications for them, no matter how casual the arrangement may seem.

Casual workers

If an individual undertakes paid work for your business for a short period of time e.g. a few months, it is likely they will be deemed to be a 'casual worker'. Casual workers are entitled to receive the national minimum wage and also to paid holiday under the Working Time Regulations. They will also be subject to the maximum working restrictions laid down under the Regulations.

In addition, casual workers are protected under discrimination legislation and therefore they have the right not to be discriminated on any prohibited ground (e.g. race, sex, religion and disability etc).

In addition to the above, employers should be mindful that 'young workers' have additional rights and protection. A 'young worker' is someone under 18 years but over compulsory school age.

WHAT TO EXPECT?

Upcoming employment law changes

National minimum wage

From 1 October 2010 the new hourly rates will be:

- Standard (adult) rate (workers aged over 21): **£5.93** (rising from £5.80).
- Development rate (workers aged between 18 and 20): **£4.92** (rising from £4.83).
- Young workers rate: **£3.64** (rising from £3.57).
- There will be a new minimum wage for apprentices of £2.50 per hour for apprentices under 19 years of age or those aged 19 and over but in the first year of their apprenticeship. All other apprentices already receive the national minimum wage depending on their age

Breakfast Seminar

SAVE THE DATE

Our next Breakfast Seminar will take place on Wednesday 15 September 2010 in the Conference Centre. The seminar will be a general update on Employment Law with a particular focus on the implications of the Equality Act 2010 which is due to be implemented later this year.

If you would like to book a place at the Seminar please contact Ann Ghaghda on 0116 262 4225.

Work experience

Work experience arrangements should not be too problematic provided they are genuine and not an attempt to procure free or cheap labour! A work experience placement should be limited in time, unpaid and should place no obligation whatsoever on the individual to attend.

If the arrangement becomes more formal there is a real risk the individual involved will become a 'casual worker' and be entitled to the rights already mentioned.

Volunteers and voluntary workers

In a genuine volunteer arrangement there will be no obligation on the volunteer to provide services, or an obligation on the organisation to provide any voluntary work.

Volunteering is an arrangement which has its own specific rules and exceptions. For example, workers employed by charities, voluntary organisations, associated fundraising bodies or certain statutory bodies are not entitled to the national minimum wage. However, if an individual described as a volunteer is in fact 'a worker' they would qualify for the national minimum wage unless a specific exemption applied.

New government

The new coalition government published its Programme for Government outlining the possible future changes to employment law. The key points to note include:-

- a plan to extend the right to request flexible working to all employees (rather than just those with children under 16 years);
- confirmation that the government plans to abolish the default retirement age by October 2011 (see below);
- an intention to encourage shared parenting from "the earliest stages of pregnancy" (possibly a reference to giving fathers the right to attend antenatal appointments) and develop a system of flexible parental leave. This proposal is intended to supplement the introduction of additional paternity leave and pay which will come into force on 6 April 2010; and
- an intention to keep the 48 hour average working week opt-out.

RETIREMENT – Abolition of the default retirement age:

The government intends to abolish the default retirement age (of 65 years) on 1 October 2011, with transitional arrangements beginning in April 2011.

Under the proposal employers will no longer be able to rely on a default retirement age and will therefore have to 'objectively justify' any retirement based on a contractual retirement age, or will need to rely on one of the 'fair reasons' for dismissal laid out in employment legislation (such a conduct or capability).

Activists have welcomed the government's decision claiming the move will inject millions into the economy and prevent 'unjustifiable' age discrimination. Critics however have highlighted the negative impact the proposal will have on businesses, with many employers concerned about the effect the change will have on their ability to manage their workforces. In addition, employers are concerned about the financial impact of the decision which will hit many businesses trying to recover from the recession.

CHANGING AN EMPLOYEE'S TERMS AND CONDITIONS OF EMPLOYMENT

During the course of most employment relationships the contractual terms governing both the employer and employee are likely to change in a number of ways. Although some changes will happen through mutual consent (i.e. pay increases) there will be times when an employer may wish to make a contractual change which the employee is less than willing to accept. So what is the 'best-practice' approach?

- 1. Basic position:** a variation of contract can only occur with the agreement of the employee or where there is express provision in the contract permitting a unilateral change.
- 2. No express contractual provision:** if the employer does not have contractual 'permission' to vary an employee's contract, there are three main options to consider:-
 - seek the employee's express agreement (either individually or in an collective agreement if more than one employee is affected);
 - unilaterally impose the change and rely on the conduct of an employee to establish implied agreement; or
 - terminate the employee's employment and offer re-employment under the new terms.
- 3. Express contractual provision:** some employment contracts give the employer a general right to make changes to any term of the contract in order to overcome the general rule that changes must be mutually agreed.

In the recent case of **Bateman v Asda Stores [2010]** the Employment Appeals Tribunal upheld a decision that Asda was entitled to rely on a statement in its Staff Handbook reserving the right to vary contractual terms in order to introduce new pay terms, without the need to obtain affected employees' express consent.

Whilst the outcome of this case is significant for employers wishing to make contractual changes, it should be noted that employees could still argue that a unilateral variation of contract is a breach of the implied term of trust and confidence. It is therefore important that employers exercise the contractual right in a reasonable manner, for example, by entering into meaningful consultation with employees affected by the proposed change.

We are happy to provide practical tips on how to approach the task of persuading employees to expressly agree to a change which may be highly significant to your business.

CASE WATCH

In the recent case of **Industrious Ltd v Horizon Recruitment Ltd and Vincent**, the EAT held that an employment tribunal was able to determine whether a Compromise Agreement was unenforceable because of misrepresentation.

Mrs Vincent had signed a Compromise Agreement with Horizon, under which Horizon would pay her a termination payment in full and final settlement of all claims against Horizon or Industrious and she would immediately and unconditionally withdraw the proceedings before the employment tribunal. A month after signing the agreement Horizon entered into a creditors' voluntary liquidation. No money was paid to Mrs Vincent under the terms of the Compromise Agreement.

The case is an important reminder to employers that Compromise Agreements are not always binding and there are circumstances in which an employee may claim that a Compromise Agreement should be set-aside. For example, an employee may argue that a material misrepresentation induced them to enter into the agreement or that they signed it under duress.

FINALLY... EMPLOYER BEWARE!

The Tribunals Service has published its Annual Statistics Report 2009-10, which shows a substantial increase in the number of claims lodged in employment tribunals. The number of claims in 2009-10 rose to 236,100, a 56% increase on the number of claims lodged the year before.

It has been suggested that the increase is due to numerous factors, including the recession. The report should act as a warning to employers that there is a growing trend amongst ex-employees to take legal action, whether during the course of their employment or following a dismissal.

It is therefore crucial that employers minimise their potential liabilities by taking legal advice before dealing with any workplace issue or dismissing an employee. In addition, having transparent and comprehensive policies and practices in place will help employers to deal with employment issues as they arise and ultimately avoid litigation wherever possible.

If you are experiencing problems with a particular employee or issue within your workplace or you believe your policies and procedures may need updating – please contact the Employment Team at Spearing Waite on 0116 262 4225, or contact us individually:-

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