Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

February 2020

Employment pitfalls

There are some areas of employment law which can catch you out when you least expect it. Here we look at some of the most common risk areas.

Unfair dismissal and length of service

The majority of employers know that an employee needs 2 years' service in order to bring an unfair dismissal claim – but did you know that terminating employment close to that 2-year anniversary date should be handled with caution?

Where an employer terminates the contract immediately without notice (including where a PILON is made), the law will extend their termination date by adding on the minimum statutory period of notice they were entitled to in order to enable them to bring an unfair dismissal claim.

For example, **A** reaches their 2-year work anniversary on 24 January. **A**'s employment is terminated with immediate effect on 20 January 2020, however their statutory entitlement to notice of one week means their effective termination date for the purposes of an unfair dismissal claim is 27 January 2020.

As that brings **A** beyond the 2-year anniversary date, **A** would be able to bring a claim for unfair dismissal, even though their employment ended before reaching the 2-year mark.

Read more p2>

Jack's Law – A world first

In our last newsletter we mentioned that the Parental Bereavement Leave Regulations were expected (but not confirmed) to come into effect in April 2020. A Government press release on 23 January has now confirmed that the Regulations will be implemented with effect from 6 April 2020.

Read more p3>

New guidance on Sexual Harrassment

The Equality and Human Rights Commission (EHRC) published a new technical guidance note: 'Sexual Harassment and Harassment at Work'. This is not a statutory code, but it is guidance which an Employment Tribunal will take into account in relevant cases so it's well worth employers being familiar with it.

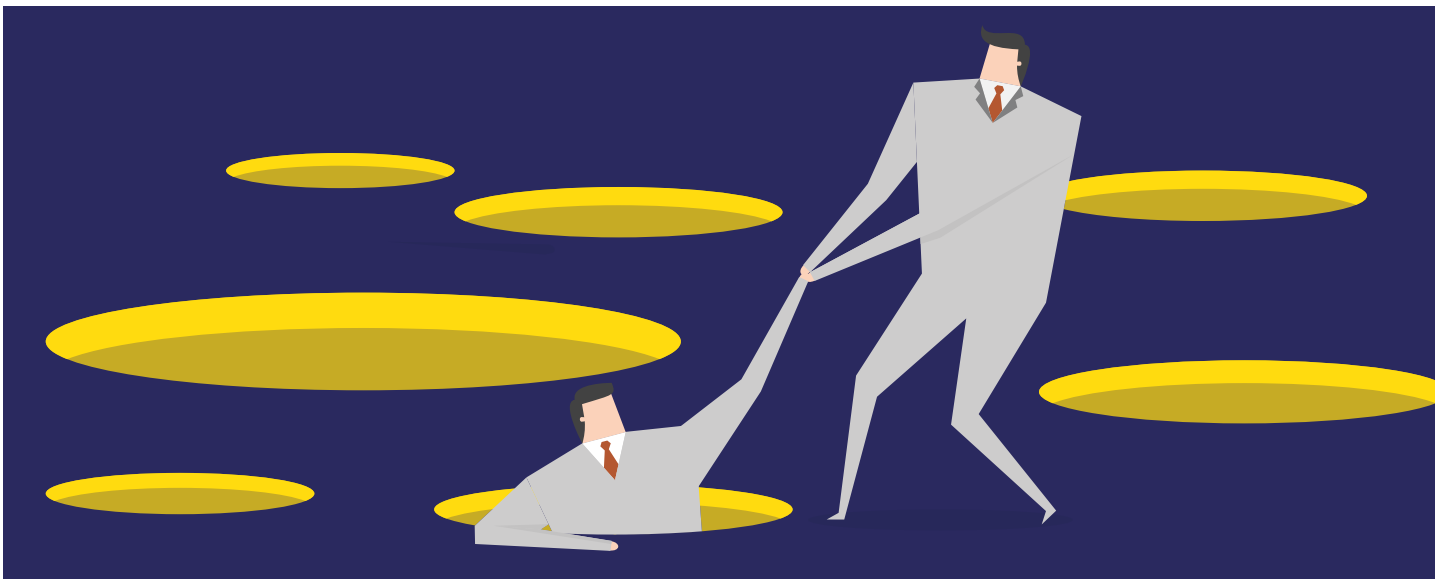
Read more p3>

Welcome

Welcome to the February edition of the Outset Workplace Newsletter.

In addition to bringing you the latest employment news, we are delighted to include an article from our corporate law team.

If you've ever considered selling your business or just interested to know the steps required in doing so, take a look at page 6.



outset.

What notice pay should an employee absent on zero pay receive?

Under the confusing section 88 of the Employment Rights Act 1996, what pay an employee whose employment is terminated whilst they are in receipt of zero or reduced pay (for example, because they are on sick leave) depends on what their contractual vs statutory entitlements to notice are.

Employees are entitled to the greater of their contractual or statutory notice entitlement. An employee receiving reduced or no pay would be entitled to full pay in respect of their notice period provided that their contractual notice entitlement is not one week or more greater than their statutory notice entitlement. This is a confusing concept no matter how many times you read it, so is best illustrated by example (in each case the employee is off sick and in receipt of zero pay):

A's contract states they are entitled to 4 weeks' notice
A's statutory entitlement to notice based on their service of 6 years, is 6 weeks
A is entitled to full pay for 6 weeks, as their contractual notice entitlement is less than their statutory entitlement

B's contract states they are entitled to 8 weeks' notice
A's statutory entitlement to notice based on their service of 6 years, is 6 weeks
A is entitled to 8 weeks' notice as per their contract, however they are not entitled to be paid for it as their contractual notice entitlement is more than one week more than their statutory entitlement.

Making deductions from pay

You may think that with an express contractual provision or other written agreement entitling you to make a deduction from pay, you can safely do so. Unfortunately, that isn't always necessarily the case.

The National Minimum Wage Regulations only permit a very limited list of deductions, and anything else you might want to deduct from pay must leave the employee with at least National Minimum Wage in respect of that pay period. Staff must still receive National Minimum Wage after the following deductions:

- Expenditure in connection with employment, e.g. uniform purchase or cleaning or the purchase of tools or equipment. This can extend, for example, to requiring employees to wear a certain colour and/or type of clothing or even asking them to wear "black tie" dress to a corporate event;
- Deductions for the employer's use or benefit, like meals or services/ goods supplied by the employer. This will include utilities provided by the employer;
- Accommodation after the accommodation allowance has been taken into account.

Deductions from pay and national minimum wage are independently and collectively complex areas of law, so always seek advice if you are unsure.

Outset Shortlisted

Our corporate, property and employment teams work together seamlessly on corporate transactions every day, so it was great to see this recognised in our recent shortlisting. Hats off to our colleagues who contributed to us being shortlisted for Deal of the Year (transaction size under £10m) at the 2020 Insider Dealmaker Awards for our work advising the sellers of Simtek EMS to Pexion Group.

insider DEALMAKERS AWARDS 2020 SHORTLISTED

The Big Questions

If you don't already follow our LinkedIn page, get in there quickly!

This week we'll be launching a new weekly post where we'll be asking those burning questions you always wanted the answer to.

Keep a look out and get involved, we'd love to hear what you think.

@Outset UK Ltd

Jack's Law – A world first

In our last newsletter we mentioned that the Parental Bereavement Leave Regulations were expected (but not confirmed) to come into effect in April 2020. A Government press release on 23 January has now confirmed that the Regulations will be implemented with effect from 6 April 2020.

In 2010 one-year old Jack Herd tragically died after falling into a pond at home. His father was allowed only 3 days off work, one of which was to attend the funeral. Jack's mother, Lucy, has campaigned ever since for a change in the law and her efforts have finally paid off. The UK has introduced the statutory right to 2 weeks' leave where parents lose a child - the most generous in the world.

Regardless of their length of service, an employee who loses a child under the age of 18, or suffers a stillbirth after 24 weeks of pregnancy, will be entitled to two weeks' leave to be taken in one block, or as two separate blocks of a week. The leave will be paid for employees who have at least 26 weeks' service and who meet minimum earnings criteria (£120 per week from April 2020). Statutory parental bereavement pay will be paid at the same rate as statutory paternity pay, i.e. £151.20 per week (from April 2020) or 90% of weekly earnings if lower.

The government estimates that this new entitlement will help to support around 10,000 parents a year. Jack's Law is an important and welcome development in the field of family friendly rights. Ahead of April, we would suggest employers put together a Parental Bereavement Leave & Pay policy so that entitlement and notice requirements are clear.

Sexual Harassment – New Guidance

The Equality and Human Rights Commission (EHRC) is Great Britain's national equality body. As a statutory non-departmental public body, the Commission operates independently of the government. It has powers to take organisations to court, intervene in individual cases and provide guidance and support to employers – all covering the topic of discrimination.

In January 2020 the EHRC published a new technical guidance note: 'Sexual Harassment and Harassment at Work'. This is not a statutory code, but it is guidance which an Employment Tribunal will take into account in relevant cases so it's well worth employers being familiar with it.

Employers can be held responsible for acts of discrimination perpetuated by their employees. The only way to minimise such risk is to take steps to prevent cases of harassment occurring, and to take appropriate action. The note sets out clear guidance including around what harassment is, who is protected, how employers can be liable and how to respond to complaints.

The guide also covers some of the more difficult areas, like malicious complaints. It warns employers not to be overzealous in focusing on malicious complaints in their policies.

Employers need to be careful that any wording doesn't have the effect of discouraging potential victims from coming forward. In particular, any statement to the effect that a malicious complaint will result in disciplinary action must also make it clear that:

- workers will not be subjected to disciplinary action or to any other detriment simply because their complaint is not upheld, and
- workers will only face disciplinary action if it is found both that the allegation is false and made in bad faith (that is, without an honest truth in its belief).

You can read the full technical guidance here.

This is not a statutory code, but it is guidance which an Employment Tribunal will take into account in relevant cases so it's well worth employers being familiar with it.

Recent Case Decisions

Is it necessary to hold a separate investigation meeting?

Sunshine Hotel Ltd t/a Palm Court Hotel v Goddard

For a dismissal to be fair, the process requires "as much investigation into the matter as was reasonable in all the circumstances of the case". It isn't uncommon for an employer dealing with a disciplinary matter to wonder whether they need to hold an investigation meeting with the employee before they move to a formal disciplinary meeting.

The Hotel dismissed Goddard following a meeting which was initially described as being an investigation meeting, but was in fact a disciplinary hearing. The unfair dismissal judgment stated, among other things, that "there was a serious procedural failing, because there was no investigation hearing". Horrified, the Sunshine Hotel appealed the decision.

Thankfully, on appeal, the court found that neither the Acas Code nor established unfair dismissal principles require separate investigation and disciplinary meetings. This will come as welcome news to employers, as you all breathe a collective sigh of relief. Sadly for the ironically named Sunshine Hotel, the unfair dismissal finding was nevertheless upheld.

Can you stop employees discussing their salaries?

Jagex Limited v McCambridge

McCambridge found salary information of a senior executive by a shared printer and shared it with another colleague. It was then widely shared among other employees of the company. McCambridge was dismissed for gross misconduct after Jagex found that sharing the salary information was a significant breach of trust and confidence between the employee and the company.

The Tribunal found that Mc Cambridge's dismissal was unfair and that "no reasonable employer would class discussion of a colleague's salary as gross misconduct." There was no express term in his contract which stated that salary information was confidential information, so therefore it could not be.

This case is a valuable reminder that salary information is not automatically confidential. Employers will need to include express provisions in the contract if they want to protect such information. Even then, employers should bear in mind that regardless of what the contract says, employees cannot be prevented from discussing their contracts with one another if they think there is inequality of pay because of sex.

Believe it or not...

What you didn't know you didn't know about the world of employment…

Apprenticeships - this might mean a pricy levy to some employers, a helpful trainee to others but don't forget that one day your apprentice could be more successful than anyone would have thought. Just look at Leonardo da Vinci, Jamie Oliver, Stella McCartney, Sir Ian McKellan, Sir Alex Ferguson and hairdresser John Frieda who all started out as apprentices.

Authorised fun - last week Bacardi sent 7,000 employees to visit bars and restaurants, during working time, to research the latest trends. The 'Back to the Bar' tradition seeks to have every employee become an ambassador for the brand and allow staff to engage with the business. Ours is a pina colada…

Can we expect an Australian Immigration System?

Last year the Government tasked the Migration Advisory Committee (MAC) with investigating and reporting on the future of the UK's immigration system. On 28 January MAC published its report of recommendations and, whilst we are still wading through the 278-page report, some key points have already jumped out at us.

One of the main aspects explored is the widely publicised government aim to introduce an "Australian style" points based system (PBS). The UK already has a PBS, but it is one in name only as applicants have to meet ALL criteria - as MAC drily point out: "The current packaging as a PBS is, forgive the pun, pointless and could be eliminated".

MAC's recommendation is to keep the existing Tier 2 (General) framework but reduce salary thresholds, abolish the Resident Labour Market Test and extend the current system to include medium (but not low) skilled workers. There are suggestions for continuing to base the salary thresholds on competitive rates so as not to undermine the resident labour market, but they do look set to reduce from their current levels.

There are also recommendations for an "Exceptional Talent" route of entry where a job offer is not required.

Flying in the face of the statements we have heard in the media for months, an "Australian style" system is definitely not recommended by MAC – who spent a lot of time speaking to and analysing the immigration systems of not only Australia, but other countries including Canada, New Zealand and Austria.

The UK government is now considering the report and its recommendations before it confirms its plans for our future immigration system. How might this impact your business? Do you rely heavily on a migrant workforce? Might you need a sponsor licence? It remains to be seen what the government will decide – but there isn't long and in the meantime we would suggest businesses hope for the best, but prepare for the worst.

Coronavirus: Managing employees in the event of an outbreak in the UK

Coronavirus has hit global headlines over the last few weeks. With over 1,300 deaths now reported and a further 15,000 new cases confirmed in the past 24 hours alone, the spread of the virus does not seem to be slowing down.

As of February 13th 2020, there are now 9 confirmed cases in the UK and Public Health England bosses believe more cases are "highly likely." The main signs of infection are fever (high temperature) and a cough as well as shortness of breath and breathing difficulties.

In the event of a widespread coronavirus outbreak in the UK, employers will need to think through how they'll respond to some difficult employee related issues.

If you missed our Head of Employment Law, Darren Steven's Q&A on Linked In which identifies the most prominent considerations, check it out here: Employers Guide to Coronavirus.

Be sure to keep up to date with information from the World Health Organisation (WHO).

Darren Stevens | Head of Employment Law

Corporate Law Insight

Key things to know when preparing your business for sale

Thinking of selling your business? Whether you're retiring, have fallen out with your business partner or just want to cash in on the fruits of your labour, you must be clear why you're selling, steps to take to prepare for sale and attract the best buyer.

Get a valuation

To understand the value of your business and its profitability contact accountancy or investment banking firms, (depending on your size) or appoint a broker or corporate finance advisor to free up your time.

Gather your paperwork

A buyer will carry out a review ("due diligence"). This will include looking at; your company books and annual returns (share sale,) balance sheet and cash flow statements, a list of assets and equipment, details of finance, loan or hire purchase agreements, supplier and customer contracts, business rates and utilities, list of employees and employment contracts, intellectual property and IT agreements, insurance policies, complaints, disputes and litigation.

Get your team ready

Appoint legal and financial advisers to help gather information for the buyer and draft the sale documents. You'll need to decide if it's a share sale (buyer takes everything) or an asset sale (buyer can pick what they want) as the tax implications will vary.

Keep track of key issues

You'll be making legally binding promises to the buyer about your company/business in the sale agreement, be honest and thorough.

Conduct an internal review

Buyers will be attracted by a business which is "neat and tidy" and has been prudently run. In fact, some buyers will use disorderly processes and paperwork as a reason to price chip so think about how you can make the business more attractive.

Talk to your management team and staff

You may need their help to gather information but do you want to make a full announcement yet? Transactions can sometimes fail to complete and the news of a potential sale can unsettle staff so it's wise to pick your moment carefully. Will senior staff enter into new employment contracts? If it's an asset sale your staff will generally automatically transfer with the business (TUPE). Are there to be any redundancies or changes? If so, you will need to factor in a consultation process.

Selling your business can be stressful and time consuming, even with the promise of a pot of gold at the end! Be organised and involved and make sure you have a good team of advisors around you - but don't take your eye off the ball either.

If you have any questions or would like to speak to someone from our corporate law team, please email Tilly.Clarke@outsetuk.com