CHILTERN HR

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NEWSLETTER

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1. Increase in compensation limits

The compensation limits applying to certain awards of employment tribunals, and other amounts payable under employment legislation will increase from 6 April.

From 6 April the maximum compensatory award for unfair dismissal claims will increase to £78,335 (from £76,574) and the maximum for a 'week's pay' will increase to £475 (from £464).

The maximum guarantee pay limit for a day's pay during short-time working or temporary layoff will increase to £26 a day (from £25) and the maximum possible statutory redundancy payment will increase to £14,250 (from £13,920).

Details of the new minimum and maximum awards for other types of cases and can be found in the Employment Rights (Increase of Limits) Order 2015

The new limits will apply where the event giving rise to the entitlement to compensation or other payments occurred on or after 6th April 2015.

2. Meaning of 'Establishment' for collective redundancy purposes

'Establishment' for collective redundancy purposes means a local employment unit, in the opinion of an Advocate General of the European Court of Justice.

What does this mean?

The Court has yet to make its decision in this case and is not obliged to follow the Advocate General's opinion, although in practice it generally does.

If the Court agrees with the opinion it will mean that employers making redundancies at several sites will not necessarily be relieved from the information and consultation requirements which apply to collective redundancies in respect of sites where fewer than 20 employees work. For example, several stores in one shopping centre could potentially form a single local employment unit.

What should employers do?

Pending the Court's decision employers making redundancies of 20 employees or more are advised to take a cautious approach when determining whether the collective redundancy obligations are triggered and aggregate the number of redundant employees across different sites.

3. Single employee was an 'organised grouping'

The Court of Appeal has held that a single employee was an 'organised grouping of employees' which had as its principal purpose, the carrying out of activities on behalf of a client for the purposes of a TUPE service provision change.

What does this mean?

In this case there had been a service provision change under TUPE and the employee's employment had transferred to her most recent employer. The employee amounted to an organised grouping as she had been deliberately allocated the responsibility of managing a client's Dutch properties and had always devoted the majority of her time to managing the Dutch properties.

In giving judgment the Court of Appeal said that tribunals should follow a four stage process in cases of this type. Firstly, they should identify the service which the transferor was providing to the client. Secondly, they should list the activities which the staff of the transferor performed in order to provide that service. Thirdly, they should identify the employee or employees of the transferor who ordinarily carried out those activities. Fourthly, they should consider whether the transferor organised that employee or those employees into a 'grouping' for the principal purpose of carrying out those activities.

What should employers do?

Employers who have inherited staff from other businesses should bear in mind that they may have obligations arising out of employees' previous contracts even if there hasn't been a formal transfer of such staff.

4. New terms which disadvantaged older workers was justified

The Employment Appeal Tribunal has held that a requirement to sign up to new terms of employment disadvantaged older workers but was justified.

What does this mean?

The requirement to sign up to the new contractual terms and conditions was a 'provision, criterion or practice' (PCP) that disadvantaged older workers because the new terms removed a number of benefits which put older workers at a particular disadvantage as they had built up greater entitlements by virtue of their longer service.

However, although the PCP put older workers at a particular disadvantage it did not indirectly discriminate against them because it was a proportionate means of achieving a legitimate aim. The employer's aim was to reduce staff costs to ensure its future viability and to have in place market-competitive, non-discriminatory terms and conditions. This was a legitimate aim and the employer's means of achieving this legitimate aim were proportionate and could, therefore, be objectively justified because there were no less discriminatory ways of reducing staff costs.

Looking at the alternatives phasing in or reducing the changes would not have achieved this aim as the contingent costs that the employer was seeking to reduce would have been maintained. Securing extra funding from the employer's parent company would not have reduced staff costs and seeking voluntary redundancies would not have helped because the employer did not need fewer employees, it needed to reduce the unit cost per employee.

What should employers do?

Employees seeking to change terms of employment, particularly those that may have a discriminatory effect, should always take specific legal advice. They should also bear in mind that cost cutting measures may not necessarily justify discrimination as it will depend on the specific facts of a case.

5. Non-payment of bonuses to disabled staff was discriminatory

The Employment Appeal Tribunal has held that non-payment of bonuses to disabled employees with high levels of sickness absence as a result of their disabilities was discriminatory.

What does this mean?

In this case the employer's discretionary bonus scheme discriminated against disabled staff. Employees who had received a formal warning during the relevant financial year were not eligible for a bonus. Managers had the discretion to ignore formal warnings that had been received for conduct related matters but not for warnings relating to sickness absence. Despite the fact that the normal trigger points that would usually lead to a warning had been adjusted for disabled employees they each eventually received a warning and as a result no bonuses were paid to them.

An automatic disentitlement to the bonus following disability related absences amounted to unfavourable treatment on grounds of their disability as had they not been disabled they would not have had the same level of sickness absence and that was why the bonus was not paid. The fact that the employer's HR officer responsible for paying the bonuses was unaware of the employees' disabilities was irrelevant and there was no valid justification for the discrimination.

What should employers do?

Employers may be able to justify a similar bonus scheme as a proportionate means of achieving the legitimate aim of encouraging good attendance if the scheme allows for sufficient flexibility to avoid withholding payment in circumstances where it is likely to be discriminatory.

6. Claiming sick pay does not necessarily defeat constructive dismissal claim

The Employment Appeal Tribunal has confirmed that an innocent employee faced with a repudiatory breach of their contract by their employer does not affirm the contract merely by continuing to draw sick pay for a limited period whilst protesting about the position.

What does this mean?

To succeed in a constructive dismissal claim the employee must not wait too long in accepting the employer's breach as they may be seen as having 'affirmed' the contract. Delay is not necessarily a determining factor on its own and a tribunal will look at all the facts of the case. For example, there may be circumstances where an employee is too ill to resign although such cases are likely to be exceptional.

What should employers do?

As the question as to whether an employee has affirmed a contract depends on the facts of a case specific legal advice should always be taken in such circumstances.

7. Injunction to restrain disciplinary hearing is refused

The High Court has refused an application for an injunction to restrain an employer from continuing with a disciplinary hearing against an employee.

What does this mean?

Injunctions are a discretionary remedy and in this case the employee came nowhere near to showing that the circumstances were such that there should be an injunction.

The disciplinary panel had showed that it was willing to make adjustments to its procedure to cater for the employee's dyslexia. Whilst the employer was not prepared to grant an immediate adjournment to allow the employee an opportunity to obtain a further report for deployment as evidence in the hearing, it did not shut out the possibility that, on considering the case further, it might decide that an independent expert report would be useful. Given particularly the late stage at which the dyslexia report had been produced, this was well within the discretion of the panel.

In deciding whether it was appropriate for the Court to intervene, it was relevant that the employer's disciplinary policy and procedure made provision for an appeal hearing so if a decision was taken to dismiss the employee but reversed on appeal he wouldn't find himself out of work.

What should employers do?

Employers faced with an application for an injunction should always take specific advice as injunctions are costly and given that they are a discretionary remedy the outcome may be hard to predict.

8. Unpaid director and shareholder was an employee

The Court of Appeal has held that a director and shareholder who was not paid for the work he provided informally to a company was an employee.

What does this mean?

There was an express agreement, in this case, that the individual would work for the company which was supported by consideration as each of the three director/ shareholders had agreed to contribute something different to the business, whether skills and/or money.

Despite the fact that he had never been issued with a contract of employment and that no express agreement as to his pay had been reached there was an implied term that he would be paid a reasonable amount for what he did. This was because it made no sense that he would be required to deploy his skills in the company's operations without being entitled to pay while one of the other three director/ shareholders was being paid.

What should employers do?

Employment status is not always easy to determine and specific legal advice should be taken if in doubt.