

Future proofing the  
workplace

HR conference - 27 April 2015

# Employment Law Update

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# Family Rights

- 30 June 2014. Flexible working regime extended to all employees with 26 weeks service
- 1 October 2014 – right to time off to attend 2 ante natal appointments (up to 6½ hours each)
- Qualifying relationship
- Declaration giving details can be required
- Employer can refuse if reasonable
- 5 April 2015. Right for adopter to attend up to 5 meetings. Paid for the main or sole adopter

# Shared Parental Leave

- Parents can share 50 weeks of 52 week period of maternity leave if mother curtails her maternity leave
- Additional paternity leave abolished
- Parents can enjoy `traditional` maternity and paternity leave
- SPL can be taken at same time or separately

# Eligibility

- Mother must have 26 weeks continuous employment by 15<sup>th</sup> week before EWC (`relevant date`) or week in which main adopter notified of match
- Other parent must have 26 weeks employment or self-employment out of 66 weeks prior to the relevant week
- Average weekly earnings of at least £30 during 13 of the 66 weeks

## Amount and Timing

- Blocks of at least a week
- May be continuous or discontinuous (up to 3 blocks)
- In addition to paternity leave which must be taken before SPL

### Eligibility for SHPP

- In addition to eligibility for SPL must have earnings at the LEL over the 8 week period ending with the relevant week
- Payable for up to 39 weeks less SMP/Maternity Allowance

## Procedure

- Mother must serve a curtailment notice to end maternity leave of at least 8 weeks and end her maternity pay period
- The notice cannot be revoked but if served before baby is born can be revoked before child is 6 weeks old and a fresh curtailment notice can be served
- Must serve non binding notice of entitlement and intention to take SPL
- ACAS suggests an informal discussion following receipt of notice re proposed arrangements, impact on business, what steps may be taken to mitigate effects including any modifications agreeable to employee
- Period of leave notice (booking notice) must be given 8 weeks before a period of SPL
- Continuous SPL cannot be refused

## Procedure cont'd

- If employee requests discontinuous SPL employer must respond in writing within 14 days
- If request is refused, employee may take total requested as continuous leave, start on a new day as long as notified within 5 days or withdraw request any time up to 15<sup>th</sup> day after originally made
- If withdrawn, request does not count as one of 3

# Varying Leave

- Can vary start or end date provided 8 weeks notice given
- Vary or cancel the amount of leave at least 8 weeks prior to original start date
- Request a continuous period becomes discontinuous or vice versa
- Variation counts as one of 3 requests unless:
  - it is made due to child being born early or late
  - employer has requested variation
  - employer has agreed more than 3 booking notices



# Rights During SPL and Return to Work

- Reasonable contact as per maternity leave
- Up to 20 SPLIT days as well as 10 KIT days
- Once employee starts SPL any unused KIT days are lost
- Same rights as an employee on maternity leave
- After 26 weeks entitled to return to same job
- Thereafter, entitled to a suitable alternative if not reasonably practicable to return to same job

# Risk Areas

- Will it be discriminatory not to enhance SHPP if maternity pay is enhanced?
- ***Shuter v Ford***
- Is there any discrimination in enhancing only the first months (to encourage early return)?
- Or the first request to encourage continuous leave?
- Are shorter blocks less disruptive?

## Next Steps

- Draft a policy and forms to assist employees
- Consider policy on enhancement
- Training

# Exit Negotiations Update

- Without Prejudice
- S111A ERA 1996

## ***Portnykh v Nomura***

- there will be a dispute if negotiations likely to lead to litigation if not settled
- employee need not have claimed a breach
- Any eventual dispute need not be in precisely same terms and in existence when compromise offered
- WP might attach to negotiations without a dispute if parties agreed the rule applied

# Maternity - at what point does a redundancy arise?

## ***Sefton Borough Council v Wainwright***

- Council merged 2 roles to create a new one and offered to the male employee while Mrs W was on maternity leave. Tribunal and EAT rejected the Council's argument that the redundancy only arose when the redeployment decision had been made and she was no longer on maternity leave
- However it was for the Council to assess whether there were other jobs no less suitable
- Discrimination claim failed – Tribunal had not asked itself reason for her redundancy

# Holiday Pay

- Commission and non-guaranteed overtime should be included in basic pay for calculation of first 4 weeks of statutory holiday pay
- Discretionary overtime?
- Amount based on average in preceding 12 weeks
- A series of deductions is broken by a period of more than 3 months
- Claims for unlawful deductions can only go back 2 years
- The right to be paid holiday is not a contractual term.

# Is Obesity a Disability?

- ***Kaltoft V Municipality of Bilund (ECJ)***
- No general principle but may be if affects daily activities due to associated conditions

# Redundancy

- Woolworths case on meaning of `establishment` to be heard on 30 April
- Until then 30/45 day consultation if 20 or more redundant within 90 days across the business



# Whistleblowing

- ***Norbrook Laboratories v Shaw***
  - a series of communications can amount to a qualifying disclosure even if individually they did not
- ***Chesterton Global Limited v Nurmohamed***
  - No more than reasonable belief that a disclosure is in the public interest is required

# Fixed Term Contracts

## ***University and College Union v University of Sterling***

- The expiry of fixed term contracts does not count towards threshold for collective redundancy
- Early termination does count as redundancy
- Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 excludes from collective redundancy rules
- Non renewal of a fixed term contract will still be a dismissal in considering individual cases

# National Minimum Wage

- Regulations provide that where a worker sleeps at or near place of work only time when awake for purpose of working is time work for NMW purposes
- ***Whittlestone v BJP Home Support Ltd***
  - Fact a worker was never called to assist during sleepovers held irrelevant by EAT as her job was to be present
  - Also entitled to NMW for travelling between homes of clients
- ***Esparon t/a Middle West Residential Home v Slavikowska***
  - Employee was engaged in time work notwithstanding sleeping facilities
  - Employer needed her on premises to comply with statutory obligations

## Fit for Work Service

- Free health advice through website and unlimited advice line
- Free referral to health assessment if employee has reached or is expected by GP to reach 4 weeks absence
- Subject to employee consent (amend employment contract)
- Referrer must consider at least a phased return reasonably likely
- Only one assessment in a 12 month period

## Fit for Work (2)

- Phone assessment within 2 working days
- Face to face (“biopsychosocial holistic assessment”) if required within 5
- Within 90 mins travel from employee’s address
- Agree a Return to Work Plan
- Case manager will contact employer with employee’s consent
- Plan provided to GP and employer with employee’s consent
- Will include fitness for work and make recommendations
- Case manager will contact employer at arranged point to review
- Should be accepted in place of Fit Note

## Fit for Work (3)

- Employee will be discharged
  - 2 weeks after return to work
  - when FFW decide they can offer no more assistance, either after 3 months or if FFW decides will be unable to return to work for 3 months or more

# TUPE Update (1)

- Contractual changes remain void if sole or principal reason is transfer (but distinction from changes `connected to transfer` unclear)
- Variation of terms incorporated from a collective agreement is allowed a year after transfer if new terms no less favourable overall
- Transferee no longer bound by terms negotiated after transfer where he is not party to collective agreement
- Changes allowed for an ETO reason if the employee agrees the change
- Where the contract permits
- Employer and employee can agree changes favourable to employee

## TUPE Update (2)

- Change to workplace location can now be an ETO reason
- Collective consultation on redundancy can now start pre transfer with transferor's agreement
- ELI 28 days before transfer (previously 14)
- Consultation may be with employees rather than representatives where organisation employs 10 or fewer



## TUPE Update (3)

- Assignment should not be assumed because an employee carries out work for a client. More than percentage of time should be considered. ***Costain v Armitage***
- Employees may not be assigned if contractual duties permit other work ***LB Hillingdon v Gormanley***
- TUPE when employee moves to joint employment?
- Employee in receipt of PHI assigned?

# Contractual Variations

- Unilateral variations clauses unusual and will be interpreted restrictively

## ***Sparks v Department for Transport***

- D for T imposition of a new attendance management procedure led to union challenge
- The court considered that though some terms relating to absence management in the Handbook were not contractual, the triggering provisions were and a clause permitting the employer to vary unilaterally as long as the variation was not detrimental had been breached

## ***Norman v National Audit Office***

- Offer letters stated that conditions of service are subject to amendment and changes would be notified. Following changes to sick pay being imposed EAT held that the ability

## Contractual Variations cont'd

to amend unilaterally had not been clear and unambiguous and the term `notify` did not confer a right merely required the employer to inform. Moreover the reference to amendment did not specify what the mechanism for amendment would be.

### ***Hart v St Mary's School***

- Employee worked 3 days per week but later contract provided for `all school hours ... as may be necessary` and that part time hours may be subject to variation depending on the requirements of the school timetable. When school tried to spread hours over 5 days EAT found the reference to the requirements of the school timetable were not sufficiently clear to allow unilateral variation and constituted a breach of contract.

# ACAS Early Conciliation (1)

- EC has been in operation for a year. In first 9 months 8.7% employees rejected offer of EC, 11.3% employers rejected. Of notifications in first 6 months 76.8% did not go to ET of which 16.3% settled by COT3
- On submission of EC form limitation period frozen for a month
- EC period can be extended by 14 days with agreement of both sides
- EC certificate issued if ACAS can't make contact with both sides/one party declines or if they conclude settlement is not possible
- Claim can then be submitted

## **ACAS Early Conciliation (2)**

- No guarantee employer will be notified of a claim
- Form does not require the claim to be specified
- Complex rules re extension of time limit for claims
- Claims can be brought not raised during EC
- Settlement agreements need to compromise all claims

# Questions



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