SLAUGHTER AND MAY/

NEWSLETTER

APRIL 2021

EMPLOYMENT BULLETIN

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APRIL 2021 EMPLOYMENT RATES AND LIMITS AND OTHER CHANGES

We attach an updated version of our Employment rates and limits document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from 6 April 2021. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

This month also saw the extension to large and medium sized private sector employers of the **off-payroll working** rules (IR35) for engaging independent contractors through intermediaries such as personal service companies (PSCs). IR35 ensures that contractors, who would have been employees if they provided their services directly to the client, pay broadly the same income tax and National Insurance contributions (NICs) as employees. Under the new rules for the private sector, postponed from last April, the end user (client) rather than the intermediary is now responsible for determining whether IR35 applies. In the event that the new rules do apply, they shift the obligation to make deductions for income tax and NICs onto the party that is closest in the contractual chain to the PSC (whether that party is the end client which contracts directly with the PSC or another intervening intermediary in more complicated contractual arrangements). The new rules apply to payments made for services provided on or after 6 April 2021.

There are changes to the calculation of **post-employment notice pay** (PENP) - the part of a termination payment which is treated as being in respect of the employee's notice period and subject to income tax and National Insurance contributions. The changes to the legislation allow an alternative PENP calculation for employees who have a pay period defined in months, but a contractual notice period defined in weeks or days, or where the post-employment notice period is not a whole number of months. They also align the tax treatment of PENP for individuals who are non-resident in the year of termination of their UK employment with the treatment for UK residents. The changes apply to individuals who have their employment terminated, and where the termination payment is received, on or after 6 April 2021.

With effect from 1 April 2021, the period for which an employer must keep records sufficient to establish that it is paying a worker at least equal to the applicable **national minimum wage** is extended from three to six years.

From 31 May 2021, the right not to be subject to a **detriment in certain health and safety** cases is to be extended to workers. This follows a case in November last year, *R v Secretary of State for Work and Pensions*, where the High Court held that, by confining protection under Section 44 of the Employment Rights Act 1996 to employees, the UK had failed to implement the EU Health and Safety Framework Directive in full. Section 44 protects employees from suffering a detriment in specific health and safety cases; including absence from work due to a reasonable belief that attendance would put them in serious and imminent danger and taking or proposing to take steps to protect themselves or others in the reasonable belief that there is a serious and imminent danger.

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NO RIGHT TO PAYMENT FOR TAKEN BUT UNPAID ANNUAL LEAVE

Summary: The Employment Appeal Tribunal (EAT) has decided that a worker cannot carry over a right to payment for annual leave in circumstances where the worker was permitted to take annual leave but was not paid for it (*Smith v Pimlico Plumbers*).

Key practice point: The EAT's decision alleviates some of the difficulties caused by the 2017 decision of the European Court (CJEU) in *King v Sash Window Workshop*. The CJEU in *King* decided that a worker who was misclassified as self-employed, and denied the right to paid annual leave as a result, could bring a claim for holiday pay for the whole period of his employment. *Smith v Pimlico Plumbers* reduces the risk of potential claims for back payment of holiday pay where a worker has taken unpaid time off as holiday. However, there can still be claims for back payment from those found to be workers who took less than the four weeks' minimum holiday because they knew they would not be paid.

Facts: The claimant, S, was held by the Supreme Court to be a "worker" (and employee) and therefore entitled to certain rights, including paid holiday, under the Working Time Regulations 1998 (WTR). Having established the right to receive paid holiday, the case returned to the Employment Tribunal where he claimed unpaid holiday pay that had accrued throughout his employment. Whilst he had been permitted to take periods of holiday, they had not been paid as required by the WTR. The Tribunal decided that *King v Sash Window Workshop* did not entitle S to bring a claim for unpaid annual leave that had been taken. S appealed.

Decision: The EAT dismissed the appeal - S could not carry forward his entitlement to holiday pay. The right, established in *King*, to carry forward the four weeks' minimum leave with no backstop applies only in respect of accrued but untaken leave, not the pay if unpaid leave has been taken.

In any event, the claim was out of time, as it had not been brought within the three months of the date of the most recent failure to pay holiday pay. The EAT also said that, even if the claim had been in time in relation to the latest deduction, S was precluded from claiming for previous deductions because there was a greater than three months' gap since the last "in time" deduction. The EAT agreed with its decision in *Bear Scotland Ltd v Fulton* that a gap of three months or more breaks the chain in a series of deductions, whilst noting that this issue is being considered by the Supreme Court later this year in *Chief Constable of Northern Ireland v Agnew*.

Analysis/commentary: The EAT concluded that the CJEU's references in *King* to a worker being dissuaded from taking leave related only to the situation where leave is not taken as a result of uncertainties as to pay. However, the EAT noted the CJEU's "*powerful statements as to the importance of being remunerated during leave*" and stated that, had S sought to rely on periods of untaken leave, he would not have been required to prove that this was because he was dissuaded from taking them. The CJEU said in *King* that, where the employer does not pay for leave, the deterrent effect of the employer's practices is "*likely to be assumed*".

SUPREME COURT CONFIRMS STORE WORKERS CAN USE DISTRIBUTION WORKERS AS EQUAL PAY COMPARATORS

Summary: The Supreme Court has confirmed a Court of Appeal decision that predominantly female supermarket store workers could compare themselves with better-paid predominantly male workers in distribution centres for equal pay claims under the Equality Act 2010 (*Asda Stores v Brierley*).

Key practice point: Whilst significant for employers in the retail sector, the decision establishes only that the claimants are entitled to compare themselves with employees in the distribution operation – future litigation will consider whether they do work of equal value and, if so, the extent of any differential and whether the employer has a "genuine material factor" defence.

Decision: As they worked at different establishments, the question was whether the claimants and their comparators had "common terms" as required by the Equality Act 2010. The Supreme Court decided that meant simply considering whether, if the comparator group had been employed on the same site as the claimants, they would have been employed on broadly similar terms to those which they had at the distribution centre. It did not have to be feasible for the comparator group to be able to carry out their role at the claimants' workplace. All the Employment Tribunal had to do in this case was to envisage that a depot was situated next to the retail store and ask whether, on this assumption, the distribution employees would continue to be employed on substantially the same terms as they were employed at

their own establishment. The Tribunal had been entitled to conclude that the distribution employees would have been employed on substantially the same terms if they had been employed at the claimants' site.

Analysis/commentary: The Supreme Court stressed that its decision was in line with the object of the equal pay legislation – to allow comparisons between employees who did not and could never work in the same workplace – and that the fact-finding exercise in relation to the "common terms" requirement should not be a prolonged enquiry.

The EAT has recently taken a similar approach to equal pay claims in another supermarket equal pay claim (*Tesco Stores Ltd v Element*), granting disclosure orders requiring the employer to provide information about the pay and contracts of roles within distribution centres. The comparators had not been identified as individuals in the claims. The EAT rejected the employer's argument that the applications were "fishing expeditions", commenting that in large-scale equal pay claims, claimants often have limited information about potential comparators. Tribunals therefore exercise their case management powers to order disclosure that may enable claimants to identify a more focused group of comparators.

NO BINDING AGREEMENT ON TRANSFER OF CAR ON TERMINATION

Summary: The EAT, overturning the decision of an Employment Tribunal, found that a binding agreement had not been reached for transfer of ownership of an employee's company car on termination of his employment (*Evergreen Timber Frames Ltd v Harrington*).

Facts: Severance terms for H were discussed over several months prior to the termination of his contract for redundancy. A settlement agreement was apparently not discussed, however. Before termination, H was given a letter confirming that he would receive redundancy pay and be "gifted" his company car. The letter was silent on two other issues that had been discussed orally – ownership of his work computer and payment of a bonus. H submitted an appeal letter in which he said that he accepted certain parts of the offer, including the car, but challenged the overall severance offer, which he viewed as being incomplete based on earlier oral discussions. When ownership of the car was not transferred to him, he brought a breach of contract claim, which was upheld by an Employment Tribunal in relation to the car. The employer appealed.

Decision: The EAT allowed the appeal. The proposed gift of the car to H was not an ex gratia promise (despite being described as a "gift") but simply one of its proposals for the termination of his employment. It was not open to H to accept the offer in part while simultaneously contending that, in breach of contract, the offer was incomplete. The offer of the car was not a freestanding gift, it was a proposal made in the context of discussions for the agreed termination of employment. The case was remitted to a fresh tribunal to consider whether an oral agreement for transfer of ownership had been reached at an earlier meeting.

Analysis/commentary: There was no settlement agreement in this case, so no clear structure for recording the outcome of the protracted severance discussions. Also, this was a contractual claim, so the rule that pre-termination negotiations are inadmissible did not apply. The rule is limited to ordinary unfair dismissal claims.

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2021	Employers to contribute to the Coronavirus Job Retention Scheme
30 September 2021	Scheduled end of the Coronavirus Job Retention Scheme
5 October 2021	Deadline for reporting 2020 gender pay gap data

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes);
- **Discrimination / equal pay:** *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *Forstater v CGD Europe* (Employment Appeal Tribunal: whether views on transgender women were protected as a philosophical belief); *City of London Police v Geldart* (Court of Appeal: whether sex discrimination claim based on pay during maternity leave requires a male comparator); *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services)
- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether restructuring selection procedure was fair)
- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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