Employment Law Newsletter Autumn 2017

Welcome to the latest edition of the employment law bulletin. Please note: in this bulletin, MILS aims to keep you up to date on some of the latest developments in employment law and although the bulletin is not intended to provide a comprehensive summary of all the changes to the law, it highlights some key areas of change for motor industry employers.

Legislation

- **Tax Free Child Care**

The Government introduced its Tax-Free Child Care Scheme on the 28th April 2017. The Scheme at present is only available for working parents of children under the age of two. However, it will be gradually rolled out over the course of 2017 with the aim of supporting parents with the cost of child care.

- **Finance Bill 2017 Employment Amendment**

In light of the recent general election, the Prime Minister announced that the Finance Bill will be fast tracked through the legislative process. As a result, the Government has decided to leave the changes to the taxation of termination payments out of the Bill. The changes, by way of a reminder, had included measures that would have required employers to subject to tax an amount equivalent to the employee's basic pay if notice is not worked as well as measures making all termination payments subject to Class 1A NIC's above the £30,000 threshold.

Once the dust has settled on the surprising election result, it is far from certain that the deferred provisions will reappear. Much of the Government's proposed legislative programme will now have to be reconsidered. At the time of writing, the Queen's Speech has not yet been delivered and so it will be a case of watch this space for further developments.

Case law developments

- **Confirmation that a three-month gap in deductions breaks a series**

The Employment Appeal Tribunal (EAT) has recently affirmed the position set out in the 2014 decision of *Bear Scotland v Fulton and Another [2015] IRLR 15* which established that claims for underpaid holidays should be brought within three months of a "series of deductions".

The EAT, in the most recent hearing, reviewed this position and determined that there was no significant reason for departing from the earlier judgement.

This means that an employee will still be restricted from making a backdated holiday pay claim if there has been a gap of three months between any subsequent underpayments.

This is obviously very good news for employers as the decision provides greater certainty for those seeking to ensure they are correctly calculating holiday pay and any subsequent claims that may arise.

- **Adjustments for application with Asperger's Syndrome**

In *The Government Legal Service v Brookes [2016],* the EAT upheld the previous decision which found that a job applicant had suffered indirect disability discrimination from her prospective employer. The applicant, who had Asperger Syndrome, was required to complete a psychometric test. She asked for the test format to be adjusted because of her disability. The employer stated that an alternative format was not available but that extra time might be given at a later stage (if successful). The applicant undertook the test but didn't pass and subsequently brought a claim against the respondent for disability discrimination.

The Tribunal found that that the applicant had indeed suffered indirect disability discrimination. The employer's refusal to provide an alternative format put the applicant at a particular disadvantage compared to those who did not have Asperger's Syndrome and this was not justified by the prospective employer. The Tribunal also found that the employer's refusal to accommodate the applicant's request (to receive answers in a different format) also amounted to a failure to make a reasonable adjustment.

This decision is clearly important for employers who rely on similar methods when recruiting. Employers might now be expected to provide alternative testing methods, particularly when disabled applicants state that the testing method puts them at a disadvantage when compared with others.

- **When cost-saving redundancy is identified as a result of ill health absence, is it disability discrimination?**

It is not uncommon for an employer to identify that it can manage without a particular role when the role-holder takes a lengthy period of absence. If the absence is disability related, does it follow that a subsequent redundancy dismissal must be disability discrimination? In a reassuring judgement for employers, the Employment Appeal Tribunal (EAT) in the case of *Charlesworth v Dransfield Engineering Services Ltd* has said this will not always be the case.

This case decided that if your ability to do without a particular role is identified during ill health absence (even if the absence results from a disability), you can potentially fairly dismiss in a non-discriminatory way if a full and fair redundancy process is followed. The key question to consider is: Why are you dismissing? This tribunal concluded that this employee's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the employer was about to identify something that may well have been identified in other ways and in other circumstances.

However, there is a warning in the EAT's judgment because it says that no doubt there will be many cases with similar facts where an absence is the effective cause of a decision to dismiss (which would then be disability related discrimination and unlawful if not justified). This means employers will have to be careful and seek advice accordingly.

In the News

- **What does the General Election result mean for HR and Employers?**

As we know, the Conservative Party failed to retain its overall majority in the recent election leading to a hung parliament. This has led to the formation of a minority Conservative Government needing the voting support of Northern Ireland's Democratic Unionist Party (DUP).

The absence of a working majority, it will inevitably make it harder for the Government to implement domestic legislation and it is likely that some of the Conservative Party's manifesto pledges will now be dropped. This should be seen in the context of Brexit talks, which are likely to be challenging in any event.

Areas which could be affected by the election result include: Employment status and the "gig" economy, National Living Wage, worker representation on boards, right to take time off to care for sick relatives, closing the gender pay gap and EU rights guaranteed post Brexit.

It is too early to say exactly what will happen to these matters and some other additional measures which were proposed. The prevailing political and economic situation does leave future employment law development very uncertain and only time will tell which manifesto proposals the Government will actually be able to implement. Please therefore look out for further updates in future editions of our newsletter.

- **Brexit – Article 50**

Following the triggering of Article 50, the Home Office has published a "landing page" which gathers information from European Union nationals living in the UK. We understand that the page will be updated with the latest information about the status of EU nationals in the UK.

- **Sickness absence at its lowest levels since records began**

The Office for National Statistics has announced that the number of workers calling in sick due to illness or physical injury is at its lowest on record. 4.3 days per worker were lost to workers calling in sick in 2016. This number is substantially lower than the first record of 7.2 days lost per worker in 1993. This is again good news for employers and we are sure in no small part due to employers taking a more active involvement when sickness absence becomes a problem.

- **GMB Union lodge employment status claim against Hermes**

The GMB is challenging the self-employed status of Hermes drivers at Employment Tribunal. GMB's Union believe that Hermes drivers should be classified as "workers" and not independent contractors. In line with other similar recent cases, it is being argued that they should therefore be entitled to employment rights such as paid annual leave, holiday pay and sick pay.

HM Revenue & Customs (HMRC) has also intensified this investigation into the self-employed classification of Hermes drivers. This follows reports by the Guardian newspaper that their working practices did not reflect their self-employment status. HMRC has allegedly subsequently contacted Hermes requesting that the firm disclose evidence and meet with them to discuss their current employment classifications. This is further evidence that HMRC are keen to clamp down on bogus or fraudulent arrangements.

Andrew Macmillan
Solicitor
Motor Industry Legal Services

Motor Industry Legal Services (MILS Solicitors) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.