EMPLOYMENT UPDATE – Winter 2016

Welcome to the RBA Winter 2016 Newsletter.

As 2016 comes to a close it has certainly been an eventful year for Employers. This edition includes an update on the new statutory rates that have been revised in the last Autumn statement a few days ago. There is a reminder from the case law on the need for meaningful consultation in a redundancy situation and a need to carry out checks and retain records that your employees have the right to work in the UK and also that their visas have not expired.

What will the new year bring? Perhaps a New Year resolution, not to try and predict anything in the coming year!

The Team at RBA wish you and your colleagues a very Merry Christmas and a Happy New Year.

NEWS AND VIEWS

New limits for salary sacrifice schemes

From April 2017, employees will no longer be able sacrifice some of their pay for employee benefits in kind and employers and employees that use these schemes will pay the same taxes as everyone else.

However, child care, pensions, cycle to work schemes and ultra-low emissions company cars are excluded from the new restrictions. You may start to receive questions from your employees about this and you should communicate with them and reassure them that their pensions, childcare vouchers and cycle-to-work schemes are exempt from these changes. Arrangements for salary sacrifice schemes that are already in place will be protected until April 2018.

The gig economy

A tribunal judge recently awarded Uber's drivers with 'workers' rights', dismissing Uber's claim that each driver is self-employed. Why is it so important? Because so many businesses use people on a self-employed basis, sometimes incorrectly. The ruling suggests the courts aren't in favour of UK businesses by-passing their basic employment responsibilities. The government are currently carrying out a consultation which looks at this. If you need any help in reviewing self-employed workers you use in your business then please contact us.

The Immigration Act 2016

The Immigration Act is designed to discourage employers from employing migrant workers, and to tackle the practice of employing illegally. Employers now face harsher penalties for hiring illegal workers under this Act.

Previously, the Home Office had to show an employer actually knew an employee was working here illegally, but since July an employer who has reasonable cause to believe an employee is working illegally is committing an offence. The maximum penalties have also been raised to up to five years' imprisonment and/or a civil penalty of £20,000 for each illegal worker.

Employers need to take their responsibilities on this seriously and ensure they monitor their workforce effectively to eliminate illegal working. This includes having proper processes in place to check when visas expire, and carrying out 'right to work' checks, even following a TUPE transfer. However, at the same time this needs to be balanced with a fair approach to employees, both to avoid discrimination and possible reputational consequences.

The Home Office has been specifically targeting certain 'high risk' sectors including care homes, catering and hospitality, and IT (other sectors will also be subject to scrutiny) so it's essential that all employers have robust employment practices on the legality and immigration status of their employees. These should include carrying out the correct 'right to work' checks on all staff before they start work and tracking visa expiry dates.

If someone in the workforce is believed to be working illegally it is important to examine the evidence carefully and, if necessary, take legal advice to ascertain precisely what the immigration status is of the individual concerned, as this is not always clear.

Unless it is immediately obvious there is no irregularity, the employee should be suspended so that the situation can be investigated without the organisation being at risk of continuing to employ someone illegally. The employee should be sent a follow up letter explaining why he or she has been suspended.

Terminating someone's contract when his or her continued employment would be in breach of the immigration rules, is certainly a potentially fair reason for dismissal, but it is not an automatically fair reason, and so it is important to follow a fair process at all times.

If you need any help with this type of situation within your business please get in touch with us and we can ensure you deal with these matters in a legally compliant way.

Changes to the taxation of termination payments

The government has released draft legislation on proposed changes to the taxation of termination payments. It has opted to retain the £30,000 tax-free allowance for non-contractual payments, which is good news for employers and employees.

A change related to the tax-free element of termination payments is that employers' NICs will now be paid on compensation payments that are above the £30,000 tax-free amount. For example, if compensation of £45,000 is paid the first £30,000 is tax free but the remaining £15,000 will be subject to both income tax and employers' (but not employees') NICs.

Changes will also be made to the treatment of pay in lieu of notice (PILON) payments. Under current rules, where an employment contract permits the company to make a PILON, HMRC

treats these payments as earnings and they are subject to income tax and NICs. However, non-contractual PILON payments are not subject to tax and NICs because they are classed as compensation.

The government believes treating contractual and non-contractual pay in lieu of notice differently is confusing, unfair and open to abuse. It has proposed that the distinction is removed and all PILON payments will be taxable from April 2018. While this removes any confusion between whether tax should or should not be paid, the impact on employers is that the cost of termination packages will increase.

In addition, any other payments that the employee would have received and would have been taxed on (had they worked their notice period) will now be taxed on termination. The type of payments that would fall into this category would be expected bonus payments.

The impact of the changes will be that terminating employment contracts will become more expensive for employers because of the need to pay employers' NI contributions and taxation of all PILON payments. Employers may find themselves having to increase termination payments made to departing employees to compensate for a lower net figure on their termination.

Advisory Fuel Rates from 1 December 2016

These rates apply from 1 December 2016. You can use the previous rates for up to one month from the date the new rates apply.

Engine size	Petrol - amount per mile	LPG - amount per mile
1400cc or less	11 pence	7 pence
1401cc to 2000cc	14 pence	9 pence
Over 2000cc	21 pence	13 pence

Engine size	Diesel - amount per mile
1600cc or less	9 pence
1601cc to 2000cc	11 pence
Over 2000cc	13 pence

LEGISLATION UPDATE

National Minimum Wage Changes

On 1st April the new National Living Wage became compulsory, entitling workers aged 25 and over to a wage of £7.20 per hour. Please note the other NMW increases below effective from 1st October 2016.

There was no increase to statutory adoption, maternity, paternity or shared parental pay rates in April 2016.

CURRENT RATES

Statutory Sick Pay	**£88.45 p.w. (£89.35** from 6th April 2017)	
Statutory Maternity and Adoption Pay	**6 weeks at 90% of average earnings** **then 33 weeks at £139.58 p.w. (£140.98** from 6th April 2017)	
Statutory Paternity Pay	**2 weeks at £139.58 p.w. (£140.98** from 6th April 2017)	
Shared Parental Pay	**£139,58 p.w. (£140.98** rom 6th April 2017)	
Week's pay for statutory redundancy	**£479 p.w.** (from 6th April 2016)	
NI Contributions Lower Earnings Limit	**£112 p.w. (£113** from 6th April 2017)	
Minimum annual paid holiday	**5.6 weeks (28 days for 5 day week)**	
Guarantee Pay	**£26.00 per day** **£130 for 5 workless days** (from 6th April 2016)	
Minimum Wage (from 01.10.16)	**Age 21 – 24**	**£6.95** per hour
	Age 18 – 20	**£5.55** per hour
	Age 16 – 17	**£4.00** per hour
	Apprentices	**£3.40** per hour
Minimum Wage (from 01.04.17)	**Age 21 – 24**	**£7.05** per hour
	Age 18 – 20	**£5.60** per hour
	Age 16 – 17	**£4.05** per hour
	Apprentices	**£3.50** per hour
National Living Wage (from 01.04.16)	**Aged 25+**	**£7.20** per hour **(£7.50** from 1st April2017)

RECENT CASES OF INTEREST

Half-hearted and Insensitive Redundancy Consultation

In the recent case of Thomas v BNP Paribas Real Estate, the Employment Appeal Tribunal (EAT) overturned the decision of the employment tribunal and ruled that 'perfunctory and insensitive' redundancy consultation was likely to make the dismissal unfair.

In this case Thomas had over 40 years' service, ending up as a Director of BNP Paribas Real Estate's property management division. After a strategic review, the Thomas was put at risk of

redundancy and immediately put on 'garden leave' and told not to contact clients or colleagues. The employer then made a number of procedural errors, including getting Thomas's first name wrong in a letter. However, the employment tribunal initially found that the dismissal was fair.

Thomas appealed and the EAT quashed the decision, remitting the claim to a different employment tribunal. The EAT criticised the decision to put Thomas on garden leave and to prohibit contact with colleagues during the consultation period. The EAT found it 'particularly troubling' that the employment tribunal had found the manner of consultation perfunctory and insensitive, yet considered that it was reasonable, without saying why. Such a process would not necessarily be unreasonable, and hence unfair, but one would expect to find some form of reasoning from the employment tribunal to explain why matters that gave rise to criticism of the process did not render the consultation unreasonable.

RBA Comment

When entering a period of consultation with an employee regarding the possibility of redundancy, we are often asked by clients if the employee can be put on some sort of leave of absence or restricted duties whilst the consultation takes place. This case highlights the dangers of not carrying out the consultation procedure correctly and the dismissal could be found to be unfair if the consultation is not seen to be carried out effectively and meaningfully, irrespective of whether or not there is a genuine underlying redundancy situation in the first place.

Entitlement to Rest Breaks

In the case of Grange v Abiello London, the EAT had to decide whether an employer could be considered to have 'refused' an employee a rest break even though no request for a break had been made.

Under the Working Time Regulations 1998 (regulation 30), workers are entitled to a rest break of 20 minutes if they work for more than six hours.

Grange was employed by the bus company from June 2011, as a relief roadside controller, a role which involved monitoring bus services. He initially worked an eight and a half hour day, half an hour of which was an unpaid lunch break. However, the nature of his role made it difficult for him to take a break. As a result, in July 2012, the company emailed him asking him if he could work eight hours straight, without a lunch break, on the basis that he could leave half an hour earlier than previously.

In July 2014, Grange submitted a grievance to the company, claiming he had been forced to work without a meal break which had affected his health. The employer rejected his grievance and he lodged an employment tribunal claim.

The initial tribunal ruling was that the best interpretation of the 2012 email Grange received was that the employer was expressing an expectation that he would work without a break and at worst, this was an instruction. The tribunal heard that Grange had not made any requests of his line manager for a rest break at any time since receiving the email. As there had been no request for a rest break from Grange, the tribunal held there could not have been a refusal and rejected the claim. Grange then appealed to the EAT.

Grange argued that his employer's failure to allow him to exercise his right to a rest break did amount to a 'refusal'. In making its decision, the EAT considered the purpose of the working time directive, which the UK's regulations were designed to implement.

It was clear that the directive's entitling workers to a rest break was intended to be proactively respected by employers. The EAT held the view that an employer is under an obligation to recognise a worker's entitlement to take a rest break, and that this entitlement will be refused by an employer if it puts into place working arrangements that fail to allow workers to take at least the minimum 20-minute rest break – there was no need for a worker to request the rest break.

It considered that there was an 'error of approach' in the employment tribunal and allowed the appeal. The case was remitted to the employment tribunal to decide whether, on the facts of the case, Grange had been denied his entitlement.

RBA Comment

This decision now closes a loophole that meant employers could not be seen to be refusing an entitlement to a rest break if workers had not put in a request to take one – an approach not in keeping with the spirit of the directive which is aimed at protecting the health and safety of workers.

The case highlights the importance of providing workers with the rights given to them by the working time regulations. Clients should take a look at their working practices and ensure that arrangements are put in place to allow workers to benefit from their rights and entitlements. While workers cannot be forced to take rest breaks, they should be positively enabled to do so.

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