SIMKINS EMPLOYMENT DEPARTMENT SUMMER BRIEFING JULY 2017

Welcome to the Summer 2017 Employment briefing. In this edition we look at

- The Taylor Review of Modern Working Practices
- Temperatures at work – when is too hot too hot?
- Enforcement of post-termination restrictions
- Employment law developments in the next quarter

If you would like to discuss any of the points raised, please get in touch with a member of the Employment department:

Susan Thompson
DD: +44 20 7874 5637
E: susan.thompson@simkins.com

Victoria Willson
DD: +44 20 7874 5716
E: victoria.willson@simkins.com

Neil Gill
DD: +44 20 7874 5616
E: neil.gill@simkins.com

The Taylor Review of Modern Working Practices – Key Recommendations

The Taylor Review of Modern Working Practices (**the Review**) was published this month on 11 July and attracted much press coverage in the process.

The Review's primary purpose was to consider the implications of new models of working on the rights of workers and the freedoms and obligations of employers. The Review followed public concern over the increase of individuals working either as self-employed or as casual workers and basic employment rights being denied to them. This increase has been generated through use of the self-employment model in the gig economy and although the gig economy is still

relatively small, making up only 2% of total recruitment, in less than three years it is expected to be worth some £2bn to the economy. Whilst the flexibility of such arrangements often suits both parties, the fear articulated by many is that some unscrupulous employers rely on a business model that engages individuals to provide services directly to customers on a self-employed basis so as to avoid having to provide statutory rights to these individuals.

Currently, employment law categorises worker status in one of three ways, 1) "self-employed", i.e. in business on your own account, 2) an "employee", subject to the control of an employer and with an expectation of being provided with work and performing that work when given, and 3) "worker", an individual who provides personal services to a party that is not a client or customer. Workers sit 'between' employees and self-employed and have certain limited rights, e.g. the right to bring whistleblowing claims, to be paid national minimum wage (**NMW**), holiday pay and protection against unlawful discrimination. However, particularly in the recent gig economy cases, e.g. Pimlico Plumbers and Uber, in which individuals who are engaged to provide goods or services directly to customers via an app, they do not fall neatly into one of the three categories. Indeed, in the Pimlico Plumbers case, the Court of Appeal expressed the difficulty it had applying 20th century legislation to 21st century working practices.

Consequently, the Taylor Review was launched in December 2016. It was hoped that it would "bring some direction to the vast number and varying types of modern working".

The key recommendations of the Review are:

1 Keep the distinction between employees and workers, but rename "workers" "dependent contractors". This, however, is not a new category of person, it is simply a rebranding exercise.

2 Remove the requirement for dependent contractors to have to perform work personally (this ensures that the use of a substitution clause does not automatically mean that the individuals are deemed self-employed (as the concept of personal service has been ruled by the courts to be a key element in determining employment status)).

3 Place more emphasis on control and the definition of worker status – this is particularly in light of the fact that many of the gig economy employers exercise high levels of control over their workforce.

4 Retain the need for personal service in an employment contract.

5 Amend legislation so that case law principles defining employees and workers are reflected in the legislation itself – possibly with supporting secondary legislation.

6 Amend the law regarding NMW to make it clear that gig economy workers allocated work through an app are undertaking a form of output work and will not have to be paid NMW for each hour logged on when there is no work available. In return, consideration should be given to increasing the rate of the NMW for hours worked that are not guaranteed by the employer, i.e. the employer has to pay a 'premium' for the flexibility.

Other recommendations include preserving continuity of employment where any gap in employment is less than one month (rather than the current one week) allowing holiday to be paid on a rolled-up basis and increasing the reference period for calculating holiday pay (where pay is variable) from 12 weeks to 52 weeks. The Review also recommends giving those on zero hours contracts the right to request guaranteed hours after 12 months.

Interestingly, the Review recognised that the introduction of employment tribunal fees has created a barrier to justice and has recommended that claimants should be permitted to bring a claim to the employment tribunal (without a fee) to determine their employment status as a preliminary issue prior to any substantive claim. It also recommended placing the burden on the employer in employment tribunal claims to prove that the claimant is not an employee or worker.

Whilst many bodies have praised the Review such as the Institute of Directors, many trade unions have criticised it as a missed opportunity to give individual workers the same rights as those of employees. Furthermore, the Review has come in for heavy criticism for failing to deal with issues such as statutory maternity pay for female workers in the gig economy or working on zero hours contracts.

There is much in the Review to commend itself to employers and employees alike as many employing companies may be unaware that the individuals they believe they have hired on a self-employed basis are in fact likely to be held to be workers or even employees with the associated rights. However, as much as employees and employers require the certainty suggested by the Review, the harsh reality is that there is a significant risk that the Government, and indeed Parliament which is rather busy on Brexit-related matters, will not have the will or even parliamentary time to implement the changes for several years yet.

Some like it hot? Is there a maximum or minimum temperature for a workplace?

Whilst it has started to cool down from the recent heatwaves, this is a question that is commonly raised by staff.

There are no legal maximum or minimum temperatures.

However, employers have a duty under the Health and Safety at Work etc Act 1974 to ensure, so far as reasonably practicable, the health, safety and welfare of their employees at work.

Temperatures in indoor workplaces are covered by the Workplace (Health, Safety and Welfare) Regulations 1992 (**the Regulations**) which states "*During working hours, the temperature in all workplaces inside buildings shall be reasonable*" (regulation 7).

There is no specific guidance for working outside.

So what is reasonable?

The Health and Safety Executive (**HSE**) is the regulator of the law on health and safety at work.

It has an approved Code of Practice, which suggests that the minimum temperature in a workplace should normally be at least 16 degrees Celsius (61 degrees Fahrenheit). If the work involves rigorous physical effort, the temperature should be at least 13 degrees Celsius (55 degrees Fahrenheit).

A maximum temperature cannot be suggested since high temperatures are found in some workplaces including foundries, bakeries and kitchens.

The Code does not have legal effect as such and these temperatures are not absolute legal requirements; the employer has a duty to determine what reasonable comfort will be in the particular circumstances.

What does case law say?

In addition to the Regulations, there is an implied duty upon employers to provide a suitable working environment. The duty is broader than the health and safety duties upon employers and could include workplace temperatures. There has been case law where it was a breach of the duty to require a workshop employee to work in temperatures of 49 degrees Fahrenheit (9 degrees Celsius) in the winter.

What should employers do?

The Management of Health and Safety at Work Regulations 1999 require employers to make a suitable assessment of the risks to the health and safety of their employees. This extends to taking action where necessary and where reasonably practicable.

Temperature of the workplace is one of the areas that employers should consider particularly during spells of hot weather or when the air conditioning malfunctions.

Depending upon the particular workplace, employers should consider whether it is appropriate to consult with employees or other workplace representatives, including trade unions, to establish sensible means to cope with high temperatures.

So what's the answer?

The short answer is very hot!

The HSE advises that "*If a significant number of employees are complaining about thermal discomfort, [the] employer should carry out a risk assessment, and act on the results of that assessment*".

So in conclusion once the mercury starts rising, employers should consider what steps they can take to ameliorate the heat before sending staff home!

Enforcement of post termination restrictions: the time for judging validity

In this feature we consider the impact of recent case law on the enforcement of post termination restrictions and, in particular, the time for judging the validity of a restrictive covenant.

Background cases

A restrictive covenant in an employment contract will only be enforceable where there is a legitimate interest of the employer requiring protection and the covenant is no wider than is reasonably necessary to protect that interest.

What is "reasonably necessary" will depend on the facts of each case and an employee's role and seniority within a business will be relevant. Where an employee has been promoted throughout their employment the question arises: **should the validity of a restrictive covenant be judged by reference to the employee's role when they entered into the contract or when their employment terminated?**

According to well established case law, the answer is the former and a court will judge the validity of a restrictive covenant as at the time it was entered into (*Pat Systems v Neilly* [2012] EWHC 2609 (QB)). Employers therefore need to carefully tailor restrictive covenants and ensure that where there are promotions or business requirements change, new appropriate covenants should be entered into.

Recent developments (the Egon case)

The recent case of *Egon Zehnder Ltd v Mary Caroline Tillman* [2017] EWHC 1278 (Ch) highlights that whilst the above remains true, a court will consider not only an employee's role/seniority at the time the contract was entered into but also what the parties contemplated at that time.

In *Egon,* Ms Tillman was initially employed at "consultant" level in a business which provided a variety of professional services to clients, including executive search and advisory services. Both Egon and Ms Tillman had high expectations of her future progress and between 2004 and 2012, in line with those expectations, she was promoted initially to "Principal/Global Head of Investment Banking" and then to "Partner/co-Global Head of the Financial Services Practice Group". Ms Tillman left in 2017 and Egon issued proceedings to prevent her from working in breach of the post termination restrictive covenants she entered into when she first joined the firm.

The Court upheld the covenants and granted an injunction against Ms Tillman. The Court's view on assessing the validity of the covenants was that the correct approach was to assess the reasonableness of the covenant by reference to Ms Tillman's status as a "consultant" and what the parties believed that would entail. It was not correct to judge the covenant by reference to her more senior role as at termination but it was necessary to consider whether the view as to her

future prospects of promotion resulted in a closer level of engagement with the protected business interests (for example confidential information and client relationships) than normally expected of other "consultants".

What does Egon mean for employers?

Egon clearly demonstrates that the Court will take account of the contemplation of the parties at the time of contracting rather than limiting its assessment to the hard facts. For typical hires, the usual approach will apply and employers should consider new appropriate covenants where there are promotions.

However, where employers are hiring junior employees and trainees (particularly in certain professional fields) who will eventually qualify/be promoted and in training will be exposed to valuable business interests such as clients and confidential information, it would be sensible to record the expectations as to promotions and potentially include language in the restrictions themselves to acknowledge those expectations.

Doing so will not save a covenant which is unreasonable, so employers should still ensure appropriately tailored covenants are drafted in each case, but it will assist with the enforcement of covenants against staff who have, in line with expectations, climbed the ranks over time.

Looking ahead.....

Employment law is ever changing and below we take a brief glimpse at a few areas we expect to see developments in over the coming months:

Whistleblowing
On 7 September 2017, new rules on whistleblowing shall apply to PRA-regulated banks and UK branches of overseas banks.

Employment status
On 28 September 2017, the Employment Appeal Tribunal is to hear Uber's appeal of the Employment Tribunal's decision that two Uber drivers were workers and not self-employed contractors.

Sex discrimination and shared parental leave
An appeal has been lodged in *Capita Customer Management Limited v Ali*, against the finding of the Employment Tribunal, that a male employee was subjected to sex discrimination when his employer refused to allow him any period of shared parental leave at full pay when a woman on maternity leave would have received 14 weeks' full pay. We expect to hear soon whether the appeal will proceed to a full hearing in the Employment Appeal Tribunal.

Sex discrimination and workplace dress codes

In the coming months, we expect to see updated guidance on dress codes in the workplace and specifically the requirement to wear high heels. This is following a report from the Government on the topic which rejected any recommendations that would require legislative change, favouring an approach based on detailed guidance.

Collective redundancy consultation

Judgment is awaited in the criminal prosecution of the former chief executive of Sports Direct, Dave Forsey, under section 194 of the Trade Union and Labour Relations (Consolidation) Act 1992 for failing to notify BIS (now BEIS) of collective redundancies at USC, the fashion retailer which has been owned by Sports Direct since 2011.

If there is anything in this newsletter that raises any queries or you would like to discuss further then do contact a member of the team.

This briefing is for general guidance only. Legal advice should be sought before taking action in relation to specific matters.