BBi Group News

BBi Group : Supporting your Business

Group News - July 2013

NEWS FROM THE HR TEAM

Introduction of fees in employment tribunals from 29 July 2013

The Government has confirmed that it will introduce fees for people who wish to lodge claims in employment tribunals from 29 July 2013. The aim of this measure is to encourage the early settlement of claims.

Fees will be set at two levels, depending on the nature of the claim.

- Type A claims are straightforward claims for defined sums, eg sums due on termination of employment such as redundancy pay or unauthorised deductions from wages.
- Type B claims are more complex, eg unfair dismissal, discrimination, equal pay and whistleblowing.

The fees will be:

- Type A: £160 issue fee, £230 hearing fee
- Type B: £250 issue fee, £950 hearing fee
- Employment Appeal Tribunal: £400 appeal fee, £1200 hearing fee, payable by whichever party raises the appeal.

There will be discounts for multiple claims, eg up to 10 people can bring a claim for double the single claim fee.

It is proposed that claimants who are on benefits or who have low incomes will qualify for remission, ie they will be excused from paying the fees.

Where the claimant's case succeeds, the employment tribunal will have the discretion to order the employer to reimburse his or her fees.

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Proposed amendments to the Equality Act

In May 2012, the Government announced its intention to repeal certain provisions in the Equality Act 2010, with the aim of removing "unnecessary regulation" and reducing bureaucracy in equality law.

The first proposal is to remove s.40 (subss.2-4) of the Equality Act 2010. Under this section, an employer can be held liable for the harassment of one of its employees carried out by a third party (eg a customer or supplier) in circumstances where the employer knew that the employee had been harassed on at least two previous occasions by a third party and had failed to take reasonable steps to put a stop to the behaviour that was causing offence.

The Government is also proposing to repeal the power of employment tribunals (contained in s.124(3)(b) of the Act) to make recommendations in discrimination cases that go beyond the individual claimant, ie recommendations that - potentially - affect the employer's whole workforce.

Thirdly, there is a proposal to abolish the statutory questionnaire procedure (s.138 of the Act) that allows employees to refer certain questions to their employer regarding their treatment at work either before or after commencing tribunal proceedings.

The repeals of the third-party harassment provisions and the statutory questionnaire procedure were originally expected to take effect from March 2013, but so far no implementation date has been announced.

Finally, as part of a separate consultation, the Government is planning to review the operation of the public sector equality duty contained in s.149 of the Equality Act.

Political opinion or affiliation

With effect from 25th June 2013, the Employment Rights Act 1996 has been amended to the effect that the qualifying period for bringing a claim of Unfair Dismissal to Tribunal (2 years) stands to be disapplied where the principal reason for dismissal is or relates to, the employees political opinion or affiliation.

This is in response to the European Court of Human Rights (ECHR) judgment in Redfearn v United Kingdom [2012] ECHR 47335/06, in which the ECHR held that UK legislation gave rise to a violation of Article 11 of the European Convention on Human Rights (the right to freedom of assembly and association).

The ECHR stated that EU Member States must "take reasonable and appropriate measures to protect employees from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the qualifying period (for unfair dismissal) or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation". The Government has chosen the former option.

Political opinion or affiliation is not a protected characteristic under the Equality Act 2010, although in Northern Ireland employees are protected against discrimination on the grounds of political opinion.

Zero Hours Contracts

There has been a growing awareness and interest in Zero Hours contracts sometimes referred to as Bank Staff or Null Hours contracts.

Historically these contracts have been used by employers to have a 'bank' of staff that can be called upon at short notice on a regular basis to cover periods of sickness absence, holidays or fluctuations in work. They have historically been used in retail, catering, care / nursing to assist for example with staffing levels over Christmas. Zero hours contracts have in recent years become increasingly popular with even the House of Lords staff being put on them. So, why are they becoming so popular and what should employers look out for?

A zero hour's contract means that an employer only needs to pay an employee when they work. If there is no work and they are not asked to attend work then the employer does not pay the employee. This naturally gives greater flexibility to an employer at a time when workloads can be unpredictable and can benefit many different types of people; students, people with caring responsibilities who seek greater flexibility when working, those unable to commit to regular days / hours etc.

However, this employer benefit can be to the disadvantage of the employee and there is anecdotal evidence that some employees are being exploited. In an interview on 12th June 2013 with The Independent, Vince Cable, Business Secretary, announced that the government is to review 'the use of controversial zero hours contracts'. The article states that it is unlikely that the government will ban them but they could give employees greater protection or restrict their use. Not surprisingly the TUC are seeking a ban on all zero hours contracts or at the very least improving regulations.

As someone on a Zero hours contract is classed as employed they do not feature in unemployment statistics and nor may they be eligible to claim benefits. One option up for discussion is the possibility of reviewing tax credits for when employees are not working.

For some smaller employer who does not have the luxury of a Human Resources team might believe zero hour's contracts are an easy option. But employers must be very careful when it comes to zero hours contracts and should not confuse them with casual contracts. It is easy to mix the two up and some employers have thought they can take staff on under a zero hour's contract and as a result 'hire and fire' at will.

One of the key factors in a Zero hours contract is the 'mutuality of obligation'. Although not guaranteeing a minimum amount of work, if an employer offers work when it is available and the employee is expected to undertake the work then this is known as 'mutuality of obligation' and in this instance the worker would be classed as an 'employee'.

If, there is no mutuality of obligation there can be no contract of employment. This may be the case where the employer is not obliged to offer the worker work and the worker, in turn, is fully entitled to decline any work when it is offered without suffering adverse consequences. In this instance the contract would need to state 'you are not obliged to accept the hours of work offered and the Company has no obligation to offer you work on an ongoing basis'. In this instance the contract would be similar to a self-employed, contract for services and not a contract of employment.

However, there is no point in having this 'casual' type of contract in place just to avoid the worker from being entitled to 'employee' status if the reality differs. The expectations and true intentions of the parties and what happens in practice are important. Should any case come before a tribunal it is the reality of the situation that the judge will focus on. So be careful, if your contract says one thing and you treat the worker differently as you may end up with someone working on a casual contract but due to the nature of the relationship they could in fact be classed as an employee and therefore be eligible for all the protected rights that are inferred on employee status and company benefits e.g. redundancy pay, pension contributions, etc.

Right to Work: A new Online Checker

As I'm sure you are well aware, there can be serious consequences for any employer if they take on someone who doesn't have the legal right to work in the UK.

To make life easier, the Government has launched an online service that allows users to quickly check whether or not someone has this particular right. You don't have to give your name so this may put your mind at rest!

All you do have to do is answer 5 simple questions, such as; 'Does the worker have a UK passport?'. Having worked through them all, you'll be given an immediate answer. If you do use the online tool, we would recommend that you keep a copy of the result.

To use this new service, visit:
www.gov.uk/legal-right-to-work-in-the-uk

Case Law

Pulse Healthcare Limited v Care Watch Care Services Limited and six others EAT 2012

In a recent tribunal, Pulse Healthcare Limited v Care Watch Care Services Limited and six others EAT 2012, six individuals engaged on 'zero hours' contracts stated that they were eligible for TUPE.

The employment tribunal decided that the written contract of employment did not reflect the true agreement between the parties. It found that the claimants were personally required to perform services, were obliged to carry out the work offered to them and that Care Watch undertook to offer work. Accordingly, there was sufficient mutuality of obligation for the Claimants to be employees. The Company also argued that the Claimants were engaged on a succession of individual contracts and therefore did not have sufficient continuity of service to bring a claim for unfair dismissal. The Employment Tribunal disagreed stating, 'to find otherwise would be unrealistic'. The case was upheld at appeal.

This case highlights that an Employment Tribunal will look at the substance of the relationship between the parties; workers engaged on zero hours contracts may be employees even if there are clear contractual provisions stating that no mutuality of obligation exists.

Under a true 'zero' hours (casual) contract if an individual is working, he or she can walk off the job without sanctions and the employer can terminate the arrangement at will. The inherent flexibility in a genuine 'zero' hours arrangement will be an important factor should this ever come before a tribunal judge.

Onu v Akwiwu [2013] UKEAT/0022/12

The claimant, Ms Onu, a Nigerian migrant worker, had worked for the respondents, Mr and Mrs Akwiwu, who were also Nigerian, as a domestic worker in their home.

They required her to clean, cook and look after their daughter. The claimant worked 84 hours per week and her passport was retained by the respondents. She was paid £50 per month, rising to £150 per month by her third year of employment. The claimant eventually walked out, on the basis that she believed she was being badly treated. She also claimed that, because she had brought employment tribunal proceedings, the respondents had made threatening telephone calls to her sister in Nigeria.

The Decision: Employment Tribunal

1. The claimant succeeded on her complaint of direct race discrimination, on the basis that the burden of proof shifted and no sufficient explanation was offered by her employers.
2. Her complaint of victimisation was rejected on the basis that the Equality Act 2010 makes no provision for a tribunal to have jurisdiction to consider such a complaint where the circumstances arose after the relationship had ended.
3. The tribunal also upheld her claim in respect under the National Minimum Wage Regulations 1999, on the basis that it rejected the respondents' argument that the exception in respect of a family worker applied.

Patel v Lloyds Pharmacy Ltd [2013] UKEAT/0418/12

The Facts

Mr Patel was a pharmacist who suffered from bipolar disorder. He was rejected for a position by Lloyds Pharmacy in 2011 following an interview, and brought a claim of direct disability discrimination. While his application form included an equal opportunities questionnaire on which he put details of his disability, as is the case with most organisations this questionnaire was removed from the application before the short-listing exercise. His condition was not raised in the interview.

Mr Patel scored very low on Lloyds' standard scoring system and he was not offered a position.

There had been some history to the relationship between Mr Patel and Lloyds. In 2008, Mr Patel had been, for a short time, a self-employed locum pharmacist for Lloyds. When he had been interviewed for that position, the interviewer, Mr Butt, had been informed by Mr Patel of his bipolar condition. In 2011, Mr Butt had emailed a manager responsible for recruitment before Mr Patel was interviewed, stating that he had reservations about Mr Patel as he had been aggressive and confrontational. However, Mr Butt had not mentioned Mr Patel's disorder.

The Decision: Employment Tribunal

An employment judge struck out Mr Patel's disability claim on the basis that it had no reasonable prospect of success, as there was nothing to indicate that the interviewers knew anything of his disability.

The Decision: Employment Appeal Tribunal

The EAT upheld the tribunal decision. It found that, even if Mr Patel's case were put at its very best, it was not possible to draw a "reasonable inference from the material that the interviewers knew that the appellant did suffer from bipolar disorder, or that it in any way contributed to Mr Butt's dissatisfaction with him in that role".

The EAT was taking this view even before the disclosure process had been undertaken, commenting that while it was theoretically possible that one of the employer's witnesses might admit discrimination under cross-examination, it would be wrong in principle to allow a hopeless case to proceed to trial purely in the hope that something "might turn up" during cross-examination.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

For further information please contact Michelle Brinklow at BBi Risk Solutions:

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NEWS FROM THE COMMERCIAL TEAM

Cyber Liability

Media and technology are revolutionising the way we communicate, yet traditional insurance policies do not always keep up with the evolving landscape. BBi use a specialist insurer CFC Underwriting who underwrite policies specifically designed to provide comprehensive protection for cyber, privacy and media risks faced by companies in their day to day operations.

The following are 10 reasons to consider Cyber Liability Insurance:

1 Data is one of your most important assets yet it may not be covered by standard property insurance policies.

It is almost certainly worth many times more than the physical equipment that it is stored upon. A cyber policy can provide comprehensive cover for data restoration and rectification in the event of a loss no matter how it was caused and up to the full policy limits.

2 Systems are critical to operating your day to day business but their downtime is not covered by standard business interruption insurance.

In the event that a hack attack, computer virus or malicious employee brings down these systems, a traditional business interruption policy would not respond. Cyber insurance can provide cover for loss of profits associated with a systems outage that is caused by a "non physical" peril like a computer virus or denial of service attack.

3 Cyber crime is the fastest growing crime in the world, but most attacks are not covered by standard property or crime insurance policies.

Phishing scams, identity theft, and telephone hacking are all crimes that traditional insurance policies do not address. Cyber insurance can provide comprehensive crime cover for a wide range of electronic perils that are increasingly threatening the financial resources of today's businesses.

4 Third party data is valuable and you can be held liable if you lose it.

Non-disclosure agreements and commercial contracts often contain warranties and indemnities in relation to the security of this data that can trigger expensive damages claims in the event that you experience a breach. Increasingly, consumers are also seeking legal redress in the event that a business loses their data.

5 Retailers face severe penalties if they lose credit card data.

Under merchant service agreements, compromised retailers can be held liable for forensic investigation costs, credit care reissuance costs and the actual fraud conducted on stolen cards. Cyber insurance can help protect against all of these costs.

6 Complying with breach notification laws costs time and money.

These generally require businesses that lose sensitive personal data to provide written notification to those individuals that were potentially affected. Cyber policies can provide cover for the costs associated with providing a breach notice even if it is not legally required.

7 Your reputation is your number one asset, so why not insure it?

Cyber insurance can not only help pay for the costs of engaging a PR firm to help restore your reputation following a breach, but also for the loss of future sales that arise as a direct result of customers switching to your competitors.

8 Social media usage is at an all-time high and claims are on the rise.

Information is exchanged at lightning speed and exposed to the world. Often there is little control exercised over what is said and how it is presented. Cyber insurance can help provide cover for claims arising from leaked information, defamatory statements or copyright infringement.

9 Portable devices increase the risk of a loss or theft.

A laptop left on a train, an iPad stolen in a restaurant, or a USB stick going missing are all good examples. In addition, the devices themselves are being targeted with a growing number of viruses being built just for them. Cyber insurance can help cover the costs associated with a data breach should a portable device be lost, stolen or fall victim to a virus.

10 It's not just big businesses being targeted by hackers, but lots of small ones too.

Cyber attacks are quickly becoming one of the greatest risks faced by smaller companies, making cyber liability insurance a must. It can help protect smaller companies against the potentially crippling financial effects of a privacy breach or data loss.

If you require any further information or require a quotation please do not hesitate to contact the commercial department on 020 8559 2111.