

February 24, 2016

In this edition we will be taking a look at some employment issues which have been making headlines and at some of the more technical points raised in recent case law. We will consider the Government's recent release of its hotly awaited consultation paper on gender pay gap reporting; and the implications of the High Court's recent ruling that parts of the criminal records checks rules are 'arbitrary' and unlawful. We will also delve into a recent tax decision of the Upper Tribunal considering the taxation of injury to feelings settlement payment; a couple of EAT cases highlighting its approach to Early Conciliation and the Tribunal's powers to make case management orders; and a rare TUPE case dealing with the issue of temporary cessation of work.



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## Gender pay gap reporting: Mind the gap

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Addressing gender inequality in the workplace is at the heart of the government's agenda for 2016, with section 78 of the Equality Act 2010 coming into effect this year. This will make it mandatory for all employers with at least 250 employees to publish information about their gender pay gap, and employers need to be ready for the changes.

## Criminal records checks "Arbitrary" and unlawful

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The High Court has upheld a challenge by way of judicial review to the criminal records disclosure scheme used in England and Wales. It has found the scheme to be "arbitrary" and disproportionate, and it was ruled unlawful, as incompatible with Article 8 of the European Convention on Human Rights.

## Injury to feelings compensation: taxable or excepted?

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In the long-running case of *Moorthy*, the Upper Tribunal has held that an injury to feelings compensation payment made in connection with a termination of employment was taxable as a termination payment under section 401 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). In doing so it has upheld the decision of the First-tier Tribunal but, controversially perhaps, disagreed with past decisions of the Employment Appeal Tribunal (EAT).

## Early Conciliation and the Employment Tribunal's case management powers: Changes to the respondents

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The two recent cases set out below highlight the flexible approach that the Employment Appeal Tribunal (EAT) seems to be taking in relation to Early Conciliation (EC) and the Employment Tribunal's (ET) powers to make case management orders at any stage of proceedings. Both cases dealt with situations in which there had been a TUPE transfer of staff.

## TUPE: Temporary cessation of Work

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There is relatively limited case law dealing with a temporary cessation of work in a TUPE context. However, in the case of Mustafa, the Employment Appeal Tribunal (EAT) considered whether there had been a business transfer or service provision change (SPC) under TUPE 2006 where a subcontractor had suspended its operations shortly before the main contract was awarded to a new contractor.

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