

UK People, Reward and Mobility Newsletter

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Whilst maintaining a nod to COVID-19 issues, in this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: new rights for working parents and carers, transparency in pay, the Supreme Court ruling on vicarious liability for an unauthorised data breach, and changes to national minimum wage regulations.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com

New rights for working parents and carers

Focus on families – neonatal care and carer’s leave

The current coronavirus crisis has led us all to spend more time with our families. The UK already has a range of policies in place that enable individuals to put their families first. Examples include the right to time off on the birth or adoption of a baby, the right to request flexible working and the right to time off for dependants. The government has recently acknowledged where the gaps still exist. It has sought to address these on the premise that employers who embrace family-friendly policies get more out of their employees, in terms of loyalty, commitment and motivation.

Neonatal care

Last year, the government published a consultation paper which sought views on a number of initiatives aimed at supporting employees to balance work and family life. A particular focus was placed on the parents of the 100,000 children who are or have been in neonatal care. Unless you have been in that situation, I do not suppose one can imagine the anguish that must come with having a child in neonatal care. The government’s proposals sought to relieve any extra anguish that a parent felt, due to not being able to take any time off work and/or having a reduced income coming into the home.

The government published its response to the consultation last month. It has confirmed that legislation will be passed to create additional entitlements to statutory neonatal leave and pay. The new entitlements will be set out in the Employment Bill.

Statutory neonatal leave will be available to employees from their first day of employment. Statutory neonatal pay will be available to employees who meet the continuity of service and minimum earnings tests applicable to other types of pay for family leave, such as statutory maternity pay. Employers will be able to reclaim statutory neonatal pay from HMRC by way of a reduction in their national insurance contributions (in a similar way to statutory maternity pay).

IN THE PRESS

In addition to this month’s news, please do look at publications we have contributed to:

- [Journal of the Law Society of Scotland – Laura Morrison surveys the issues that have arisen as a result of the coronavirus](#)
- [People Management – Laura Anthony asks is it acceptable to covertly monitor staff?](#)
- [Scottish Grocer – Laura Morrison looks at what retail needs to know when it comes to the coronavirus](#)

Neonatal leave and pay will be available to parents of babies who are admitted into hospital as a neonate (28 days old or less), if the admission lasts for a continuous period of seven days or more. It is expected that parents will receive a week of neonatal leave and pay for every week that their baby is in neonatal care, capped at a maximum of 12 weeks. It is anticipated that the leave must be taken in blocks of one or more weeks. It is also proposed that the leave will be taken after maternity or paternity leave. These details are yet to be confirmed. They were omitted from the government’s consultation response. Employers can, of course, offer more generous rights.

Some aspects still remain to be decided, such as whether both parents will be able to take neonatal leave at the same time. Also, will leave accrue in respect of each child where parents have two or more babies requiring neonatal care at the same time? There is plenty of time to sort the finer detail, with the government not intending to implement the right until 2023. So, while all government departments may currently be preoccupied, the commitment remains that parents of children who require neonatal care will be supported.

Leave for unpaid carers

A second family-friendly right that is expected to make its way into the Employment Bill is leave for unpaid carers. The government has started a consultation on the proposal to give employees, who are also unpaid carers, one week’s additional unpaid leave a year. Again, it is open to employers to provide a more generous benefit. Some may already have comparable provisions from which employees can benefit.



The consultation states that the aim is to “make things better for working families”. It recognises that the 5 million unpaid carers in the UK face particular challenges. “Carers” in this sense is taken to mean “a person providing unpaid care to family members, friends, neighbours, or others because of long-term physical or mental health, disability or problems related to old age”. The definition of the caring relationship will likely mirror that which we are used to in respect of the right to time off for dependants.

In terms of the individual that is in need of care, it may be due to a physical or mental health problem, a disability or issue related to old age. It is anticipated that the care is likely to last for a longer period of time, such as “six months or a year”. The government is consulting over whether certain conditions should automatically qualify as meeting the threshold for carer’s leave, by taking a similar approach to conditions which are deemed disabilities under the Equality Act 2010. However, the consultation document only refers to cancer, HIV infection and multiple sclerosis, and no other deemed disabilities.

Other issues that remain subject to the consultation include:

- Should there be a minimum qualifying period of service that the employee must have before he/she can take advantage of carer’s leave?
- What reasons are acceptable reasons for taking carer’s leave?
- What can the leave not be taken for?
- What evidence must an employee submit to show they are eligible to take carer’s leave?

- Should there be restrictions on how the leave can be taken?
- How much notice should an employee give of their intention to take carer’s leave?

The government proposes that an employee taking carer’s leave would enjoy similar protection against suffering any detriment or dismissal. It is also proposed that a new right would be introduced for an employee to bring a claim if their employer has unreasonably refused to permit them to take carer’s leave.

We will have to wait and see what comes out of the consultation to get a better feel for what provisions may end up in the Employment Bill. However, administering the scheme will add to the workload of HR professionals. The consultation closes on 3 August 2020. Employers that want to contribute to the same can do so by going to <https://beisgovuk.citizenspace.com/lm/carersleave/>. We do not know when this new right will come into force. However, it seems to be following the same path as the neonatal leave discussed above, and therefore we could see carer’s leave becoming available in or around 2023.

Comment

At a time when we are spending a lot of time with our immediate families and missing our wider families, it is of some comfort to know that, as employees, schemes are being put in place which will help us to get the balance right to support those that are closest to us.

Could transparency of pay be your beacon in troubled times?

Business are looking at their peers, their customers and their supply chains to see what they can discover at this time. One exciting area for consideration is attracting and retaining the best talent. Many businesses are anticipating restructuring or other fundamental changes in the next year. That can result in a pool of talent becoming available that businesses could not have dreamt of in pre-COVID-19 times. So...what is the best talent looking for in the current market? Are women looking for different things to men? Are different generations looking for different things? What about a desire for employees to be paid equally to those of the other gender for doing like work?

When looking at equal pay, there may be little difference in generations, as this year marks 50 years since the introduction of the Equal Pay Act. However, few businesses believe pay transparency would be easy for them, even now. Principally, the concern is the risk of litigation if they reveal skeletons in their closet. However, anecdotally, entrepreneurial and forward-looking businesses that have already effected such changes have reported positive outcomes. The secret appears to be to combine transparency with a real focus on setting objective performance criteria to measure performance. One for the thought bank...

If you are trying to attract and retain female talent, you need to consider the embarrassment factor. Just a month before the commencement of the job retention scheme, the Fawcett Society was reminding us that only 24% of people they surveyed reported that salaries were discussed openly in their workplace and 52% of women would be embarrassed to ask their male colleagues how much they earn.

Businesses should be careful not to delay in this area, given the government's decision to suspend gender pay gap reporting obligations this year. That measure is truly relevant to the COVID-19 "survival" phase (alleviating a pressure point for businesses). This will return to focus and, by that time, you may be behind the curve.

Eventually your hand may be revealed in any event. It may be better to use this as a selling point for your organisation by doing something now.



The Fawcett Society is backing a private members bill which aims to introduce a new "right to know" what a comparator is paid and what their terms of employment or engagement are. The idea is that the current measures do not work without transparency. This is also billed to be a way to avoid the need for colleagues to have backdoor conversations in order to obtain the information they require.

The right would extend to workers. They would only need to suspect that their colleague (within the organisation) is a comparator for equal pay purposes to make a request. The employer would need to provide defined information within 20 days. The information that could be requested would potentially include information about the comparator's salary, benefit, bonus, overtime, allowances in respect of shift working and standby time, bank holidays and time off in lieu, attendance pay and performance-related pay. There is also proposed to be a less specific catch-all of "any other terms related to equal pay". The bill envisages that employees would be permitted access to a comparator's Form P60 as well as job descriptions and job evaluation studies carried out by the employer. Employees would have the ability to make multiple requests in respect of different comparators.



There are penalties proposed for employers who do not comply.

There are also proposals including a tribunal ordering full costs and expenses if the individual goes on to make a successful disclosure application. There is also a suggestion that the tribunal may order that the material factor defence is not available to the extent that the employer has not provided information about particular terms. There is a proposal that any costs would be paid by the employer within 28 days. If the employer failed, it would be debarred against defending a subsequent claim.

In addition to the above, the bill also proposes a number of other measures including:

- extending transparency by extending gender pay gap reporting to companies with 100 employees or more;
- requiring employers to publish an action plan to tackle gender pay gaps;
- reforming remedies and time limits in respect of equal pay;
- providing a right to equal pay where a single source can rectify unequal pay (at present the European Union underpins this, but the Fawcett Society considers it to be at risk in the Brexit separation);

- revising the statutory statement of particulars (section 1 Employment Rights Act) to include equal pay;
- giving claimants back their lost pension rights and an injury to feelings award when they win a claim; and
- placing obligations on certain employers to publish information on pay between employees of different ethnic origins, as well as between male and female employees.

Private members bills do not always get the greatest traction and the bill is currently only at the second reading stage in the House of Lords. Therefore, it is at an early stage in its legislative journey. It is highly unlikely that it will be in a position to get immediate airtime given the need for immediate COVID-19-related measures. The question is whether there is an appetite for these changes once COVID-19 has settled. Assuming there is a desire for change, the delay gives businesses an opportunity to get ahead. Businesses can decide on their own terms the extent of any changes they want to make in this area. In a time when people feel a real sense of community, changes that bring unity may appear much more profound. Who does not want to be the organisation that talent looks to and says are ahead of the curve?

The Supreme Court's ruling on vicarious liability for an unauthorised data breach

Introduction

The Supreme Court has ruled that Morrisons was not vicariously liable for an unauthorised data breach intentionally committed by a disgruntled former employee.

Background

Andrew Skelton, an internal auditor at Morrisons, received a verbal warning for minor misconduct in July 2013. As a result, he held a grudge against the company. Several months later, in November 2013, Mr Skelton was asked to send internal payroll data to Morrisons' external auditors, as he had done on previous occasions. This time, as he did so, he also made and kept a copy of the data. The data contained personal information on employees, including names, dates of birth, national insurance numbers, bank account information, etc.

In January 2014, Mr Skelton uploaded a file containing personal data on 98,998 Morrisons' employees to a publicly accessible file-sharing website. He was at home when he made the disclosure, using a personal mobile phone and false email account.

In March 2014, Mr Skelton alerted three newspapers of the leak of personal data, posing as a concerned member of the public who had simply found it. The newspapers did not publish the data, but one of them did inform Morrisons, who quickly acted to have the data removed and informed the police. It also informed the employees and undertook measures to protect their identities. Mr Skelton was arrested a few days later and eventually sentenced to eight years in prison.

In the lower courts

The claimants in this case, a group of Morrisons employees whose personal data had been leaked, brought proceedings against Morrisons for breach of the Data Protection Act 1998, misuse of private information and breach of confidence – based on primary as well as vicarious liability.



The lower courts rejected the notion that Morrisons was under a primary obligation in respect of any of the alleged breaches but, nevertheless, found it vicariously liable for the acts of Mr Skelton. The Court of Appeal found that what happened after Morrisons provided Mr Skelton with the data was a seamless episode in the ordinary course of Mr Skelton's employment. It was considered immaterial that Mr Skelton's objective was to harm Morrisons. Even though Mr Skelton made the disclosure at home, using personal equipment, it was still within the field of activities assigned to him.

Decision of the Supreme Court

The Supreme Court overturned the lower courts' decisions. The crucial issue in determining vicarious liability was whether Mr Skelton made the information public within the ordinary course of his employment. In a unanimous decision, the Supreme Court held that he did not.

The Court considered whether Mr Skelton's conduct was so closely connected with what his employer authorised him to do that it may fairly and properly be regarded as done in the ordinary course of his employment (known as the "close connection" test).

The Supreme Court said the key was the capacity with which an employee was acting when the events took place. It observed that the mere fact that

Mr Skelton's employment gave him the opportunity to commit the wrongful act was not sufficient to warrant imposing vicarious liability.

Further, the Supreme Court said that a previous court's comment that "motive is irrelevant" should not be taken out of context. In this case, it was highly relevant whether Mr Skelton was acting for Morrisons' business or for purely personal reasons. The Court said a distinction should be drawn between cases where an employee was engaged in furthering his employer's business and cases where an employee is pursuing his own interests. Mr Skelton was guided purely by a sense of personal vengeance and acted with the specific intention of harming his employer. Accordingly, the imposition of vicarious liability was not warranted.

Comment

The Supreme Court's decision will surely allow employers to breathe a sigh of relief. The lower courts' decisions would have opened up the potential for broad liability for the acts of rogue employees. Provided businesses continue to comply with data protection requirements under the GDPR, they are unlikely to be liable for acts of employees which are firmly outside their control.





Changes to national minimum wage regulations

The national minimum wage (NMW) regulations are notoriously complicated and a number of businesses have faced enforcement by HMRC as a result of falling foul of them unintentionally. The technical nature of the rules meant that companies were often caught out. This, in turn, led to criticism of the rules, the chief of which is that enforcement provisions drew no distinction between businesses who had breached the regulations through ignorance and those that deliberately flouted them. The changes introduced are designed to bring a more “proportionate” approach to enforcement and to reflect the complexity of modern day working arrangements.

Name and shame scheme

The “naming and shaming” of businesses which failed to pay the NMW was suspended in 2018 to allow for a review of its effectiveness and for further consultation to take place with employers’ organisations. The government has decided to reactivate the scheme with effect from April 2020, with a few amendments to the previous iteration of the scheme.

The threshold of arrears of pay at which businesses are named and shamed has been increased. Previously, any business which owed its workers £100 or more on aggregate could be named and shamed. That threshold has increased to £500. Those businesses which are less than £500 in arrears will still face fines and have to pay back workers, but will not be placed on the published list of those businesses which have breached the regulations. This is still an aggregate figure rather than the actual amount owed to any particular worker and, therefore, does not assist larger companies which may owe a number of workers very small amounts but which total more than £500.

In a further change, lists of those companies breaching the rules will be published more regularly. Instead of taking place quarterly, it is anticipated that lists will be released every few months.

Salary sacrifice

Some businesses have been caught out where salary sacrifice and deduction arrangements have taken their workers below the NMW. Examples of schemes which have fallen foul of the rules include salary sacrifice pension arrangements, benefit schemes which have allowed workers to purchase products from the business and pay for them via deductions from their salary (such as season tickets) and savings schemes (such as Christmas savings schemes). Although the schemes were not compulsory and benefited the worker, the fact that the deductions took them below NMW meant that the business faced enforcement from HMRC.

The new enforcement guidance states that those businesses using certain schemes will not face financial penalties if the scheme takes the worker’s pay below the applicable NMW rate. Businesses in these circumstances will not be named and shamed either. This new enforcement policy will apply to salary sacrifice arrangements, non-mandatory purchases and savings schemes such as those which had previously been caught. However, it will only apply where the worker has consented to the deduction or reduction in their salary. Deductions for uniform purchases and other items connected with the worker’s employment are not included and enforcement will follow if these types of deductions take a worker below the NMW.

It is important to note that, even though the business will not face financial penalties, where the reduction or deduction takes the worker below the NMW it will still have to repay the arrears to their workers.

Salaried hours workers

Under the NMW regulations, there are only four types of work: salaried hours work, time work, output work and unmeasured time work. The method of calculating whether NMW has been paid varies according to the category of work into which the worker falls. If a worker falls into salaried hours work, the business will not breach the NMW regulations if the worker receives less than the NMW in one pay reference period provided that they are paid NMW for the average hours worked in the calculation year.

However, prior to the changes, a worker would only fall into the salaried hours work category if they met all four of the following criteria:

- they are paid for an ascertainable number of hours per year;
- they are entitled to an annual salary;
- they receive no additional payment for those hours (other than a performance bonus); and
- they are paid either in equal weekly or monthly instalments.



This resulted in some workers falling outside the salaried hours work category – for example, those workers with a different pay cycle or who receive premium payments, such as enhanced bank holiday rates, shift allowances or unsocial hours payments.

In order to combat this and to increase flexibility, the government has widened the type of pay arrangements covered by the salaried hours work category. It can now include additional payment cycles such as fortnightly or four-weekly payroll arrangements. This is intended to reflect the modern working culture where such different pay arrangements are common.

The new regulations allow businesses to pay their salaried hours workers premium payments. Businesses will also be able to set their own calculation year to further increase flexibility and make it easier for them to monitor their workers' pay. Together, these changes should make it easier for businesses to correctly categorise their workers and take advantage of the salaried hours work category.

Conclusion

These changes to the regulations and enforcement policy, while not fundamentally changing the requirement to pay NMW, should at least mean that it is easier for businesses not to breach the NMW provisions unintentionally. The change to the enforcement policy should also give comfort to those businesses which do breach the rules by their use of salary sacrifice and similar schemes. However, the regulations need to be navigated with care to ensure compliance and to avoid being named and shamed.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- [Collective consultation requirements: is your business prepared?](#)
- [Supreme Court: no vicarious liability where employee pursuing his own vendetta](#)
- [Good Work Plan changes come into force today](#)
- [Employment Tribunal can serve ET1 claim forms by email during the COVID-19 pandemic](#)

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