Employment Newsletter

February 2019

BACKHOUSE JONES

When are you required to provide a Statement of Employment Particulars?

In the case of *Stefanko and Others v Maritime Hotel Ltd* the Employment Appeal Tribunal (EAT) held that employees have a right to a statement of employment if they have worked continuously for at least 1 month.

The Facts

The Claimants in this case were all employed as waiting on staff by the Maritime Hotel, all of which had relatively short periods of employment averaging around a few months each (one Claimant, Ms Woronowicz, was employed for only for 6 weeks). Ms Woronowicz succeeded in a claim for automatic unfair dismissal. She also complained that the Hotel had failed to provide her with either a payslip or statement of employment particulars.

Section 1(2) Employment Rights Act 1996 (ERA) states that an employee should be given a written statement of the particulars of employment not later than two months after the beginning of the employment. Under section 38 of the Employment Act 2002, unless an employer can demonstrate that there are exceptional circumstances, employees could be entitled to an award of between two and four weeks' pay if their employer fails to provide them with a written statement of initial employment particulars or of any changes to their terms of employment.

However, it should be noted that there is no standalone claim under s38, it can only be claimed if the employee has successfully brought another substantive claim such as any detriment in relation to National Minimum Wage, breach of Working Time Regulations, unfair dismissal etc.

As Ms Woronowicz did not have 2 months' continuous employment, the Employment Tribunal refused to award her compensation under s38.

However, Ms Woronowicz appealed to the EAT, who found that this approach was incorrect because Section 2(6) of the ERA says that the right to a statement of employment particulars exists even if a person's employment ends before the two months are up. The EAT held that she was entitled to a statement of employment particulars and an increased her award for not receiving one.

Commentary

Currently, there is an exception to the right for employees who work less than 1 month without a statement of employment particulars. However, following the Taylor Review of Modern Working Practices (2017), the government has announced extensive employment law reforms intending to improve working life and employment rights with a particular emphasis on vulnerable workers including agency workers, casual workers and zero hours workers.

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 which comes into effect from 6 April 2020, is set to repeal this exception and provide that the statement of particulars must be given on or before the first day of employment, rather than within two months of employment starting.

It also adds to the information that must be given in a written statement, to include information on the length of time a job is expected to last, the notice period, eligibility for sick leave and pay, other rights to leave, any probationary period, all pay and benefits and specific days and times of work.

Employers need to be aware of their obligations come next April and put plans in place to ensure compliance with the new legislation.

All employers want their employees to get along but what happens when they really get along?

Whether it is friendships or romantic encounters, the interactions between employees can affect their productivity and the Company dynamic as a whole.

Given the amount of time that employees spend with each other in the workplace it is likely that personal or intimate relationships can and will develop. Employers should accept that personal relationships are normal and that in many cases will not present a problem.

Traditionally, any type of workplace relationship has been frowned upon for several reasons. This includes distractions and interruptions which is then detrimental to productivity and relationships leading to gossip amongst co-workers. However, research has found that workplace friendships can actually be good for employees and the Company. As more people spend longer at work, the line between home and work is thinner than ever. In fact, contrary to popular belief it is now the opinion that employees are happier when they have friends at work which makes it is easier to get through the day and so ultimately it can lead to increased productivity and decrease staff turnover.

Although much trickier, a workplace relationship can be viewed in a similar way. Employers should ensure that all employees are familiar with the Company's stance on workplace relationships and managers know how to address issues in one or more of the following ways:

- A Workplace Relationship Policy.

In light of the potential implications, we would suggest that a well written and informative Personal Relationships at Work policy is put in place to inform employees of the balance between their rights to a private life and the Company's right to protect its interests.

- Provide training.

Consider offering courses for managers and supervisors focusing on romantic relationships between their employees.

- Grievance and Anti-harassment Policy's. There can be a thin line between workplace romance and possible sexual harassment so all employees should be made aware that inappropriate and unwanted conduct of a sexual nature is not acceptable. This can also be an issue when relationships fail.

- Employers may want to include a guideline in their policy that requires employees to inform management of any close personal relationships between colleagues so that they can review the situation in relation to possible interference with their work. In such circumstances, employers may find it necessary to explore the possibility of one party being moved to a different area of work or location.

Be aware that the dismissal of an employee simply for having a personal relationship at work is likely to be unfair, as well as possible discrimination on the grounds of sex.

Such situations should be handled with care and sensitivity in the interests of all concerned and employers should ensure that any approach or actions are not unfair or discriminatory. Please speak to a member of the employment team if you require further advice.

FAQs: Post Brexit recruitment of EU citizens

Whether you think Brexit is a good thing or a bad thing it seems to be a term that evokes an eye roll from all who glance their eyes upon the portmanteau of 'British' and 'Exit', nevertheless, we all need to prepare for what is to come.

We can all admit that no-one seems to have a concrete answer for anything and when we are given an answer to a certain issue by the powers that be, we are often left with more questions. With the deadline for Brexit looming and the ever-increasing risk of a no-deal we've set out our answers to some of the more frequent questions we've been asked about retaining and recruiting EU nationals post Brexit:

Will we be able to employ EU citizens after 29 March 2019 in the event of a deal or no deal?

Yes, if an EU citizen is already living and working here in the UK you will be able to employ them. It is however important that any EU employees and their families apply for settled or pre-settled status before 30 June 2021. This will entitle them to remain in the UK after 30 June 2021.

What are the conditions to employ EU citizens after 29 March 2019 if there is a deal or no deal?

The Government recently voted not to have an extension on Brexit, this therefore means that the withdrawal date remains 29 March 2019, a date fast approaching. At current the prime minister is still negotiating a withdrawal agreement with the EU after her previous draft

was defeated in the commons. We therefore don't know what agreements will be in place for any future agreement negotiated over the coming weeks. The defeated draft Withdrawal Agreement only protects the rights of EU citizens already living/and or working in the UK on 29 March 2019 and coming to the UK during the transition period.

It is not clear what conditions will apply to EU citizens who arrive after 29 March 2019 if there is no deal.

Will the same rules apply that currently apply to Non-EEA employees?

They could do, the government has stated that details of a future immigration system would be set out in a white paper, the publication of this paper has been changed several times.

Will certain sectors be exempt from restriction of freedom of movement?

Currently, only the Agricultural sector has been given "exemptions" for the freedom of movement. The exemptions come in the form of a two-year pilot scheme of which would see seasonal workers allowed to come to the UK between spring 2019 and summer 2020. The scheme only allows fruit and vegetable farmers to employ migrant workers for a period of 6 months. 2500 workers from outside the EU will be able to come to the UK each year, alleviating labour shortages during peak production periods.

There is a cost for the employers when employing seasonal workers as a higher minimum wage will be paid to the seasonal workers.

Will we have to pay a skills charge for EU employees?

This is still an unknown, it looks likely however that the UK is not to be tied to free movement post Brexit.

What needs to be done to obtain settled status and will it still apply if there is no deal?

In November 2017, the government published a 'technical note' on EU citizens' rights which set out requirements for EU staff to obtain 'settled status' in the UK.

The scheme has started to be rolled out but will not be fully open until March 2019. The deadline for applying is 30 June 2021 and most people will need to have started living in the UK by 31 December 2020. The application form is online and EU nationals will need proof of their identity and documents to confirm they have lived in the UK for five years.
Individuals who have not lived in the UK for five years by 30 June 2021 can apply for pre-settled status. Once they receive this and have five years continuous residence, they can apply for settled status.

It is supposed to be a simple process and decisions will be given "very quickly" according to the government. It also said there would have to be "a very good reason" to refuse an application (unlike the existing residency application process)!

In the case of no deal, EU citizens who live in the UK by 29 March 2019 can still apply for settled status but the application deadline will be 31 December 2020. We don't know what rules will apply to EU citizens who arrive after 29 March 2019 if there is no deal.

Do we have to check whether an EU citizen has a right to work in the UK after 29 March 2019?

Yes, but these are the same checks that currently exist and employers are used to. A number of weeks ago, a government minister (Caroline Nokes) said that employers would need to carry out additional right-to-work checks for EU citizens if no deal is reached. Since then she has said that employers will not need to do this even if there is no deal.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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