Employment Newsletter

February 2020

BACKHOUSE JONES

Employment Law Changes – How to prepare for April 2020

Last month we touched on some of the key employment law changes that are going to happen in 2020 and this article covers these in more detail.

April tends to be a busy time in the world of Employment Law, when most changes come into effect. This year is no different with some of the upcoming changes resulting from the Good Work Plan, considered by some to be the biggest reform in employment law for 20 years.

We have highlighted below some key changes that are due to come into effect from 6 April 2020 which will inevitably affect your business. It is important that all employers put steps in place to ensure that they are ready and complaint with the changes which directly affect them in advance of 6 April 2020

Particulars of Employment

Currently, an employee is entitled to a written statement of the particulars of their employment once they have worked for longer than a month, with the same employer, and must receive this within 2 months of them starting work. However, with effect from 6 April 2020 all new employees and workers will have the right to a statement of particulars of employment from day one of their employment.

The Government has also extended the information which must be included in the statement of particulars. In addition to the current information, the following information must now also be provided:

- the expected length of their role with the employer, or the end date of a fixed-term contract;
- Notice both the employer and worker are required to give to terminate the agreement;
- details of eligibility for sick leave and pay;
- details of other types of paid leave, e.g. maternity and paternity leave;
- the duration and conditions of any probationary period;
- all remuneration, not just pay, including vouchers, lunch, health insurance and all other benefits in kind;
- the normal working hours, the days of the week the worker is required to work, and whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined;
- any training entitlement provided by the employer, any part of that training entitlement which the employer requires the worker to complete, and any other training which the employer requires the worker to complete and which the employer will not bear the cost.

Furthermore, all workers (not just employees) will have the right to a written statement of employment

Action plan:

Employers are advised to review their current contracts of employment and recruitment processes to ensure that all the required information is contained in their contracts and that there are procedures in place to ensure that contracts are issued on or before the first day of employment.

Holiday Pay

As it stands, holiday pay is determined by reference to the average weeks' pay over a period of 12 weeks. Identifying challenges that some workers, particularly those in seasonal and atypical roles, are failing to benefit from their full holiday pay entitlement, with effect from 6 April 2020 the reference period for calculating average pay will be extended from 12 to 52 weeks. Where an individual is yet to be employed for a 52week period, holiday pay will instead be calculated on the number of complete weeks for which the worker has been employed. The Government hopes that this change will ensure greater flexibility for these kinds of workers who are otherwise disadvantaged by having to take their holidays during quiet periods only, when weekly pay may be lower than usual.

Action Plan:

From 6 April 2020 ensure that when calculating average pay you look back at the previous 52 weeks where a worker has worked and received pay, ignoring any weeks not worked or where no pay was received, to calculate average weekly pay.

Parental Bereavement Leave

Under the new Parental Bereavement Leave Regulations 2020, parents who have lost a child aged 18 and under will be entitled to two weeks leave. These two weeks need not be taken consecutively; however, they must be taken within 56 weeks of the death of the child. Parents who do take leave are entitled to receive the same benefits under their contract, however their remuneration is limited to the lower amount of either £151.20 per week, or 90% of their normal weekly earnings if this is less than £151.20. See our separate article in this month's newsletter for further information.

Agency Workers – Swedish Derogation

The "Swedish derogation" in the Agency Workers Regulations 2010 (which currently allows employment businesses to avoid pay parity (after 12 weeks) between agency workers and direct employees if certain conditions are met) will be removed by the Agency Workers (Amendment) Regulations 2019.

If you are affected by this, please contact us for further advice.

IR35 – Using Contractors in the Private Sector

The IR35 tax rules are aimed at reducing tax avoidance in circumstances where are individual (worker) personally performs services for another person (the Client) through an intermediary, such as a Personal Service Company (PSC) and if the services were provided directly, the worker would be regards as an employee of the client for tax purposes.

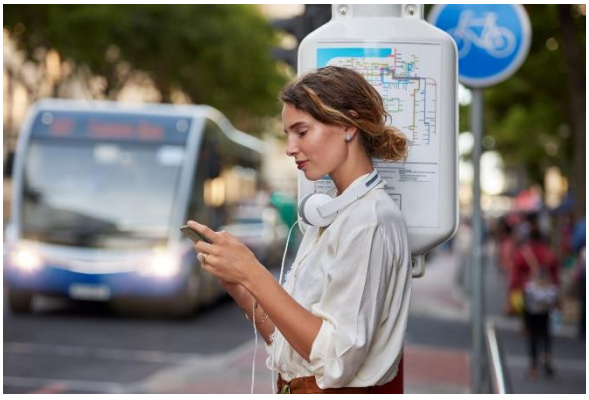
From 6 April 2020 medium and large sized businesses will become responsible for assessing the employment status of workers they engage through an intermediary – currently it is the intermediary's responsibility to determine if IR35 applies.

If you determine that, but for the intermediary, the relationship if it was direct would be one of employer/employee, the essence of the IR35 rule is that all payments made to the PSC will be treated as payments of employment income on which the client (or a third-party intermediary) must account for tax. This shifts responsibility for IR35 tax compliance from the personal service company to the client or intermediary.

Action Plan:

If you use independent contractors, determine if the Company falls within the definition of a medium or large sized business. Small business will not be caught by the new rules.

If it does, then employers are advised to review their current workforce, including those engaged through agencies or other intermediaries to identify those individuals who are supplying their services through PSCs. Determine if the new rules will apply for any contracts that will extend beyond April 2020. You can use the Governments 'CEST' Check Employment Status for Tax service to do this.
If you believe that the new rules apply you should provide written notice of your decision to the PSC or intermediary.



Do we need to investigate before we dismiss?

The short answer is yes! Investigation is a key part of the disciplinary procedure and if you have attended any of our Employment Training sessions, you will have heard us say this. However, a recent Employment Appeal Tribunal ("EAT") case of Sunshine Hotel Limited v Goddard, looked at whether an investigation meeting is always required, and the conclusion was somewhat surprising.

The EAT has made a finding that there is no legal requirement for an employer to hold an investigatory meeting prior to a disciplinary hearing for a dismissal to be fair and this was explained in the Judgement.

Facts

The Claimant (Goddard) had been employed by Sunshine Hotel Limited as a night porter since 2003, until 17 April 2018 when he was summarily dismissed for sleeping whilst on duty. This had been corroborated with CCTV footage. The Claimant was suspended and invited to attend an investigation meeting. In the letter sent, it stated that should a substance to the allegations manifest, then he would have a disciplinary case to answer for.
On 16 April 2018 a disciplinary hearing was held instead of an investigation, the outcome of which saw the Claimant summarily dismissed for gross misconduct.

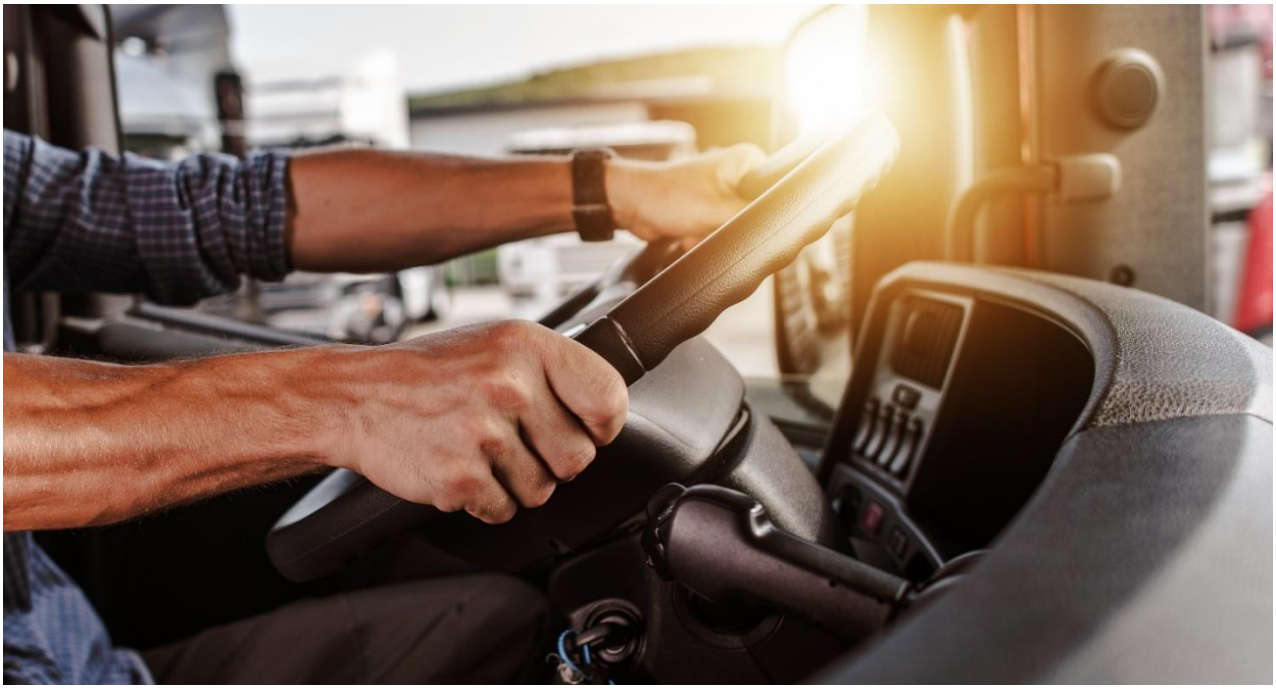
In the initial tribunal hearing held in 2018, the judge ruled that by failure to hold an investigation hearing prior to a disciplinary hearing was a serious procedural failing on behalf of the Respondent and therefore, the Claimant had been unfairly dismissed. The

Judge further concluded the Claimant had been deprived of the opportunity to provide a full explanation before attending a disciplinary hearing and labelled this a “basic employment right”.

The Respondent appealed this decision on ground that the Employment Tribunal had erred in apparently considering that a failure to hold an investigatory meeting was determinative in rendering the dismissal unfair. The appeal was brought before Honourable Mr Justice Griffiths in October 2019, who particularly criticised the previous ET Judge for concluding an investigation was a basic employment right.

Griffiths J therefore concluded that an investigation is not a pre-requisite in every disciplinary procedure. When making his decision, he focussed on the wording of s.98(4) of the Employment Rights Act 1996 and as the dismissal was due to Mr Goddard’s conduct, the three stage test set out in the case of British Home Stores v Burchell [1978], which requires an employer to have “carried out as much investigation into the matter as was reasonable in all the circumstances of the case”.

Griffiths J further noted para 5 of the ACAS Code which only requires employers to carry out an investigation in some cases prior to a disciplinary hearing. Paragraph 5 also accepts that in some cases, a collation of evidence by the employer to be used at a disciplinary hearing will be sufficient. Whilst the EAT held that an investigatory meeting was not a basic right, it suggested that the employer in this case hadn’t carried out as much investigation as was reasonable in all the circumstances before carrying out the disciplinary hearing. The Judge suggested that a proper investigation might have made some difference as Mr Goddard had suggested that he was not asleep for the whole period for which he was dismissed. Mr Goddard stated that he had patrolled the hotel which took approximately 45 minutes and further, he had a migraine, neither of which were investigated. Appeal dismissed and the Claimant was successful in his claim.



Comment

Whilst this case may have clarified that holding a separate investigation meeting prior to a disciplinary hearing is not a legal requirement, it is certainly not advise that a blanket application to this finding is taken to remove the need for an investigation meeting in most, if not all cases. Each case should be assessed on the circumstances as even when this finding was made, the Claimant remained successful in his claim overall.

Another important factor to consider alongside this case, is that there are scenarios whereby you may be obliged to carry out an investigatory meeting that was not provided for in this case:

- where your disciplinary procedure appears in the Contract of Employment and cites an investigation meeting, to not follow it could give rise to a breach of contract claim as well as unfair dismissal;

- where your company disciplinary policy references an investigation meeting as part of the procedure, then you should hold one. It is never advisable to undermine your own policy and a dismissal in this situation is likely to be deemed procedurally unfair which can render the dismissal unfair and a successful claim for the employee;

- where your company has a collective agreement with a Trade Union, you should firstly check whether the agreement incorporates the need to hold an investigatory meeting prior to a disciplinary hearing.

Best practice is that employers follow a 3 stage disciplinary procedure as per the ACAS Code of Practice; investigation, disciplinary hearing and appeal hearing, regardless of the allegation. Whilst we recognise that some cases will appear cut and dried, with CCTV in support, this does not allow for mitigation, explanation of the employee that, if considered, would remove the need for a disciplinary case to answer being progressed. Findings at an investigation stage not only save company time and resources but it also saves paid suspension being required in cases where this step is missed and the hearing doesn't proceed as scheduled initially. If you are minded to skip this stage, advice should be taken beforehand.

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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