Employment Law Newsletter - June 2019

In this issue ...

Tribunal claims

The number of employment tribunal claims continues to rise. According to the Ministry of Justice's statistics since fees were abolished two years ago, claims have gone up 150%.

What's the worst that could happen?

Occasionally, upon receiving a tribunal claim, a company may muse on the idea of ignoring it. 'What's the worst that could happen?' Now we have the answer. It could cost you around £3.5 million. Or £3,449,328,254 to be precise. That is the sum that the University of Southampton was ordered to pay Professor Richard Werner, who coined the phrase 'quantitative easing', when it failed to attend tribunal to defend his claim that it had discriminated against him because he is German and Christian. It has six weeks to appeal. Unsurprisingly, the University is conducting an 'urgent investigation' into why it failed to defend the claim.

So, when you do get a claim, which you will, what should you do?

Use Acas

For most claims, employees are obliged to go through Early Conciliation with Acas. If Acas contacts you, find out the basis of the claim and decide whether you can defend it successfully. Even if you can, consider whether you would prefer to settle. It will be cheaper and simpler to do it now rather than later.

Respond in time

You have 28 days from the date the claim was sent to you to file your response. If you miss the deadline, you may be prevented from defending the claim.

Submit a robust response

The tribunal judge doesn't know you or your business. They have yet to learn of the claimant's vivid imagination. Their first impression will be based on the quality of your response. When responding, read the claim thoroughly and carefully respond to every allegation. If the claim is complex, get legal advice.

Time limit

Check whether the claimant presented their complaint in time. Normally they have three months from the date their employment ended or the last alleged act of discrimination. However, time spent conciliating through Acas extends that limit. If the claim is out of time, ask for it to be struck out.

Collect evidence early

Identify the documents and witnesses you need to defend the claim straight away. So, the claimant's contract of employment, letters, meeting notes and e-mails. Speak to all the relevant staff members involved and take their witness statements. This will help you assess the merits of the claim and defend it if you choose to fight.

Mitigation

Remember to collect evidence of other suitable jobs for which you think the claimant should have been applying if they are out of work

Right to work in the UK and TUPE

If you employ someone who is subject to immigration control and lacks the right to work in the UK, you are liable for a civil penalty of up to £20,000 per worker. If you do it knowingly, you face an unlimited fine, up to six months in prison or both. I'm sure you already check the right to work for all prospective employees before they start, but what about people you acquire through TUPE?

TUPE is silent on the obligations of the outgoing employer to carry out checks. The Home Office guidance says that you have 'a grace period of 60 days from the date of the transfer of the business to correctly carry out the statutory document checks for these new employees'. So, what should you do?

Due diligence

Carry out due diligence on the processes that the outgoing employer follows to prevent illegal working.

Protect yourself

Obtain a warranty and indemnity cover from the outgoing employer for liabilities incurred up to the point of transfer.

Trust no one

Don't rely on assurances from the outgoing employer that they have carried out the checks. Do your own as soon as possible and certainly within 60 days of the transfer.

Are job applicants entitled to their interview notes?

Yes, in this GDPR world, job applicants have the right to see notes of their interview if the notes

are either transferred to computer or form part of a relevant filing system. For a manual system to be covered, there must be some structure to guide a searcher to specific information about a candidate. Interview notes filed in alphabetical order or chronologically would be covered by GDPR. So, what should you do?

Decide how you will store your notes. Remember they may help you to defend an allegation of discrimination if they correctly record the reason for your decision.

Remind interviewers that candidates can ask to see their notes so anything that they record should be accurate and appropriate.

Holiday pay must include voluntary overtime

That was the Court of Appeal's decision in East of England Ambulance NHS Trust v Flowers and others. The overarching principle is that holiday pay must correspond to a worker's normal pay. The question was whether the pattern of work, including voluntary overtime was sufficiently regular for payments made for it to amount to normal remuneration. In this case it was. Whether the overtime was voluntary was not material.

So, what does this mean for you?

If you offer voluntary overtime, you must consider whether the pattern is sufficiently settled for it to form part of your holiday pay calculation.

No limit on overtime holiday pay claims in Northern Ireland

In Chief Constable of the Police Service of Northern Ireland and another v Agnew (Alexander) and Others it was agreed that the calculation of holiday pay for police officers in Northern Ireland should have included overtime not just basic pay. So not including it constituted an unlawful deduction from wages. In Bear Scotland Bear Scotland Ltd and others v Fulton and others; Hertel (UK) Ltd v Woods and others; Amec Group Ltd v Law and others [2015] IRLR 15 EAT it was decided that if there was more than a three-month gap in deductions the chain was broken. Only the claim presented within three months was in time. Did Bear Scotland apply in Northern Ireland?

If it did, the bill would be around £300,000. If not, the claim could go back to 1998 with a liability of £3 million. In a blow for those with staff in Northern Ireland the court decided that Bear Scotland would lead to 'arbitrary and unfair results'. It found that nothing in the legislation in Northern Ireland prohibited or limited gaps.

So where do you stand?

This case is limited to Northern Ireland employers. Outside Northern Ireland, Bear Scotland still stands as do the Deduction from Wages (Limitation) Regulations 2014, which impose a two year limit on most unlawful deductions claims.

However, if you do employ staff in Northern Ireland, you could face large holiday pay claims dating back many years.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com