

Welcome to our new look GateWay newsletter. May we take this opportunity to wish you a happy new year and all the very best for 2010.

1. IN THE NEWS

Employment Tribunal; Statistics

Name and shame serial litigants

An employment solicitor and barrister have set up a website that identifies serial employment tribunal litigants.

The website allows one party to search for another to see whether they have won or lost any previous actions. The aim is to help identify those litigants that bring claims which lack merit in the hope of assisting future respondents.

In order to avoid defamation and data protection issues the pair have used information solely derived from the public domain such as past employment tribunal decisions and costs orders.

Comment

Please note that any claim should be assessed on its own merits. Whilst this website will no doubt be useful to highlight a claimant's colourful litigious history, it will not help a respondent defend a claim. The website makes no judgment about the number of cases any litigant has had. The service can be found at <http://www.serial-litigants.com/>

Immigration

Tier 2 shortage occupation list revised again

Those occupations where there is a recognised skills shortage in the UK are set out in a list produced by the UK Border Agency.

The list is regularly reviewed to take account of the Migration Advisory Committee's recommendations, which are made in light of changing economic and social pressures in the UK labour market.

The list has been amended again and applies to all certificates of sponsorship assigned on or after 14 December 2009. For all applications made prior to this date, the list in place at that time will apply.

Comment

The skills shortage list allows the UK government to react to changing pressures in the UK labour market and is a useful and flexible tool when curbing or increasing migrant worker numbers. Once amended, the list effectively raises or lowers the points that an applicant may need to enter and work in the UK under a Tier 2 sponsorship.



Practice and Procedure

New ACAS code on time off for trade union duties and activities

ACAS have, after much consultation, published a final version on its Code of Practice for time off for trade union duties and activities.

The Code is accompanied by 2 non-statutory guides and comes into effect on 1 January 2010. The Code and guidance papers can be found at:

<http://www.acas.org.uk>

New Employment Law Organiser

The Department for Business, Innovation and Skills has produced a free downloadable package to enable employers to fulfill their key legal obligations during an employee's lifecycle. The package is split into 3 sections from recruitment stage to termination.

The package can be found at:

<http://www.businesslink.gov.uk>

2. CASE LAW

TUPE

Cable Realisations Ltd v GMB Northern

The EAT has held that an annual shutdown period should be discounted when considering whether a transferor has provided information "long enough" before a TUPE transfer to enable the employees' representatives to adequately inform the employees.

This case concerned a TUPE transfer from Cable Realisations Limited (the transferor) to Paramount (the transferee). The transferor recognised the GMB (the union) and was required to inform their representatives of the transfer and any measures that it envisaged taking "long enough" before the transfer to enable them to perform their duties to inform the employees.

The TUPE regulations do not state what time period constitutes "long enough". Instead, this will be judged in light of the circumstances of each transfer.

When considering whether or not the transferor had given the information "long enough" before the transfer, the EAT held that an annual 2 week shutdown period (where 99% of the union's employees were on holiday and 85% were away from home) should not be taken into account. This was because the union representatives were unable to perform their duties during this period.

The EAT held that the transferor had failed to provide the information in sufficient time.

Comment

The TUPE regulations state that an employee can be awarded up to 13 weeks pay for a failure to inform and consult. The ET awarded 3 weeks' pay to each affected employee on the basis that whilst they had not been informed in enough time, there were no measures envisaged and no formal obligation to consult.

Some commentators argued that was a wrong interpretation of the TUPE regulations. Whilst the EAT upheld the award of 3 weeks' pay for each

affected employee, on the basis that it reflected the “justice of the case” and “like baby bear’s porridge, it was just right”, employers should be aware that up to 13 weeks pay for each affected employee can be awarded. This could prove prohibitively expensive for a transferor where a large number of staff had transferred from it.

Sex Discrimination

Sahota v Home Office and Pipkin

The EAT has in the case of *Sahota v Home Office and Pipkin* considered whether protection from discrimination on the grounds of sex, without the need for a male comparator, extends beyond pregnant employees to those undergoing IVF treatment.

Although Mrs Sahota’s appeal failed for numerous reasons the EAT took the opportunity to express a view on the comparability of IVF and pregnancy and held that a woman is protected:

- from the point that fertilised ova are implanted (e.g when she is regarded as being pregnant);
- for a two week period after a failed implantation (e.g when the pregnancy ends); and
- for the short advanced period that it takes for ova to be collected, fertilised and the “immediate” implantation of the fertilised ova.

The EAT rejected the view that a woman should always be protected from the date that an ova is fertilised on the basis that it could be kept for many years without any definitive date for implantation. It held that this would be inconsistent with the principle of legal certainty.

Comment

Whilst a woman won’t be protected simply because an ova is fertilised, a woman will be protected if that ova is fertilised with a view to immediate implantation. There is therefore a grey area that may cause confusion to employers. If you have any doubts, please contact a member of our employment team.

3. NEW AND PROPOSED LEGISLATION

Immigration

New Bill published

A draft Immigration Bill was published which aims to simplify and consolidate 40 years of immigration laws.

The new Immigration Bill introduces the concept of “immigration permission” which will be granted on either a temporary or permanent basis. It therefore replaces five categories of leave that exist today.

Comment

Of note to employers, under the new Immigration Bill, if a migrant wants to change or vary their immigration permission to live and work in the UK, they will have to apply for a new “immigration permission”. This should help ease confusion amongst some employers who are regularly faced with different immigration certificates and are unclear on what basis the employee has the right to live and work in the UK.

Tribunal

New Compensation Limits from February

For the first time, the maximum compensatory limit has been reduced from £66,200 to £65,300 because of a drop in the Retail Price Index.

The Tribunal compensation limits are reviewed on an annual basis and are applicable from on or after 1 February 2010. In cases involving dismissal, the new figures will apply where the effective date of termination is after that date.

The recent increase to a week’s pay to £380 remains unaffected.

Meanwhile, the Secretary of State for Work and Pensions has announced that the standard rate for statutory maternity, paternity and adoption pay will rise from £123.06 to £124.08 whereas the rate for Statutory Sick Pay will remain the same at £79.15 per week.

The team



Jacqueline McCluskey
Partner
dt: +44 (0) 131 222 9803
m: +44 (0) 750 146 3230
JMcCluskey@hbj-gw.com



Robert King
Partner
dt: +44 (0) 141 249 6198
m: +44 (0) 791 867 7770
RKing@hbj-gw.com



Shelagh McKenzie
Solicitor
dt: +44 (0) 131 222 9556
SMcKenzie@hbj-gw.com



Caroline Brodie
Solicitor
dt: +44 (0) 131 222 9576
CBrodie@hbj-gw.com

Birmingham
One Eleven
Edmund Street
Birmingham B3 2HJ
t: +44 (0) 121 234 0000

Edinburgh
Exchange Tower
19 Canning Street
Edinburgh EH3 8EH
t: +44 (0) 131 228 2400

Glasgow
Cornerstone
107 West Regent Street
Glasgow G2 2BA
t: +44 (0) 141 221 2300

Leicester
Knightsbridge House
Lower Brown Street
Leicester LE1 5NL
t: +44 (0) 116 285 9000

London
Fleet Place House
2 Fleet Place
Holborn Viaduct
London EC4M 7RF
t: +44 (0) 20 7653 1600

Nottingham
City Gate East
Tollhouse Hill
Nottingham NG1 5FS
t: +44 (0) 115 983 8200

Dubai
Suite 303
Sheika Sana Al
Maktoum Building
Sheikh Zayed Road
Dubai UAE
t: +971 (4) 321 9999