August 2019

Nash&Co Solicitors

NASH KNOWLEDGE

August Edition

We have an interesting mix of articles this month. From the risk of using social media at work, to a case involving covert recording and how Employment Tribunals have a wide discretion ideal with errors on claim terms.

We've also look into the potential changes that could happen to statutory sick pay.

As usual, if there's anything specific you'd like us to cover, please don't hesitate to let us know!
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Highlights

Discrimination in the virtual landscape
A look at two contrasting cases of the real risk of using social media.

The secret listener
A look at the case of Pheonix House Ltd v Stockman.

Potential changes to statuary sick pay
Could a further 2 million workers become entitled to SSP?

An odd inflexibility, but one to watch out for
Did a claim form with an incorrect Early Conciliation Certificate number prove fatal?

Employment Team

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Discrimination in the virtual landscape

This month there have been two contrasting cases demonstrating the real risk of not thinking before using social media.

The first, Forbes v LHR Airport Ltd related to a security officer at London Heathrow airport. One of Mr Forbes' colleagues shared an image of a golliwog on her Facebook page, together with a message saying "Let's see how far he can travel before Facebook takes him off". The image was shared through social media with some of Mr Forbes' colleagues, but not Mr Forbes himself, until it was physically shown to Mr Forbes by one of his colleagues.

Mr Forbes brought a claim of harassment against his employer, but his claim was dismissed by the Employment Tribunal on the basis that the sharing of the Facebook image was not done in the course of employment. When reaching its decision, the Tribunal found that the employee who shared the image was not at work at the time and did not mention the employer in the image.

The Employment Appeal Tribunal upheld this decision and further confirmed that acts taken by an employer after an alleged act of harassment, such as an apology by the alleged harasser, can be taken into account when determining whether an individual could reasonably take offence at an act.

Whilst all cases must be judged on their own facts, this case provides some useful insight in relation to when social media usage should be considered as in the course of employment for harassment purposes. It would appear that, where an individual has few work colleagues as "Facebook friends" and no tangible link between the social media account and the employer, it will be difficult for an employee to establish that another employee's social media post was made in the course of their employment; therefore, the employer should not be liable.

In contrast to this case, a clear example of a social media post being used in the course of employment was seen recently in Port Talbot where a family run taxi firm advertised for staff on Facebook, but said it did not want to employ Pakistani or "dark" drivers. The company has denied racism and, instead, said that their passengers do not like drivers with these characteristics.

This post, given it was in recruitment, was clearly in the course of employment and, whilst we would not wish to pre-judge any future litigation (or, indeed, the criminal investigation which has been started), we would suggest that their attempted justification demonstrates a fatally flawed understanding of equality legislation. Perhaps an apology might be the first step in remedying both their breach of legal obligations and the reputational damage which has undoubtedly been caused by their offensive posting.

The secret listener

In an age where covert recording is easily achieved with the aid of mobile phones, tablets and the like, the Employment Appeal Tribunal has confirmed that covert recordings will generally amount to misconduct, potentially even gross misconduct, if an employee does not inform their employer that a recording is being made and the reason for the recording is to damage or entrap the employer.

Facts – *Phoenix House Ltd v Stockman UKEAT/0284/17 (No.2)*

Ms Stockman worked for Phoenix House, a charity which provides support to people with drug and alcohol problems, as a financial accountant. Following a restructure within the company, the role of financial accountant was made redundant and Ms Stockman successfully applied for the more junior role of payroll officer.

Ms Stockman complained that she had been treated differently by her superior, Mr Lambis, and that the company's restructure was biased against her. Ms Stockman explained that a colleague supported her view.

A meeting was held between the colleague and Mr Lambis to discuss the matter, during which Ms Stockman interrupted the meeting and refused to leave until she was informed of what was being discussed.

Later that day, Ms Stockman was invited to attend a meeting with HR which she covertly recorded. In the meeting, Ms Stockman was informed that due to interrupting and refusing to leave the earlier meeting, she would be subject to disciplinary action.

Ms Stockman lodged a grievance against Mr Lambis and was signed off sick by her GP for some time.

The disciplinary hearing took place during Ms Stockman's absence and she was issued with a written warning.

Mediation between Ms Stockman and Mr Lambis was attempted, unsuccessfully. As a result of this, HR scheduled a hearing to consider whether the working relationship between Ms Stockman and Mr Lambis had broken down to such an extent that it was irretrievable. Despite Ms Stockman explaining that she wished to put the grievance behind her and return to work, it was found that Ms Stockman still believed that the grievance was well-founded and therefore, it was assumed that Ms Stockman maintained a distrust for senior management. In light of this, it was found that the working relationship had irretrievably broken down and Ms Stockman was summarily dismissed.

Employment Tribunal proceedings

Both the Employment Tribunal and Employment Appeal Tribunal upheld Ms Stockman's claim that she had been unfairly dismissed. In particular, the Employment Appeal Tribunal held that it was unreasonable for Phoenix House to find that there had been an irretrievable breakdown in the working relationship between Ms Stockman and Mr Lambis since Ms Stockman had explained she was happy to put the matter behind her.

The covert recording that Ms Stockman had made during her meeting with HR did not come to light until legal proceedings had been initiated by Ms Stockman. Phoenix House argued that, had it been aware of the recording at the time, Ms Stockman would have been dismissed for gross misconduct.

The Employment Tribunal found that Phoenix House had not specifically set out in their disciplinary policy that covert recording would amount to gross misconduct and, in addition, found that Ms Stockman had not recorded the meeting in an attempt to entrap the employer; rather, Ms Stockman made the recording to protect her own position. As such, the Employment Tribunal disregarded Phoenix House's argument. The Employment Appeal Tribunal agreed with the earlier Tribunal's decision and confirmed that:

'*The purpose of the recording will be relevant; and in our experience, the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation*'

The Employment Appeal Tribunal also confirmed that it is relevant to look at all surrounding facts, for example: if an employee had lied about making a recording; they were specifically informed that they could not record the meeting; or the meeting contained highly confidential information.

Our View

Whilst it is not uncommon for employees to record meetings, to successfully plead that an employee covertly recording amounts to gross misconduct, it is relevant to consider all surrounding circumstances and consider whether there is any form of malice in the employee's reasoning for recording. Further, from both Tribunals' comments on this case, employers may now find it useful to expressly list covert recording as a potential gross misconduct offence in their disciplinary policy.

BUSINESS CYCLE NETWORK

Are you a keen cyclist looking for a new style of networking? Then why not give our Business Cycle Network a go? Meeting monthly, we go for a 90 minute cycle as a group, leaving and returning from the Nuffield Health Devonshire, and on the group's return, we'll spend some time chatting and forging new business relationships over bacon sandwiches and tea/coffee. You're then free to use the club's facilities before going back to work.

Interested? Visit us at www.nash.co.uk/cycling to find out more information about the rides, read the guidelines and register to take part.

Potential changes to statuary sick pay

Currently, only employees earning more than £118 per week are eligible for statutory sick pay; however, the Department of Work and Pensions and the Department of Health and Social Care have launched a joint consultation to consider whether this threshold should be reduced; potentially bringing statutory sick pay entitlement to a further two million workers.

As many will recall, the statutory sick pay rebate was removed a few years ago and, therefore, this extension of the benefit will, under current rules, fall squarely on shoulders of employers.

The consultation is, therefore, considering whether smaller businesses should have access to a rebate system where those affected are employees with long term health conditions; however, where the consultation seeks to give with one hand, it seeks to take with another by proposing that the rebate should be conditional upon good employer behaviours in respect of supporting employee rehabilitation, rather than being an automatic rebate entitlement.

The consultation remains live until 7 October 2019; however, in our view this proposal has the potential to be both expensive for employers and, for small employers who may benefit from a rebate, potentially horribly bureaucratic with the outcome that they do not enforce the rebate in any event.

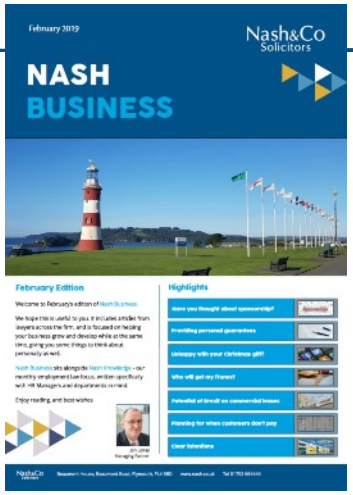
We would hope that the consultation will make the rebate for smaller employers automatic to avoid a policy designed to demonstrate that the government cares for the lower paid becoming a further cost for businesses in uncertain times.

NASH BUSINESS

The most recent edition of Nash Business was published on the 15th May and the next one will be going out on 14th August. You can see May's edition and sign up automatically here:

https://www.nash.co.uk/nash-business-newsletter/

Nash Business is a quarterly publication, featuring helpful advice to assist you with running and growing your business the right way.



An odd inflexibility, but one to watch out for

Employment Tribunals famously have a wide discretion in allowing employees to amend their claims: adding allegations, allowing additional claims founded on the facts in the claim form and, even, extending the deadline to make those claims. The Tribunal can also add and remove Respondents to an existing claim, even where no early conciliation certificate has been issued in relation to them.

In this world of flexibility, therefore, it would seem obvious that, where a Claimant inadvertently puts the wrong Early Conciliation reference number on their claim form, the Judge will allow the form to be amended to correct the error, as this would be consistent with the overriding objective – a minor amendment to rectify a technical error, why would they not?

Well, it turns out that they won't because the Employment Appeal Tribunal have confirmed that they can't. Under the Employment Tribunal Rules a Judge is *required* to reject a claim which has an incorrect Early Conciliation reference number and, therefore, given that the claim should have been rejected at the outset, there is no claim for a Judge to amend. If the Claimant's new, corrected, claim form is then received by the Tribunal outside of the Tribunal time limits for bringing a claim, then that's tough luck – the Claimant should have got it right first time.

Whilst this may seem unfair, it is one of the few occasions where technical requirements fall in favour of the employer. As such, when an employer receives a claim form, they should double check the Early Conciliation reference number – they may find that they have been given a get out of jail free card.

Interesting cases and legislation on the horizon

BMC Software v Shaikh awaiting judgment from the Court of Appeal
Whether an employer's breach of the implied sex equality clause giving rise to successful equal pay and constructive dismissal claims could also found a separate claim of sex discrimination?

Brazel v The Harpur Trust awaiting judgment from Court of Appeal
When calculating holiday pay for part-time term-time workers should you use the average number of hours worked in the preceding 12 weeks under the Working Time Regulations 1996?

Flisher v Kent County Council awaiting ET hearing
Whether a foster carer is a worker so as to be able to bring claims for holiday pay.

Royal Mail Group v Jhuti awaiting judgement from Supreme Court
Is a dismissal automatically unfair if the dismissing officer was unaware of the protected disclosure because he was misled by the claimant's line manager (to whom the protected disclosure was made)?

Gray v Mulberry Company (Design) Limited due to be heard by the Court of Appeal in October 2019
Does a belief in the moral right to own your own copyright amount to a philosophical belief for religious discrimination purposes?

X v Y Limited due to be heard by the Court of Appeal in October 2019
Does legal advice in respect of "cloaking" a discriminatory act under the guise of a legitimate business re-organisation lose legal advice privilege due to iniquity.

Ibrahim v HCA International due to be heard by the Court of Appeal in November 2019
Whether the complainant's complaint to HR that he was being defamed by false rumours was made in the reasonable belief that it was 'in the public interest'.

Royal Mencap Society v Tomlinson - Blake due to be heard by the Supreme Court in Feb 2020
How should sleep in shifts be treated for NMW purposes.

Important legislation changes ahead

2019?

Unpaid Work Experience (Prohibition) Bill

If passed, will entitle those on work experience of more than 4 weeks to receive the minimum wage for their age.

Pay: all tips to go to workers

New legislation is to be drafted to ensure that all tips left to workers for example in bars and restaurants will be paid to the workers in full.

The Government is consulting on whether salary sacrifice arrangements should reduce wages for the purposes of National Minimum Wage legislation and the outcome of this should be sometime this year.

2020?

The National Insurance Contributions Bill

Employer National Insurance Contributions will be payable on termination payments above £30,000.00.

Statement of terms: introduction of written statement of terms for workers and for all workers and employees to receive a statement on their first day of work.

Parental Bereavement Leave and Pay The Parental Bereavement (Leave and Pay) Bill would give qualifying bereaved parents of children the right to two weeks' paid leave (see our article in October's edition).

The so called Swedish Derogation under the Agency Worker Regulations is likely to be removed in April 2020.

2021?

Whistleblowing Directive

Public and private organisations with more than 50 employees (or financial services organisations) will have to set up internal reporting channels that would allow people to report within the organisation itself. Implementation of this Directive will depend on the terms on which the UK leaves the EU following Brexit. See the article in last month's edition for further information.

And beyond .....

The right to shared parental leave and pay is potentially to be extended to working grandparents, which could be interesting.

UPCOMING RATES AND LIMITS (From 7th April 2019)

1 National Minimum Wage

Workers aged 25 or over (the National Living Wage): £8.21 per hour
Workers aged 21 to 25: £7.70 per hour
Workers aged 18 to 21:£6.15 per hour
Workers under 18: £4.35 per hour

2 Family Rights

Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay, & Maternity Allowance: £148.68 per week.

3 Sick Pay

Statutory Sick Pay: £94.25 per week

Taxation: UK (Excl Scotland)

4

In the UK (excluding Scotland), for the tax year 2018/19:
Basic Tax Rate of 20% applies on annual earnings above the PAYE tax threshold and up to £37,500
Higher Tax Rate of 40% applies on annual from £37,501 to £150,000
Additional Tax Rate of 45% applies on annual earnings above £150,000

Taxation: Scotland

5

In Scotland, for the tax year 2018/19:
Scottish Starter Tax Rate of 19% applies on annual earnings above the PAYE threshold and up to £2,049
Scottish Basic Tax Rate of 20% applies on annual earnings from £2,050 to £12,499
Scottish Intermediate Tax Rate of 21% on earnings from £12,445 to £30,930
Scottish Higher Tax Rate of 41% on annual earnings from £30,931 to £150,000
Scottish Top Tax Rate of 46% on annual earnings above £150,000

Limits

6

Maximum amount of a week's pay (used for calculating a redundancy payment or for various awards including the unfair dismissal basic award): £525.00

Limit on amount of unfair dismissal compensatory award: £86,444.00

Maximum guaranteed payment per day: £29.00

UPCOMING RATES AND LIMITS (From 7th April 2019)

National Insurance

7

National Insurance earnings limits
The lower earnings limit: £118pw
The upper earning limit: £962pw

Auto Enrolment

8

automatic enrolment

The minimum contribution rates for defined contribution schemes, expressed as a percentage of a jobholder's qualifying earnings, is 3% for employers and 5% for employees.

Vento Bands

9

Injury to feeling and psychiatric injury:

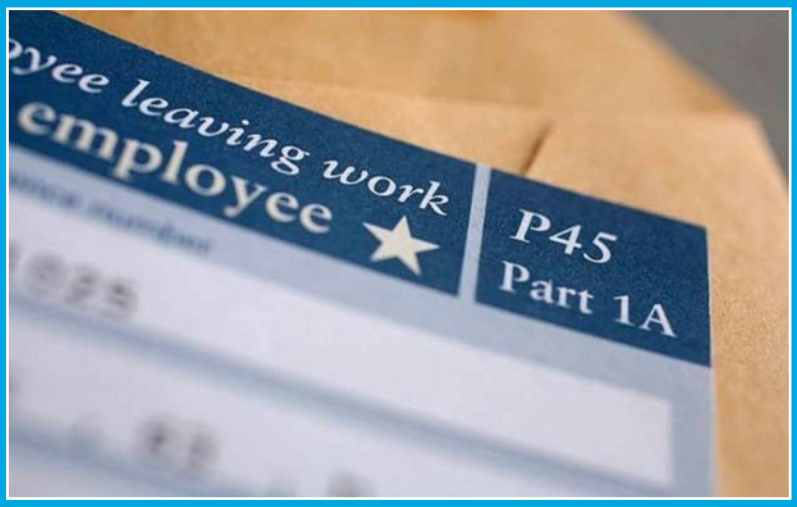
Lower Band of £900 to £8,600
Middle Band of £8,600 to £25,700
Upper Band of £25,700 to £42,900

Statutory Minimum Notice

10

Statutory or Contractual Notice

There are two types of notice period: statutory and contractual. Statutory notice is the minimum legal notice that can be given.



Length of Employment	Notice Required From Employer
Under 1 month	No statutory notice requirement
1 month to 2 years	1 week
2 years to 12 years	1 week for each completed year of service
12 years or more	12 weeks

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