SLAUGHTER AND MAY/

NEWSLETTER

APRIL 2022

EMPLOYMENT BULLETIN

QUICK LINKS

APRIL 2022 EMPLOYMENT RATES AND LIMITS AND OTHER CHANGES

We attach an updated version of our Employment Rates and Limits document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, applicable from 6 April 2022. We have also included a summary of the time limits and qualifying service requirements for claims, as well as a reminder of the various collective consultation timeframes.

The other development this month of note for employers is the revocation of the "Working safely during COVID-19" guidance and its replacement by new **public health guidance**: *Reducing the spread of respiratory infections, including COVID-19, in the workplace*. This was published on 1 April 2022 and will be reviewed again on 30 April.

The main points are:

- If staff are symptomatic, employers "*in accordance with their legal obligations, may wish to consider how best to support and enable their workforce to follow this guidance as far as possible*." That link is to the new general guidance for people with COVID symptoms, which continues to advise self-isolation for five days. There is no guidance on whether sick pay is available in these circumstances – it will be down to employers to apply the usual rules on SSP and any additional rules they may decide to keep in relation to COVID-19.
- The previous guidance on workplace measures has been reduced to measures to increase ventilation and keep workplaces clean. No references to social distancing etc. remain. There is no longer a requirement to report workplace outbreaks of respiratory infections to the local public health team, nor (for most employers) to consider COVID-19 explicitly in statutory health and safety risk assessments.
- There is a link to updated guidance for employees whose immune systems mean that they are at higher risk. That guidance advises this group to work from home if they can and, if they cannot, to speak to their employer about arrangements to reduce the risk. If an individual is disabled for the purposes of the Equality Act 2010 and is put at a substantial disadvantage, there may be a duty for the employer to make reasonable adjustments.

There is still no indication on a date for the introduction of the **Employment Bill**, expected to contain a variety of measures (please see our horizon scanning section below). The Government's position continues to be that the Bill will be published "when Parliamentary time allows". However, a new Statutory Code of Practice on the practice of **"fire and rehire"** may be imminent. The Labour Markets minister Paul Scully announced at the end of last month that, in the light of the actions of P&O Ferries, it recognises the need for greater clarity for employers. The new Code will detail how businesses must hold fair, transparent and meaningful consultations on proposed changes to employment terms. A court or employment tribunal will take the Code into account when considering relevant cases, including unfair dismissal. There will be a power to apply an uplift of up to 25% of an employee's compensation if an employer unreasonably fails to comply with the Code.

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

WITHDRAWAL OF CHECK-OFF ARRANGEMENTS WAS BREACH OF EMPLOYMENT CONTRACTS

Summary: The High Court decided that civil servants working for the Home Office had a contractual right to have union dues deducted by their employer at source and that the unilateral withdrawal of check-off was a breach of their contracts. The Court also found that the employees were not deemed to have accepted the change by continuing to work (*Cox v Home Secretary*).

Key practice point: The High Court confirmed the principles of implied agreement to changes of terms and conditions established by the Court of Appeal in *Abrahall v Nottingham City Council* in 2018. (The Court of Appeal found that a pay freeze imposed by the employer was invalid, even though the employees did not bring tribunal claims until two years later.) In this case, the employer was unable to demonstrate that the employees' continuing conduct was unequivocal and referable only to their acceptance of the new contractual provision.

Relying on implied acceptance of a contractual change will always involve some uncertainty for the employer as to its effectiveness, particularly where the change is wholly detrimental to employees. Employers who choose to go down this route should make it clear to employees that if they continue to work, they will be taken to have agreed to the proposed change. A better approach will often be to implement the change via express agreement. A third option - dismissal and re-engagement - is problematic, especially so given the current developments in this area mentioned in the item above.

Facts: A "check-off" facility under which civil servants could authorise their employer to deduct union membership subscriptions from their salaries at source was contained in various documents including staff handbooks and the Civil Service Pay and Conditions of Service Code. The Home Office withdrew the facility, in line with Cabinet Office policy that it was unnecessary. The employees claimed they had a contractual entitlement to check-off.

Decision: The High Court found that the check-off provisions had been incorporated into contracts of employment. Check-off was an important facility of real benefit to the employees and the union; the wording was of a contractual nature and did not conflict with any other provision.

The Court went on to consider the employer's contention that there was an implied term that check-off could be removed on reasonable notice. Applying the established test on implied terms, the Court rejected this; an implied term was not necessary for reasons of "business efficacy", nor was it a term that would be "*so obvious that it went without saying*". In addition, there was a limited exception whereby check-off could be withdrawn during official industrial action; this was inconsistent with any general right to withdraw check-off.

Having concluded that the removal of check-off was a breach of contract, the Court next had to consider if the claimants had accepted the breach. The employer argued that the employees had acquiesced in the change by continuing to work after check-off was withdrawn and by setting up alternative (direct debit) arrangements to pay union fees. However, *Abrahall v Nottingham City Council* established that the Court could infer acceptance only from conduct that was "unequivocal"; in other words, if it was "only referable" to the employees having accepted the change. In continuing to work, the employees had relied on their union to pursue a collective grievance on their behalf, which it did. The continuation of work was not therefore an act that was "only referable" to an acceptance of the removal of check-off. The setting up of direct debits was also not referable only to an acceptance of the removal of check-off; it was equally consistent with the taking of reasonable mitigating steps - the alternative would have been to risk losing the benefit of union protection and potentially incur further loss. Finally, the Court noted that although the employees raised no individual objections, there was protest at the collective level.

The Court commented that the fact that the change was entirely detrimental to the employees, rather than being removed in conjunction with beneficial changes, made acceptance more difficult to infer.

Analysis/commentary: The Court acknowledged that the position on implied acceptance might have been clearer had the union stated that any continuation of work was under protest. Similarly, the employer could have informed the employees that continuing to work after the removal of check-off would be viewed as acceptance.

NO PROTECTION FROM DETRIMENT FOR PARTICIPATING IN INDUSTRIAL ACTION

Summary: The Court of Appeal has decided that Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which protects workers from detriment connected with trade union activities, does not cover

participation in industrial action. Although the lack of protection may be a breach of the European Convention on Human Rights, it was not appropriate to read additional wording into Section 146 (*Mercer v Alternative Future Group Ltd*).

Key practice point: The position following this decision is that UK legislation does not prevent an employer taking action short of dismissal in response to an employee's participation in industrial action. However, there is likely to be further litigation on the issue, so employers will want to be cautious when contemplating action (the removal of discretionary benefits, for example) during industrial action.

Background: Section 146 provides that employers must not subject employees to a detriment for the sole or main purpose of deterring them from "*taking part in the activities of an independent trade union at an appropriate time* ". Previous cases had found that this did not cover participation in industrial action, even though dismissal for participating in industrial action which is "protected" (i.e. compliant with the balloting and notification rules of TULRCA) is automatically unfair under a different part of TULRCA.

Facts: A trade union representative was involved in organising a series of strikes. She was suspended from work for speaking to the press about the strike action. The Employment Appeal Tribunal (EAT) found that in order to make it compatible with Article 11 of the European Convention on Human Rights (which protects the right to take industrial action), Section 146 had to be read as if it included participation in industrial action. The employer appealed.

Decision: The Court of Appeal allowed the appeal. There was a clear intention to exclude industrial action from the scope of Section 146. The Court accepted that the failure to give legislative protection against any sanction short of dismissal for official industrial action might be a breach of Article 11. However, the gap in protection could not be resolved by interpreting Section 146 as if it included industrial action. There was more than one possible solution to the problem, engaging a number of policy questions, such as whether protection against detriment should be given to all industrial action or only to official industrial action and whether it should extend to long-running official industrial action, given that the protection against dismissal expires after 12 weeks. The Court said that these questions are issues of policy best left to Parliament.

Analysis/commentary: In addition to this case, which may well go to the Supreme Court, there is another claim (*Morais v Ryanair DAC*) waiting to be heard in the Court of Appeal, on whether Section 146 protects workers from detriment for participating in industrial action during working hours.

DETERMINING DETRIMENT IN VICTIMISATION CLAIMS

Summary: The Employment Appeal Tribunal (EAT) found that an Employment Tribunal had applied the wrong test when deciding that a police force applicant, who claimed he had been unsuccessful because of his ongoing discrimination claim against another force, had not suffered detriment for the purposes of a victimisation claim. Detriment has to be interpreted widely and it is sufficient that a reasonable worker might take the view that the treatment was to their detriment (*Warburton v The Chief Constable of Northamptonshire Police*).

Key practice point: The decision confirms the wide scope of the meaning of "detriment", setting a low bar for bringing a victimisation claim based on a previous complaint about discrimination. Cases are likely therefore to turn on establishing whether the detriment was caused by the claimant having made the complaint.

Facts: The claimant had applied to be a police officer with Northamptonshire Police. In his vetting form, he referred to discrimination proceedings he was pursuing against Hertfordshire Police in relation to an unsuccessful application to join that force. He was informed that his application was unsuccessful due to failing to meet the vetting requirements. He brought a claim against Northamptonshire for victimisation under Section 27 of the Equality Act 2010, alleging that he had suffered a detriment because he had done a "protected act" – bringing a discrimination claim against Hertfordshire. The claim was rejected. The Employment Tribunal accepted the employer's contention that the application had merely stalled due to the vetting process. It found that the claimant had not suffered detriment and that, even if he had, it was not caused by the proceedings against Hertfordshire, but due to a third police force failing to provide the necessary information for vetting.

Decision: The EAT allowed the appeal and ordered the claim to be reheard. The Tribunal had not asked itself the correct question when deciding that the claimant had suffered no detriment. Detriment must be interpreted widely. It

is not necessary to establish any physical or economic consequence and it is sufficient if a reasonable worker might take the view that they had suffered a detriment. Although, as the employer argued, putting the application on hold might have been a reasonable step, it was not relevant to whether a reasonable person might take the view that the matter was to their detriment. The EAT noted that, while an unjustified sense of grievance will not pass the test, it should not be particularly difficult to establish a detriment for these purposes.

The EAT also concluded that it was not clear that the Tribunal had applied the correct test as to whether any detriment was caused by the claimant having done a protected act. The question was whether the protected act had a "significant influence" on the outcome.

HORIZON SCANNING

What key developments in employment should be on your radar?

2022	Legislation expected to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Neonatal leave and pay • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights • Tips to be retained in full by workers

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)
- **Employment contracts:** *USDAW v Tesco Stores Ltd* (Court of Appeal: whether implied term prevented employer from exercising contractual right to terminate on notice to remove entitlement to enhanced pay); *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Unfair dismissal:** *Rodgers v Leeds Laser Cutting Ltd* (EAT: whether, for automatic dismissal for a health and safety reason, the serious and imminent danger must be directly linked to working conditions)
- **Whistleblowing:** *Kong v Gulf International Bank* (Court of Appeal: whether dismissal for questioning colleague's competence on the subject matter of a protected disclosure was automatically unfair).

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@SlaughterandMay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

- LUCY DUANE
- ASSOCIATE
- T: +44 (0)20 7090 5050
- E: Lucy.Duane@SlaughterandMay.com

- PHILIPPA O'MALLEY
- ASSOCIATE
- T: +44 (0)20 7090 3796
- E: Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- ASSOCIATE
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650