

EMPLOYMENT NEWSLETTER

NOVEMBER 2015

CASE UPDATE

Breaches of contract can be in the "public interest" for whistleblowing complaints



A driver alleged that he was dismissed due to a letter he and other drivers had sent to their employer regarding unfair allocation of overtime. The employer argued that this could not be a protected disclosure as it was not in the public interest. The ET accepted this and struck out the claim as the employee's concerns did not, directly or indirectly, affect the public and it fell squarely in the loophole of *Parkins v Sodexho* which the recent amendment to the legislation had intended to close.

However, the EAT reversed this noting that there has since been a decision which has found that the "public interest" test may be satisfied by a disclosure affecting a relatively small number of employees with the same concerns as the whistleblower (*Chesterton Global Ltd and Anor v Nurmohamed*). In addition, what is important is whether the employee *reasonably believes* that their disclosure is in the public interest, not whether it actually is. ***Underwood v Wincanton PLC 2015***.

Employees temporarily laid off may still transfer under TUPE as organised grouping

There have been a number of previous cases that have confirmed that a temporary cessation of a business will not prevent a "business transfer" taking place under TUPE. However, a recent decision has considered this in the context of service provision changes. In this case, painters and decorators were employed by a subcontractor. Work was released in tranches from the original contractor but no work was provided for a period of time so the employees were laid off. In the meantime the original contractor engaged a new subcontractor. The EAT have confirmed that, despite being laid off when the transfer took place, the employees could still transfer. The judge commented that there is nothing in the regulations to require an organised grouping of employees to be actually engaged in the relevant activities immediately before the transfer and that a temporary cessation of employment including holidays or sickness should not deprive employees of the right to transfer. ***Inex Home Improvements Limited v Hodgkins and others 2015***



WHAT'S AHEAD?*

When Expected	Change
1 October 2015	The exemption of turban-wearing Sikhs from wearing a safety helmet on construction sites has been extended to all work places subject to certain exemptions.
April 2016	The government has the power to bring in regulations to require exit payments to be repaid where high earning public sector employees or office holders (i.e. those earning more than £100,000) are subsequently re-employed in the public sector within 12 months, on a pro rata basis.
Summer 2016	A 12 week consultation is expected to start in November/December 2015 on the proposals to replace the Human Rights Act 1998 with a British Bill of Rights with a view to the new law receiving Royal Assent by summer 2016

*To be read in conjunction with the ['What's Ahead' section of October's newsletter](#)



LEGISLATION

Compliance with the NMW and NLW

On 1 September 2015, BIS announced measures to improve compliance with the National Minimum Wage (NMW) and, the National Living Wage (NLW) (when it is introduced). The measures include:

- Doubling the penalties from 100% of arrears to 200% of arrears for non-payment of the NMW and NLW (halved if employers pay within 14 days). The overall maximum penalty of £20,000 per worker is unchanged.
- Disqualification from being a company director for up to 15 years for the non-payment of the NMW and the NLW.
- In addition, BIS announced that in autumn 2015 the government will consult on the introduction of a new offence of aggravated breach of labour market legislation.
- A new position called the Director of Labour Market Enforcement and Exploitation
- A new HMRC team dedicated to pursuing the most serious cases of deliberate non-payment of the NMW and NLW by employers.



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IN THE NEWS....

Granny nannies?

The Chancellor George Osborne, has announced that shared parental leave and pay will be extended to working grandparents to help support working families. The government states that it recognises the crucial role grandparents play in providing childcare and evidence suggests that nearly 2 million grandparents have given up work, reduced their hours or taken time off to help cut down childcare costs. It is intended that legislation will be brought into force by 2018.

Gender pay and bonus disclosure

In a recent interview with Radio 5 live, Nicky Morgan has said that, in addition to introducing regulations requiring employers with more than 250 employees to publish information about the average pay of male employees and female employees, the government "now want them to go further by including information about bonuses paid to male and female employees". It is anticipated that the response to the gender pay gap consultation will be published soon. We will follow with an update when details of the requirements are published.

NO SAFE HARBOUR FOR EU DATA SUBJECTS



The ECJ has ruled that the 'Safe Harbour' scheme (a scheme which had enabled entities operating in the US to self-certify that they had 'adequate' security/operational measures in place to process data from the UK/EEA), which was one of the ways to formalise the transfer of data between the EEA and the US, is invalid. Organisations which transfer client and employee personal data outside of the EEA to entities that relied on this scheme should review their practices and confirm with recipients in the US

how they are securing personal data. In the employment context, the transfer of data may occur where, for example, US companies are used in recruitment and vetting processes; global businesses transfer data to offices in the US and/or where some cloud computing platforms are used. It is important to remember that it is the employer, as data controller of employee data that will be responsible for complying with data protection laws. The Information Commissioner in the UK has said that it is currently assessing the situation and will provide further guidance in due course.

Maximillian Schrems v Data Protection Commissioner.

ZERO HOURS CONTRACTS GUIDANCE

The government has produced [guidance for employers on zero hour contracts](#). It is fairly brief but covers: what are zero hour's contracts; employment rights for zero hour's employees and workers; when zero hours contracts may be appropriate (such as for new businesses, seasonal work, unexpected sickness absence, events companies and where services are being tested although the list is not exhaustive); best practice when engaging zero hours workers and the ban on exclusivity clauses.

