RMI Employment Law Bulletin
Summer 2021

With the economy starting to open members are starting to face HR challenges associated with this opening up. In this seasonal update we are looking at other developments in employment law and some of the challenges going forward.

Legislative Changes

Furlough

As part of the Spring Budget the Chancellor announced that the Coronavirus Job Retention Scheme would be extended until 30 September 2021. The level of grant available to employers will however be reduced from July 2021 onwards and employers will need to contribute towards the wages of furloughed employees. In summary, the level of employer contribution in July will be 10% and the government contribution will drop to 70%; and for August and September, the employer contribution per month will be 20% and the government contribution per month will drop to 60%. Employees will therefore continue to receive 80% of their salary for hours they were unable to work up to the cap of £2,500.

The Chancellor announced that £100 million has been put towards a new Taxpayer Protection Taskforce to crack-down on fraudsters who have exploited the COVID support schemes.

Flexible furlough

RMI members will have noted the recent changes in furlough and the amount that can be claimed towards employees' wages.

According to Government information 11.6 million jobs have been supported since the scheme began. The priority now is not only to support jobs but to incentivise employers to bring back staff as the economy returns to normal. The Government has produced the table below to summarise the changes

	July	**August**	**September**
Government contribution: wages for hours not worked	70% up to £2,187.50	60% up to £1,875	60% up to £1,875
Employer contribution: employer National Insurance contributions and pension contributions	Yes	Yes	Yes

	July	August	September
Employer contribution wages for hours not worked	10% up to £312.50	20% up to £625	20% up to £625
For hours not worked employee receives	80% up to £2,500 per month	80% up to £2,500 per month	80% up to £2,500 per month

You can continue to choose to top up your employees' wages above the 80% total and £2,500 cap for the hours not worked at your own expense.

Further guidance can be found at

https://www.gov.uk/government/publications/changes-to-the-coronavirus-job-retention-scheme/changes-to-the-coronavirus-job-retention-scheme

The scheme will end, 30 September 2021.

IR35

The IR35 rules which were delayed for 12 months in response to the pandemic before being extended to the private sector came into effect on 6 April 2021. They were put in place to ensure that a person working from their own personal service company but who is working just like an employee pays broadly the same amount of tax and national insurance contributions that the employee would.

Medium and large organisations in the private sector who engage personal service companies are now responsible for deciding the employment status of the worker and if IR35 applies, they will be responsible for making the necessary tax and national insurance deductions, as well as paying employer national insurance contributions and the apprenticeship levy, where applicable.

Employers will therefore need to review the position with regards to the employment status of contractors whom they engage to ensure that they are complying with their IR35 obligations. They may also wish to review the economy of using contractors since the rules may operate to increase costs to business and will, inevitably, lead to fresh administrative burdens.
HMRC's online tool for checking employment status for tax purposes can be found at: https://www.gov.uk/guidance/check-employment-status-for-tax .

Shielding

From 1st April 2021 the clinically extremely vulnerable were no longer advised by the government to shield from the coronavirus, and they will no longer be eligible to receive Employment and Support Allowance or Statutory Sick Pay on the basis that they have been advised to shield. They are however advised to take extra precautions to protect themselves such as reducing the number of social interactions that they have.

As with everyone else, the clinically extremely vulnerable must continue to adhere to the regulations which are in place to include the restrictions on mixing with other households. They are now advised to attend the workplace but only if they cannot work from home. Where applicable and with the employer's agreement, they may continue to be furloughed until the scheme ends on 30 September.

Case Law Update

Worker status – (Uber & Others v Aslam & Others)

The Supreme Court decided that the Claimants were in fact 'workers' and not self-employed contractors. The significance of this is that workers enjoy some employment law rights including the right to receive the national minimum wage, paid holiday, and statutory rest breaks, whereas self-employed contractors do not.

Uber argued that it was simply acting as a booking agent for the drivers who in turn were working for themselves. The Supreme Court found that this position was not consistent with the degree of control that Uber exerted over the drivers, for example, by restricting their ability to communicate with passengers.

This ruling will be significant for Uber as it opens the way for potentially thousands of national minimum wage and unpaid holiday pay claims. It also has wider implications for those working right across the UK's gig economy, and further claims from other industries are to be expected.

National Minimum Wage – (Royal Mencap Society v Tomlinson-Blake and another case)

The Supreme Court held that sleep-in workers are not entitled to receive the National Minimum Wage in respect of hours spent sleeping, even though the worker may be required to be constantly on call and to have a 'listening ear' while asleep.

In interpreting the meaning of 'work,' Lady Arden stated that not all activity which restricts a worker's ability to do as he pleases amounts to work for the purposes of the NMW legislation:

"It is clearly not the position that, simply because at a particular time an employee is subject to the employer's instructions, he is necessarily entitled to a wage. There are many situations when a worker has to act for the benefit of his employer which do not count for time work purposes, for example when he travels between home and work".

The Court concluded that the worker must be 'awake for the purposes of working'.

This decision will be welcomed by employers particularly in the care and charitable industry given the clarity that it provides with regards to application of the National Minimum Wage legislation.

d) Long-term effect of disability – (All Answers Ltd v W and another)

The Court of Appeal overruled both the Employment Tribunal and the Employment Appeal Tribunal finding that they had not conducted the proper assessment for determining the date from which the long-term effect of an asserted disability is to be assessed.

In deciding whether the effect of the impairment was likely to last the required 12 months, the Employment Tribunal ought to have made that assessment by reference to the date of the alleged acts of discrimination. The EAT found that although the Tribunal had not focused on that date, it had properly considered the issue by looking at the effect of the impairments both before and after the alleged discriminatory acts to show that they were long term.

The Court of Appeal held that the assessment as to whether the impairments were likely to last 12 months had not been done with reference to the facts which existed at the date of the alleged discriminatory acts. The Court referred to the "marked absence" of any reference to that date and stated that any events which occurred after it were not relevant in assessing the 12-month likelihood.

The Court noted that the Tribunal's judgment was written in the present tense and that the phrases "Is Mr W disabled"?; "He suffers" from a mental impairment; "Is clearly long term;" disabled "and remains so" – further indicated that the issues had been looked at as at the date of the Tribunal hearing and not at the relevant date.

'Gender-critical' beliefs are protected under equality law – (Forstater v CGD Europe and others)

You may recall from the news when the Harry Potter author, JK Rowling, spoke out in support a woman who lost her employment tribunal claim over her gender-critical views. The Employment Appeal Tribunal has now overturned that decision.

<u>Basis of the case</u>

The Claimant, Maya Forstater, who believes that it is impossible to change the sex assigned to a person at birth, lost her job after making her views known on online platforms such as Slack and Twitter. Some of her colleagues were offended by her posts and complained, alleging that they were "trans-phobic." When her contract was not renewed, the Claimant brought proceedings to the employment tribunal, among which, she claimed that she had been discriminated against on the grounds of her gender-critical belief. The tribunal determined that her belief was not 'protected' under equality law, and her claim was dismissed. Ms Forstater appealed this decision.

A belief will be protected if it amounts to a 'philosophical belief' within the meaning of section 10 of the Equality Act 2010. Caselaw has established a number of criteria for determining what constitutes a philosophical belief,

- It must be worthy of respect in a democratic society,
- not incompatible with human dignity and
- not conflict with the fundamental rights of others.

The initial tribunal held that the Claimant's "absolutist" belief, whereby she would "refer to a person by the sex she considers appropriate even if it violates their dignity", rendered it one that was "not worthy of respect in a democratic society". The Claimant appealed.

The Employment Appeal Tribunal held that,

> *"It is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection … the potential for offence cannot be a reason to exclude a belief from protection altogether."*

Mr Justice Chaudhury noted that:

> "*Just as the legal recognition of Civil Partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples, becoming the acquired gender "for all purposes" within the meaning of GRA does not negate a person's right to believe, like the Claimant, that as a matter of biology a trans person is still their natal sex. Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society."*

The EAT cautioned that its decision was not expressing a view as to any merits on either side of the transgender debate, and that people with gender-critical beliefs cannot misgender or harass trans persons with impunity. Everyone continues to be subject to the prohibitions on harassment and discrimination within the meaning of the Equality Act; employers continue, subject to the statutory defence, to be liable for any such prohibited conduct during the course of employment; and whether any such conduct is made out will be for an employment tribunal to decide in a given case.

Having now established that the Claimant's gender-critical belief is protected, her case has been sent back to the tribunals to determine whether the non-renewal of her consultancy agreement was because of or connected to that belief.

Holiday Pay: Supreme Court to decide whether a gap of three months breaks the chain in a backdated claim

The Employment Rights Act 1996 provides that, any tribunal claim for unpaid holiday pay generally needs to be brought within three-months of when the payment became due, unless the underpayment forms part of a 'series of deductions.' If a series exists, then a claim can be made for all of the underpayments in the series, and the three-month time limit begins to run from the last underpayment. There is, however, no statutory definition of what amounts to a 'series' of deductions.

Following the decision of the Employment Appeal Tribunal in Bear Scotland v Fulton (2014) – where there is a gap of three months between underpayments, this will break any series

of deductions, meaning that any underpayments preceding the break will generally be out of time. Mr Justice Langstaff reasoned that for a series to exist, there requires to be both a sufficient factual and temporal link between underpayments, and that a period of more than three months was too long a time to wait before bringing a claim.

However, the Court of Appeal in Northern Ireland has called into question the correctness of this decision. In Chief Constable of the Police Service of Northern Ireland v Agnew (2019) – a class action involving unlawful deductions from wages relating to some 3,700 police officers and support staff – it ruled that a 'series' was not necessarily broken by gap of three months, and that to hold otherwise would lead to "arbitrary and unfair" results. The Court concluded:

> *"… if a three-month gap broke a series it would do so when the unlawful deductions occurred consistently and persistently at six monthly intervals but not when they occurred at two monthly intervals. There is nothing in the ERO which expressly imposes a limit on the gaps between particular deductions making up a series. We do not consider that there is anything implied from the terms of the ERO which compels to such an interpretation of a series. As a matter of the proper construction of the ERO we conclude that a series is not broken by a gap of three months or more."*

Although the respective legislative provisions relating to a 'series of deductions' are identical as between Northern Ireland and England and Wales; since the Court of Appeal in Northern Ireland is not a court of coordinate jurisdiction, its decision, while persuasive, is not binding in England and Wales or Scotland. However, Agnew is being appealed to the Supreme Court and the case is due to be heard at the end of June 2021. The Supreme Court's decision will be binding on all employment tribunals in the UK, which could have far-reaching implications for employers should the decision be upheld – particularly those in Northern Ireland – where the statutory cap of two years on backdated claims does not apply.

In Conclusion

Don't forget, any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.