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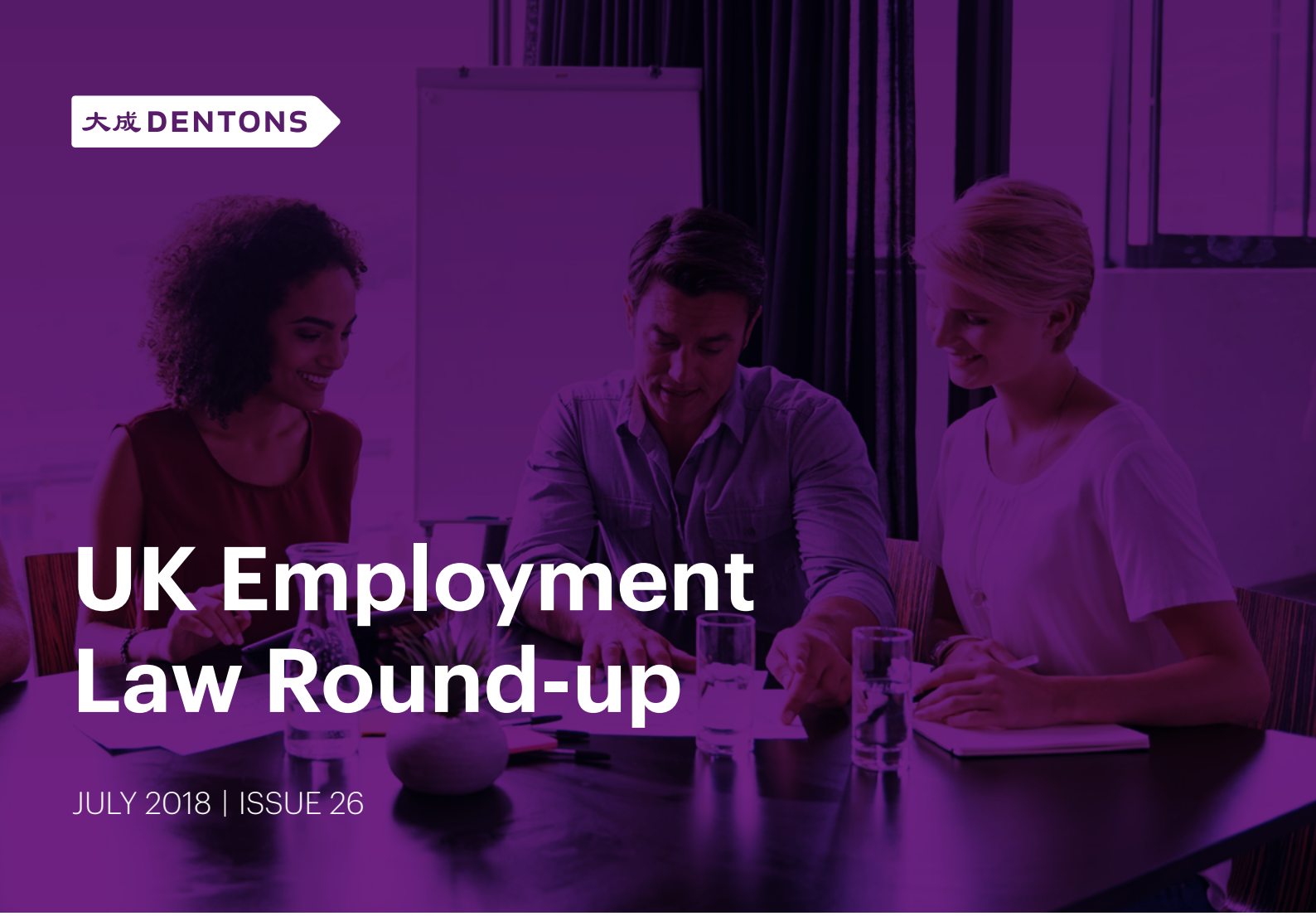


UK Employment Law Round-up

JULY 2018 | ISSUE 26

In this issue we look at some of the key employment law developments that have been taking place over the past month. In particular, we consider the Royal Mencap case and the Court of Appeal's finding that sleep-in workers are only entitled to the National Minimum Wage when they are awake and "actually working", not when they are asleep and merely "available for work". We also look at the issue of gender pay gap mis-reporting and the most recent gig economy case, involving Hermes Parcelnet Ltd, where couriers were held to be workers rather than self-employed individuals. Finally, in the wake of #MeToo and other such movements, we identify some key questions that can be asked by HR professionals tasked with reviewing their organisation's approach to creating a harassment-free culture.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK Employment Hub.

IN THIS ISSUE

Royal Mencap Society v. Tomlinson-Blake

Last week, the Court of Appeal (CA) handed down its much-anticipated decision in the case of *Royal Mencap Society v. Tomlinson-Blake*. The decision saw the CA overturn the ruling of the Employment Appeal Tribunal (EAT) which had held that carers working sleep-in shifts were entitled to the National Minimum Wage (NMW) for every hour of their shift, regardless of whether they were awake and carrying out relevant duties. In overturning this decision, and a significant body of case law, the CA has held that sleep-in workers are only entitled to the NMW when they are awake and "actually working". They are not entitled to the NMW when they are asleep as they are then only "available for work".

As has been typical in the care sector, Mrs Tomlinson-Blake received a flat rate payment of £22.35 plus one hour's pay of £6.70 for a nine-hour-long sleep-in shift. She contended that this pay fell below the NMW as, when accounting for every hour spent at work, her wage equated to around just £3.23 per hour. The EAT rejected Mencap's argument that Mrs Tomlinson-Blake was not awake and carrying out her duties for the majority of her shift and was therefore not

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer – Verity Buckingham and Natasha Vas look at the issue of employee activity on social media.
- People Management – Helen Jenkins reflects on the progress being made, both in Britain and globally, in the area of gender equality.
- People Management – Victoria Middleditch looks at whether it's time for mandatory quotas on women in the boardroom.
- People Management – Jessica Pattinson looks at leadership within businesses and whether enough is being doing to develop management internally.

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.

entitled to remuneration for those hours. In doing so, they took the following factors into account:

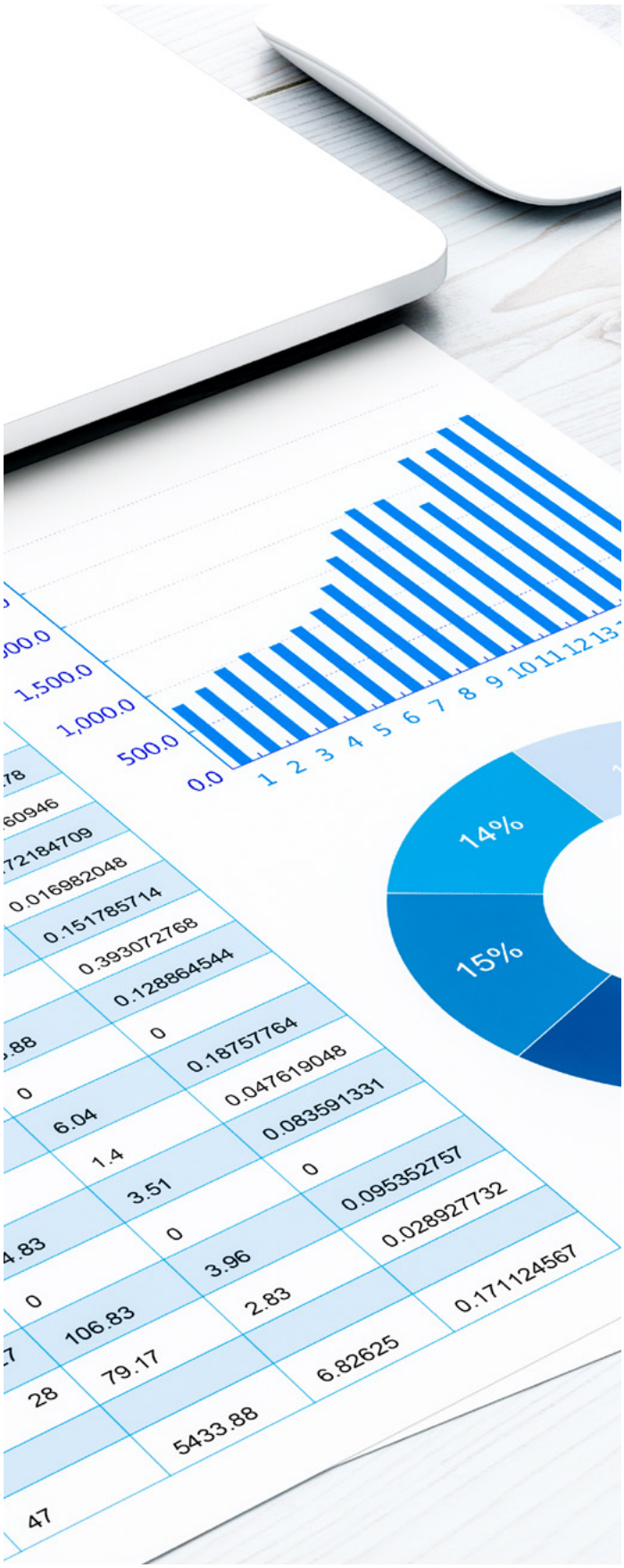
- Mencap's statutory obligation to have someone on the premises;
- Mencap's requirement to have someone present to fulfil their obligations to the council; and
- Mrs Tomlinson-Blake's responsibility to be present and use her professional judgement as to whether attention was required through the night.

In overturning this decision the CA ruled that only time spent awake and "actually working" should be included in the calculation of NMW payments and referenced the exclusion under Regulation 32 of the NMW Regulations 2015. This Regulation specifies that the NMW is only payable during hours "when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping". A plain reading of this regulation was favoured over the EAT's multifactorial test above. The CA stated that this approach is limited to the facts of sleep-in workers who are "contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity".

This decision has been welcomed by employers in the care sector, given the significant financial ramifications that the EAT's decision was set to impose on the sector in terms of both increased staffing costs and claims for up to six years' worth of back pay. Before the decision was released Martin Green, the Chief Executive of Care England, stated that "if the existing decision of the Employment Appeal Tribunal is upheld it would be a watershed moment for the sector, with profound effects for the viability of residential domiciliary and supported care".

Understandably this outcome will be disappointing news for individual care workers. However, many organisations in the care sector are saying that this landmark ruling is a major boost towards safeguarding the ongoing support for vulnerable people and sustainability of the sector.

The CA decision is, of course, subject to any further appeal to the UK Supreme Court. Unison, which supported Mrs Tomlinson-Blake, confirmed that it will consider appealing the decision following its release. Given some of the reactions that it has been met with on social media by various commentators, it is fair to assume that this may not be the end of the matter. We will keep you updated with any developments.



An estimated one in six employers have misreported their gender pay gap

The rush prior to the 4 April deadline for private businesses with more than 250 employees to publish their gender pay gap report may seem like a distant memory to most. However, according to a recent independent statistician's report, as many as one in six organisations misreported their pay gap and may now need to revisit their reporting methodology.

By way of recap, the report had to include the following data:

- The proportion of men and women in each of the four pay quartiles.
- The gender bonus gap – the difference between men's and women's mean and median bonus pay over a 12-month period.
- The proportion of male and female employees who received a bonus in the same 12-month period.
- The overall gender pay gap figures, calculated using both the mean and median average hourly pay.

The figures also had to be supported by a written statement from an appropriate senior individual confirming the information was accurate.

Over 10,000 organisations published their reports by April and the headline numbers have certainly caused a stir. The data showed that 78 per cent of large organisations pay men more than women and that the national median gender pay gap stands at 9.7 per cent (a blog post on other figures released can be found here).

Now an independent statistician, Nigel Marriott, has suggested that between 9 and 17 per cent of gender pay gap data is wrong. Marriott has identified, among other things, inconsistency between the ACAS guidance and the Gender Pay Gap Regulations as a contributing factor to employers' confusion.

Marriott has highlighted a number of common errors and statistical impossibilities. For instance, 937 organisations reported a median gender pay gap of zero, which could only be correct if the male quartile gap is also virtually zero. As Marriott describes, if a

company is reporting a positive median gender pay gap, then this must imply that the sum of the percentage of men in the upper and upper middle quartiles should be greater than the sum of the male percentages in the other two quartiles. Yet over 500 organisations have reported relatively large male quartile gaps and at the same time have claimed to have a zero median gender pay gap.

Two organisations reported their gender pay gap as being greater than 100 per cent, which is impossible unless women are actually paying for the privilege to work at their respective companies. Organisations have also been entering their income quartiles the wrong way around, inputting +9 per cent rather that -9 per cent for example.

Many commentators have argued that in future reporting cycles errors would be reduced if pay gap data were presented in the more intuitive pound and pence format instead of percentages e.g. women make 51p for every £1 that men make. This change has also been championed by a recent report from the Government Equalities Office, which found that data was better understood when shown this way.

Whilst an error rate of this scale is perhaps not a surprise given that this is the first year of companies publishing their findings, it is clear that further guidance must be produced for employers. Only time will tell if such guidance will be forthcoming, but in the meantime it is understood that the Equality and Human Rights Commission is contacting organisations that have filed questionable data and asking them to correct or explain their reports or risk being taken to court, where they could face unlimited fines.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- What amounts to a protected disclosure for the purposes of whistleblowing? http://www.ukemploymenthub.com/kilraine-v-london-borough-of-wandsworth-2018
- Supreme Court hears Barnardo's PRI/CPI Appeal http://www.ukemploymenthub.com/supreme-court-hears-barnardos-rpi-cpi-appeal
- Home Office publishes details of settlement scheme for EU citizens http://www.ukemploymenthub.com/home-office-publishes-details-of-settlement-scheme-for-eu-citizens
- Pay gaps between younger and older workers http://www.ukemploymenthub.com/pay-gap-between-younger-and-older-workers
- Migrants' rights in the spotlight http://www.ukemploymenthub.com/migrants-rights-in-the-spotlight

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Leyland and Others v. Hermes Parcelnet Ltd

Leyland and Others v. Hermes Parcelnet Ltd is the latest tribunal judgement in an increasingly long line of case law regarding the status of gig-economy workers. Following on from the Supreme Court decision in *Pimlico Plumbers*, *Hermes* reasserts that the courts are concerned with the reality of the underlying relationship as opposed to contracts often carefully tailored to avoid the application of worker status.

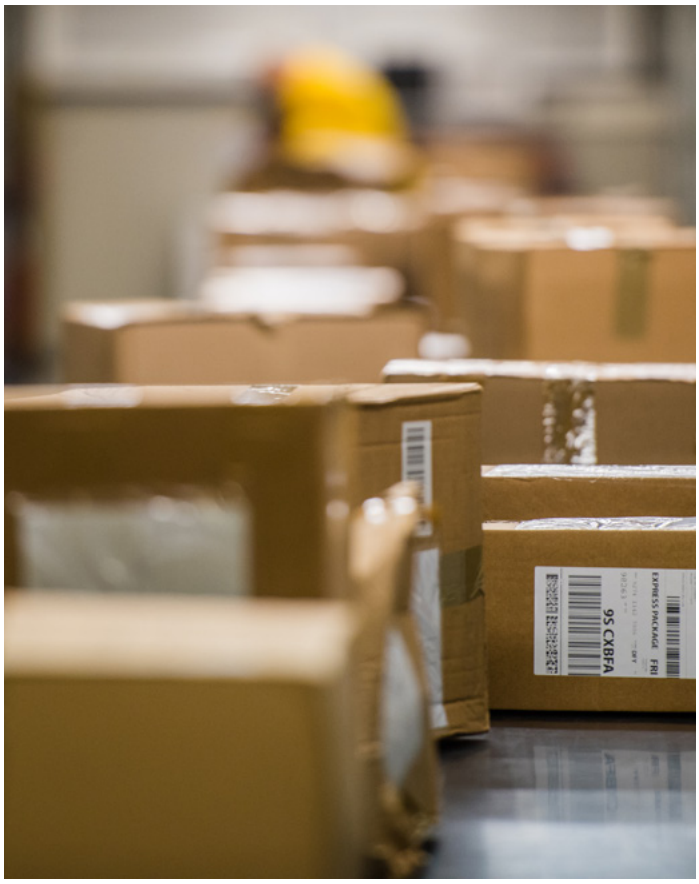
In this case, the claimants were a group of parcel couriers for Hermes Parcelnet Ltd (Hermes). All parties accepted that the claimants were self-employed, but the couriers alleged that they were also workers. This would have the effect of giving them statutory rights to national minimum wage and paid holiday, among other benefits.

Hermes relied upon terms in the contract that suggested there was no obligation on the couriers to do or perform the work personally – meaning that they could not be workers – and that Hermes was a client of the couriers. Thus, it argued that the relationship was a contract for services rather than a contract of service.

The couriers' contracts provided for an "unfettered right of substitution", meaning that the claimants were allowed to provide a replacement courier from either within the business ("cover") or outside the business ("substitution", i.e. friends and family). Hermes was unsuccessful on this point because the reality was that it retained the right to reject a replacement, even if that substitute was from within the business. Moreover, the tribunal judge found that it was not a case of being permitted to substitute, but rather an obligation to substitute if the courier could not complete the task given to them on their contractually specified days of work. As such, it was found that the requirement of undertaking work personally was clearly met.

Had the working days requirement not been included in the contract – meaning that the couriers could choose when to work – of the required mutuality of obligation might not have been so easily identified by the Tribunal. That in turn may have meant the couriers would not have been able to claim worker status.

Hermes' self-employed contractor argument was unsuccessful on this point as well. The tribunal decided



that the workers' degree of dependence was similar to an employment relationship rather than an arm's length relationship characteristic of self-employment. Moreover the couriers did not advertise their services to the world at large but were independently recruited by Hermes as a necessary part of its business structure.

Finally Hermes unilaterally decided on all rates of pay, prepared all invoice collections and decided on which bonuses were payable to the couriers. It could also withdraw those bonuses whenever it wished. These factors reinforced the argument that Hermes was not a client of the couriers.

As a result, the couriers were successful in their claim to achieve worker status with all the statutory obligations which that brings upon Hermes. It must be noted that these decisions are highly case specific and it is unwise to rely on individual cases, especially tribunal cases, as binding precedent. However, what is clear is that the courts are continuing their move towards an understanding of work-related engagements which looks behind the contract and into the reality of the relationship.

How can HR professionals manage #MeToo claims in the workplace?

The global job site Monster.co.uk recently released the findings of its survey on sexual harassment in the workplace. The research found that high-profile movements fighting against sexual harassment, such as #MeToo and Time's Up, gave a quarter of UK workers the confidence to report wrongdoing in their place of work.

While it is encouraging that these campaigns have created momentum and workers are now more likely to challenge any harassment they have witnessed or experienced, it also shines a spotlight on the prevalence of such issues in the workplace. In the last year alone more than 30% of British workers reported experiencing or witnessing gender discrimination at work and more than 20% said they had experienced or witnessed sexual harassment in the workplace. Just 44% believed that men and women with the same experience and qualifications have an equal chance of being hired. The results make for uncomfortable reading.

The survey's findings also highlighted that almost 30% of HR professionals felt their organisations' policies needed to be updated to encourage greater equality in the workplace. More worrying still, despite an increase in the number of organisations having equality policies, a quarter of HR professionals reported that those policies are not always applied during recruitment.

Against this backdrop, here are some key questions for those HR professionals tasked with reviewing their organisation's approach to creating a harassment-free culture:

1. **Are our diversity and equality policies fit for purpose?** Do they set the standard and tone your organisation strives to uphold? Are they clear and easy to understand? Take the opportunity to give your policies a health-check and ensure that they express a zero-tolerance approach to any form of discrimination.
2. **Do our staff know about these policies and where to find them?** After reviewing your equality policies make sure they are visible and easily accessible to all. Consider launching an internal marketing campaign to remind staff what policies are in place and where these can be found. Take the opportunity to remind staff that they will be supported if concerns are raised.
3. **Is diversity and equality training required?** Monster.co.uk's report highlights a worrying disparity between policy and day-to-day reality. It is worth remembering that it is not enough simply to have well-drafted policies in place. Ensure your organisation practises what it preaches at all levels by providing appropriate training and refreshing it on an annual basis, particularly for those managers who may have to handle sexual harassment claims or are involved in recruitment. Training can help to ensure that decisions are made objectively and that stereotyped assumptions or unconscious bias do not creep in to the process.

Can your organisation improve attitudes to equality? Whilst no organisation is perfect, engendering a culture where equality and respect is front and centre is key. If allegations or claims of sexual harassment are raised, ensure that these are taken seriously and dealt with quickly, in confidence and in accordance with your organisation's policies and procedures.

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