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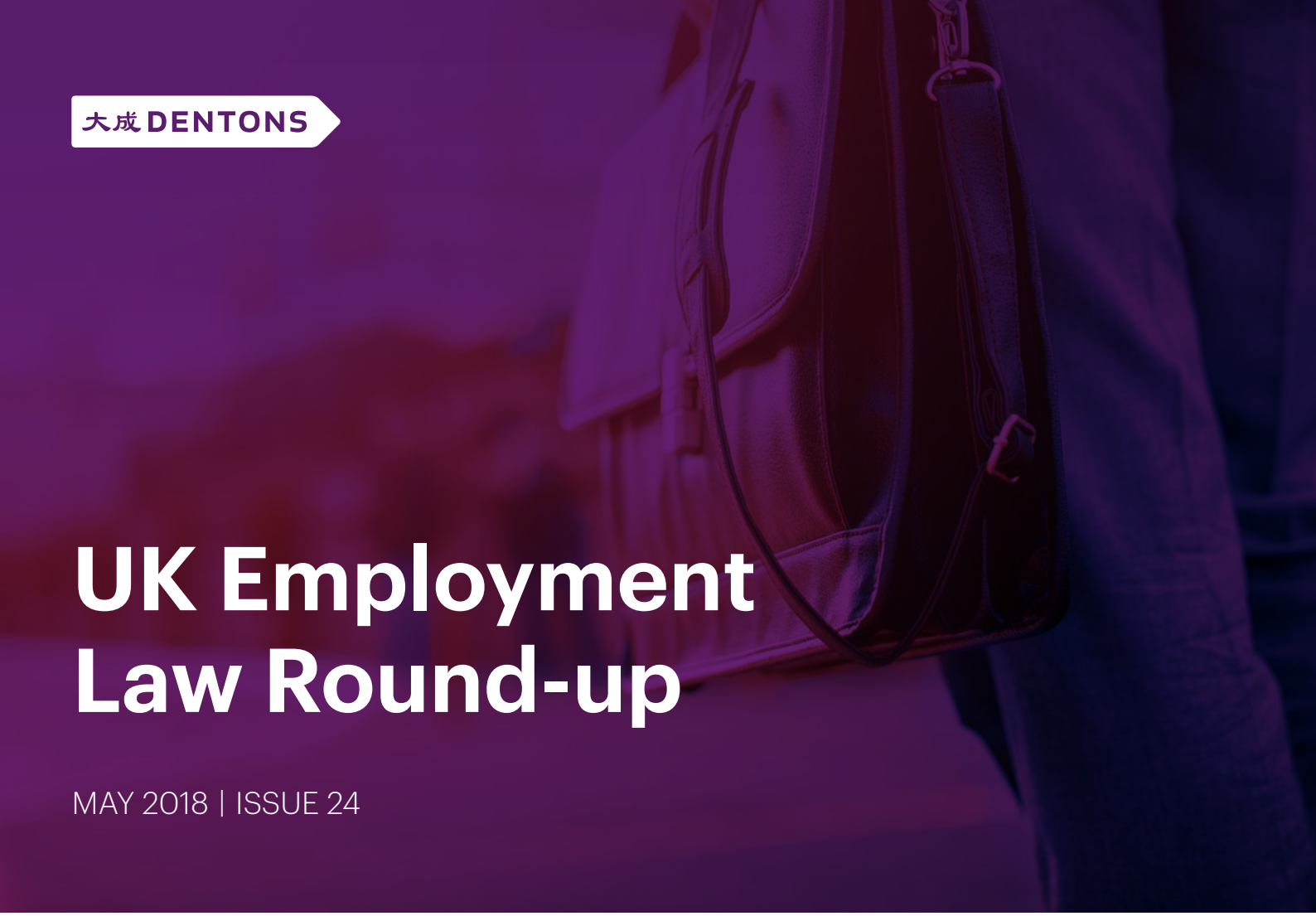


UK Employment Law Round-up

MAY 2018 | ISSUE 24

In this issue we look at how to navigate some common pitfalls when taking on individuals for work experience placements, key developments in the law on constructive dismissal, and the continuing conundrum of whether to enhance shared parental pay. We also look at what GDPR has in store post 25 May, with some tips on compliance from an HR perspective.

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

It's internship season – how to avoid the common legal pitfalls!

With academic terms now coming to an end in schools and further and higher education establishments across the UK, the season of the internship (often called "summer/work placements", "work experience" or "volunteering") is now upon us. We consider below the common legal pitfalls for employers engaging interns and how these can be avoided.

Establishing status

Unhelpfully there is no single statutory definition for the status of someone who carries out an internship. Government guidance has made it clear that simply labelling a job "intern" or "volunteer" does not necessarily exclude that person from being classed as a "worker" in terms of the Employment Rights Act 1996.

A "worker" is someone who is engaged under a contract to personally provide services to an employer and in respect of which there is mutuality of obligations between the parties. Where the intern is also a "worker", they will have numerous employment rights such as right to annual leave, rest breaks and, perhaps most importantly, the right to be paid the National Minimum Wage (NMW).

Employers should carry out a proper analysis of whether the arrangements may give rise to "worker" status, particularly if considering taking on the intern on an unpaid basis.

Pay

Voluntary workers are excluded from the NMW, but not all "volunteers" are voluntary workers in terms of the law. Voluntary workers are a category of worker who carry out work for charities, voluntary organisations, associated fundraising bodies and statutory bodies. They receive no payment other than basic expenses for travel or food and typically do not have a formal employment contract.

The same is generally true for interns. Certain forms of internships such as work shadowing, where no actual work is done, or placements of less than a year undertaken by students as part of their course, are specifically exempt from the NMW. However, if the internship is not part of a course, and the intern is over the compulsory school age, then they are likely to qualify for the NMW.

IN THE PRESS

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

- People Management – Helena Rozman reports on what the future will be for EU workers.
- The Scotsman – Jessica Pattinson: The wait for Brexit clarity on immigration continues

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.

The illustrative examples given in the government guidance are helpful for employers to identify when the NMW is required to be paid. We have set out an extract below – the full guidance can be accessed here.

Internship with an oral agreement:

Lucas takes up an internship at a newspaper business. He agrees orally with the editor that he will work personally for four days a week from 9am to 5pm and will undertake research activities as directed. He receives some payment for working the agreed hours.

Lucas has made an oral contract with the editor and should be paid at least the minimum wage.

Work shadowing:

Sayeed, a university student, arranges two weeks' work shadowing at a local company. This is unrelated to his studies. At the company, Sayeed shadows team members in different parts of the organisation and learns about the company. His activities are limited to observing, listening and questioning. He does not receive any payments, but can claim travel expenses.

Sayeed does not need to be paid the minimum wage because he is not a worker for minimum wage purposes.

Individuals taking part in work shadowing are not performing work.

On the topic of pay, there is a general trend towards abolishing unpaid internships and so employers should give consideration to whether the internship should be paid in any event. We have blogged about this in the past (please click here to access our articles).

Written terms

Internships or placements are typically intended to give a young person some experience of the workplace. There is no legal necessity to have a written agreement with a volunteer or an intern. However, having something in writing which lays out expectations and learning objectives is very helpful. Typically such an agreement will be a short, straightforward document which also identifies the intern's role, any training or induction that will be given, whether the internship will be paid, any expenses that will be covered and any practical health and safety information that may be relevant.

If you would like advice and guidance on status, the NMW or intern agreements, please contact a member of our team.

Constructive Dismissal

Two constructive dismissal cases have been decided since our last newsletter which make for interesting reading. The first case serves as a reminder of how not to approach making changes to terms and conditions of employment and in the second case the Court of Appeal has provided some helpful guidance on how tribunals and courts should determine "last straw" cases.

The first case is *Mostyn v. S and P Casuals*. Mr Mostyn was a sales executive and between 2012 and 2016 his sales figures fell significantly. His employer addressed this drop in performance by inviting him to a meeting in February 2016 and asking him to accept a £20,000 cut in his basic pay. Perhaps unsurprisingly Mr Mostyn resigned with immediate effect and brought a claim for constructive unfair dismissal, based principally on breach of the implied term of mutual trust and confidence.

While his claim was initially dismissed by the Employment Tribunal (which found that Mr Mostyn's resignation was in response to the breach of the implied duty of trust and confidence but that the respondent had reasonable and proper cause for imposing the pay cut) the Employment Appeal Tribunal found that there had been a fundamental breach by the respondent of the express term relating to salary payment and that should have been determined before considering whether there had been a breach of the implied term.

Making changes to terms and conditions of employment can be a contentious and emotive issue. It goes without saying that employers do not have the ability to unilaterally make changes to key terms and conditions of employment – salary being the most obvious example. Full and proper consideration should always be given to the reasons for making changes which have a negative impact and properly documented in terms of a proposal before any discussion with employees. Careful thought should be given to the correct process to be followed. For minor and inconsequential changes, notification of the change, an explanation for the change and a sufficient period of notice should be given. In a case such as this where a substantial salary reduction is proposed an employer should consider whether it is a redundancy situation and proceed on that basis with the offer of an alternative position on a lower salary (which is unlikely to be a suitable alternative position but can be discussed

as an option with the affected employee). For other such substantial proposed changes the employer should engage in a full and meaningful consultation process to discuss a proposed change prior to taking any steps to implement or "force" the change through. Finally, bear in mind that if more than 20 employees are affected by the proposed change and you ultimately need to go down the dismissal and re-engagement route to implement the change, then you may need to engage the collective statutory consultation process (which is exactly the same process as for collective redundancies). We would recommend seeking advice in these circumstances.

The second constructive dismissal decision is the case of *Kaur v. Leeds Teaching Hospitals NHS Trust*. In this case the employee resigned in response to a "last straw" incident when her appeal against a final written warning was rejected. While the employee was ultimately unsuccessful in her claim and appeal, the Court of Appeal found that an employee could still bring a claim for constructive dismissal relying on a series of acts by the employer even where the employee has affirmed as earlier fundamental breach of contract. The Court also provided some useful guidance on the correct approach to these cases:

- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- Has he or she affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a fundamental breach of the implied duty of mutual trust and confidence?
- Did the employee resign in response (or partly in response) to that breach?

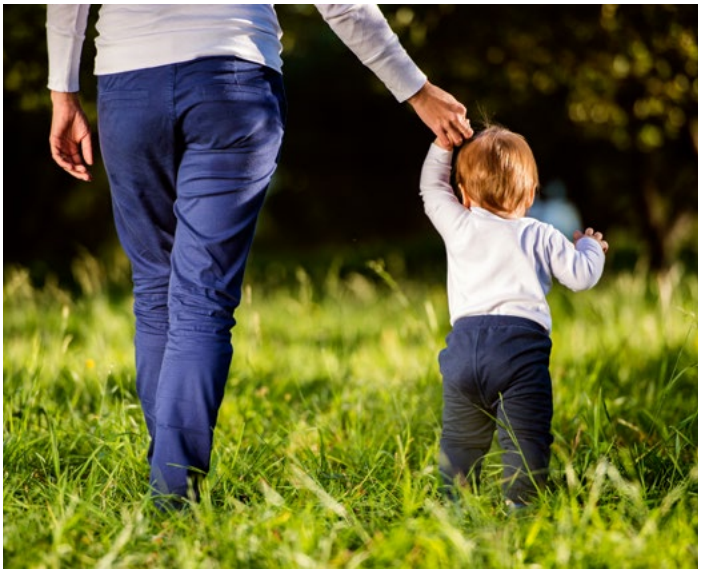
In short, even if an employee accepts an employer's fundamental breach of contract but the employer subsequently breaches the contract again, the employee can rely on the earlier breach (that was accepted) in a constructive dismissal complaint relying on an employer's course of conduct. Course of conduct constructive dismissals are much more common than constructive dismissals arising out of one fundamental breach by the employer but the case of *Moyston*, discussed above, is a clear example of the latter.

Is it discriminatory to pay enhanced maternity pay, but not enhanced shared parental pay?

Where an employer pays enhanced maternity pay, are they obliged to enhance shared parental pay to the same extent in order to avoid discrimination claims? While the position on whether this constitutes direct discrimination appears to be largely settled (following the recent case of *Capita v. Ali* which we reported on last month), the latest judgment on this topic has potentially opened the door to a wave of indirect discrimination claims from men who believe they have been short-changed compared with their female counterparts.

In *Hextall v. Chief Constable of Leicestershire Police,* a male police officer claimed both direct and indirect discrimination. His claim was based on his employer's policy of not paying those on shared parental leave (SPL) the same rate as women on maternity leave. Those on SPL were paid the statutory minimum, while maternity pay was enhanced.

Following the same reasoning as the *Capita* case, the tribunal found that it was not direct discrimination to offer men on SPL a lower rate of pay than women on maternity leave, on the basis that the appropriate comparator to a man on SPL was a woman on SPL, and not a woman on maternity leave. The tribunal also extended this reasoning to reject the indirect discrimination claim and so rejected both claims.



On appeal to the EAT, however, it was found that the tribunal had erred with regard to its judgment of indirect discrimination. The EAT found that the "particular disadvantage" relied upon by the claimant was that, although the rate of pay for SPL was the same for both males and females, the rate had a disproportionate impact on males because, unlike females, they have no choice but to take SPL (and cannot choose to take maternity leave instead). The EAT therefore said that the relevant pool for considering whether men suffered a disadvantage was those who had an interest in taking leave to care for their new-born child.

The case has now been remitted to a fresh tribunal to hear the claim again. Although it is not clear what will ultimately be decided in the case (and we suspect there will be numerous appeals), it is a key decision for businesses since it is common for employers to pay enhanced maternity pay but only statutory shared parental pay.

In light of the uncertainty, now may be a good time for employers to reassess their approach to family rights and associated pay, particularly against the UK backdrop of gender pay inequality which has been highlighted by the recent gender pay gap reporting exercise.

Putting the UK's shared paternal leave into the EU context, the Swedish model has been recognised as one of the most family-friendly and equality-focused systems in the world, with the European Commission inspired to propose a new work-life balance directive, part of which would aim to firm up paternal pay across the EU.

Swedish parents are given 480 days to split between themselves, however they see fit, at any time until the child is 8 years old. It is a "use it or lose it" system, where each parent must keep at least 90 days each. Parental leave in Sweden is paid at around 80% of normal salary (subject to a cap) for 390 days, then at a flat rate for the remaining 90 days. Swedish employers report that, while there are challenges around resourcing and cost, there are also key benefits such as boosting morale and retention of talent. Of course, Swedish employers have the advantage that the generous enhancements are met, at least in part, by government subsidies.

We will be watching the progress of the *Hextall* case so please look out for future updates. If you would like any advice or guidance on your organisation's family leave policies, please contact a member of the team.

GDPR compliance: the position post 25 May 2018

Although 25 May 2018 had garnered an almost sacred status in the calendars of employers, the inconvenient truth is that GDPR compliance does not end on this date and will require a concerted ongoing effort to be maintained. The ICO has stated that GDPR compliance should be viewed as an evolutionary process for organisations, with 25 May simply being the date the legislation took effect. The ICO warned that no business stands still and organisations will be expected to continue to identify and address emerging privacy and security risks in the weeks, months and years beyond May 2018.

As a reminder, from an HR perspective, the following steps should ideally have been taken prior to 25 May:

- **Information audit:** you have carried out an audit of the information you hold in order to identify the personal data and what you do with it.
- **Lawful grounds:** in respect of each piece of personal data, you should have identified the legal basis for processing. As a reminder, there is a move away from relying on consent in the context of an employment relationship, since consent is only valid if it is "freely given".
- **Privacy notices:** you should have prepared and communicated GDPR compliance privacy notices to your employees, contractors and prospective recruits.
- **Contracts:** you should have either reviewed and updated your data protection consent clause in your standard form employment contract, or otherwise notified the workforce that you will not be relying on such consent going forward.

If you have not yet had an opportunity to carry out the steps above, it is strongly recommended that you action these as soon as possible so that you can demonstrate to the ICO that you are taking a proactive approach to compliance.

Of course, even if the steps set out above have been achieved, this is not the end of the story. The ICO expects employers to continue to take proactive steps to maintain and improve their data protection position going forward.

Key to this is education and training of staff at all levels of the business. You should consider rolling out formal training for the business' senior decision-makers to educate them about the GDPR's new risk-based compliance approach, the new requirement of data protection by design and default and the potential impact of non-compliance, including the GDPR's significantly expanded monetary sanctions for compliance violations (up to EUR 20 million or 4% of annual global revenue for serious breaches). However, training on GDPR should not be limited to senior staff. It is likely that almost all staff in your business will have access to personal data at some point during their employment with you. As a business, you should regularly train staff to recognise personal data, understand how to keep it secure and recognise when a data subject is enforcing their rights or, crucially, what steps they need to take in the event of a data breach.

Robust policies and procedures are also essential. It is important to review and update existing data protection policies, including any IT security and data retention policies, as well as putting in place procedures or guidelines to deal with, as a minimum, (1) data subject access requests and (2) detecting, reporting and investigating any data breach (and the new requirement to notify the ICO of such a breach within a strict timescale).

In terms of the data you already hold, consideration should be given to carrying out a data purge, to minimise the data that you hold. Data should be securely deleted or destroyed where you do not (or no longer) have lawful grounds for processing. Data retention periods should also be reviewed and brought in line with best practice.

In the event that you start to process a new category of personal data, or you process personal data for a different purpose, the relevant privacy notice will need to be updated to reflect this. Ideally, someone in the business should be appointed to take responsibility for this.

Overall, the strong message that comes out of GDPR is that compliance is not a destination but a continual process of improvement. It is important for businesses to keep an eye out for any updated guidance, case law and best practice that emerges in respect of data protection. We will be writing about significant developments as they arise. In the meantime, should you require any advice on GDPR compliance, please do not hesitate to contact one of our team.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- EHRC gender pay gap investigations http://www.ukemploymenthub.com/ehrc-gender-pay-gap-investigations
- Employee found to have been constructively dismissed despite dishonestly claiming £30,000 in expenses http://www.ukemploymenthub.com/employee-found-to-have-been-constructively-dismissed-despite-dishonestly-claiming-30000-in-expenses
- The Gig Economy – focus on the future http://www.ukemploymenthub.com/the-gig-economy-focus-on-the-future
- Business schools and the new apprenticeship levy http://www.ukemploymenthub.com/business-schools-and-the-new-apprenticeship-levy
- Employment Tribunal fees – what does the future hold for Employment Tribunals? http://www.ukemploymenthub.com/employment-tribunal-fees-what-does-the-future-hold-for-employment-tribunals

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