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Employment Newsletter

Winter Round Up 2020

In this edition of our newsletter we explore:

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National Minimum Wage And Other Statutory Rates Set To Increase.

The government has published proposed new statutory rates for 2020.

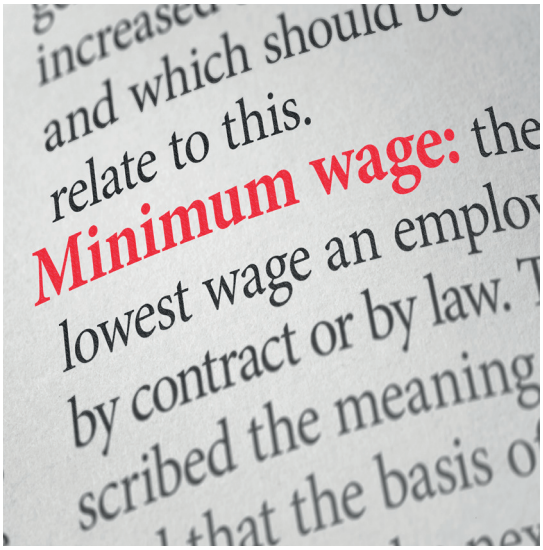
The national minimum wage will rise on 1 April 2020. The national living wage rate, which is for workers over 25, will increase from £8.21 to £8.72 per hour.

Meanwhile, other elements of the national minimum wage are set to increase:

- for workers aged 21 – 24, the hourly rate will rise to £8.20;
- for workers aged 18 – 20, the hourly rate will rise to £6.45;
- for workers aged between 16 – 17, the hourly rate will rise to £4.55; and
- the minimum wage for apprentices will increase to £4.15.

The government has promised that the national living wage will hit two-thirds of median earnings over the next five years. Based on current estimates, this would mean a rate of roughly £10.50 in 2024.
The government has also recently published its proposed statutory rates for various family-friendly benefits.

From 5 April 2020, the rates of statutory maternity pay, statutory adoption pay, statutory paternity pay, and statutory parental pay are set to rise from £148.68 per week to £151.20 (or 90% of the employee's average weekly earnings, if lower).



In the case of statutory adoption pay and maternity pay, the standard rate applies after the first six weeks of leave have been paid at 90% of the employee's normal weekly earnings. Meanwhile, the rate of statutory sick pay will increase from £94.25 to £95.85 per week on 6 April 2020.

The publication of the new rates will allow HR personnel to plan their budgets in advance of April for 2020/21 to ensure compliance, and to update their policies and other documents on family benefits.

"No Beards" Policy Held To Discriminate Against Sikh Work-Seeker.

In the recent case of Sethi v Elements Personnel Services Ltd, an Employment Tribunal held that a "no beards" policy indirectly discriminated against Mr Sethi on the grounds of his religion.

Mr Sethi was a Sikh who adhered strictly to Kesh (which is the requirement that body hair not be cut). Elements Personnel Services Ltd ('Elements') was an agency providing temporary staff for the hospitality industry, predominantly for 5 star hotels working within front of house food and beverage roles.

Mr Sethi had made initial enquiries about employment with Elements and subsequently attended an induction/ training session. At this session, Elements' policies on various matters were explained and pictures were shown of the dress/appearance standards.

Elements' Code of Conduct stated the following:

Code of Conduct

The impression we create by our personal appearance and what we wear is a powerful visual language which communicates more about us in one glance than can be said in a thousand words. The following are our professional appearance standards and must be adhered to without exception.

Hair

Hair styles and colours must not be extreme or unusual and must present a professional business image.

Male: Hair must be neatly trimmed so that sideburns are no lower than mid-ear and hair falls no lower than the top of the collar. No beards or goatees are allowed.

Female: No elaborate styling and hair must be worn only in a bun style.

At the end of the session, Mr Sethi explained that he wouldn't be able to shave his beard for religious reasons. After internal communications at Elements, Mr Sethi was informed that as it worked with '5* Hotels the hotel managers unfortunately won't allow having facial hair due to health and safety/hygiene reasons' and that it would not be able to keep him on its books.

The Tribunal did acknowledge that there had been evidence that Elements' clients had complained about workers' grooming standards, but found that there had been no evidence of their clients being asked about whether they would accept a Sikh working for them who could not shave for religious reasons. The Tribunal found that Element's policy was concerned with appearance, rather than hygiene. The Tribunal also noted that there were some 5* and other 4* (and lower) establishments where a "no beard" policy was not enforced and so concluded that if it were a hygiene issue, they would have expected evidence to indicate that it were more or less universally adopted.

The Tribunal held that the "no beards" policy was a provision, criterion or practice (PCP) which placed Sikhs generally, and Mr Sethi in particular, at a disadvantage (depriving them of work) because of the practice of Kesh. The Tribunal did accept that there was a legitimate aim for Elements to seek to comply with their clients' requirements in respect of grooming standards but considered that the blanket ban on beards was not a proportionate means of achieving a legitimate aim.

This case serves as a reminder to all those introducing policies that a blanket ban should be avoided where possible and that each matter should be considered on a case-by-case basis.

How Much Unused Holiday Can A Worker Carry Over Because Of Sickness?

In the UK, workers are entitled to at least 5.6 weeks of annual leave. Four weeks of this derives from the EU Working Time Directive ('WTD Leave'), but an additional 1.6 weeks of holiday is given in the UK under the Working Time Regulations 1998 ('WTR Leave').

It is well-established that workers who cannot use their holiday entitlement due to sickness absence, must be permitted to take it when they return to work. In cases of long-term sickness absence, this right includes carrying the unused holiday into the next leave year.

This carry-over principle applies irrespective of whether the worker has requested that their holiday be carried over.

This raises the question of whether workers should be allowed to carry over only their WTD Leave or their entire 5.6 weeks of annual leave when they are prevented from taking any holiday due to a long-term sickness absence.

The Employment Appeal Tribunal (EAT), in Sood Enterprises Ltd v Healy, previously decided the issue, ruling that WTR Leave does not carry over for workers in circumstances of long-term sickness absence, only WTD Leave can be carried over.

The European Court of Justice, in TSN v Hyvinvointialan, has now confirmed that the EAT's approach was correct. Its opinion was that any right to paid annual leave that exceeds the minimum level under EU law is governed exclusively by national law.

Therefore, unless there is a contractual agreement enabling a worker to carry over their entire annual leave entitlement if unused due to sickness, this will be limited to their four weeks of WTD Leave.

Although this case only concerned long-term sick leave, it is also worth noting that there have been other cases establishing the same right to carry over holidays in situations involving maternity leave or where workers have been wrongly told that annual leave would be unpaid (e.g. where the employer mistakenly believes that the worker is an independent contractor and has no right to paid holiday).

Should Interns Be Paid?

Cefinn, Samantha Cameron's fashion label, has recently come under fire for advertising an unpaid internship. It is reported that the workwear brand was looking for an intern to assist with marketing and PR and that in a (now-deleted) tweet it had been confirmed that the role was unpaid.

Under UK employment law, anyone classed as at least a 'worker' has the right to be paid the National Minimum Wage. The hourly rate for the minimum wage depends on a worker's age and whether they are an apprentice and the rates change every April.

Whether an individual is classed as a 'worker' depends on several factors including that an individual must turn up for work (even if they do not want to), that they personally perform the work as required by the contract or arrangement and that they do not substitute someone else to do the work.

Therefore, an intern can still be classed as a worker and is entitled to National Minimum Wage on that basis. There are some exceptions to this, particularly in relation to:

- Students required to do an internship for less than one year as part of further or higher education;
- Students who are still of compulsory school age;
- Volunteer workers (if they are working for a charity, voluntary organisation, associated fund-raising body or a statutory body and don't get paid, except for
- limited benefits such as travel for example); or
- Those who are only shadowing work (i.e. if the intern is not carrying out any work and are only observing the work undertaken by an employee).

Cefinn's intern advertisement reportedly required the intern to carry out tasks such as market research, sample management and production assistance.

It came under criticism on the basis that the programme clearly did not fall into one of the above exempt categories and described a skilled job involving real work. On this basis, those interns should be paid the National Minimum Wage.

'Worker' status also gives rise to several other rights, including the right to be paid in respect of holidays and to benefit from pension auto-enrolment.

The quite public criticism of Cefinn serves as a useful reminder to all companies that legal obligations in respect of workers' rights must be met.

Manager Gives Unwanted Massages To Employee: Is It Sexual Harassment?

The thought of massaging a colleague at work would cause most of us to cringe. However, there is often a difference between conduct that is inappropriate in the workplace and conduct which is discriminatory.

This distinction was at the heart of the recent case of Raj v Capita Business Services Ltd. The Claimant (R) and his manager (W) worked in an open plan office.

On several occasions, W had stood behind R while he was sat at his desk and given him a massage. R submitted that this lasted two or three minutes, that W had felt his shoulders, neck and back and that this had made him feel uncomfortable.

R brought a sexual harassment claim against his employer in relation to W's massages.

What is Sexual Harassment?

The legal definition of harassment is unwanted conduct related to a relevant protected characteristic (e.g. someone's age, disability, race, gender reassignment, religion of belief, sex or sexual orientation) or conduct of a sexual nature and which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The Employment Tribunal rejected his claim. Even though it found there was unwanted conduct creating an offensive environment for R, the Tribunal was not satisfied that the conduct was of a sexual nature or related to sex. There was no evidence that W had behaved in a similar way with any other colleagues and the massages had been with 'gender neutral' parts of the body. The Tribunal concluded that W's massages were a form of 'misguided encouragement', not sexual harassment.

R appealed against the Employment Tribunal's decision, arguing that the Employment Tribunal had erred in not shifting the burden of proof onto the employer to try and prove that the reason for W's conduct was not related to sex. R based this appeal on the fact that there had been a finding of unwanted conduct producing the necessary offensive environment and the Tribunal had also dismissed W's account of the massages as unreliable.

The Employment Appeal Tribunal dismissed the appeal. There had been no error in the Tribunal's decision. Whilst R had suffered unwanted conduct, which had also created the required offensive environment, R had failed to show that this conduct had related to the protected characteristic of sex or was of a sexual nature. In any case, the Tribunal had accepted that there was a non-discriminatory reason for the conduct (i.e. motivating or encouraging R). The EAT also concluded that while the Tribunal had dismissed parts of W's account, this did not mean the conduct was related to sex.

This case serves as a reminder of how seemingly harmless actions in the workplace, however well-intentioned, can potentially be discriminatory and highly damaging to companies. Had the actions of W been more sexual in nature, the outcome could have been very different. Each case will turn on its own facts, so employers should ensure that any allegations of harassment are thoroughly investigated and take legal advice where there is any uncertainty.

Can An Employer Be Liable For The Social Media Activity Of Its Staff?

In the age of social media, it is increasingly easy for the line between personal and professional life to become blurred.

Where an employee makes an offensive post on an apparently private social media account, you would be forgiven for assuming that it is not the employer's responsibility and it cannot be held liable for any wrongdoing. However, employers can be held liable under the Equality Act 2010 for any acts that are deemed to have been done 'in the course of employment'. This is a very fact-specific question so, depending on the circumstances, the personal social media activity of careless employees may well result in liability for an employer. This was the issue considered in the recent case of Forbes v LHR Airport in relation to the sharing of a racially offensive image on Facebook.

Case of Forbes v LHR Airport Ltd - Sharing Offensive Images on Facebook

Mr Forbes worked as a security officer for LHR Airport Ltd. One of his colleagues, Ms Stevens, shared an image of a golliwog on her Facebook page with the message "let's see how far he can travel before Facebook takes him off" (Ms Stevens's eventual explanation was that she was not trying to offend, but was raising a point about Facebook's moderating policy). The post was seen by a colleague, who then showed the image to Mr Forbes, which lead him to complain to his line manager.

Following a disciplinary investigation, Ms Stevens received a final written warning and she offered an apology for her actions. Mr Forbes was, however, later posted to work alongside Ms Stevens. When he complained about this, he was moved to another location without explanation. He then went off sick for a period.

The Claim against the employer

Mr Forbes brought a claim against his employer for discrimination relating to racial harassment under the Equality Act 2010, on the basis the company were liable for the actions of its employees. This was dismissed in the Employment Tribunal (ET), which found that the sharing of the post was not done 'in the course of employment'. The ET considered it relevant that:

Ms Stevens was not at work when the image was shared; the post did not mention any colleagues or the employer; and the image was shared on a platform where only a small portion of the network were connected to the employer. Mr Forbes appealed to the Employment Appeal Tribunal (EAT), but this appeal was dismissed. The EAT held that an image shared on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was not an act done 'in the course of employment'.

Social Media in the Workplace

It would be wrong for employers to think that this case absolves them of any liability for employee social media activity. Had the facts been slightly different, with a more tangible connection between the social media post and the employer, the employer could have been liable. For example, if the employer had been named in the post or a greater number of employees had seen the post, or even if the post had been shared during work hours or on a work device, the outcome could have been different. Employers must therefore be cautious when handling complaints relating to social media and seek advice if there is any uncertainty.

A Guide To Types Of Shares.

Companies in England and Wales generally issue three types of shares – ordinary shares, redeemable shares and preference shares. Within each type of share a company may decide to split them into separate classes. There are numerous benefits of issuing different types of shares for both companies and shareholders, including different options to return capital to shareholders (other than via a dividend) and minimising risk for investors.

Ordinary shares

Shares are 'ordinary' if they are not of another type, such as redeemable or preference shares. This is the most common type of shares in English and Welsh companies. They may hold any nominal value, for example a penny, a pound or more and contain a variety of rights relating to voting, dividends and capital.

Redeemable shares

Redeemable shares can be redeemed either at the option of the issuing company or by the holder of the shares. They are generally used as a method for returning excess capital held by a company to shareholders, a useful tool to return capital to shareholders without the need to declare a dividend.

Redeemable shares can only be issued by a company if it has already issued ordinary shares - a company cannot be incorporated with only redeemable shares or buyback all of its other types of shares if this would leave only redeemable shares. They may be voting shares but are usually issued as non-voting.
The terms of redemption can vary greatly. Common terms include a fixed redemption date, discretion to either the company, the holder, or both, to redeem the shares within a set range, or allow redemption in a fixed number of tranches over a range of dates.

The terms of redemption are usually stated within the articles of association of the company, though they can also be left to the discretion of the board.
Companies must comply with the Companies Act when redeeming shares, otherwise the acquisition will be void. Unlawful redemptions may expose directors of the company to personal liability for a criminal offence with a sentence of up to two years, an unlimited fine or both. Shares must be fully paid in order to be redeemed, the redemption must be approved by the board and a notice sent to the shareholder. There is no requirement to sign a stock transfer form (though this approach may be adopted for completeness) and stamp duty is not payable following the redemption to HMRC.

Preference shares

Preference shares usually rank ahead of ordinary shares in relation to both dividends and capital but carry limited or no voting rights. They usually entitle the shareholder to a fixed dividend, providing the holder with a guaranteed fixed income from the shares (though this is not an absolute requirement). This fixed income means that the holder will not benefit if the company is successful as the rate of dividend will not increase. They are generally a lower risk form of investment than ordinary shares, issued for lower nominal values than ordinary shares and are therefore held in much higher proportions than ordinary shares.

If preference shares do hold a right to a fixed dividend they are usually outside of the 'ordinary share capital' of the company, meaning that they do not benefit from entrepreneur's relief upon a disposal, however see our blog on the recent case of Stephen Warshaw V HMRC for commentary on this point and the need to take care to ensure that the rights attaching to preference shares do not inadvertently cause them to fall within the definition of 'ordinary share capital'.

Myerson HR: Your HR Needs Covered.

A full-service package based on a simple, fixed, annual fee, giving you full control over your HR spend.

What is Myerson HR?

Whether you have just ten employees, or over a thousand, you need to make sure your business complies with the latest HR and employment law requirements. Getting it wrong can result in significant financial and reputational consequences.

So we've developed Myerson HR. It makes sure you're covered, allowing you to concentrate on what's most important – running your business. Myerson HR is tailored to you and your business, to give you peace of mind, knowing that all your HR and employment needs are taken care of by our trusted and experienced lawyers.

It includes:

- A full Myerson HR audit and a suite of compliant HR documents
- Access to a comprehensive bank of template letters, agreements and policies
- A nominated employment lawyer as your main point of contact
- Unlimited access to our HR and employment law helpline, staffed by our experienced lawyers
- Priority access to employment workshops, seminars and events
- Regular newsletters and newsflash updates

Further Options

We can also offer access to Myerson HR insurance protection, HR management software, bespoke training and on-site additional HR support.

You can trust us

With over 20 partners and 100 staff, we represent businesses and individuals locally, nationally and internationally.

Our employment lawyers are experts in their field, who offer an accessible, high-quality and cost-effective alternative to the city centre, regional and national law firms.

We employ lawyers who are personable, talented and approachable, who understand the value of your business and its employees. This enables us to provide you with an enthusiastic and unrivalled employment law service.

Download our Brochure

For more information on Myerson HR, please download a copy of our brochure by clicking on the image below or call 0161 941 4000 to speak to a member of the employment team.

Well-Being Breakfast Seminar
Wednesday 22nd April.

We would like to invite you to attend our next event, a **Well-Being Breakfast Seminar** on Wednesday 22nd April.

The seminar will include guest speakers Janet Grant from The Better People Organisation and Jayne Marks from The Creative Engagement Group.
The seminar will provide practical guidance for managing the legal aspects of health and well-being issues at work, as well as looking at proactive steps to recognise problems early and promote resilience and well-being amongst employees.

Join us from 8:30am – 10:30am
Keep an eye on our events page to find out more.

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Because life is rarely **black** and **white.**

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