Employment Law Brief

with

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Shall we talk about something else?

There is of course much more to say about the employment law implications of coronavirus and lockdown. But what would we be talking about if the pandemic had just never happened?

In April a number of changes were made in employment law that got almost no attention because we were all thinking about something else. None of them are game-changing, but they are worth being aware of.

The right to parental bereavement leave, for example, is now in force. This modest right to two-weeks' leave paid at the lower rate of SMP (£151.20) – will, thankfully, be rarely used. I would also expect councils to treat those employees who do need to take it much more generously than the law requires.

There has also been a small change in the tax treatment of termination payments. Compensation for loss of office is generally tax free for the first £30,000. Beyond that the payment was subject only to income tax. From 6 April, however, that part of the balance above £30,000 will attract NI contributions of 13.8%. This is the employer's contribution that must be paid through PAYE so it doesn't affect how much the employee receives – but it does mean that higher settlements are now even more expensive.

Compensation limits increase every April. They do this in line with inflation, which is annoying because it makes the figures quite fiddly. I can remember when the maximum compensatory award for unfair dismissal was a round £10,000. Yes I do feel old. The new figure is the lower of one year's pay or £88,519 which is not a figure I will be able to remember. The limit on a week's pay for the purposes of a statutory redundancy payment or the basic award for unfair dismissal also went up in April from £525 to £538. As a side note, when the Redundancy Payments Act was introduced in 1965 the limit on a week's pay was £40. If that had kept pace with inflation the limit on a week's pay would now be £780 and the maximum redundancy payment would be £23,400 rather than the current maximum of £16,140.

For Agency workers, the Swedish derogation has now been abolished! Don't worry if you've never heard of the Swedish derogation, I've yet to find a local authority that actually took advantage of it. Essentially it was a provision in the Agency Workers Regulations that denied agency workers a right to equal pay with directly employed staff if they were given a full contract of employment by the agency and guaranteed 50 per cent of their average earnings in any period when there was no assignment for them. It was initially expected that this measure – modelled on the way in which agencies generally operated in Sweden – would be rarely used. In fact it was adopted by many agencies who were providing workers for one big client who guaranteed a steady stream of work so that in reality the workers always had an assignment to go to, albeit a poorly paid one. Quite rightly this loophole has now been removed.

Probably the most substantive change made in April is an extension of the right to a written statement of terms and conditions. This is a change that emerged from the Good Work Plan that emerged from the Taylor Review commissioned when Theresa May was Prime Minister. Much of the focus of that Review was the precarious position of those who were not on

standard contracts of employment and so it was recommended that those who were workers rather than employees should be entitled to a written statement of terms and conditions of employment. To protect those on short-term contracts, the one-month qualifying period for the right to a statement was also abolished and instead of employers being given eight weeks to provide one, they now have to be given on day one of a contract. Many casual workers who only work intermittently will therefore be entitled to a new written statement every time they come into work.

There were also some changes made to the details of the particulars that need to be given. Specifically, the statement must set out any terms and conditions relating to the days on which the worker may be required to work and where this is variable, set out the way in which the variation will be determined. The statement must also set out any terms relating to a probationary period and any training entitlement that the worker will have.

There is a sleight of hand here. On the face of it these changes give vulnerable workers more certainty and clarity over their hours of work, how secure that work is and what training is available. But the change does not require employers to improve the terms they offer workers – just describe them accurately. The employer must set out any terms related to these issues – but that does not mean that there must actually be any. So while a written statement must refer to applicable disciplinary procedures, that does not mean that they must now apply to workers. The statement must refer the individual to a person they can apply to if they have a grievance – but that does not mean that workers must be covered by the same grievance procedure that applies to employees.

And finally we come to holiday pay – an employment law topic that refuses to just lie still. When calculating holiday pay, we are used to looking at a 12 week average for those employees whose pay varies from week to week. The problem with that is that it might not be properly representative of the employee's overall wages. From April, however, the average must be calculated over a 52 week period - or from the employee's start-date if he or she has yet to work that long. One quirk of the calculation is that weeks in which no pay is due do not count towards the average. So for a term time only casual worker the employer will need to go back much more than a year (though the Regulations say no more than 104 weeks) before arriving at right figure. We are still waiting, incidentally, for the Supreme Court to decide whether or not it should hear the employer's appeal in the case of Brazel v Harpur Trust in which a term-time only casual music teacher was held to be entitled to holiday pay based on what was then the 12-week average rather than the often-used shorthand of 12.07% of pay. It is almost comforting to know that when the coronavirus crisis has passed, we will still have the same old issues with annual leave and holiday pay to return to.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman