HEWITSONS

Hewitsons Employment

LEGAL UPDATE

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What's new

Employee Status

In the recent case of *Chatfield-Roberts v Phillips & Universal Aunts Limited* the Employment Appeal Tribunal held that is can be possible, in certain limited circumstances, for an individual to be an employee despite them having the right to appoint a substitute.

Ms Phillips worked for three years as a live-in carer for Mr Chatfield-Roberts' uncle. She was introduced to the family by an agency, Universal Aunts Limited. In August 2016 Ms Phillips' appointment was terminated and Ms Phillips issued various claims in the Employment Tribunal. Before Ms Phillips was able to pursue those claims she needed to show that she was an employee of either Mr Chatfield-Roberts or Universal Aunts Limited.

Ms Phillips had initially worked for Mr Chatfield-Roberts through Universal Aunts, on a rota basis, whereby carers would move to a different appointment every few weeks. However Mr Chatfield-Roberts and his family then requested a more permanent arrangement. Following this Ms Phillips was appointed to work solely for Mr Chatfield-Roberts, initially for a period of six months which was then extended, and Ms Phillips remained working for him for 3 years. During the appointment Ms Phillips had stopped preparing invoices and was paid by standing order, although she was paid on a gross basis and paid her own tax and national insurance.

Ms Phillips had arranged for a substitute from the agency to carry out her work on several occasions during her placement with Mr Chatfield-Roberts. However, this was only during periods of leave – her weekly days off, her paid annual leave and a period of jury service.

In the first instance the Tribunal found that whilst Ms Phillips was not an employee of the agency, she was an employee of Mr Chatfield-Roberts. Mr Chatfield-Roberts appealed arguing that the ability for Ms Phillips to use a substitute was not compatible with employee status. The EAT found however

that a right of substitution exercised only when an individual is unable to work can still be consistent with personal performance, and therefore does not preclude employee status. It held that, in the circumstances, Ms Phillips was an employee of Mr Chatfield-Roberts and was not self-employed.

Whistleblowing

In the recent case of *Ibrahim v HCA International Ltd*, the Employment Appeal Tribunal ('EAT') has held that complaining about defamation can amount to a protected disclosure for the purposes of a whistleblowing claim.

Mr Ibrahim was an interpreter at a hospital. After rumours circulated amongst patients that he was responsible for breaches of confidentiality, he complained to HR that his colleagues had falsely blamed him. He was later dismissed. Mr Ibrahim brought a claim for whistleblowing.

For Mr Ibrahim's whistleblowing claim to be successful, Mr Ibrahim needed to show that his disclosure amounted to a protected disclosure. Therefore, firstly there had to be a disclosure of information that Mr Ibrahim reasonably believed showed there was a breach of a legal obligation. The EAT said that the reference to 'legal obligation' is wide enough to cover allegations of defamation (which carries statutory and common law duties) and so could form the basis of a whistleblowing claim. However, Mr Ibrahim's claim failed on the second requirement that the disclosure must be in the public interest, as his concerns centered around the effects of the rumours on his personal situation.

What to look out for

Consultation on Extending Redundancy Protection for Women and New Parents

The Government is seeking views on extending redundancy protection for women and new parents. When employees are made redundant, employers should offer them a suitable alternative vacancy if one is available. Under current law, a woman who is selected for redundancy whilst on maternity leave must be given priority over other redundant employees when the employer offers suitable alternative employment.

The proposal is to extend this right so that it covers not only those on maternity leave, but also women who have returned from maternity leave within the last six months and potentially also those women who have told their employer they are pregnant.

This proposal and the subsequent consultation follows reviews and reports which have found that pregnant women and new mothers continue to feel forced out of work. The consultation also considers extending the right to those on adoption leave, shared parental leave and longer periods of parental leave.

The consultation is open until 5 April 2019 and can be accessed at https://beisgovuk.citizenspace.com/lm/redundancy-protection-for-women-new-mothers/.

EU Settlement Scheme

From 21 January 2019, EU citizens who hold a valid passport, and their non-EU citizen family members who hold a biometric residence card, will be able to apply for the "settled" or "pre-settled"

status under the EU Settlement Scheme. This is the immigration status they will need to remain in the UK following Brexit.

This voluntary test phase is the first public roll-out of the Scheme. It follows a successful private test phase with employees in the higher education, health and social care sectors. To apply during this test phase, applicants will need to use the Home Office Android app and can only apply if they have their passport or a biometric residence card.

The Scheme will open fully on 30 March 2019, after which EU citizens will be also able to rely on their biometric national identity card to prove their identity. Further, applications will then also be able to be made by post rather than only using the app.

Changes to Right to Work Checks

The Home Office's 'Right to Work Checking Service' launched in April 2018. This free service enables UK employers in certain circumstances to check if a person has the right to work in the UK and if they are under any restrictions. Until now, employers could use the online service but still had to request paper documents. However, changes in the law from 28 January 2019 mean that employers can now rely solely on the online check where the prospective employee has an immigration status that is capable of being checked via this service.

The online service can be used by non-EEA nationals who hold a biometric residence permit or card and EEA nationals who have been granted immigration status under the EU Settlement Scheme. EEA nationals who have not been granted status under the Settlement Scheme will still need to demonstrate their right to work through the appropriate documents (such as their national passport), as before.

The aim is that these changes will modernise the immigration system, simplify right to work checks and make it easier for migrants with certain immigration statuses to prove their right to work. Migrants are required to view their Home Office right to work record first and can then authorise employers to view it by giving them a "share code". The system is based on the migrant's consent, so employers cannot check the record without such consent, and it enables the migrant worker to see exactly what has been shared.

Another change from 28 January 2019 is that employers can now accept short-form birth and adoption certificates together with a National Insurance number when carrying out right to work checks. This will make it easier for British citizens without a passport to demonstrate their right to work.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking here.