

 DMH Stallard

Employment Webinar
January 2022

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Will Walsh

IR35 in the private sector

- Introduced into private sector on 6 April 2021
- Applies where workers provide services through a Personal Service Company (“PSC”)
- Unless the business is small it must determine whether the worker providing the services on behalf of the PSC is operating as an employee, for tax purposes
- If operating as an employee, business must pay net of PAYE deduction and incurs employer’s NI (13.8%) and apprenticeship levy (0.5%)

IR35: Small company exemption

- Small company exemption applies if it satisfies two of the three conditions:
 - Annual turnover not more than £10.2 million
 - Balance sheet total not more than £5.1 million
 - Number of employees not more than 50
- Based on last set of accounts before year end
- Takes account of all companies in a Group

IR35: What do businesses need to do?

- Who decides? The business to whom the worker supplies the services decides
- If there is a contractual “chain” the user of the services hands their status determination to the next person in the chain
- You may decide for yourself whether someone is employed for the purpose of the rules
- Alternatively, you can use HMRC’s online CEST Tool
- HMRC will accept CEST result, but must answer questions honestly
- 12 month grace period is almost at an end

Health and safety detriment protection extended

- Section 44 of the Employment Rights Act 1996 protects employees from being subjected to detriment in specific health and safety cases, in particular:
 - Absence or proposed absence from work due to reasonable belief that attendance would put them in serious danger
 - Taking or proposing to take steps to protect themselves or others in reasonable belief of serious danger
- Same protection extended to workers from 31 May 2021
- Applies to detriments that occur or continue after 31 May 2021

2021 Cases of note

Will Walsh

GIG economy

- *Uber and others v Aslam and Others (Supreme Court)*
- Outcome: Uber drivers are workers
- Crucial factor in the decision was Uber's level of control
- Uber had control over:
 - fare fees
 - the driver's ability to accept or decline a request
 - how a driver delivered their services
 - the communication between the drivers and passengers

GIG economy (2)

- *Stuart Delivery Ltd v Augustine (Court of Appeal)*
- Outcome: The delivery courier was a worker
- Written agreement contained a substitution clause
- However in reality was required to perform services personally
- Ability to release delivery slot to other couriers was too limited

GIG economy (3)

- *R v CAC and Roofoods Ltd t/a Deliveroo (Court of Appeal)*
- Outcome: Deliveroo riders are not workers
- Riders are under no obligation to provide services personally
- Riders have an unlimited right of substitution

Philosophical belief discrimination

- *Forstater v CGD Europe and others (EAT)*
- Ms Forstater believed that a person's sex is a biological fact, not a feeling or identity, and a trans woman is not really a woman. A person can identify as another gender and ask people to accept that, but this does not change their actual sex
- Her contract was not renewed after she expressed her views
- Was her view a "philosophical belief" capable of protection under the Equality Act 2010?
- Belief must be worthy of respect in a democratic society and not be incompatible with human dignity or conflict with fundamental rights of others
- EAT concluded that it was a philosophical belief
- Only beliefs akin to Nazism or encouraging violence or hatred would be found not worthy of respect
- Note that manifestation of belief remains important

Sex discrimination: Gender pay gap

- *Bayfield and Jenner v Wunderman Thompson (UK) Ltd (ET)*
- Employer had stated desire to change its reputation of being full of “straight white men”
- Two senior male employees made redundant
- Another senior employee not included in selection pool because she was female
- Found to be unfair dismissal and direct sex discrimination
- ET noted reasonable for an employer to take steps to improve their reputation and reduce their gender pay gap
- However no justification defence for direct sex discrimination

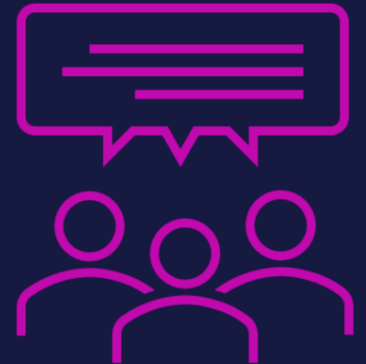
On 9 December 2021, the ET statistics were published for the quarter from April to June 2020. These include details of new claims received and also the number of “disposals”. When compared with the same period 12 months before (April to June 2019) what did the numbers reveal:

- a) Claims received increased by 18% and disposals reduced by 21%
- b) Claims received reduced by 9% and disposals reduced by 4%
- c) Claims received increased by 6% and disposals reduced by 16%
- d) Claims received remained the same but disposals reduced by 15%



The average awards for compensation have also now been published for the 2019/2020 year. What type of claim has had the highest average award in 2019/2020?

- a) Unfair dismissal
- b) Sex discrimination
- c) Disability discrimination
- d) Race discrimination
- e) Age discrimination
- f) Sexual orientation discrimination



According to a written question published in Hansard on 12 January 2022, the average length of time between issuing an ET1 and a first hearing for a single claim is:

- a) 112 days
- b) 177 days
- c) 228 days
- d) 335 days



Covid related Tribunal cases

Greg Burgess

Refusal to wear a mask

Kubilius -v- Kent Foods Ltd

- K was delivery driver who regularly delivered to and from Tate & Lyle's refinery on the Thames
- 21.5.20 – K attends refinery and was issued with face mask on arrival. K told by two T&L employees that he had to wear face mask
- K refused on basis that he remained in his vehicle throughout and that wearing a face mask was not a legal requirement
- T&L reported incident to KFL and he was banned from site
- K's summary dismissal was fair:
 - Some employers may have only issued a warning but dismissal was within band of reasonable responses
 - Handbook stated staff must follow customer instruction regarding PPE
 - KKL concerned about K's future conduct as he continued to insist he had done nothing wrong
 - Practical difficulties of K being banned from site

Suspected breach of self-isolation rules

Lewis -v- The Benriach Distillery Company Ltd

- L was forklift driver at whiskey distillery
- 8.2.21 – L's son displaying Covid symptoms and had booked a test. However, L thought he was faking his symptoms to get off work!
- L went into work despite Scottish government guidance stating you should self-isolate if someone you lived with displaying symptoms. Test came back positive
- L dismissed for gross misconduct
- L's summary dismissal was unfair:
 - If L did not believe his son's symptoms then no requirement to self-isolate
 - L had 23 years unblemished service
 - L was clearly someone who followed rules as he had complied with guidance shortly before this, and no financial impact of self-isolating
 - Company had not tested L's belief about his son's condition
 - Contributory fault of 25% and compensation reduced to £23,978

Refusal to have vaccination

Allette -v- Scarsdale Grange Nursing Home Ltd

- A was care home worker
- December 2020 – staff vaccinations postponed due to Covid outbreak affecting 33 staff and 22 residents. SGNHL made it condition of continued employment for staff to have vaccine
- January 2021 – day before A due to have vaccine she said she would not agree. Gave her reasons (did not trust vaccine's safety, it has been rushed through, read stories on internet about it being part of government conspiracy)
- At disciplinary hearing, she said she had a religious objection because of her Rastafarianism. It was first time she had said she was a practising Rastafarian. SGNHL were concerned that if she remained unvaccinated she could pose a real risk to the safety of residents, colleagues and visitors. They had also been told that their public liability insurance would be lost if they had unvaccinated staff. A was dismissed for refusing a reasonable management instruction.

Refusal to have vaccination (2)

Allette -v- Scarsdale Grange Nursing Home Ltd

- A's dismissal was fair because:
 - Although her scepticism was genuine, it was unreasonable as there was no medical authority or clinical basis for not having vaccine
 - SNGHL had legal and moral obligation to protect its vulnerable residents
 - The interference with A's right to respect for her private life (Article 8) was proportionate in the circumstances
 - It was reasonable to conclude that A's refusal was unconnected with her religious belief, as she had only raised this at the last minute

Refusal to attend work

Moore -v- Ecoscape UK Ltd

- During first lockdown E initially closed its site and then put in place various measures to protect staff safety to allow them to re-open
- M did not feel safe returning. E put in place additional measures for her – separate office with own facilities
- M said wanted to WFH. E said not possible as her role required her to help with deliveries and customers
- M raised grievance which was rejected and she resigned
- M's claims for CUD and automatic unfair dismissal were dismissed
 - M had genuine concerns about Covid but her fear was a general one about leaving home, not specifically about her workplace being unsafe
 - Government guidance was to WFH if possible but her role did not make that possible, and E had taken reasonable steps to address her concerns

Making pregnant employee redundant

Saine -v- Twechar Community Action

- S employed as Employment and Training Officer – unique role
- March 2020 – efforts to bring in funding for her role to continue were not proving successful
- 17.3.20 – S informs TCA she is pregnant
- Following lockdown announcement on 23.3.20 S was advised to WFH
- 30.3.20 – TCA holds meeting with staff and mentions potential redundancies. S and another colleague who was shielding were not invited to meeting as did not want to put their health at risk
- 6.4.20 – S placed on furlough
- Whilst on furlough redundancy process started with her and other colleagues – she was pooled with colleagues and she was scored using a matrix
- 14.4.20 – consultation meeting and S notified of her potential redundancy. She took it that she was being made redundant and became upset. No further discussions
- 20.4.20 – S taken off furlough and issued with notice

Making pregnant employee redundant (2)

Saine -v- Twechar Community Action

- Prior to S revealing she was pregnant, there were funding issues for her role and so she was not dismissed for a reason connected with her pregnancy
- She was unfairly dismissed because:
 - The scoring undertaken by TCA was fundamentally flawed as S' role was not interchangeable with her colleagues
 - There was no meaningful consultation prior to her being brought back from furlough and issued notice. No alternatives to redundancy were considered
- Was she treated unfavorably because of pregnancy and/or maternity?
 - She had not been invited to the 30.3.21 meeting because of her pregnancy. However, this was not unfavourable treatment because TCA were trying to protect her from being exposed to risk

What is expected in 2022

Will Walsh

Upcoming changes

- Introduction of a new statutory right to one week's unpaid carer's leave
- Consultation on flexible working proposing to make the right to make a flexible working request a day one right
- Proposal to extend redundancy protection rights to pregnant employees and those returning from maternity, adoption or shared parental leave
- Introduction of potential duty requiring employers to prevent sexual harassment and third-party harassment in the workplace

New rates for 2022

- As from 1 April 2022, the following national living wage and national minimum wage rates apply:

National Living Wage (23 and over) - £9.50

21-22 Year Old Rate- £9.18

18-20 Year Old Rate- £6.83

16-17 Year Old Rate- £4.81

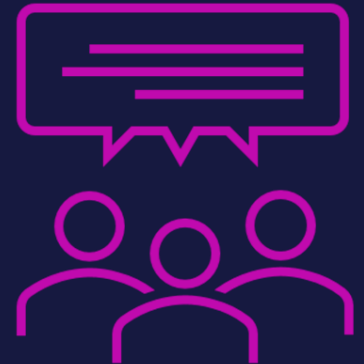
Apprentice Rate- £4.81

Accommodation Offset- £8.70 per day

- In April 2022 new statutory rates will apply for different types of family leave pay, statutory sick pay and statutory redundancy pay (rates TBC)

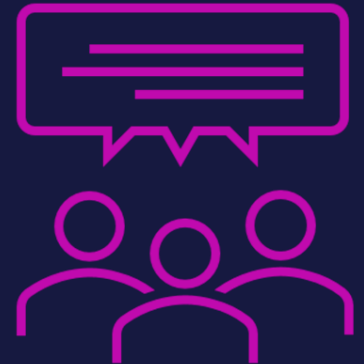
What were the greatest HR challenges for your organisation over the past 12 months?

- a) Ensuring that those working remotely are productive
- b) Managing ER issues remotely
- c) Dealing with mental health and other 'disability' issues
- d) Maintaining and improving staff engagement
- e) Other



Looking forward, what do you think will be important issues for HR over the coming 12 months?

- a) Managing the 'return to the office'
- b) Dealing with hybrid working practicalities
- c) Handling ER issues
- d) Dealing with mental health and other 'disability' issues
- e) Maintaining and improving staff engagement
- f) Other



Speakers



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