Employment Update – October 2019

National Living Wage

The Chancellor, Sajid Javid, has announced that the National Living Wage (top tier of National Minimum Wage) will rise to 66% of median earnings, the level that the Organisation for Economic Co-operation and Development (OECD) defines as "low pay", by 2025.

Using current wage data, this increase, if implemented, would raise National Living Wage to £10.50 per hour. This would be an increase of £2.29ph, over the current rate of £8.21. This would equate to an increase of about 28% over the next five years.

The Chancellor also stated that it was his intention to lower the age threshold for being paid National Living Wage from the current age 25 and over, to age 21 and over. Currently 1.6 million people receive National Living Wage. This number will raise considerably if the age threshold is lowered to 21. If National Living Wage does reach the figure of two thirds of median wages, it is envisaged that about one in four workers will be captured by it.

If increases of this magnitude do happen, and in the current state of political flux that is anybody's guess, a rate of £10.50 per hour would be the world's highest minimum rate of pay. As at 2019, there are five industrial countries with a higher minimum wage rate than the UK.

Clearly these proposed increases would bring plenty of people who previously sat comfortably above NLW, in to its scope (though none of the adult wage rates in NAECI would be overtaken). Whilst that is good news for them, it remains to be seen how the rest of UK plc will react in terms of their future wage claims, to what could be seen as a massive "erosion of differentials".

Employment Tribunal Statistics

The Ministry of Justice have released the Employment Tribunal statistics for the second quarter of 2019. These show that there was no reprieve for the Employment Tribunal system, which continues to be groan under a heavy workload. Compared to the same Quarter a year before, Tribunal caseload (i.e. number of claims in the system) has increased by 19%. This figure follows the upwards trend since the abolition of Tribunal fees.

Whilst there has been an increase in numbers of new claims received with single claimant claims up 14%, the number of new multiple claimant claims has decreased by 57%. It is taking longer for the ET system to deal with claims with average age of a single claimant claim at disposal having increased by five weeks from 28 weeks to 33 weeks. The time taken to dispose of multiple claimant claims is even worse, when compared to a year ago, having increased from 133 weeks to 140 weeks.

While we are undoubtedly still witnessing the after-effects of the abolition of Tribunal fees, some of the continuing increase may be attributed to the fact that more people than ever are currently in employment leading to an associated rise in claims.

Shortly after the abolition of Tribunal fees, the Ministry of Justice launched a Tribunal fee refund scheme. Since October 2017, some 22,000 refund payments have been made with a total monetary value of £17.6 million.

Despite the continuing upward trend, it is perhaps a surprise that new claims have not yet reached the very high levels that were seen prior to the introduction of fees to bring claims into the Tribunal system. This is possibly due to the significant role that “ACAS Early Conciliation” is now playing in settling matters before they reach Tribunal. ACAS Early Conciliation became mandatory in May 2014, and in Q2 2019, 25% of claims were settled via ACAS before actually reaching Tribunal.

Towards the end of 2018, the Ministry of Justice indicated that there was a real possibility that a new, ‘progressive’ fee structure could be introduced for Tribunals, in the future. Nearly a year later, we have neither fine detail nor a firm political commitment to a revised fee regime, however, such a development would be likely to have a negative impact on the number of new claims emanating.

Government Holiday Pay guidance

The Department for Business, Energy and Industrial Strategy has, at long last, issued **new guidance** on holiday pay, including amongst other things some clarification about how employers should perform the 12 week average pay calculation for workers whose hours and rates or pay vary according to the time worked.

Regarding the 12-week average pay calculation, the guidance confirmed:

- this should be based on the 12 paid weeks ending with the last whole week worked before the holiday (for these purposes a week runs Sunday to Saturday, unless the worker is paid weekly on another day)
- it may be necessary to extend the 12-week reference period, because employers need to exclude any ‘unpaid’ weeks and add additional ‘paid’ weeks into the reference period until there are 12 ‘paid’ weeks in the reference period. Helpfully, the guidance reinforce the idea of discounting, from the reference period, those weeks with no work being done or associated payments made, but keeping in those weeks where some hours of work (this can be can be less than 38h) was done and paid for.
- if a worker has not yet worked 12 weeks, the employer should use the maximum number of weeks the worker has worked.

Members should also note that the Government have already indicated that from April 2020, the reference period is likely to be extended from 12 weeks to 52 weeks. So just when employers had become familiar with the correct way of calculating holiday pay for the 20 days of Euro-leave, it is going to change again.