Are payslip laws the start of transparency over worker rights?

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Employment analysis: The first wave of reforms from the government's Good Work Plan have come into effect, aiming to improve clarity in payslips and extend employment rights to casual and zero-hour contract workers. The Department for Business, Energy & Industrial Strategy (BEIS) has promised to 'give workers ground-breaking new rights', so we consider how feasible this is, and what challenges the government could encounter. Emma Bartlett, partner specialising in employment law at Charles Russell Speechlys, and James Davies, founder partner of Lewis Silkin's employment practice, discuss the key proposals in the Good Work Plan—including itemising payslips and abolishing the 'Swedish derogation'—and how they will work in practice.

Original news

Work reforms improve payslip information and aim to benefit 1.5 million workers, LNB News 08/04/2019 5

The Department for Business, Energy & Industrial Strategy (BEIS) and the business secretary, Greg Clark, have announced that almost 300,000 workers on casual and zero-hour contracts will receive a payslip for the first time as part of the government's Good Work Plan. All payslips will now include how many hours were worked ensuring that employees can check they are being paid in full and at the correct rate. BEIS also announced that the Swedish derogation has been repealed—a legal loophole that companies used to pay agency workers less than permanent staff.

On 6 April 2019, BEIS announced a number of changes as part of wide reform to 'give workers ground-breaking new rights' by cracking down on 'legal loopholes'—such as the Swedish derogation—and increasing protection for employees.

Payslip transparency

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018, SI 2018/529 came into effect on 6 April 2019, thus from that date all 'workers' have the right to receive a payslip, and hourly-paid workers' payslips will display hours worked and rates of pay.

This is ‘an important step toward pay transparency’, Bartlett says, because the itemised layout of payslips will make it easier for workers to ‘verify that they’ve been paid correctly’. This in turn will make it ‘easier for workers to challenge their pay and understand if national minimum wage obligations have been met’.

Davies agrees that this more comprehensible layout for payslips will not only ensure workers receive the correct pay rate, but that their employers are upholding their legal duties to pay them fairly, ie giving them the correct rate of national minimum wage or living wage.

From the employer’s perspective, Bartlett says this change could present ‘a burden’ because they will have to generate new payslips. However, as employers should already have access to the necessary data, and as most payslips are delivered electronically, the burden should not be too heavy.

Increased potential penalties for non-compliant employers

The reforms offer more support for workers should they wish to prosecute their employers, with the maximum penalty employment tribunals can award for ‘aggravated’ breaches by employers has been increased from £5,000 to £20,000 for breaches beginning on or after 6 April 2019.

This is a ‘substantial increase’, according to Bartlett, who points out that under these changes, the employment tribunals ‘can issue orders that employers who are found to have not just breached employment law, but undertaken an aggravated breach’.

Recent government guidance indicates that a tribunal may be more likely to find that the employer’s behaviour in breaching the law has aggravating features if the employer:

• breached the law deliberately or committed the breach with malice

• had a dedicated and/or well resourced human resources team

• had repeatedly breached the employment right concerned, for example made even higher unlawful deductions from a claimant following a judgment against the employer for the same breach

Davies, however, argues that the increase in the maximum penalty for ‘aggravated breaches’ ‘is likely to have little, if any, effect’, because ‘employment tribunals rarely make this order because the money goes to the government rather than to the individual who has suffered the poor behaviour’. Tribunals, Davies argues,

will be reluctant to choose this option as it is unlikely to benefit the claimant/worker, so it is questionable how much of a difference this will make.

As it stands, Davies says 'many employers fail to pay damages awarded to workers', so tribunals seem to avoid making 'an order for a large sum to go to the government if that might make it less likely that the claimant will receive their money'. More change is needed to address these issues.

Agency workers

The 'Swedish derogation' refers to regulations 10-11 of the Agency Workers Regulations 2010, SI 2010/93, which is an exemption which permitted employment agencies to pay workers less than permanent staff in the equivalent job—provided the agency employed the workers on a permanent contract and paid them between assignments—evading equal pay entitlements. Under the reforms, this will be revoked by the introduction of The Agency Workers (Amendment) Regulations 2019, SI 2019/724, which is due to come into force from 6 April 2020.

Repealing the Swedish derogation, Davies says, will 'mean that agency workers will be entitled to the same pay as permanent employees in equivalent positions after completion of a 12-week qualifying period'. The effectiveness of this, he says, is uncertain as it 'remains to be seen whether this will benefit agency workers in practice or whether assignments will simply be ended before the 12-week point is reached'.

Furthermore, the retention of the minimum of 15 employees needed to request an information and consultation body, Davies believes, 'will limit the effect of this change'.

On a more positive note, Bartlett points out that it gives agency workers the ability to 'seek parity rather than receive compensation that is "no less equivalent"', making life easier 'as this can often be a fudge'.

Davies advises employment businesses who use the Swedish derogation to 'revisit their arrangements to ensure workers receive the terms to which they are entitled from next April'.

This, Davies says, is one of two changes which will benefit agency workers. The other is the introduction of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019, SI 2019/725, under which agency workers are now entitled to a statement setting out key facts about their terms.

Outlining worker rights

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018, SI 2018/1378 will come into force from 6 April 2020, giving workers the right to a statement of rights from day one.

Bartlett explains that the new statement will contain more than is currently the statutory requirement for employees (known as a statement of particulars under section 1 of the Employment Rights Act 1996), including:

'• length of time the job is expected to last

• notice period

• eligibility for sick leave/sick pay—worker who are not employees currently don't have the right to this, but some "employers" may be prepared to offer it

• whether there is a probationary period

•other leave rights

• all pay and benefits

• detail the specific days and times of work'

Davies says the 'Statement of Terms' rights will be an improvement for workers' rights not just because of the change in time frame (it applying as a day one right), but because it will apply to all workers—not just employees—and the information that must be provided has been expanded. Although 'relatively modest', he argues 'this change should make it practically easier for workers to know and enforce their rights'.

Bartlett agrees this change 'will give greater transparency of [worker] rights', arguing that 'it's good practice in any event to have the statement of rights delivered before or on the first day of work'.

More to come

The Good Work Plan contains further proposals to empower employees to request more security from their employer—the right to request a more stable contract. The time frame for introducing this right has not been

established, but Bartlett explains that, when it comes, this ‘right will apply to those working on atypical contracts such as zero hours, where their hours of work are not guaranteed’.

Currently, workers on such contracts will have the right to request a more stable contract after 26 weeks.

Other key proposals

According to Bartlett, the other most important changes proposed under the Good Work Plan include:

‘• casual employees currently lose continuous service if there is a break of one week or more in their employment. This will be amended so that the break has to be at least four weeks to break continuity of employment, thereby providing better opportunity to casual employees to establish continuity of employment and the consequent increased rights that brings once they’ve achieved two years continuous service, or even 26 weeks—no date for implementation yet

• the reference period for calculating holiday pay will be 52 weeks rather than 12 weeks, which should help workers affected by seasonal trade where they have peaks and troughs in their working hours (and are paid accordingly)—due April 2020

• no timescale for implementation of a regulation that employers must not make deductions from tips (eg the cost of administering them particularly by troncs)—somewhat surprising no time frame but I should think employers may have started to do the right thing already given the HMRC investigations and media attention around this

• the Good Work Plan recognised that employee relations flourish where there is good communication between employer and workforce and so where there is no employee information and consultation forum, only 2% of the workforce (rather than 10% which it currently is) will need to request one—this is due for April 2020’

Davies draws attention to:

‘• the government intends to increase the period required to break continuity of service from one week to four weeks

• holiday pay rights will be tweaked with the reference period for calculating holiday pay to be increased to 52 weeks from 12 (which should assist employers as well as employees by preventing an atypical peak or dip in pay during the reference period distorting holiday pay)

• a state body will enforce holiday pay for “vulnerable” workers—although we have been given very few details about how this might work in practice

• service-sector workers will be helped by a ban on deductions from staff tips

Ensuring effectiveness

BEIS calls the Good Work Plan ‘the government’s largest upgrade to worker’s rights in a generation’, but do these reforms go far enough?

While Davies acknowledges that these reforms ‘are only the start of the government’s ‘Good Work Plan’, he expresses doubt about whether the government can deliver on its aims to ‘clarify the tests for employment status and align the employment and tax tests as much as possible’:

> ‘It is difficult to see how employment law’s tri-partite categorisation (employee, worker and self-employed) can be easily reconciled with the tax authorities’ binary conceptualisation (employed and self-employed). Furthermore, it is hard to see how the employment status test could be clarified without making it much less flexible.’

Bartlett also has reservations about whether these reforms will deliver in practice, referring to ‘the most fundamental proposal’ to define a third category of worker status. The government plans to hold a consultation on the proposal to define a category of ‘dependent contractor’ to prevent employers seeking to impose terms on individual workers which would include a right of substitution to refer to them as self-employed contractors rather than ‘workers’. By doing this, Bartlett argues that ‘companies have created “hidden workers” who have been denied certain worker rights—principally the right not to have unlawful deductions from wages, the right to national minimum wages, and the right to holiday pay’.

Therefore, Bartlett concludes ‘the government claims this will be the biggest package of workplace reform, but until the determination of a new “worker” status is ironed out, then I can’t say I agree’.

Further gaps to fill

The Good Work Plan takes forward 51 of the 53 recommendations made in the Taylor Review, according to BEIS but Bartlett says 'there is still much which needs to be fleshed out'.

She points out that, while some of the simpler aspects of the Good Work Plan proposals have timeframes, the more complex changes require more mapping out:

> 'The government recognises, for example, that it will not be simple to draft legislation clarifying employment status. It is also not clear how the right to request a predictable and stable contract will work in practice, and it appears to be a right to request—perhaps similar to the right to request flexible working—rather than a right to have a stable contract. As ever, the devil will be in the detail.'

Clarity is the main concern of Davies too, who says 'we are awaiting the government's response to the consultation it launched to garner views on reform of the tests for employment status and we have no detail on how this difficult reform might be effected in practice'.

For answers, Davies says we must look towards caselaw.

Written by Samantha Gilbert.

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