Employment &Business*Brief*

July 2020

Brave New World

The more observant of you will have noticed that there was no April 2020 brief. At that time, it seemed that the world held its breath waiting to see what was going to happen. Conjecture was rife and we felt that our time would be better spent dealing with you on a personal basis. We hope some of the information we shared and discussed was useful.

Here at Gullands we have always had the capacity through our IT infrastructure to work remotely. Our documents are stored electronically as well as on paper. Our phones can be diverted to mobiles and we know how to use skype. Some things were a steep learning curve, including the adoption and understanding of a whole new concept to employment law of furloughing and how to conduct a court hearing remotely by telephone.

What has come out of this is the knowledge that there are different ways of dealing with matters which can be more streamlined and reduce time and cost to our clients and we hope to take those forward in the Brave New World that we are all facing

Those who want to come into the office will see the measures we are taking to keep our staff and clients safe. Face masks are de rigueur and your temperature will be taken on entry (36.5 today thanks for asking).

For those that do not want to come in all those things we have learnt in lockdown are still being used.

Our team are ready and able to help you with whatever decisions lie ahead, be it understanding the tapering of furlough or consideration of redundancies. And let us not forget the multitude of existing employment matters that we still have to grapple with such as discrimination, employment status and disciplinary processes. Are you aware of who and when you have to supply a contact to given this changed recently?

We wish you the very best for the challenging times ahead.

Is your business licensed for overseas workers?

From January 2021 when the new points-based immigration system comes into force here in the UK, it is estimated that only 2% (31,000 out of 1.4 million private sector businesses) will currently be able to employ overseas workers. To be allowed to employ overseas workers businesses need to be on the Government's register of licensed sponsors.

What does this mean in practice?

Under the new rules businesses will need to have a sponsor licence which are issued by the Home Office, to enable them to recruit from either the EU or non-EU citizens who will all in the future be treated the same for immigration purposes.

There will naturally be concerns that due to the Covid-19 pandemic, businesses may not be in a position to prepare in time and may miss out on the ability to recruit from January 2021. Applications to become a licensed sponsor typically take three months to process but this is anticipated to take much longer due to the backlog caused by the shutdown.

The cost of a licence is currently £536 for a small company or £1,476 for a medium to large organisation and these last for four years. Organisations also need to pay an up-front fee of £7,500 to hire an overseas worker.

Amanda Finn comments: *"Due to the disruption of Covid-19, Brexit planning has taken a back seat within some businesses but with less than six months to the end of the transition period it is important for businesses to also turn their attention to their future staffing requirements, especially if they usually rely on overseas workers. Businesses should also engage with their existing employees to make sure they have registered to remain in the UK under the EU Settlement Scheme."*

Worker status clarification

The European Court of Justice (CJEU) has provided more clarification around how 'worker' status is defined under EU Law in the case of a Yodel courier.

The courier was engaged as a self-employed contractor for Yodel here in the UK and he used his own vehicle and mobile phone. Deliveries had to be made during a specific time period but he was able to choose his own working hours and delivery routes.

The Watford Employment Tribunal were asked to consider if the courier was a worker and not self-employed during the period he worked for Yodel as he never used subcontractors. Under UK law a

person with worker status has to 'undertake to do or perform personally any work or services'.

The Tribunal sought the involvement of the CJEU to consider if the fact that an individual who has the right to engage subcontractors or 'substitutes' to perform all or any part of their work means they were not to be regarded as a worker, either at all or only in respect of any time period using a substitute.

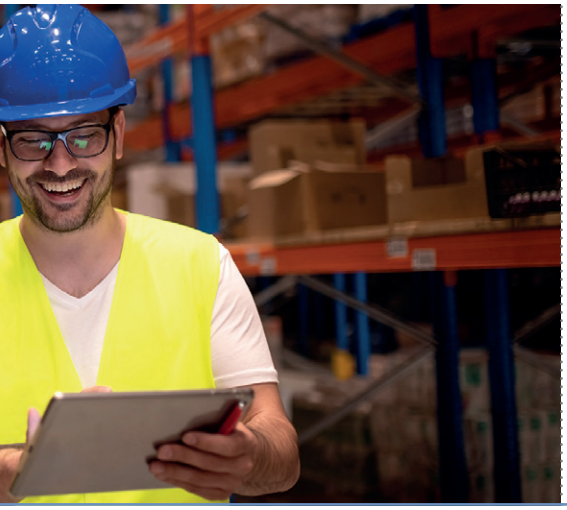
It also asked if it was necessary to consider if the individual exercised their right to use a subcontractor and if the fact that limited companies and limited liability partnerships are engaged on the same terms as the individual was relevant.

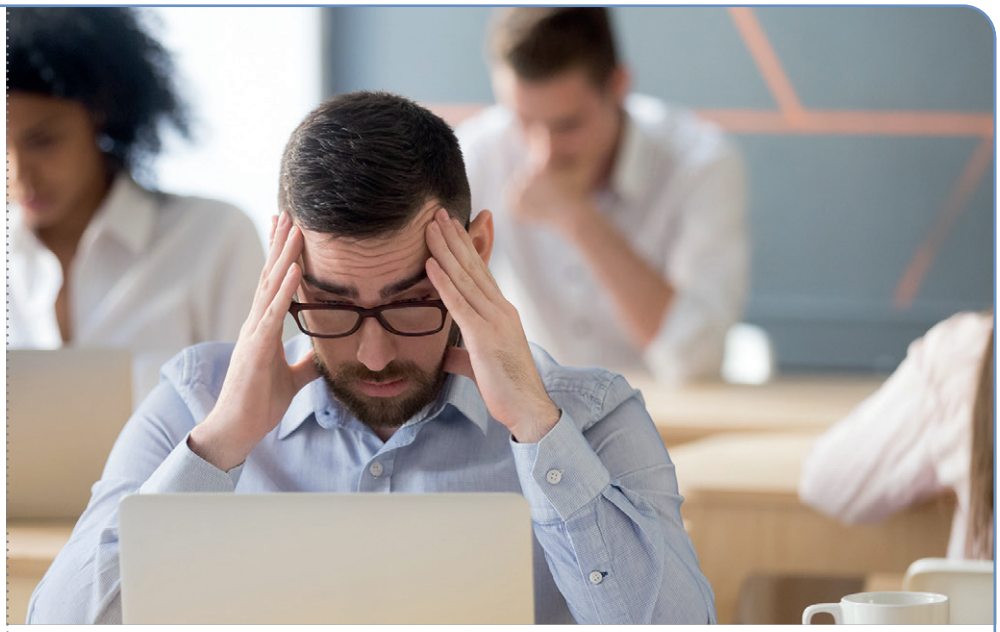
The CJEU stated the EU Working Time Directive should be interpreted as stipulating that a person engaged by an organisation under an agreement which states that they are a self-employed independent contractor cannot be classified as a worker when they have the discretion to:

- ✓ Use subcontractors or substitutes to perform the service they provide.
- ✓ They have the ability to accept or not various tasks offered to them.
- ✓ They can provide their services to any third party which could include direct competitors of the firm.
- ✓ They can set their own hours of work within certain rules set to suit their own interests and not just those of the firm.

The fact that in this case the deliveries needed to be made during a specific time frame was inherent to the nature of the service they were providing to Yodel. The CJEU did not make a judgement in this case and stated it was the job of the tribunal to use their clarification to determine this individual's employment status.

If you have questions about the employment status of anyone providing a service to your business, get in touch to discuss it further.





Employers must consider disability before dismissing staff

A recent employment tribunal ruling in March is a reminder for employers to fully understand an employee's disability prior to disciplinary proceedings which may lead to dismissal.

The successful claim was brought against the Leeds Teaching Hospitals Trust. The Trust acknowledged the claimant suffered from fibromyalgia and depression/generalised anxiety disorder both of which are recognised under the Equality Act. Due to her conditions she was a regular patient at several NHS Departments and her anxiety caused her to repeatedly check when she had her appointments as well as those of her mother on three occasions. Her line manager became aware this was happening and the NHS launched an investigation. This unfortunately increased her anxiety leading her to question the manager about how the investigation was proceeding.

The claimant was suspended during the investigation on the basis of her pestering the manager and this suspension was found to be an act of disability discrimination in itself in that it arose in consequence of her disability.

The tribunal concluded that the Trust had discriminated against the claimant as they had failed to realise her medical conditions caused her behaviour and they also failed to take into account either her health or her disability at any stage of the process. The Trust also failed to recognise her genuine misunderstanding of the Trust's policies regarding medical records, described as 'opaque'.

Policies need to be clear so that every employee understands them. In this case the dismissal was found to be unfair and arose from the claimant's disability which amounted to discrimination.

The judge awarded the claimant £269,113 in damages stating: "Miss Austin did not know that what she was doing was wrong. She understood that she must not access or share the records of other people outside of her immediate family but she did not understand that applied to her or her mother's records. Miss Austin did not breach the Trust's policies or rules maliciously, intentionally or recklessly."

It is important that managers who are carrying out a disciplinary process understand why employees act in a certain way and understand if there is a possible link between their disability and their behaviour. Employers must be mindful to take into account the employee's health or disability at each stage of the disciplinary process. Employers should also follow the procedures for dealing with any concerns about an employee's actions and make sure that all of their company policies are transparent and are written using a clear, concise language.

Legal considerations for Coronavirus lending

For businesses now focused on recovery, funding is still available through the Government backed schemes but it is important to understand exactly what you might be undertaking if you apply.

For small-medium sized firms the Business Bounce Back Scheme (BBLS) provides borrowing from £2k up to 25% of their turnover (up to a maximum of £50k).

The Government guarantees 100% of the loan and there are no fees or interest to pay for the first year. The length of the loan is six years and you can repay it early without a fee. The borrower remains liable for 100% of the loan.

To be eligible your business has to be based in the UK, to have been established before 1 March 2020 and been adversely impacted by the Coronavirus. Businesses cannot apply if they are banks, insurers and reinsurers, public sector bodies and state funded primary and secondary schools. If your business has received a loan of up to £50,000 under the CBILS, CLBILS or Covid-19 Corporate Financing Facility then you can transfer it to the Bounce Back Loan Scheme before 4 November 2020.

CBILS is for larger lending facilities of up to £5m for businesses (with turnover up to £45m) who are experiencing trading difficulties due to Coronavirus and it provides the lender with a Government-backed guarantee. The borrower still remains liable for 100% of the debt with a Government backed guarantee of 80% of the debt advanced by the lender. CBILS can be used to support a wide range of business finance facilities:

- Term loans
- Overdrafts
- Asset finance
- Invoice finance

Sarah Astley comments: *"There is still time to apply for those businesses who need access to funding but there will need to be considerable preparation and the business must be eligible under the relevant criteria. It is important that business owners fully understand the terms of borrowing under one of the schemes. Businesses need to check their constitutional documents to make sure there are no restrictions on them borrowing as well as their existing commercial or banking documentation. Because this is quite a complex area, I would advise business owners to take advice to fully understand what their legal responsibilities are and how this may impact on existing financial covenants or constitutional documents."*

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CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage

	April 2019	April 2020
Apprentices	£3.90	£4.15
16-17	£4.35	£4.55
18-20	£6.15	£6.45
21-24	£7.70	£8.20
25+	£8.21	£8.72

Statutory Sick Pay (from April 2020)
Per week £95.85

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2020) £151.20

Statutory Holiday
5.6 weeks for a full time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years. Maximum week's pay is capped under the Statutory Scheme for dismissals after 6th April 2020 at £538.00.