ABBEY HR SERVICES

Employment Law Updates.

Tips paid through payroll will not count towards national minimum wage
In its response to its consultation on 'Service Charges, Tips, Gratuities and Cover Charges', the Government has confirmed that it will legislate to prevent tips being used to top up wages to meet the national minimum wage (NMW). The new legislation will come into effect on 1 October 2009. There will also be further consultation on a proposed new best practice guide on tipping.

As the law currently stands, the National Minimum Wage Regulations 1999 provide that service charges, tips, gratuities and cover charges that are not paid to workers through an employer's payroll do not count towards the NMW. Conversely, when such payments are collected by the employer and paid through the payroll, these amounts do count towards discharging the employer's liability to pay the NMW. The Government has now decided to prevent all of these types of payment from counting towards the NMW.

Court of Appeal confirms tips distributed through a 'tronc' system do not count towards national minimum wage
The Court of Appeal has handed down its judgment in Annabels (Berkeley Square) Limited and others v Commissioners for Her Majesty's Revenue and Customs. The Court of Appeal has held that tips paid to staff under a 'tronc' system, whereby the employer hands the money to a 'troncmaster' who distributes it among workers, do not count towards the national minimum wage (NMW) under the current legislation. This decision comes just after the Government has announced that it will legislate to ensure no tips will count towards the NMW from 1 October 2009.

The employer in this case operated a system whereby, on a weekly basis, any tips collected were handed to troncmasters. The troncmasters then distributed the tips to staff to top up their basic pay, which otherwise would not have met the NMW. HMRC alleged this arrangement meant that the employer was not paying the NMW and it issued enforcement notices against it. Upholding the decision of the Employment Appeal Tribunal, the Court of Appeal held that the money paid out of the tronc was not, at that time, the employer's property and so was not a payment by the employer and hence could not count towards the NMW. The Court of Appeal noted that the tronc system had been set up, at least in part, to avoid paying National Insurance contributions in respect of gratuities. To achieve this, it is essential that the allocation of gratuities is not decided upon by the employer and that the allocation of money is always a matter for the troncmaster. Thus, in the Court's view, there was no basis for regarding the money paid to the troncmaster as being held for the employer as its agent.

Government pledges action over blacklisting of trade union members
The Government has announced that it will introduce new regulations to prevent trade union members being denied access to employment by secret blacklists. Under the Employment Relations Act 1999, the Government has the power to introduce regulations prohibiting the blacklisting of workers for their union membership or activities.

In 2003, the Government consulted on draft regulations but, as no hard evidence was found that blacklisting was actually taking place, the proposals were not taken forward. However, it committed to reviewing its decision if evidence of the use of blacklists emerged. In March 2009, the Information Commissioner reported that 40 construction companies had subscribed to a database containing the details of union activity and other employment information of over 3,000 construction workers to vet them for employment. That database has now been closed down under data protection laws but the Government has said this evidence shows there is a problem and hence the proposed legislation will now be taken forward. The Government will therefore launch a short consultation in early summer on the new regulations. As there has already been a full consultation in 2003, the consultation will be shorter than the usual twelve-week period and will take account of developments since 2003. The proposal is then to lay the regulations before Parliament in the autumn, to be implemented as soon as possible thereafter.

Government consults on implementing Agency Workers Directive
The Government has launched a consultation on implementing the EC Temporary Agency Workers Directive in England, Wales and Scotland. The Directive requires that temporary agency workers be given equal treatment in comparison to permanent workers as regards basic employment conditions such as pay, working hours and holidays. The Government will, however, make use of a permitted derogation to provide that the equal treatment rule only applies after the agency worker has been in the same job with the same employer for 12 weeks.

The Government is proposing that the equal treatment rule should only apply to those taking up temporary work through an employment business, and not those seeking permanent employment through an employment agency. The Government takes the view that, in the latter case, the worker's contract of employment tends to be with the end-user client and that therefore the Directive is not intended to cover this situation. In terms of the scope of the equal treatment rule, the Government proposes that the agency worker should be entitled to equality with regard to rest periods and annual leave in so far as these exceed the statutory minimums under the Working Time Regulations 1998. The definition of 'pay' will include basic pay and other contractual entitlements directly linked to the work undertaken by the agency worker, such as overtime, shift allowances and unsocial hours premiums.

The consultation period closes on 31 July 2009. Northern Ireland will be subject to separate consultation and legislation. Member States have until 5 December 2011 to implement the Directive.

New national minimum wage rates announced
Accepting the recommendations of the Low Pay Commission (LPC), the Government has announced the new rates of the national minimum wage (NMW) to apply from 1 October 2009. For workers aged 22 and over, the rate will rise from the current £5.73 to £5.80 per hour, for workers aged 18 to 21 it will rise from £4.77 to £4.83 per hour and for workers aged 16 and 17 it will rise from £3.53 to £3.57 per hour. The increases this year are smaller than previous increases to take account of prevailing economic conditions. The accommodation offset will rise from £4.46 to £4.51 per day.

The Government has also announced that the adult rate of the NMW will be extended to 21 year-olds from 1 October 2010, following a recommendation made by the LPC. Another of the LPC's proposals was that information on employers who have shown wilful disregard for NMW laws should be available. The Government has committed to developing this proposal and considering the practical issues involved. A response to the LPC's recommendation that there should be introduced a NMW rate for apprentices is expected this summer.

The Government estimates that nearly one million workers will benefit from the increased rates.

Court of Appeal holds that length of service criterion in redundancy selection did not amount to unlawful age discrimination
In Rolls Royce plc v Unite the Union, the Court of Appeal has held that the inclusion of a length of service criterion in a redundancy selection policy constituted a proportionate means of achieving a legitimate aim and hence did not amount to unlawful age discrimination. The Court of Appeal also gave the provisional (obiter) view that the use of length of service as a criterion could be considered a 'benefit' under Regulation 32 of the Employment Equality (Age) Regulations 2006.

In this case, the employer and the union entered into collective agreements relating to redundancy for two groups of employees. Both agreements provided that redundancy selection would involve a points scoring system under which employees were assessed in various categories. Each employee was also to receive one point per year of continuous employment. A dispute arose over whether this length of service criterion complied with the Employment Equality (Age) Regulations 2006 so the parties asked the High Court to decide the matter. The High Court held that, while the criterion was age discriminatory, it was objectively justified. The collective agreements were designed to enable any redundancies to be carried out fairly and peaceably and this was a legitimate aim. In any event, the agreements fell within the exemption provided by Regulation 32, which exempts certain benefits based on length of service from the general prohibition on age discrimination. Allocating points for long service in a redundancy selection procedure may mean workers keep their jobs, which could properly be described as a benefit.

The Court of Appeal has now dismissed the employer's appeal and upheld the High Court's decision. In a majority judgment, the Court held that the legitimate aim was to reward loyalty and create a stable workforce in the context of a fair redundancy selection process. It was proportionate to use length of service as a criterion because it was just one of many criteria used and was not determinative of the selection and thus was consistent with principles of fairness.

This case therefore confirms that although using length of service as a criterion is potentially unlawful age discrimination, it can be justified where it is one of a substantial number of other criteria and is not necessarily a determinative factor. However, where 'last in, first out' is used in a redundancy process so that length of service is the only selection criterion, this may not be a proportionate means of achieving a legitimate aim and thus may not be lawful.

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Abbey HR Services, One Mitchell Court, Castle Mound Way, Rugby, CV23 0UY,

Tel: 0845 076 2288, Fax: 0845 076 2289, Email: sales@abbeyhr.co.uk, Web: www.abbeyhr.co.uk