Bevan Brittan

Employment Eye

Higher Education in Focus

April 2020

Bevan Brittan

Employment, Pensions and Immigration

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Employment Eye
Higher Education in Focus

April 2020

Welcome to the April 2020 edition of our Higher Education Employment Eye. Inevitably, most of this edition to taken up with COVID-19 related articles but near the end are a couple of non-COVID case law updates which we think you may find interesting. Keep safe and well!

Please email **subscriptions@bevanbrittan.com** if you would like to sign up to receive our regular employment bulletin, Employment Eye, and if you would like to receive invitations to our free in-house employment law training events.

Ashley Norman heads our employment law services to the higher education sector and would be pleased to discuss any issues relating to employment law, immigration and student matters.

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Coronavirus Job Retention Scheme ("CJRS") – Access for Higher Education?

The last month has seen a number of Government announcements concerning potential financial support for employers and businesses during this unprecedented time. The CJRS is a government scheme designed to help employers maintain their current workforce during the coronavirus pandemic. Employers who are eligible for the CJRS will be able to furlough employees (who meet the relevant conditions) and claim a grant from HMRC to cover 80% of their usual monthly wages, up to £2,500 a month. The government have announced that the CJRS will run until the end of June and payments can be backdated to 1 March 2020.

Government Guidance and Directions

The government has produced guidance which sets out who can access the CJRS; this has undergone several revisions since it was first published, with the most recent changes being made on 20 April 2020 (the "**Guidance**"). On the 15 April 2020, the Chancellor of the Exchequer also issued a Direction to HMRC providing further information as to how the CJRS will operate (the "**Direction**"). Whilst providing more clarity in some areas, there still remains elements of confusion and several contradictions between the Guidance and the Directions.

Public Sector Organisations

At the time of writing (24 April 2020), the Guidance states that the CJRS will not be used by many public sector organisations, as most public sector employees are continuing to provide essential public services or contribute to the response to coronavirus. Further, where employers receive public funding for their workforce and this funding is continuing, employers are expected to use this funding to pay their employees in the usual fashion.

In addition to the above, organisations who are receiving public funding specifically to provide services necessary to the response to coronavirus are not expected to furlough their employees. These aspects of the Guidance clearly restrict the scope for public sector organisations being eligible to access the CJRS.

Nevertheless, the Guidance goes on to provide that it may be appropriate for public sector organisations to use the CJRS where organisations are "*not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response*". In light of this, the Guidance does not exclude Higher Education Institutions from accessing the CJRS, but it should be approached with caution.

To add to the lack of clarity, the Direction precludes to make any reference to the exclusion of publically funded employers. As such, on a literal reading of the Direction there may be an argument that Higher Education Institutions are entitled to the CJRS in the same way as all other employers. However, completely disregarding the Guidance may be risky as it has been revised since the Direction was announced which may indicate that HMRC intend to interpret the Direction in the way it has set out in its Guidance.

Difficulties for Higher Education Institutions

The difficulty for many Higher Education Institutions will be ascertaining whether they fall into the category of public sector organisations who are able to use the CJRS. Further, Higher Education Institutions will be under pressure to ensure that they explore all possible solutions to avoid financial failure but there are potential reputational risks if publically funded organisations are perceived as taking advantage of the taxpayer funded CJRS.

This forms the debate as to whether Higher Education Institutions are providing essential public services during this time. Many universities have come together to help respond to this crisis in various ways such as carrying out vital medical research into providing a vaccine, providing much-needed equipment and deploying their facilities. However, these services are very unlikely to extend to all staff employed at Higher Education Institutions.

Therefore, absent further clarity from HMRC or the government, the question as to whether Higher Education Institutions are eligible to access the CJRS for their employees is likely to depend on a number of factors. These include the nature of funding the institution receives, whether staff are able to be re-deployed, whether the organisation is being funded specifically to provide services necessary to the coronavirus response (such as developing respirators) and the specific role of each employee potentially being furloughed.

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COVID-19 Immigration Law Updates

With COVID-19 seemingly affecting all parts of our personal and working lives, it's no surprise that immigration law is also being impacted. The obvious effect is that with severe limitations on world travel and numerous countries having closed their borders, the movement of people and labour, even within the EU, has been significantly reduced. There have also been some important recent, specific changes to immigration policy in response to COVID-19.

Right to Work

First, there has been a relaxation of aspects of Right to Work ("RTW") checks. Understandably, many employers are concerned about how they can adhere to their RTW obligations when hiring new staff or auditing existing workers. Fortunately, the Home Office has announced (30 March 2020) that the rules will be temporarily relaxed to reflect the medical guidance around social distancing and remote working. The key changes are:

- Checks can now be carried out via video calls (eg, skype or zoom);
- Job applicants and existing workers can send scanned documents or a photo of documents for checks using email or a mobile app, rather than sending originals; and
- Employers can use the employer checking service if a prospective or existing employee cannot provide any of the accepted documents.

New Home Office Guidance for Tier 4 sponsors (Universities and other relevant educational institutions)

Second, new Home Office guidance on Tier 4 Sponsors, Migrants and Short-term students has been published (17 April 2020) explaining the temporary cessations in response to COVID-19. Some of the changes are set out below.

1. Distance Learning

The Home Office acknowledges that many Tier 4 sponsors (Universities and other relevant educational institutions) have switched to distance learning teaching methods due to the COVID-19 outbreak. Sponsors are not normally permitted to offer distance learning courses to Tier 4 students but due to the current exceptional circumstances, the Home Office will not consider it a breach of sponsor duties to offer distance learning to existing Tier 4 students in the UK or those who have chosen to return overseas but wish to continue their current studies.

Sponsors do not need to withdraw sponsorship in these circumstances. If a student has permanently withdrawn from, or formally deferred, their studies, the usual reporting requirements apply. New international students who have been issued a Tier 4 visa but have been unable to travel to the UK are permitted to undertake distance learning and sponsorship does not need to be withdrawn. Further, new international students who have not yet applied for a visa

but wish to commence a course by distance learning do not need to travel to the UK to do so and therefore do not require sponsorship under Tier 4. Finally, sponsors are not required to notify the Home Office where they have moved to distance learning provision.

The arrangement will apply until 31 May 2020, when they will be reviewed. The Home Office have also published

2. Absence Reporting

No action will be taken against sponsors who continue to sponsor students who are absent from their studies due to COVID-19. Further, sponsors do not need to report student or employee absences related to COVID-19 which they have authorised. This can include absences due to illness, their need to isolate or inability to travel due to travel restrictions. However, sponsors must maintain records of students who are absent for this reason.

It is worth noting that sponsors do not need to withdraw sponsorship if a student is unable to attend for more than 60 days due to COVID-19. However, if a student has permanently withdrawn from their studies, or deferred there studies for reasons unrelated to COVID-19, sponsors must report this as usual.

Decisions on whether to withdraw a student from their studies or terminate an employment are for sponsors to make. The Home Office recognises the current situation is exceptional and will not take any compliance action against students or employees who are unable to attend their studies/work due to COVID-19 or against sponsors which authorise absences and continue to sponsor students or employees despite absences for this reason.

Commencing studies

The Home Office will now permit new students who applying to switch into Tier 4 in the UK to commence study ahead of their application being decided if:

- They are studying with a Tier 4 sponsor other than a Legacy Sponsor;
- The Tier 4 sponsor has assigned a Certificate of Acceptance for Studies (CAS);
- The student has submitted an in-time application and had provided the sponsor with confirmation of this; and
- The student has a valid ATAS certificate if one is required for their course.

There a number of other conditions which must also be met before a student is able to commence studying ahead of their application being deciding such as the sponsoring agreeing to ending their sponsorship and teaching the student if the application is ultimately refused. However, the Home Office clearly recognises these are unprecedented times and appears to be introducing welcomed flexibility to previous policies.

The full guidance can be found here.

Changes to Statutory Sick Pay ("SSP") in response to COVID-19

In light of the unprecedented circumstances we find ourselves in, the Government has announced a number of changes to the *SSP (General Regulations) 1982*. These regulations dictate who is deemed to be incapable of work for the purposes of receiving SSP and the new amendments have had the effect of widening the scope of who will fall within this category.

Following the introduction of the *SSP (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020*, a person is now deemed to be incapable of work because they are self-isolating to prevent infection from COVID-19 where:

- They have symptoms of COVID-19, however mild, and are staying at home for seven days, beginning with the day on which the symptoms started (day 1); or
- They live with someone who is self-isolating (as above) and are staying at home for 14 days, beginning with day 1; or
- They are already self-isolating in accordance with the second bullet (above), develop the symptoms of COVID-19, however mild, and are staying at home for seven days, beginning with the day the symptoms started.

They must also be unable to work as a result of this isolation. This has no doubt been introduced to ensure staff do not feel the urge to go in to work when they should in fact be isolating.

The *SSP (General) (Coronavirus Amendment) (No. 3) Regulations 2020* further extended who would be deemed incapable to work. This regulation provides that a person who is "extremely vulnerable" (as defined in public health guidance) and has been advised to shield now also fall within the category of those deemed incapable to work. The Explanatory Memorandum to this new regulation states that it has been introduced to ensure people who are unable to work because they are shielding themselves in accordance with public health guidance are entitled to SSP and that it is intended to be a "*safety net for individuals, in cases where their employers chooses not to furlough them under the CJRS*". This amendment makes it clear that those who are "vulnerable" and are currently advised to follow social distancing guidance are not entitled to SSP if they are unable to work from home.

Clearly the introduction of both of these new regulations will result in employers having to pay more SSP payments out to their employees throughout the pandemic. Fortunately, the government have also introduced the SSP Rebate Scheme which will repay employers the current rate of SSP that they pay to employees for periods of sickness starting on or after 13 March 2020. The repayment will cover up to 2 weeks starting from the first day of sickness, if an employee is unable to work because they have coronavirus, they cannot work because they are self-isolating at home or they are shielding in line with public health guidance. Although this scheme will only cover the first 2 weeks of sickness, it will certainly lessen the financial burden for employers with sick and self-isolating staff.

And finally, some non-COVID case law….

Supreme Court overturns Court of Appeal Judgment on liability for data breach

(Wm Morrisons Supermarkets plc v Various Claimants)

The Supreme Court has held that Morrisons is not vicariously liable for the actions of an employee who uploaded payroll data to the internet in a deliberate attempt to harm their employer.

The Supreme Court found that the Court of Appeal had misunderstood the principles governing vicarious liability in a number of respects and that the wrongful disclosure of payroll data was not closely enough connected to what the employee was authorised to do. As such, the Supreme Court held that he could not have been acting in the course of his employment.

The decision provides confirmation that employers will not always be liable for data breaches which have been committed by rogue employees. This will be a welcomed decision for employers in all sectors as had there could have been a potentially wide-ranging implications had the Court of Appeal's decision been upheld.

Supreme Court refuses permission to appeal in parental leave case

(Hextall v Chief Constable of Leicestershire Police)

Mr Hextall sought leave to appeal the Court of Appeal's finding that it was neither direct or indirect discrimination, nor a breach of the equal pay sex equality clause, for two employers to fail to pay two male employees enhanced shared parental pay of an amount equivalent to the enhanced maternity pay which was available to female employees. Following a number of appeals from both parties, the Court of Appeal held that the Tribunal and EAT had erred in holding that the Claimant's claim was not an equal terms claim.

However, even if the Claimant's claim had been properly characterised as breach of the equal pay sex equality clause, the Court of Appeal held it could not succeed where his comparator's more favourable terms related to special treatment afforded to a female in connection with pregnancy and childbirth. Further, the Court of Appeal also held that Mr Hexall's indirect discrimination claim could not succeed as women on maternity leave are materially different from men or women taking shared parental leave and therefore they had to be excluded as a comparator. Against this backdrop, the Supreme Court has refused permission for the case to be appealed further.

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