

## EMPLOYMENT LAW UPDATE SUMMER 2021

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# EMPLOYMENT LAW UPDATE

## SUMMER 2021

### RECENT DEVELOPMENTS

#### Furlough Scheme extended to 30th September 2021

*The furlough scheme/ CJRS has now been extended to 30<sup>th</sup> September 2021 following the Government's latest announcement on 3 March. However, the Government's contribution will be reduced by 10% in July and by 20% in August with employers required to make up the difference.*

Pending any further changes, the extended Coronavirus Job Retention Scheme (CJRS) will apply up to 30 September 2021 as follows:

- Up to 30 June 2021, the Government will pay 80% of wages for furloughed employees up to £2,500 per month (gross) although employers can top this up if they wish. The employer is responsible for all payments of National Insurance and pension contributions.
- From 1 – 31 July 2021, the Government will pay 70% of wages for furloughed employees up to £2,187 per month (gross) with employers making up the 10% difference (plus NI and pensions)
- From 1 August to 30 September 2021, the Government will pay 60% of wages up to a maximum of £1,875 with employers making up the 20% difference (plus NI and pensions).
- Flexible furloughing is allowed under the extended CJRS as well as full time furloughing. The Government will pay for hours not worked. Employers are required to pay for hours worked in the normal way.
- Any notification to employees regarding furlough leave must be in writing. Employers are required to report hours worked and the usual hours employees would be expected to work in any claim period.
- From May 2021, the extended CJRS can be claimed for all employees who are on the employer's PAYE payroll on 2 March 2021. The employer must have made a RTI submission to HMRC between 20 March 2020 to 2 March 2021 with details of earnings for these employees.
- The extended CJRS is available for all employers whether or not they have made a previous CJRS claim.



#### Other Points

- It is no longer possible for employers to claim for any period of notice served by employees (whether resignation or dismissal). Employers also remain liable for redundancy costs.

- Employees are entitled to be paid holiday pay at full rates so employers may need to top this up if the furloughed employees are getting 80% wages. Holiday leave continues to accrue during furlough leave but employers still need to approve any holiday request.
- Any claims made after 1<sup>st</sup> December 2020 are published on the HMRC website. This is to meet HRMC transparency commitments and to deter fraudulent claims. Furloughed employees will also be able to view claims made for them in their personal tax account. This is to prevent claims by employers for employees who are still working.
- Employees can request to be put on furlough leave for personal reasons such as childcare. It is up to employers whether to accept the request.

## Comment

By 30 September 2021, the CJRS will have been in place for almost 18 months. Whilst less generous but more flexible than originally applied in April 2020, it remains to be seen whether the CJRS has saved jobs or simply deferred redundancies.

## Extension of IR35 to private sector

From **6 April 2021**, the Off Payroll Working Rules (IR35) which apply in the public sector have now been extended to large private sector companies. This means that payments to contractors supplied to large and medium sized companies (250+ employees) by personal service companies (PSCs) will be treated as payments of employment income and subject to income tax and national insurance contributions. This shifts responsibility for tax compliance from the PSC (usually owned by the contractor) to the client or intermediary. It is up to the client or intermediary to prove that the contractor is genuinely self-employed if they do not wish to deduct tax and NI.

The regulations were put back from April 2020 due to the Covid situation. However, they were already taking effect in 2020 with some large companies employing contractors directly through PAYE instead of PSCs on a self-employed contractor basis.

## National Minimum Wage not payable for sleeping time

### Royal Mencap Society -v- Tomlinson-Blake

*The Supreme Court has recently determined that care workers carrying out overnight sleep in shifts in their place of work were not entitled to be paid the national minimum/living wage for the entire duration of these shifts except for the hours during which they were awake and actually working.*



## Facts

Mencap provides support and care to vulnerable adults on behalf of local authorities. Ms Tomlinson-Blake (the claimant) was employed by Mencap as a care support worker. She was part of a team who worked a mix of day shifts and overnight sleep in shifts at two residential care homes, providing 24 hour care to individuals with learning difficulties.

No specific tasks were allocated to her during sleep ins but she was obliged to remain at the care home throughout the shift and to keep out a “listening ear” in case her support was needed. She was required to intervene if it was needed although in practice, the need to intervene was minimal. The evidence was that she was positively expected to get a good night sleep as she might have to work the following day.

The claimant received an allowance for the whole sleep in shift plus one hour’s pay. This was less than the national minimum/living wage (NMW/NLW) on an hourly basis. The claimant issued employment tribunal proceedings claiming that she was entitled to be paid the NMW/NLW on an hourly basis for the duration of the sleep in and not just the hours she was awake and working. Following various appeals, the case has now been determined by the Supreme Court.

## Decision

The Supreme Court upheld the Court of Appeal’s decision that under the National Minimum Wage Regulations, workers on sleep in shifts were only entitled to have their hours counted for NMW purposes when they were (and were required to be) awake for the purposes of performing some specific activity. The decision took into account the report of the Low Pay Commission which had led to the enactment of the National Minimum Wage Act in 1999. This recommended that the only time that should count for NMW purposes were periods when workers on a sleep in shift were “awake and required to be available for work”.

## Comment

The Supreme Court decision has been welcomed by employers in the care sector since costs would have increased substantially if they were required to pay the NMW/NLW in full for hours spent on sleep in shifts including backdated pay. However, given that the Low Pay Commission’s report is over 20 years old, it is possible that the government may look at this issue again although as many care homes are publicly funded, the government is unlikely to want to increase its own costs.

## Uber Drivers are workers - not self-employed

### *Uber BV -v- Aslam*

*The Supreme Court has recently upheld a decision that Uber drivers are workers and not self-employed contractors. This means that they are entitled to the national minimum/living wage, statutory holiday and sick pay together with various other workers' rights.*



### **Background**

Self-employment is increasing rapidly in the UK but not necessarily by choice. Companies frequently require individuals to work on a self-employed basis whereas they are in reality, employees or workers. Employees have full employment rights including the right to claim unfair dismissal. Workers have some employment rights including the national minimum/living wage (NMW) and statutory holiday and sick pay. Self-employed individuals have no employment rights.

The test of worker/self-employed status is one of control. The more autonomous the person is in their role, the more likely they are to be self-employed.

### **Facts**

Uber operates by means of a smart phone app by which passengers can book rides from drivers who also have the app. The drivers own their own cars and are free to choose when they make themselves available to accept bookings. The drivers work as self-employed contractors under a contract with Uber.

Mr Aslam and other Uber drivers brought Employment Tribunal claims against Uber arguing that they were, in reality, workers and not self-employed contractors and thus entitled to the NMW and holiday leave etc. Uber argued that it was merely a technology platform facilitating the provision of private hire vehicle services with Uber acting as agent between the drivers and the passengers.

The Employment Tribunal decided that the drivers were workers. It concluded that the self employed contracts did not reflect the actual working relationship and that the drivers were controlled by Uber.

## Supreme Court Decision

Following various unsuccessful appeals brought by Uber, the Supreme Court unanimously dismissed Uber's appeal and upheld the tribunal's decision that the drivers were workers and not self-employed contractors. It also determined that they were working from the time they logged onto the App and not just the time they were driving passengers.

In reaching its decision, the Court relied on the fact that Uber exercised significant control over the way the drivers delivered their service including setting fares, pay rates and contract terms imposed on the drivers. Essentially, the drivers were in a position of subordination and dependency.

## Comment

The Supreme Court decision is final and there is no further right of appeal. Uber has responded to the decision by reclassifying all its UK drivers as workers and these UK drivers will, for the first time, be entitled to holiday pay equivalent to 12.07% of their earnings and to automatic enrolment in a workplace pension scheme. They will also earn the national minimum/living wage after expenses for the time they are assigned to trips. Uber has, however, rejected the Court's view that this should also apply to the time spent logged onto the app waiting for customers. This could lead to further legal challenges.

Following the Uber decision, it is now very difficult to argue that gig economy workers are genuinely self-employed. Other challenges are likely to follow as currently applies to the case brought against the Post Office by sub-postmasters claiming worker status.

## FUTURE PROPOSALS

### New Employment Bill

The Government is proposing a new Employment Bill which is expected to include the following measures:

- Protecting tips and service charges for workers – employers will be required to pass on all tips and service charges to workers. There will be a code of practice to ensure that tips will be distributed on a fair and transparent basis.
- The right to request a more predictable contract – workers on zero hours contracts will have a “right to request” a more predictable and stable contract after 26 weeks' service. There is, however, no obligation for the employer to accept the request.

- Extending redundancy protection to prevent pregnancy and maternity discrimination – this is designed to extend the redundancy protection which applies to employees on maternity leave to pregnant employees and until six months after they have returned from maternity leave.



## CURRENT RATES

The National Minimum Wage (NMW) and National Living Wage (NLW) provides minimum hourly rates of pay for employees and workers. From **1 April 2021** the NLW applies to workers age 23 and over (previously 25+) and the NMW applies to workers age 16-23. The rates for the NMW and the NLW are increased in parallel in April of each year. The new rates from **1 April 2021** are as follows:

	Apprentices	16 and 17	18 – 20	21 – 22	23+
National Minimum Wage	<b>£4.30</b>	<b>£4.62</b>	<b>£6.56</b>	<b>£8.36</b>	<b>£8.91</b>
National Living Wage					
Previous rate before April 2020	£4.15	£4.55	£6.45	£8.20 (21-24)	£8.91 (25+)

The penalties for failing to pay the NMW and NLW are high and can be up to £20k per worker.

## Employment Protection Awards

The maximum limits on employment protection awards are increased in April each year. From **6 April 2021** the rates are as follows and apply to all dismissals after this date:

Award	Current Rate Applies to dismissals from 6 April 2021	Previous Rate for dismissals before 6 April 2021
Unfair dismissal compensatory award (maximum)	<b>£89,493</b> (maximum or 12 months' pay whichever is lower)	£88,519 (maximum or 12 months' pay whichever is lower)
One week's pay for statutory redundancy pay and basic award	<b>£544</b>	£538
Maximum statutory redundancy payment and basic award	<b>£16,320</b>	£16,140

Awards for discrimination claims have no maximum limit.

## Maternity and Paternity Pay

Statutory Maternity Pay and Statutory Adoption Pay are payable for a period of 39 weeks. Statutory Paternity Pay is payable for a period of two weeks following the birth. Under the Shared Parental Leave scheme, it is possible for parents to share up to 37 weeks of the mother's maternity pay.

The rates are increased in April each year and from **6 April 2021** are as follows:

Type of Payment	Current Rate from 6 April 2021	Payment Period	Previous Rate from April 2020
Statutory Maternity Pay and Statutory Adoption Pay (higher rate)	90% of normal weekly earnings	First 6 Weeks	£151.20
Statutory Maternity Pay (basic rate)	<b>£151.97</b> per week*	Next 33 Weeks	
Statutory Paternity Pay	<b>£151.97</b> per week*	Up to 2 Weeks	£151.20

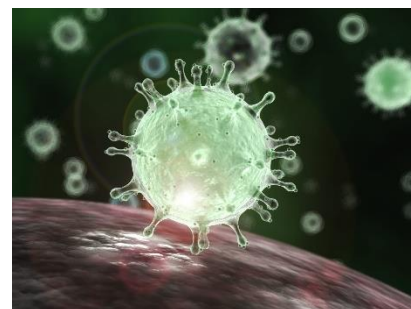
\*or 90% of normal earnings, if lower.

### Statutory Sick Pay

Statutory Sick Pay is payable if an employee is incapable of work for 4 or more consecutive days. The entitlement starts from the 4th qualifying day up to a maximum of 28 weeks. From **4 April 2021**, the SSP rate is **£96.35** per week (previous rate - £95.85).

### Covid-19 Virus – changes to SSP

For employees suffering from the Covid-19 Virus or who are self-isolating or shielding others, SSP will be paid on the first day of absence rather than the fourth day. Small to medium sized employers (less than 250 employees) will also be reimbursed for the full amount of two weeks' SSP rather than having to pay it themselves. SSP is, however, minimal - £96.35 per week, but there is now the option to furlough employees instead, if appropriate. This would entitle employees to 80% of salary up to £2,500 per month.



SSP only applies to employees but self-employed individuals or workers can also make a claim for universal credit or contributory employment and support allowance.

### Contact details

For further information or advice, please contact Tessa Fry, Head of Employment at [tessa@solts.co.uk](mailto:tessa@solts.co.uk) or 020 7317 8698

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**Disclaimer** – This update is intended to provide readers with information on recent legal developments. It should not be construed as legal advice or guidance on a particular matter.



