



# Employment Law Breakfast Briefing

Essential updates & practical guidance for employers

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# Key changes at a glance

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# Introduction

- Employment Tribunal – where are we now?



# Key Changes at a Glance

January 2015	
05 January 2015	Ban of “overseas only” recruitment by employment agencies
08 January 2015	The Deductions from Wages (Limitation Regulations 2014) came into force Lock v British Gas Trading Limited Bear Scotland v Fulton



# Key Changes at a Glance

February 2015	
04 February 2015	Lock v British Gas Trading Limited
05 February 2015	Advocate General's opinion on Woolworth's case USDAW v Ethel Austin Limited (in administration)



# Key Changes at a Glance

March 2015	
10 March 2015	Prohibition of enforced subject access requests Section 56 Data Protection Act 1998
30 March 2015	Parliament will be dissolved



# Key Changes at a Glance

April 2015	
05 April 2015	Shared parental leave will be available to parents of children due to be born or placed for adoption with them on or after 5 April 2015
05 April 2015	Removal of the requirement for 26 weeks' service before employees become entitled to adoption leave Right for single and joint adopters to attend adoption appointments Statutory adoption pay brought into line with statutory maternity pay (first 6 weeks 90% of normal earnings)
05 April 2015	Maternity and parental leave etc. (Amendment) Regulations 2014 Extends the existing unpaid parental leave regime to parents of children aged between 5 and 18
05 April 2015	The Shared Parental Leave and Paternity & Adoption Leave (Adoption from overseas) Regulations 2014 and Statutory Shared Parental Pay (Adoption from Overseas) Regulations 2014





# Key Changes at a Glance

April 2015	
06 April 2015	National Minimum Wage (Consolidation) Regulations to come into force
06 April 2015	Increase in weeks pay £464 to £475. Max compensation £76,574 to £78,335
06 April 2015	Legislation to combat false self employment through service companies. Finance Bill 2014
05 April 2015	Shared parental leave will be available to parents of children due to be born or placed for adoption with them on or after 5 April 2015
05 April 2015	Removal of the requirement for 26 weeks' service before employees become entitled to adoption leave Right for single and joint adopters to attend adoption appointments Statutory adoption pay brought into line with statutory maternity pay





# Key Changes at a Glance

May 2015	
07 May 2015	General election
01 July 2015	Two year cap on back pay claims for holiday pay



# Key Changes at a Glance

Autumn 2015	
Autumn 2015	New tax free childcare scheme
Autumn 2015	Draft order to outlaw caste discrimination



Welcome

2016

# Shared Parental Leave

Ed Jennesson



# Introduction

- To enable eligible parents to choose how to share the care of their child during the first year of birth of adoption
- Introduced by the Children and Families Act 2014



# Shared parental leave

- Shared parental leave is optional
- Mother opts-out of maternity leave
- Opts into Shared Parental Leave (“SPL”)/Shared Parental Pay (“ShPP”) system
- If the mother does not opt-out, then she stays within the normal maternity leave/SMP Rules



# Shared parental leave

- SPL can be taken **consecutively** or **concurrently**, provided they do not take more than the total SPL available:
  - Interest?
  - 2% - 6% of fathers;
  - 62% - interested;
  - nobody knows





# Entitlement

- Expected week of childbirth (“EWC”) begins **on or after 5 April 2015**
- The Shared Parental Leave must be taken between the date of the baby’s birth and first birthday
- The mother can share leave with her partner if they’re **both** eligible for SPL



# Entitlement

- The mother has 52 weeks' entitlement - but in reality it can be no more than 50 weeks because she must take 2 weeks' compulsory maternity leave
- Four weeks if mother works in a factory
- 39 weeks (but in reality 37 weeks, as 2 weeks will be paid during compulsory maternity leave)



# Entitlement

- You **must share care** of the child with either:
  - your husband, wife, civil partner or joint adopter;
  - the child's other parent; or
  - your partner
- **You or your partner must be eligible for maternity leave/pay**



# Entitlement

- You must also:
  - have been employed continuously for at least 26 weeks by the end of the 15th week before the EWC;
  - be employed by the same employer while you take SPL; and



# Your Partner's eligibility

## Employment and earnings test

- During the 66 weeks before the baby is due your partner must:
  - have been working for at least 26 weeks;
  - have earned at least £30 a week on average, taking the highest earning 13 of the last 66 weeks; and
- at date of birth/adoption, must have the main responsibility for the care of the child



# Statutory Shared Parental Pay

- You will qualify for ShPP if one of the following applies:
  - you qualify for Statutory Maternity Pay or Statutory Adoption Pay; or
- you qualify for Statutory Paternity Pay and have a partner who qualifies for Statutory Maternity Pay or Maternity Allowance or Statutory Adoption Pay



# Curtailing Maternity Entitlement

- The mother must give “binding notice”





# The Formal Notices

## Leave Curtailment Notice

- A leave curtailment notice must:
  - be in writing;
  - state the date on which the mother wants either her ordinary or additional statutory maternity leave period to end (the leave curtailment date), which must be:
    - at least one day after the end of the compulsory maternity leave period;
    - at least eight weeks after the date on which M gave the leave curtailment notice to her employer; and
    - where M is curtailing her additional maternity leave period, at least one week before the last day of M's additional maternity leave period



# Revoking Leave Curtailment Notice

- The mother (or adopter) can revoke their notice to end maternity leave (or SMP, maternity allowance or adoption leave):
  - it is before the planned end date and the mother hasn't returned to work;
  - the revocation notice is in writing and expressly states the mother revokes her leave curtailment notice; and
  - either:
    - neither, the mother nor her partner are eligible for shared parental leave or statutory shared parental pay - in which revocation must take place within 8 weeks of serving the curtailment notice;
    - the partner dies, in which case revocation must take place within a reasonable time of the partner's death and state the date of death;
    - if the mother gave notice of curtailment before the baby was born and then changes her mind, in which revocation must take place within 6 weeks of the birth.
    - **NB** in this case, and this case only, the mother is allowed to change her mind again later and serve another leave curtailment notice



# Notice of Entitlement and Intention to Take Shared Parental Leave

- Three notices are required:
  - the mother and partner must each **give their employers** written notice of entitlement to SPL and ShPP;
  - their, and their partner's name;
  - the start and end dates for the mother's maternity;
  - the total amount of shared parental leave, and statutory shared parental pay, available, and how much they and their partner intend to take (so no parent can take SPL unless they have agreed between them how the remaining leave is to be divided, and signed a document to that effect - see below);
  - the expected week of confinement (or adoption) or date of birth;
  - confirmation that they are **sharing childcare responsibility** with their partner, and
  - a non-binding **indication** of when the employee expects to take the leave (and claim the ShPP).



# Notice of Entitlement and Intention to Take Shared Parental Leave

- The employee must also provide a **signed declaration**, stating that:
  - s/he satisfies the qualifying requirements for **SPL and ShPP**;
  - the information s/he has given in the notice of entitlement is accurate;
  - s/he will immediately inform his/her employer if they cease to care for the child (or where the employee is the partner, if the mother tells the partner she has ceased to care for the child);
  - if the employee is the partner, that he is the father of the child, the person who is married to (or partner, or civil partner of) the mother



# Notice of Entitlement and Intention to Take Shared Parental Leave

- The employee's partner must also provide a signed declaration stating:
  - their name, address and NI number ( or declaration they do not have an NI number);
  - that they are the mother/adopter of the child, or the partner of child, or the spouse/civil partner of the mother;
  - that they satisfy the qualifying requirements for SPL and ShPP;
  - that they consent to the organisation processing the information contained in the declaration form;
  - that they consent to the amount of SPL that the employee intends to take;
  - (Where the partner is the mother) that the mother has curtailed her maternity leave/pay or returned to work;
  - (where the partner is the mother) that the mother will immediately inform the partner if she ceases to qualify for SPL.





# What if the Employer wants to check the Employee's Entitlement to SPL?

- The employer has 14 days:
  - to ask for a copy of a child's birth certificate;
  - and/or the name and address of the partner's employer.
- The employee must supply the information within 14 days of being asked, or they lose the right to take shared parental leave
- There is no obligation on the employer to do this, and there's not generally going to be any point unless the employer suspects fraud



# Period of Leave Notice

- An employee must give **8 week's notice** of any shared parental leave s/he wishes to take
- The notice may contain a request for more than one period of leave, and the request can be for continuous or discontinuous leave
- The blocks must be in complete weeks, and may begin on any day of the week (so if a week of shared parental leave starts on a Wednesday, it will finish on a Tuesday)
- The employee can book a maximum of three separate blocks of leave





# What if the child is born early?

- If the child is born fewer than eight weeks early, the parent should already have given their eight weeks' notice to take SPL
- They can bring the start date forward
- If the child is born more than eight weeks early, then the “8 weeks' notice” rule will not apply
- However, they have to give their relevant notices as soon as practicable after the birth



# What if the parent changes his/her mind?

- An employee can cancel or vary an agreed period of SPL, provided they notify the employer at least eight weeks before in writing
- This will count as a new notification



# Continuous versus Discontinuous Leave

- Continuous leave is where the employee simply wants to be on leave between two dates (the start date and the end date)
- As will be the case in the majority of requests
- If the request is for continuous leave, the employer **must** grant it
- Discontinuous leave is a set number of weeks of leave over a period of time, with breaks between the leave where the employee returns to work. It only counts as one of the employee's three blocks of leave



# Continuous versus Discontinuous Leave

- Employer is not obliged to agree
- If the notice is for discontinuous leave, the employer is not obliged to agree
- If the employee and employer can agree discontinuous leave within the two weeks after the request is made, then the notice will be binding



# Terms and Conditions during Shared Parental Leave

- During shared parental leave, the employee's contract continues. S/he remains entitled to continue to receive all benefits **except** wages or salary
- **Pension contributions** will continue to be paid by when shared statutory parental pay is being paid, but not when the employee is on unpaid shared parental leave



# SPLIT (Shared Parental Leave in Touch) days

- Both mother and partner can book up to 20 SPLIT days during their shared parental leave
- Both employee and employer **must agree**





# Statutory Shared Parental Pay

- In theory, up to 39 weeks statutory shared parental leave is available. But in reality, the true figure is **37** weeks, since the mother must take at least two weeks' compulsory maternity leave
- The first six weeks of SMP are paid at 90% of average weekly earnings or £139.58, whichever is higher. But the first six weeks of ShPP are paid at 90% of average weekly earnings, or £139.58, whichever is **lower**





# Right to return to work

- The employee is expected to return to work on the day that their period of shared parental leave ends
- If s/he wants to return to work early, s/he can serve another (of the three) notices to vary the leave - and must give at least 8 weeks' notice of return date
- The employee is entitled to return to same job they held before commencing shared parental leave



# Right to return to work

- However:
  - if the total block of shared parental leave (when added to any statutory maternity/paternity/adoption leave which immediately precedes it) is more than 26 weeks; and
  - it is not reasonably practicable for the employee to return to the same job they held before commencing shared parental leave
- Then they can be returned to another job which is both suitable and appropriate for the employee to do



# Dismissal and Detriment

- The employer cannot dismiss the employee (it's automatically unfair) or subject the employee to detriments, if:
  - the employee takes, or seeks to take, SPL;
  - the employer believes the employee was likely to take SPL; or
  - the employee takes, requests, or refuses, SPLIT days.
- Also, if the employee is selected for redundancy for any of the above reasons, the dismissal will be automatically unfair



# Holiday Entitlement

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# Holiday entitlement

- Employees and workers.
- 5.6 weeks' statutory annual leave including:
  - four weeks' annual leave (Euro); and
  - 1.6 weeks' annual leave (UK).
- Contractual entitlement to more?



# A Week's Pay for a Week's Leave

- WTR 1998 - week's pay for a week's statutory leave
- A week's pay S.221 to 224 of the ERA 1996
- No normal working hours - average of last 12 weeks
- Normal working hours:
  - including basic hours and guaranteed compulsory overtime
  - not including other overtime, bonuses and commission
- Bear Scotland - ERA insufficient





# Bear Scotland Limited v Fulton (EAT)

- Considered non-guaranteed overtime
- Held:
  - non-guaranteed overtime should be included
  - if intrinsically or directly linked should be included
  - does not extend to additional 1.6 weeks



# Four Weeks' Leave

- If “intrinsically linked” include:
  - commission payments;
  - overtime workers are required to perform (guaranteed and non-guaranteed);
  - incentive bonuses;
  - productivity/performance bonuses;
  - shift allowances and premiums; and
  - standby payments and payments for emergency call out duties



# Four Weeks' Leave

- Not included in the calculation are:
  - benefits in kind;
  - bonuses not linked to the worker's performance;
  - expenses; and
  - one off bonuses and occasional payments



# Commission

- Lock v British Gas (ECJ)
- Commission included if “intrinsically linked”
- Calculated over a reference period which is considered to be representative



# Overtime Pay

- Tarmac Roadstone Holdings Limited 1973 (CoA)
  - guaranteed (compulsory) overtime - even if the employee is not called to work it, the employer is liable to pay them for it;
  - non-guaranteed overtime - the employee is obliged to work overtime if required, but the employer is not obliged to provide overtime or pay in lieu; and
  - voluntary overtime - an employee cannot be required to work it and the employer does not have to provide it.



# Overtime Pay

- Compulsory guaranteed overtime
  - include for all 5.6 weeks
- Non-guaranteed overtime
  - include for four weeks
- Voluntary overtime?
  - include for four weeks if part of “normal pay”





# The Correct Reference Period?

- Lock (ECJ) - period “considered to be representative”
- ERA 1996 - 12 week reference period?
- Bear Scotland (EAT) - appropriate period to be determined by the member state



# Which four weeks is it?

- Unclear!
- Bear Scotland - suggested employers can choose
- 1.6 weeks described as “additional leave” in Regulation 13A WTR
- Express in contract



# Historical Liability for Unlawful Deductions

- Bear Scotland - cannot be claimed as part of a “series of deductions” if more than three months has elapsed between deductions
- In most cases, backdated claims will be limited to a year



# New Legislation

- Deduction from Wages (Limitation) Regulations 2014 came into force on 8 January 2015
- 2 year limitation period will apply to claims presented on or after 1 July 2015
- No claims for underpayments two years before claim



# Case Review

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# Karsten Kaltoft v Kommunernes (ECJ)

**Obesity may be a disability**

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# Metroline Travel Ltd v Stoute (EAT)

**Type 2 diabetes not a disability**

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# Williams v Leeds United - High Court

**Sending pornographic e-mail from a work account was a repudiatory breach of contract, despite the fact it was discovered several years later**



# Games Retail Limited v Laws (EAT)

**Dismissal for offensive, non-work related comments on a personal Twitter account is potentially fair**



any questions?





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