

## EMPLOYMENT REVIEW

Your quarterly legal bulletin on Employment Law news from Allan Janes Solicitors

[www.allanjan.es.com](http://www.allanjan.es.com)

### EAT's ruling strengthens whistleblowers' rights



In a decision which significantly strengthens the hand of workplace whistleblowers, and self-employed people in particular, the Employment Appeal Tribunal (EAT) has ruled that a health and safety consultant was a legally

protected 'worker' despite not having the benefit of an employment contract (*Keppel Seghers UK Limited v Hinds*).

It was common ground that it is a prerequisite for obtaining work as a health and safety consultant within the construction and civil engineering industry that such services are provided through a company. In this case, the consultant's engagement by an energy recovery business had been arranged by an employment agency and he had provided his services through a one-man company. He had no direct contractual relationship with the business.

extension to the meaning of a 'worker' for the purposes of the protection afforded in respect of protected disclosures.

Those submissions did not persuade the ET and the consultant was permitted to proceed with his claim.

In dismissing the business's appeal, the EAT noted that Section 43K of the ERA was explicitly introduced for the purpose of providing protection for whistleblowers and others who are not formally employed. Given that background, a 'purposive construction' should be adopted as it was the will of Parliament that such protection should be afforded, rather than denied, wherever that could properly be achieved.

It was the business that largely dictated the terms and conditions under which the consultant worked. He had been 'sourced' as an individual who met the business's requirements; he had viewed himself as an integral part of the company's workforce and he did not have the right to nominate another person to work in his place.

The ruling has opened the way for the consultant to pursue his whistleblowing claim to a full hearing.

**The law protecting whistleblowers is robust. For advice on dealing with the issues that arise on the making of a protected disclosure, contact us.**

### ALLAN JANES SOLICITORS

21-23 Easton Street  
High Wycombe  
Buckinghamshire  
HP11 1NT

Tel: (01494) 521301  
Fax: (01494) 442315  
Email: [rebecca.smith@allanjan.es.com](mailto:rebecca.smith@allanjan.es.com)

After he launched Employment Tribunal (ET) proceedings claiming that he had been subjected to detrimental treatment for making a protected disclosure, he faced arguments that he did not fit the definition of a 'worker' within the meaning of the Employment Rights Act 1996 (ERA). Section 43K provides for an

### Time off to accompany a pregnant woman to ante-natal appointments

From 1 October 2014, an expectant father or the partner (including a same-sex partner) of a pregnant woman is entitled to take unpaid time off work to accompany the woman to up to two of her ante-natal appointments.

The time off is capped at six and a half hours for each appointment. The Department for Business, Innovation and Skills has produced guidance for employers on the new right in the form of frequently asked questions. This can be found on the Government website [www.gov.uk](http://www.gov.uk).

## New minimum wage rates – a reminder

Employers are reminded that the following changes to the National Minimum Wage (NMW) rates came into effect on 1 October 2014:

- the adult NMW rate increased from £6.31 to £6.50 per hour;
- the NMW rate for workers aged 18 to 20 increased from £5.03 to £5.13 per hour;
- the NMW rate for 16- and 17-year-olds increased from £3.72 to £3.79 per hour; and

■ the apprentice rate of the NMW, which applies to apprentices under 19 or over 19 and in the first year of their apprenticeship, increased from £2.68 to £2.73 per hour. The accommodation offset increased from £4.91 to £5.08 per day.

In recommending the rates that will apply from 1 October 2015, the Low Pay Commission (LPC) has been asked to consider whether any changes can be made to the apprentice NMW rate –

in particular, whether the structure and level should continue to be applied to all levels of apprenticeship, including higher levels.

In addition, the LPC will review the conditions that need to be in place to allow the value of the NMW to increase in real terms and assess whether such increases can be afforded at the current time.

## Guidance on employing disabled people

Nearly seven million people of working age in the UK are disabled or have a health condition and, historically, there has been a significant gap between the proportion of disabled people and non-disabled people in employment.

To tackle the issues preventing disabled people from fulfilling their potential in the workplace, the Government launched a Disability Confident campaign, aimed at working with employers to remove barriers and increase understanding of the needs of disabled people.

The Department for Work and Pensions has now updated its guidance for employers on employing disabled people and people with health conditions. This provides a summary of information to help employers recruit and support



disabled people in work and provides links to other resources available to enable employers to become more confident when attracting, recruiting and retaining disabled people. The guidance also contains advice on specific conditions and the type of adjustments that may be necessary to accommodate them.

The guidance can be found on the Government website [www.gov.uk](http://www.gov.uk).

## Deduction from salary of senior employee not a penalty

It is commonly thought that when an employee resigns with immediate effect, an employer has no right to recompense from the employee.

However, where the employer has the contractual right to make a deduction from salary and this does not constitute a penalty, it is normally in order to do so. Where the deduction can be seen to be a 'penalty clause' rather than restitution for an anticipated loss based on a genuine pre-estimate of the loss, the court will not enforce it as UK law prohibits penalty clauses where the

penalty is greater than the commercial loss suffered.

In a recent case, a company that specialises in support to offshore drilling activities for the oil and gas industry deducted some £5,000 from the final salary payment of a project engineer who left without working her notice period.

The employee's contract of employment provided that if she left without providing appropriate notice, 'the company will deduct a sum equal

in value to the salary payable for the shortfall in the period of notice'.

The Employment Appeal Tribunal concluded that the clause was not a penalty clause as the replacement of a senior employee who leaves without notice represents a genuine commercial loss to the business.

Accordingly, the deduction was justified.

**If a senior employee of yours leaves without giving sufficient notice, contact us for advice on the steps you can take.**

**Allan Janes**  
solicitors

**ALLAN JANES SOLICITORS**

21-23 Easton Street, High Wycombe  
Buckinghamshire, HP11 1NT

Tel: (01494) 521301

Email: [rebecca.smith@allanjan.es.com](mailto:rebecca.smith@allanjan.es.com)

**WWW.ALLANJANES.COM**