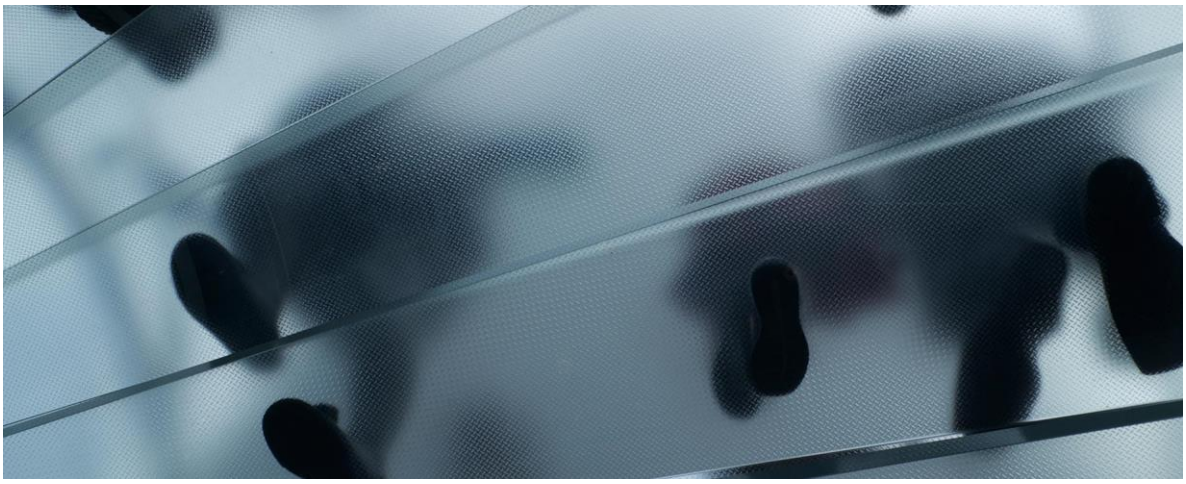

November 2018

Employment Update

Key employment and business immigration developments for employers

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In the News

Sexual harassment – crackdown on confidentiality?

Prime Minister Theresa May has said that the Government will tighten the use of confidentiality provisions in employment disputes, saying "it is clear that some employers are using them unethically". The comment followed a recent court ruling that prevented the Daily Telegraph from naming a businessman accused of bullying and sexual harassment (although the man's identity was subsequently revealed in the House of Lords under parliamentary privilege).

"...the Government will tighten the use of confidentiality provisions in employment disputes..."

The Women and Equalities Committee has now launched an inquiry into confidentiality provisions or "non-disclosure agreements" in harassment and discrimination cases. Such provisions are commonly used when settling employment disputes, where the parties agree to keep the details of the dispute and the settlement confidential. However, they came under fire during the Women and Equalities Committee inquiry into sexual harassment earlier this year. Following that inquiry, the Committee recommended that the Government legislate to require the use of standard, approved confidentiality clauses only, which set out their meaning and their limits, and which explain that they cannot prevent an employee from blowing the whistle.

The Committee's latest inquiry, launched on 13 November 2018, is seeking written submissions on whether there are certain types of harassment or discrimination for which confidentiality provisions are more likely to be used, whether such provisions should be banned or restricted and what safeguards might be necessary to prevent unethical use. The inquiry runs until 28 November 2018.

Earlier this year, the Equality and Human Rights Commission (EHRC) also called for reform in this area. The EHRC wants to see legislation that would make any clause void if it seeks to prevent disclosure of future acts of discrimination or harassment. In addition, it argues that confidentiality provisions should only be used to settle discrimination or harassment disputes where confidentiality has been requested by the employee.

Given these developments, it is clear that tighter controls on confidentiality provisions are highly likely in this area. In the meantime, many employers are updating their settlement agreements to make it clear that confidentiality provisions do not prevent the employee from blowing the whistle, reporting misconduct to a regulator or reporting criminal activity to the police.

Ethnicity pay gap reporting

Following on from gender pay gap reporting, the Government is proposing to introduce mandatory reporting on the ethnicity pay gap. The proposal is that this would apply to employers with 250 or more employees. The Government has launched a consultation paper seeking feedback on the sort of information employers should be required to publish and whether ethnicity pay reporting should mirror the gender pay gap reporting requirements. The consultation asks whether employers should report a single "white versus not white" figure or a breakdown of different ethnic groups.

It is not yet clear when the requirement would be introduced (or whether, for example, it would be introduced in phases). Employers may consider responding to the consultation and/or starting to think about what ethnicity data they collect. The Government consultation is open until 11 January 2019. **Employment Update** will report developments.

Immigration Radar

EU Settlement Scheme

As reported in the September 2018 **Employment Update**, the Government has introduced a new EU Settlement Scheme for EU nationals living in the UK. Under current proposals, all EU nationals and their family members living in the UK at Brexit will need to apply under the scheme for either indefinite leave to remain (for those with at least five years' residence) or limited leave to remain (for those with less than five years). The scheme opened on a restricted trial basis on 28 August 2018 and the second phase of the pilot will run from 1 November to 21 December 2018. However, the pilot is currently limited to staff working in the higher education, health and social care sectors. The scheme is expected to open fully by 30 March 2019.

Brexit and right to work checks

The Home Office has confirmed that employers will not need to change their right to work checks for EU nationals immediately after Brexit. Whether there is a deal or no deal, employers will be able to continue to rely on an EU passport or national identity card as sufficient proof of right to work for EEA nationals for a "sensible transition period" after Brexit. If a deal is reached, the UK Government proposes that the transition period would run until 31 December 2020 but it is not yet clear what the transition period would be in the event of no deal. **Employment Update** will report developments.

Work visas for non-EU nationals

Changes were made to the visa application process for non-EU nationals on 5 November 2018 which are designed to make the application process more straightforward. The key changes are that:

- applicants can now submit most applications online via the new UK Visa and Citizenship Application Service (UK VCAS)

- applicants are now able to either book and attend in-person appointments at a new core service centre or pay an additional fee to attend a more convenient local service centre (eg at a local library) to provide their

biometrics and supporting documents (existing UKVI premium service centres are set to close on 29 November 2018)

- applicants can opt to pay an additional fee to apply via a 'super priority service' for next working day processing
- applicants are able to upload copies of their supporting documents online (eg passport, pay slips and bank statements) rather than providing the originals
- where an applicant has left out certain evidence from the application, or not completed the form correctly, there is now greater scope for UK Visas and Immigration to request further evidence or exercise discretion, rather than rejecting the application outright.

While these changes are welcome, the costs of non-EU visa applications are set to increase further. In December 2018, the Government plans to double the immigration health surcharge payable by non-EU applicants from £200 to £400 per year. All non-EU nationals applying for visas longer than six months must pay the immigration health surcharge upfront at the time of applying, so the change will increase the cost of visa applications significantly.

Case Watch

Holiday – use it or lose it?

Two cases, joined together before the European Court of Justice (ECJ), both featured employees in Germany who had left their employment with accrued untaken holiday. The employers refused to pay them for the holiday, relying on national laws. Both employees were seeking pay in lieu for untaken holiday which had accrued in the same year as termination but one was also seeking payment for untaken holiday which had accrued in the previous holiday year. The employees brought claims in the German court, and the German courts asked the ECJ whether the German "use it or lose it" law was compatible with the Working Time Directive.

The ECJ decided that the "use it or lose it" law could only apply if the employee had been given an opportunity to take the holiday. This does not mean the employer has to force employees to take holiday, but it should encourage them to do so, and inform them in good time of the risk of losing that holiday at the end of the holiday year. If employees have not been given the opportunity to take holiday, then they will not lose that holiday at the end of the year.

"Employers should ensure that they warn employees, in good time before the end of the holiday year, to take their holiday in time..."

Employers should ensure that they warn employees, in good time before the end of the holiday year, to take their holiday in time (and remind them of how much, if any, they would be allowed to carry over). This could be done for example by a business wide email, or message on the intranet. Employees who are on long term sick leave can take holiday during their sick leave if they wish and should be reminded of this. This case only applies to the four week holiday entitlement under the Working Time Directive. The additional 1.6 weeks under the UK's Working Time Regulations, and any additional contractual holiday entitlement, may be forfeited at the end of a leave year, even if the employee had not been encouraged to take it in time.

KREUZIGER V LAND BERLIN; MAX-PLANCK-GESELLSCHAFT ZUR FÖRDERUNG DER WISSENSCHAFTEN EV V SHIMIZU

Data breach – who is liable?

The employee in this case was an internal IT auditor at Morrisons. He had a personal grudge against the company and so copied the personal data of just under 100,000 employees from his work laptop onto a USB stick, took it home and uploaded it to the internet. He was convicted of various criminal offences. Over 5,500 of the employees whose data had been disclosed brought claims against Morrisons for compensation. Morrisons argued that it could not be held responsible for the actions of a rogue employee who was deliberately trying to harm the company.

The Court of Appeal ruled that Morrisons was liable for the actions of the employee. This was the case even though the company had not itself misused employee data or even allowed the misuse. The company was liable because there was a sufficiently close connection between the employee's behaviour and his work. He only had access to the personal data by virtue of his role as an IT auditor. His actions at work and subsequent disclosure of the personal data on the internet was a "seamless and continuous sequence of events". Morrisons is therefore now liable to compensate the employees whose data was disclosed (although the amount of compensation is yet to be decided).

The case is a stark warning for employers about the dangers of a data security breach. Employers have a duty to ensure that employees' personal data is kept secure and must take appropriate technical and organisational measures against accidental or unauthorised use or disclosure of that information. Employers that fail to do so can now face significant fines under the General Data Protection Regulation (GDPR) and compensation claims from aggrieved employees. However, the case is also a reminder that employers can be liable for the actions of rogue employees, even if the employer has itself done nothing wrong. All that needs to be shown is a sufficient connection between the employment and the wrongdoing. The Court of Appeal suggested that the solution is for employers to insure against losses caused by such wrongdoing. The case is being appealed to the Supreme Court so it may not be the last word on the issue.

WM MORRISON SUPERMARKETS PLC V VARIOUS CLAIMANTS

Discrimination – clash of rights?

The claimant in this case, a gay man, placed an order with a bakery in Northern Ireland for a customised cake with the slogan "Support Gay Marriage". The owners of the bakery are devout Christians and oppose same-sex marriage on the basis of their belief that marriage must be between a man and a woman. They cancelled the claimant's order and gave him a refund. He brought a claim of direct discrimination on the grounds of sexual orientation and religious or political belief under the relevant law in Northern Ireland.

The claimant initially won his case in the county court and the Court of Appeal. However, on a further appeal to the Supreme Court, the Court ruled that the bakery had not unlawfully discriminated against him. The Court ruled that the bakery did not refuse the order because of the claimant's sexual orientation but because of the message he wanted on the cake. This was not direct sexual orientation discrimination, as the bakery would also have refused to supply a cake with the same message for a heterosexual customer. In relation to political or religious belief discrimination, the Court also ruled that it would be contrary to the bakery owners' rights to force them to supply a cake with a message with which they profoundly disagreed.

"...employers should endeavour to accommodate such religious objections where possible..."

While this case is all about the provision of goods and services to the public, difficulties can arise for employers where an employee refuses to perform a certain task because of their religious beliefs. For example, there have been several cases where supermarket assistants

have refused to handle alcohol or certain meats because of their religious beliefs. As this case shows, employers should endeavour to accommodate such religious objections where possible, particularly where the impact on the business is minimal.

In contrast, there have also been cases where employers have been justified in requiring individuals to perform tasks contrary to their beliefs. For example, a Christian registrar lost a discrimination claim when she was disciplined for refusing to carry out civil partnerships for same-sex couples, and a relationship counsellor similarly lost a claim when he was dismissed for refusing to provide sexual counselling to same-sex couples. However, employers must tread carefully – the employers in both cases were able to show that they had pledged to provide their services to the public in a non-discriminatory way and that this was fundamental to their ethos.

LEE V ASHERS BAKERY CO LTD AND OTHERS

New Law

National minimum wage

The Government has announced that the rates of the national minimum wage and the national living wage will increase as follows from April 2019:

- £8.21 per hour for workers aged 25 and over (rising from the current national living wage of £7.83 per hour)
- £7.70 per hour for workers aged 21 to 24 (rising from £7.38 per hour)
- £6.15 per hour for workers aged 18 to 20 (rising from £5.90 per hour)
- £4.35 per hour for workers aged 16 to 17 (rising from £4.20 per hour).

The apprenticeship rate for apprentices under 19 or in the first year of their apprenticeship will also increase from £3.70 to £3.90 per hour.

Termination payments

The Government has announced that planned changes to the treatment of national insurance contributions (NICs) on termination payments will be delayed until April 2020. Currently, where an ex gratia termination payment is made on top of notice pay, the first £30,000 can be paid free of income tax and any amount above this is taxable. However, the entire payment is exempt from NICs. From April 2020, the first £30,000 of the ex gratia termination payment will still be free of income tax and NICs but any amount above this will be subject to both income tax and NICs. The change was originally scheduled for April 2019 but has been delayed until April 2020 as part of the Autumn 2018 Budget.

Changes to taxing contractors

As part of the Autumn 2018 Budget, the Government has announced that the public sector off-payroll working rules will be extended to the private sector in April 2020. The extension will mean private sector employers may need to change the way they engage and tax contractors.

Under the public sector rules, introduced in April 2017, where an individual contractor or consultant provides their services to a public sector client via a personal services company, the client must decide whether the "IR35 legislation" applies. This broadly involves asking whether, without the personal services company, the individual would be regarded as an employee of the client. If so, the client (or body responsible for paying the

contractor's company) must deduct income tax and NICs from payments to the contractor's company as if the contractor were an employee. The client must also pay the relevant employer's NICs.

The Government has said that, from April 2020, the rules will apply to medium and large private sector employers (likely those with more than 50 employees and/or above certain balance sheet and turnover thresholds). A further consultation will be launched in 2019 on the detail of the proposal. While April 2020 may seem a long way off, in scope employers should begin auditing their use of contractors and consultants, and begin planning for the changes during 2019 in order to be ready for implementation.

Watch this space

Employment Tribunal fees

The Ministry of Justice has given some indications that Employment Tribunal fees could possibly be reintroduced. Fees were abolished in July 2017 on the basis that they prevented access to justice and were indirectly discriminatory against women. However, the Permanent Secretary for the Ministry of Justice has said he is confident that a fee system could be found which does not deny access to justice. He confirmed there are no immediate plans to reintroduce fees but suggested a new fee regime is being developed. **Employment Update** will report developments.

Our Work

Since our last **Employment Update**, our work has included:

- presenting training sessions for boards, managers and staff on equal opportunities and diversity, including sexual harassment
- working in conjunction with our Financial Services and Markets team to assist our asset management clients to prepare for the extension of the Senior Managers and Certification Regime to all FCA-regulated firms
- advising on a number of disputes with employees beginning with a chain of escalating grievances
- advice to a client around options for injunctive relief relating to breaches by a former employee in a sales function of his post-termination restrictive covenants
- advising on whether TUPE applies following a service provision change in relation to the mixed supply of goods and services
- advising a client on a business-wide restructuring, including obligations around collective consultation and individual redundancy processes
- drafting a bonus scheme for senior managers of an asset management business
- defending a team move in the High Court
- advising clients on fitness and propriety against the background of sexual harassment allegations
- creating a new performance management process and training managers on it.

If you have any queries on this edition of Employment Update, please contact any member of the Employment Department

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