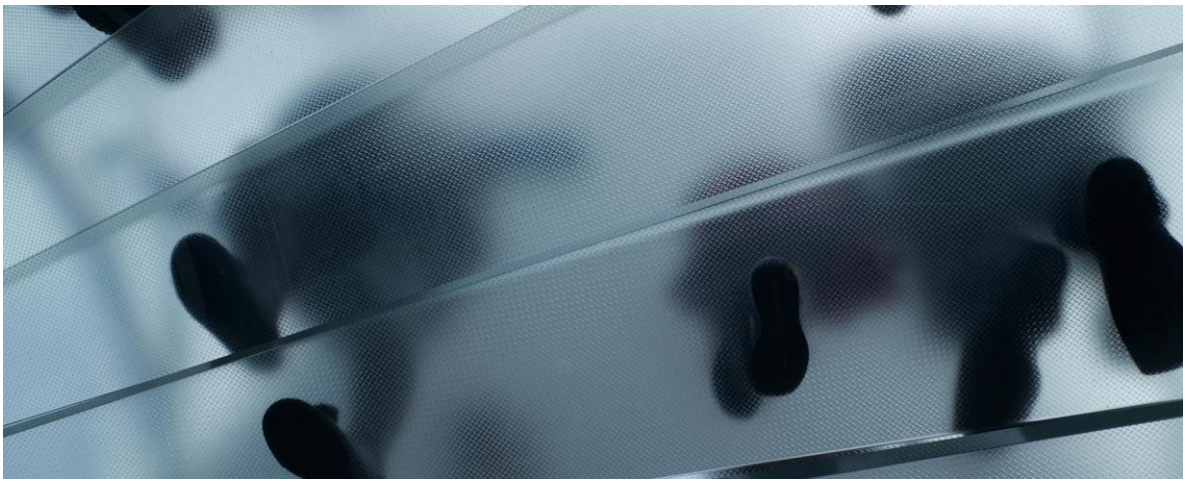

September 2017

Employment Update

Key employment and business immigration developments for employers

Autumn Audit

Key HR issues this autumn

With the summer holidays drawing to a close, the coming months are set to be busy for many HR practitioners. Below we look at some of the key employment and immigration issues on the HR agenda this autumn:

- **Gender pay gap reporting:** UK employers with 250 or more employees are now required to publish figures annually to show the gender pay gap in their workforce. With the first reports due by 4 April 2018, in scope employers who have not yet reported should use the coming months to finalise the figures and the narrative around them.

- **General data protection regulation:** The EU General Data Protection Regulation (GDPR) comes into force in the UK on 25 May 2018. The GDPR will make significant changes to HR practices in relation to the collection and processing of employee personal data. Employers should therefore use the autumn/winter to audit their current practices and ensure compliance with the new GDPR requirements from day one of implementation.

- **Employment status:** Employment status issues continue to make headlines, with a growing number of individuals successfully claiming "worker" rights. Reform in this area is likely following the recommendations of the Taylor Report (see below). It is also an area of focus for HMRC. Employers who have not already done so may wish to review the different types of workers they engage – including casuals, zero-hours workers, agency staff, freelancers and self-employed contractors – to assess whether they have been appropriately classified.

- **Brexit:** As the negotiations for Brexit unfold, employers should keep an eye on developments, particularly in relation to the status of EU nationals currently living and working in the UK, as well as what visa arrangements might be put in place post-Brexit (see below). Employers may wish to review the support currently being offered for EU staff and what might be needed in future.

- **Senior Managers & Certification Regime:** The Senior Managers & Certification Regime (SMCR) is being extended to all FCA-regulated firms. The FCA has published two consultation papers on its proposals

for the extension. Financial services employers should now consider how the SMCR will apply to them and start preparing for implementation, likely to be in the second half of 2018.

We are working with a number of clients on various projects in these areas. If you would like to discuss the impact of any of these issues on your business, please get in touch with your usual Employment Department contact.

In the News

Executive pay and employees on boards

Listed companies will be required to publish the ratio of pay between CEOs and average workers, under plans unveiled by the Government. Employees will also need to be given a stronger voice at board level. The reforms, which are part of a package to strengthen corporate governance, are expected to come into force by June 2018.

In 2016, the Government published a green paper on corporate governance reform. The Government has now published its response, along with a number of proposals aimed at curbing excessive pay for executives and ensuring the interests of employees and shareholders are better represented. Key proposals include:

"Listed companies will be required to publish the ratio of pay between CEOs and average workers..."

- requiring all quoted companies to publish annually the pay ratio between CEOs and average workers, along with a narrative putting the ratio in context and explaining any changes year to year
- requiring premium listed companies to give employees a stronger voice at board level by choosing one of three mechanisms: a non-executive director designated to represent the workforce; a formal employee advisory council; or a director appointed directly from the workforce
- introducing a new public register to "name and shame" listed companies where at least 20 percent of shareholders have objected to executive pay packages, and
- requiring all private and public companies of a "significant size" (likely 1000 employees) to explain how their directors take employees' and shareholders' interests into account in exercising their functions (as required under the Companies Act 2006).

While the reforms largely target publicly listed companies, the Government will also look to develop a set of voluntary corporate governance principles for large private companies and require them to disclose what arrangements they have in place for corporate governance.

The changes are expected to be introduced by June 2018, to apply to company reporting years commencing on or after that date.

Employment Tribunal fees

Employees no longer have to pay a fee to bring an Employment Tribunal claim, following a decision by the Supreme Court that the Tribunal fee regime is unlawful.

Employment Tribunal fees were originally introduced in 2013 and led to a sharp drop in the number of Tribunal claims. However, Unison (the trade union) claimed that the fees prevented access to justice and were discriminatory against women, who are more likely to bring a discrimination claim (which attracted a higher level of fees). The Supreme Court agreed, and held that the fee regime should be abolished as of 26 July 2017.

All fees previously paid by employees to bring claims must now be reimbursed and the Government will announce shortly how employees can go about claiming the reimbursement. All employees who previously had their case rejected or dismissed for failure to pay fees will also be able to apply to have their case reinstated. One employee has succeeded already in having her case reinstated, after her claims of disability and age discrimination were rejected for failure to pay the fee. The employee had brought the claims within the relevant time limit and had originally sought a fee remission but was denied. An Employment Tribunal has ruled that the time limit should now be extended in the light of the Supreme Court's ruling (*Dhami v Tesco Stores Limited*).

What is not clear is whether an employee who took no steps to file a claim or apply for a fee remission within the relevant time limit would now be allowed to bring a claim. Arguably an employee would have an uphill struggle in these circumstances but we will have to wait and see how Tribunals approach this.

Following the end of fees, it seems likely that the number of new Tribunal claims being brought will now increase. The increased likelihood of a claim may also, in some situations, affect how exit negotiations are carried out.

"Following the end of fees, it seems likely that the number of new Tribunal claims being brought will now increase."

Immigration Radar

Brexit – update on EU nationals

A "leaked" document outlines the Government's draft plans for EU immigration after Brexit. The document repeats earlier proposals about the status of EU nationals living and working in the UK. However, it also provides some new detail around EU nationals coming to the UK after Brexit. Some of the proposals include:

- EU nationals coming to the UK after Brexit will need to obtain a work visa under a new regime, which will require them to have a job offer
- work visas for low-skilled workers would be limited to two years in length and there could be a cap on the number of low-skilled visas available
- work visas for highly-skilled workers would be available for three to five years in length
- low-skilled workers would not be able to settle permanently in the UK but highly-skilled workers may be able to do so, and
- a resident labour market test may apply to visas for EU nationals.

The Government is yet to publish its official plans, so the proposals may well change. They are also subject to negotiation with the EU. **Employment Update** will report developments.

Separately, the Government's independent advisor on immigration, the Migration Advisory Committee (MAC), is seeking views from employers and other stakeholders on the impact of Brexit on the UK workforce. Evidence is sought on issues such as the types of roles EU workers perform, what effect a reduction in EU migration would have on different sectors and whether the EU referendum has already had an impact on the employment of EU nationals. Employers wishing to respond can do so directly or through their relevant industry body. Evidence must be submitted by 27 October 2017. A copy of the consultation document, including details of how to respond, can be found here.

It is expected that the MAC's final recommendations will help shape the Government's final post-Brexit immigration policy.

Case Watch

Suspension – is it justified?

The employee in this case was a primary school teacher. Allegations were made that she had used unreasonable force on three occasions on a child with behavioural difficulties, including dragging the child out of the classroom. The Head Teacher looked into two of these incidents and found that reasonable force had been used. Despite this, the employee was suspended to allow an investigation to be conducted fairly. The employee resigned and claimed constructive dismissal. She argued that suspension was a breach of the implied duty of trust and confidence as it was not reasonable or necessary in the circumstances.

The High Court ruled that the suspension was unjustified. There had been no attempt to get the employee's or the Head Teacher's version of events prior to suspension and there was no consideration of alternatives to suspension. Also, the stated purpose of the suspension was to allow a fair investigation to be conducted (not child protection) but no explanation was given as to why suspension was necessary for this. Suspension had been adopted as the "default" position which was a breach of the implied term of trust and confidence.

"... employers should avoid suspension as an automatic response whenever there is an allegation of misconduct..."

This case highlights that employers should avoid suspension as an automatic response whenever there is an allegation of misconduct. Such a "knee-jerk" reaction could be a breach of the implied duty of trust and confidence and lead to a constructive dismissal claim. Instead, the employer should carefully consider whether suspension is justified and be clear about why this is the case – for example, where there is a risk to the safety of other employees or a risk of interference with witnesses or evidence. As this case shows, once the employer has "nailed its colours to the mast" on the reasons for any suspension, it will be different to change the rationale later. In this case, the employer originally said the suspension was to ensure a fair investigation, which prevented it from later trying to persuade the Court that the suspension was justified on child protection grounds.

AGOREYO V LONDON BOROUGH OF LAMBETH

Non-competes – when are they enforceable?

The employee in this case worked for a global executive search firm. She was recruited initially as a consultant but was later promoted to partner. She subsequently resigned to join a competitor in the US. Her employment contract contained a post-termination non-compete, which prevented her from being "concerned or interested" in any competitor for six months after the end of her employment. The employer sought an injunction to enforce the non-compete but the employee argued it was too wide to be enforceable.

The High Court granted the injunction but, on appeal, the Court of Appeal ruled that the non-compete was too wide. The Court said that the words to "be concerned or interested in" a competitor prevented the employee from having even a minor shareholding in a competitor for investment purposes. The Court also said these words could not be removed from the non-compete to narrow it. The non-compete was, therefore, too wide to be enforceable.

This case underlines the need for very careful drafting with post-termination restrictions. Courts will only enforce such restrictions if they go no further than is reasonably necessary to protect the employer's legitimate interests (eg confidential information or client connections). A restriction which goes too far will be unenforceable and, except in very limited

circumstances, courts will not reduce the scope to make it enforceable – they will generally strike out the entire covenant.

As this case shows, a court can strike down a covenant even if it is only "theoretically" too broad. Here, the reason the non-compete was too broad was that it prevented the employee from holding shares in a competitor even as a personal investment. However, there was no question that the employee was going to be actively involved in the competitor and the non-compete would have been enforceable if that was all it covered. It is, therefore, usually advisable to include an express carve-out that allows the employee to hold shares in a competitor by way of personal investment.

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Holiday pay and voluntary overtime

The employees in this case worked for a council carrying out housing repairs. Fifty-six employees claimed that they were not receiving the correct holiday pay because certain additional payments for voluntary overtime, standby allowances and callout payments were not factored in. The cases of five employees were heard as representative claims. The five each worked differing amounts of voluntary overtime, with one working an extra day of overtime voluntarily every week and another working overtime very rarely. They all participated in a voluntary standby rota – typically for one week in every four or five weeks – for which they received standby and callout allowances. They claimed that, when on holiday, they should have received an amount in respect of voluntary overtime, voluntary standby allowances and voluntary callout payments in addition to their basic salary.

"...regular voluntary overtime payments should be included in the calculation of statutory holiday pay."

The employees won their claim. The Employment Appeal Tribunal ruled that, under EU law, workers should be paid their normal or average remuneration when they take holiday, so they do not suffer any financial disadvantage. The overtime payments formed part of the employees' normal pay here because, even though overtime was voluntary, it was worked regularly. Their holiday pay should, therefore, have included an element for voluntary overtime (apart from one of the employees who very rarely worked overtime). The same was true for the standby and callout payments, which also formed part of normal pay.

The case confirms that regular voluntary overtime payments should be included in the calculation of statutory holiday pay. This is consistent with other recent rulings which suggest that regular additional payments should be included. With overtime, the question is not whether the overtime is voluntary or contractual, but rather whether it is regularly worked. Where overtime is regularly worked, overtime pay forms part of the worker's normal pay and should therefore be included in holiday pay. Strictly speaking, the principle applies only to the first 20 days of statutory annual leave each year (ie the minimum guaranteed by EU law). Employers are free to adopt a different approach to the additional eight days' statutory holiday in the UK and any contractual holiday granted in excess of the statutory entitlement.

DUDLEY METROPOLITAN BOROUGH COUNCIL V WILLETTS AND OTHERS

New Law

Increase in discrimination compensation

Compensation in a successful discrimination claim is made up of two elements – the employee's financial loss and injury to the employee's feelings. While both elements are uncapped, the Court of Appeal has set guideline

bands for the amount of compensation that should be awarded for the injury to feelings element, based on the severity of the discrimination or harassment. Those bands have recently been up-rated to reflect increases in RPI and to ensure consistency with compensation in other civil claims. The new bands, which apply to claims issued on or after 11 September 2017, are:

- £800 to £8,400 for less serious cases, such as a one-off incident of harassment
- £8,400 to £25,200 for more serious cases
- £25,200 to £42,000 for the most serious cases, such as a lengthy campaign of harassment (although compensation for injury to feelings could exceed £42,000 in the most exceptional cases).

These bands will be revised every April in line with RPI from 2018 onwards.

Consultation

Extension of SMCR

The Financial Conduct Authority has published two consultation papers on its proposals to extend the Senior Managers & Certification Regime (SMCR) to all FCA-regulated firms that are currently subject to the approved person's regime. The extended SMCR will apply from sometime in 2018 (likely to be the second half of 2018). The SMCR was originally introduced in March 2016 for banks and insurers and is designed to introduce greater individual accountability in the financial services industry, in the wake of high profile governance failures at major financial institutions. The FCA's proposal for the extended regime is to have three categories of firms – core, enhanced and limited scope – with slightly different requirements to reflect the different size, structure and activities of firms. The consultation is open until 3 November 2017. In scope firms may consider engaging with trade associations on their responses to the consultation. In scope firms should also work out their categorisation and begin preparing now for implementation.

"In scope firms should also work out their categorisation and begin preparing now for implementation."

Watch this space

Gig economy and the new face of workers

A cycle courier for Addison Lee has won a claim to be classified as a "worker" rather than a self-employed contractor. This follows a series of successful claims by drivers and riders in the gig economy, including against Uber, CitySprint and Excel.

The Government has now published the results of its independent review into this area, the Taylor Review on Modern Working Practices. The review was commissioned by the Government in 2016 to consider how employment law might keep pace with modern business models, particularly in the gig economy.

The report calls for reform of the law on employment status. One of its key recommendations is around the current "worker" category – ie those who are not employees but provide their services personally and have some basic employment rights. The report recommends renaming this category as "dependent contractors" and widening its scope so that more people would be entitled to basic employment rights like national minimum wage, paid statutory holiday and sick pay.

"The Government has now published the results of its independent review into this area..."

Other key recommendations include:

- giving individuals a right to obtain a ruling on their employment status from an Employment Tribunal
- aligning the employment status tests for tax and employment law purposes, so that employees and dependent contractors would be subject to income tax and NICs
- retaining the use of zero-hours contracts (despite calls for them to be banned) but considering a higher minimum wage for zero-hours workers and giving them a right to request fixed hours, and
- allowing employers in the gig economy to pay dependent contractors either the national minimum wage for hours worked or a "fair rate" per task (which is at least 1.2 times the rate per task that would allow a worker of average speed to earn the national minimum wage).

The report, which can be found here, also contains recommendations around holiday pay, statutory sick pay and protections for agency workers.

Prime Minister Theresa May has welcomed the report and it is now for the Government to consider how to implement its recommendations, which is likely to take some time.

Our Work

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

- successfully defending an unfair dismissal claim brought by an employee claiming the dismissal was unfair generally and also because he had blown the whistle
- advising a client in relation to the election of Special Negotiating Body representatives (both in the UK and 11 other European jurisdictions) for the purposes of negotiating the framework for a European Works Council
- advising on the employment aspects of a business acquisition by way of a TUPE transfer and the collective consultation of 100+ employees by the transferor in the pre-transfer period
- advising a client on the departure of its incumbent Managing Director and on the employment and immigration aspects of recruiting his replacement from abroad, including the immigration rules around business visits and a Tier 2 General visa
- advising on the off payroll IR35 rules in relation to contractors in the public sector, and
- reviewing and drafting standard terms and conditions for the engagement of recruitment agencies supplying permanent hires and temporary workers.

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

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