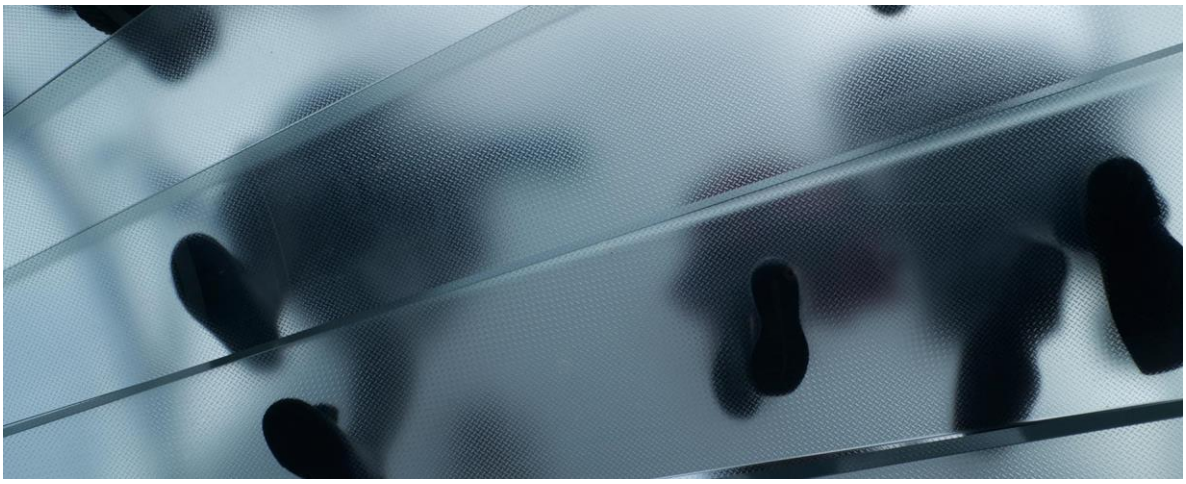

July 2017

Employment Update

Key employment and business immigration developments for employers

In the News

Equal pay for fathers?

A father has won a sex discrimination claim against his employer after it failed to offer full pay for shared parental leave to match the pay offered by the employer for mothers taking maternity leave.

The employee, Mr Ali, had taken two weeks of paid paternity leave and two weeks of paid holiday when his daughter was born prematurely. He wanted to take more time off after his wife was diagnosed with postnatal depression and doctors advised her to return to work. Mr Ali was told that he could take shared parental leave but this would be at the statutory rate only, so he decided not to apply. The Employment Tribunal ruled this amounted to direct sex discrimination because the employer's policy offered 14 weeks' full pay for women on maternity leave (*Ali v Capita Customer Management*).

The ruling may seem worrying for employers: many employers offer enhanced pay for mothers on maternity leave but statutory pay only (or a shorter period of enhanced pay) for employees on shared parental leave. However, the ruling is not the final word on the matter. Another Employment Tribunal reached the opposition conclusion in a different case on the same issue (*Hextall v Chief Constable of Leicestershire Police*). Both decisions have been appealed and it is hoped the Employment Appeal Tribunal will provide some clarity. It is arguable that offering enhanced pay for maternity leave but not shared parental leave is indirect, rather than direct, sex discrimination, because both women and men can take shared parental leave. This would mean employers could then potentially justify the difference in treatment on the basis of aims such as the need to recruit and retain female employees or the desire to protect the mother/child bond in the early weeks of maternity. Employers may, therefore, wish to hold off changing policies until the outcome of the appeals is known. Employers should also ensure they have good reasons for any policy of extending maternity pay and not shared parental pay, which are backed up with evidence where possible.

"Employers may, therefore, wish to hold off changing policies until the outcome of the appeals is known."

Immigration Radar

Brexit – Update on EU nationals

The Government has announced its proposals for protecting EU nationals living in the UK on Brexit. The proposals provide some certainty for employers but also raise questions which are unlikely to be answered until negotiations on the issue are well advanced or even concluded.

The Government has confirmed that EU nationals who have lived in the UK before a designated "cut-off date" will be protected. However, the cut-off date has not been set – it is subject to negotiation and will be anytime between 29 March 2017 (the date Article 50 was triggered) and 29 March 2019 (the date the UK will leave the EU).

"...EU nationals who have lived in the UK before a designated "cut-off date" will be protected."

The Government proposes that:

- EU nationals who have lived in the UK continuously for five years as at the cut-off date will be able to apply for a new "settled status" which would give them a permanent right to live and work in the UK
- EU nationals who arrived prior to the cut-off date, but who will not have been in the UK for five years on Brexit, will be able to apply to stay until they reach the five years required to apply for settled status, and then apply for "settled status"
- EU nationals who come to the UK between the cut-off date and Brexit (if these are different) would be allowed to stay for a grace period after Brexit but would then have to apply under a new regime, which will apply to all EU nationals coming to the UK after Brexit. There are no details at this stage of what the new regime will look like.

The proposals are made on the basis that the same rights would apply to UK nationals living and working in other EU countries.

Under the Government proposals, all EU nationals, regardless of when they came to the UK, will have to apply for a new form of immigration status document. To avoid a bottleneck, the Government proposes there would be a grace period of up to two years from Brexit for such applications to be made, and also proposes to open up the new application process in 2018 for those wishing to apply early.

It is also proposed that EU nationals who have already applied for, and obtained proof of, their permanent residence status under the current rules would have to re-apply for "settled status". However, it is suggested such applications would be more streamlined, so it is still worth considering applying now.

We are currently working with a number of employers to offer various levels of support to their EU staff in preparation for the changes, including:

- presentations and/or surgeries to inform EU staff of developments and provide guidance and reassurance on available options, and
- providing specific advice and assistance with applications for EU residence documentation under the current rules.

If you would like to discuss the impact of the Government's proposals on your business, please speak to your normal Employment Department contact or our business immigration specialist, Moji Oyediran (moji.oyediran@traverssmith.com).

Case Watch

Non-compete – time to refresh?

The employee in this case worked for a global executive search firm. She was recruited initially as a consultant but with the expectation she would be promoted. She was seen as a "considerable prize" for the firm and her starting salary and bonus were higher than other consultants. She was subject to a non-compete, which prevented her from competing with any part of the business that she had been materially involved in for six months after the end of her employment. There was no geographical limit so, in theory, the non-compete could have applied anywhere in the world. The employee was promoted to principal faster than usual, and then quickly to partner, but did not sign a new contract on either promotion. She subsequently resigned to join a competitor in the US. The employer sought an injunction to enforce the non-compete but the employee argued it was too wide in its scope to be enforceable.

The High Court ruled that the non-compete was enforceable. The Court emphasised that the non-compete had to be judged at the time the employment contract was entered into. Here, the employee was a consultant when she entered the contract. Although a six-month non-compete would normally have been too long for a consultant, it was appropriate here given the expectation of promotion and the fact that the employee had more access to clients and confidential information than other consultants. Also, it did not matter that there was no express geographical limitation in the non-compete. The clause prevented the employee from competing only in those areas in which she had been materially involved in the firm's business, which created an in-built geographical limit.

"...it will usually be much safer for employers to take a fresh look at covenants on promotion..."

This case is a helpful reminder that post-termination restrictive covenants are judged at the time they are entered into, not at the time they are enforced. It was fortunate here that the employer could show there was a clear expectation of promotion from the outset. However, it will usually be much safer for employers to take a fresh look at covenants on promotion and either require the employee to enter into fresh covenants or restate existing covenants if they are considered still appropriate. Alternatively, where there is a clear expectation of promotion from the outset, employers should consider drafting covenants to reflect this.

EGON ZEHNDER LTD V TILLMAN

Gross negligence – is dismissal justified?

The employee in this case was a senior regional manager for Sainsbury's. The company operates a survey for assessing employee engagement and the integrity of the process is critical, as it affects performance progression, targets and decisions about pay. In an effort to manipulate the results, the employee's HR Partner sent an email to certain store managers encouraging them to choose the most enthusiastic colleagues to complete the survey. When the senior regional manager discovered this, he told the HR Partner to clarify what he meant but failed to ensure the HR Partner did this. The senior regional manager did not contact the store managers directly or alert senior management. The senior regional manager was dismissed without notice for gross misconduct due to his gross negligence. He argued that his conduct could not amount to gross misconduct as he had not acted dishonestly or wilfully and also because he had an unblemished prior record.

The High Court and the Court of Appeal ruled that the company was entitled to dismiss for gross misconduct. The senior regional manager had direct responsibility for ensuring the successful implementation of the employee engagement procedure, which was a core part of the employer's operating process and philosophy. Once he knew the integrity of the procedure had been undermined, it was his duty to remedy it. His failure to do so undermined the trust and confidence in the employment relationship.

This case confirms that an employee's negligent failure to act can, in some circumstances, constitute gross misconduct and justify summary dismissal. However, the employer would need to be satisfied that the failure to act is sufficiently serious. This would usually only be the case where the employee is a senior manager or has clear responsibility for a particular matter, the employee is made aware of the seriousness of the matter and the failure has the potential to cause significant harm to the employer's business. In this case, the employee was a very senior manager with particular responsibility for ensuring the integrity of a process which was regarded as critical to the employer's business.

ADESOKAN V SAINSBURY'S SUPERMARKETS LTD

Redundancy during sickness absence

The employee was a branch manager for an engineering services company. The company was struggling with profitability and, from 2012 onwards, was on the lookout for cost savings. In the summer of 2014, the employee developed renal cancer and was off work from October to December 2014. While he was absent, the employer identified the possibility of restructuring the business to make the employee's role redundant to achieve significant savings. Following a consultation in March 2015, the employee was made redundant in April 2015. The employee brought claims of unfair dismissal and disability discrimination, arguing he had been made redundant because of his absence, which was related to his disability.

"Employers should therefore exercise great caution when making redundancies against a background of disability-related absence."

The Employment Tribunal and the Employment Appeal Tribunal rejected the claims. It ruled that neither the employee's illness nor his absence was the cause of his redundancy. The employer was already on the lookout for cost savings and, although the employee's absence helped it identify that it could manage without him, the employer might have identified this in other ways.

This case is helpful but only up to a point. It shows that it is not impossible to make an employee redundant following a period of sickness absence but it would only be safe to do so where the absence plays no part in the decision to dismiss. In contrast, where the employer realises it can manage without a particular employee only after a period of extended sickness absence, making the employee redundant would normally amount to disability-related discrimination. Employers should therefore exercise great caution when making redundancies against a background of disability-related absence. The same is true where there has been a period of maternity leave which leads to a conclusion that the employee is no longer needed. Dismissal in these circumstances will usually constitute discrimination on the grounds of sex or maternity.

CHARLESWORTH V DRANSFIELDS ENGINEERING SERVICES LTD

New Law

Data protection – new requirements

On 25 May 2018, the EU General Data Protection Regulation (GDPR) will come into force in the UK. The GDPR will make significant changes to data protection affecting HR practices. The Government has confirmed that, despite the UK leaving the EU, it plans to implement the GDPR in the UK through new legislation to replace existing data protection law.

"The GDPR will make significant changes to data protection affecting HR practices."

The key HR areas affected include:

- **Employment contracts:** Most employment contracts contain provisions where employees consent to the employer processing their personal data. The GDPR imposes stricter requirements for consent, including that it must be specific and freely given. More importantly, the Information Commissioner's Office (ICO) has produced draft guidance suggesting that employers should avoid relying on consent to process employee data because of the imbalance of power in the employment relationship, which means consent is unlikely to be freely given. Employers should, therefore, review employment contracts, policies and handbooks to consider removing references to consent going forward. Employers should also consider on what other grounds employee data can be processed.

- **Handbooks, policies and privacy notices:** The GDPR also imposes more onerous requirements on employers to notify employees what personal data is processed, how it is being processed and what employees' rights are in relation to their data. Employers should consider how this information will be communicated to employees and whether existing handbooks, policies, contracts or privacy notices will need updating.

- **Subject access requests:** The rules on "subject access requests" – an employee's right to see all data held on them – are also changing. Under the new rules, employers will have one month to respond to requests, rather than the current 40-day time limit. The right for employers to charge a £10 processing fee is also being removed in most circumstances. In addition, employers will have to provide more information about the data, including the envisaged period of storage and details of the employee's data protection rights.

- **Transfers of employee data:** Currently, employers can only transfer employee data outside the EEA either with the employee's consent or where certain other arrangements are in place. Under the GDPR, employers will no longer be able to rely on consent when transferring employee data abroad (eg to a parent company or overseas provider of HR services). Employers who rely on consent will therefore need to consider putting in place alternative arrangements for such transfers.

Employers should begin preparing now for the changes, to ensure compliance from day one of implementation. The ICO has published 12 steps for businesses to take to prepare for the changes, which include:

- ensuring that decision-makers and key individuals in the organisation are aware that the law is changing (and the operational and financial costs involved)

- auditing what data is held by the organisation, where it came from, who it is shared with and the legal basis for processing the data

- checking procedures to ensure they cover all the rights individuals have (such as rights to have personal data deleted or provided electronically)

- updating procedures for handling subject access requests, and

- designating a "Data Protection Officer" with responsibility for data protection compliance.

We are working with a number of HR clients to prepare for the GDPR. If you would like to discuss the impact on your business, please speak to your usual Employment Department contact.

Watch this space

Employment status review

As reported previously in **Employment Update**, the Government last year commissioned an Independent Review of Employment Practices in the Modern Economy. The review, led by Matthew Taylor, has now concluded and a report is expected this summer. The report is expected to make a number of recommendations affecting employment law, including that there should be more clarity on employment status. This could lead to new definitions of employee, self-employed individuals and "workers" (who have some employment rights such as the right to national minimum wage, paid holiday and protection for blowing the whistle). **Employment Update** will report developments.

Our Work

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

- advising on a number of team moves
- advising a client on terminating the employment of an individual who had been on long term sickness
- advice around the validity of a strike action notification and ballot from an employer client's recognised union
- advice to a client around the enforceability of post termination restrictive covenants for a departing senior sales executive
- advising a plc client on the restructuring of its executive directors and associated announcement obligations, and
- advising an international client on an internal reorganisation impacting its UK workforce and its employees based in France, Germany and Spain, involving analysis of TUPE and associated information and consultation obligations.

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

Partners: Siân Keall, Tim Gilbert, Ed Mills

Anna West, Adam Rice, Ailie Murray, Moji Oyediran, Adam Wyman, Charmaine Pollock, Alex Fisher, Xabier Reynoso, Will Dixon, Zoë Bristow, Sarah Baker, Katy Matthews

If you have a colleague or a contact in another organisation who would like to receive **Employment Update**, please send contact details to employment@traverssmith.com

10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com