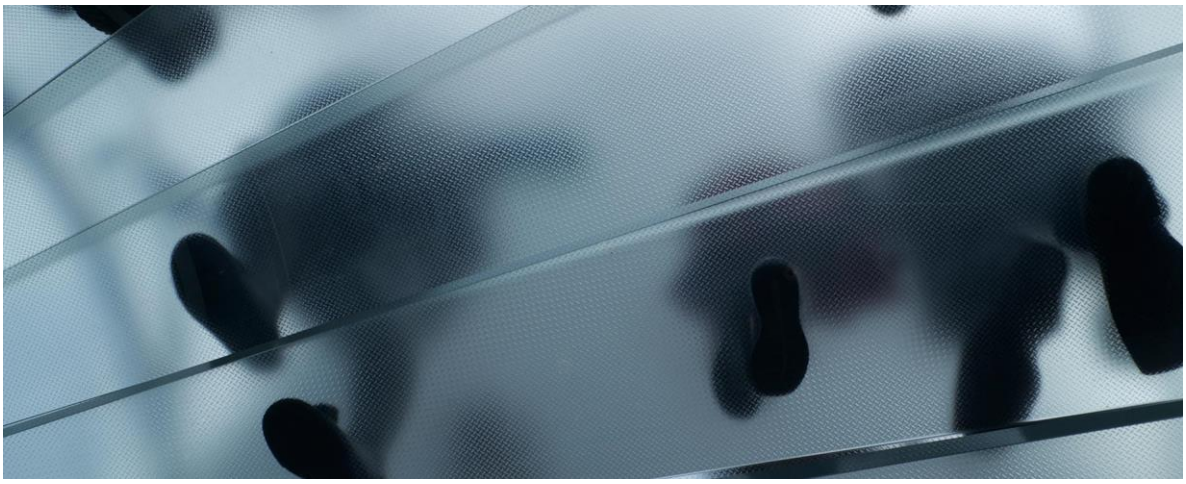

March 2016

Online Update – Essential Information for Employers

In the News

Gender pay gap reporting

The Government has published draft regulations on mandatory gender pay gap reporting. The regulations, which come into force in October 2016, will require employers with at least 250 employees to publish figures on the gender pay gaps within their organisations. The first reports will be required by April 2018, to cover the period ending April 2017.

Under the draft regulations, in scope employers will be required to publish:

- the overall mean (average) and median (mid-point in the data) difference between male and female pay across their workforce
- the mean (average) difference between bonuses and other incentives paid to male and female employees across the workforce
- the proportion of male and female employees who received bonuses and other incentives in the relevant year, and
- the number of men and women who appear in each quartile of pay in the workforce.

" ...employers will be required to publish the overall ... difference between male and female pay across their workforce."

The figures will need to be published on the employer's website annually and left there for at least three years. In scope employers will also be required to submit evidence of compliance each year to a government-sponsored website.

Whilst not a requirement, many employers will want to include a narrative along with the figures, to provide some context, and the Government plans to allow this.

Employers who fail to report may be 'named and shamed' but there are no proposals at this stage for civil or criminal penalties to apply.

In the light of the announcement, in scope employers should begin looking at their pay data to see what information is available. This also gives an opportunity to seek to address any issues before being made public. Employers may wish to consider involving internal or external lawyers so that the analysis is privileged. We are already working with a number of our clients on these projects.

"...employers should begin looking at their pay data to see what information is available."

The Government is seeking views on the draft regulations, which are available here, until 11 March 2016 and employers may wish to provide comments. Travers Smith has also produced a more detailed guidance note on the draft regulations – please speak to your usual Employment Department contact or email employment@traverssmith.com for a copy.

Case Watch

Holiday pay and commission

The employee in this case worked as a sales consultant for British Gas. He received a basic salary plus commission on sales. Commission made up approximately 60% of his overall pay. However, he received basic salary only in respect of holiday periods, when he had no opportunity to earn commission. He claimed that British Gas had breached the Working Time Regulations by failing to pay anything for commission he would otherwise have accrued in respect of work during holiday.

The Employment Tribunal referred the case to the European Court of Justice (ECJ), which decided that, under EU law, holiday pay should include an amount in respect of average commission. The case then returned to the UK Employment Tribunal to determine the position under UK law. The Employment Tribunal ruled that holiday pay for the first 20 days' statutory holiday under UK law should include an element for average commission earned, in line with EU law. British Gas appealed to the Employment Appeal Tribunal (EAT) but the EAT agreed with the Employment Tribunal. The EAT has now confirmed that UK law must be interpreted in line with EU law. Accordingly, where a workers' remuneration includes commission based on sales achieved, holiday pay for the first 20 days' statutory holiday must include an element of average commission.

This case confirms that commission should be included in the calculation of holiday pay. It is consistent with recent cases that suggest that regular additional payments earned by workers, such as overtime and shift allowances, should be included in holiday pay. While there is nothing new in the EAT's decision, there are over 900 cases against British Gas and many thousands of claims against other employers which have been put on hold pending the outcome of this decision. In addition, British Gas has been given permission to appeal the ruling to the Court of Appeal. The issue of holiday pay and commission is, therefore, likely to return to the spotlight in the coming months. **Online Update** *will report developments. In the meantime, for a more detailed Q & A note on holiday pay, commission and overtime, please speak to your usual Employment Department contact.*

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Dealing with disability-related absence

The employee in this case was an administrative officer for the Department for Work and Pensions (DWP). She was diagnosed with post-viral fatigue and fibromyalgia (a condition that leads to pain and fatigue), which the DWP acknowledged was a disability. The DWP's absence management policy provided for a process of escalating warnings that was triggered by eight days' absence in any rolling 12-month period. The employee was absent for 66 days and received a warning under the policy. Although the policy allowed the trigger-point to be extended for disabled employees, no extension was granted in this case. The employee brought a disability discrimination claim arguing that the DWP failed to make reasonable adjustments. She argued that

the DWP should have revoked the warning and adjusted the trigger-point under its absence management policy to 20 days for future absences.

The Employment Tribunal and the Employment Appeal Tribunal initially ruled that there was no duty to make adjustments here, since the absence management policy applied equally to disabled and non-disabled employees. However, on appeal, the Court of Appeal confirmed that the duty to make reasonable adjustments did apply. The Court confirmed that the duty is triggered whenever a policy that is applied across the board puts disabled employees at a disadvantage.

This case confirms that, where the employer has a policy of issuing warnings once a certain level of absence is reached, the duty to make reasonable adjustments applies. Accordingly, employers should avoid rigidly applying the absence management policy to disability-related absences. The particular adjustments required in each case will depend on the nature of the employee's disability, the level of absence and the medical evidence. For example, it may be appropriate in some cases to adjust the 'trigger-points' in the policy to take account of additional absence caused by the employee's disability. However, the employer would need to seek medical advice on what level of absence is expected in the future. Sometimes it may be more appropriate to take the employee outside of the absence management policy altogether and treat the absence as a capability issue, particularly where the absences are likely to be longer. This would involve taking medical advice on the prognosis of the employee's condition and whether any reasonable adjustments can be made, and weighing this against the impact on the workplace before making any decisions about the employee's ongoing employment.

"...employers should avoid rigidly applying the absence management policy to disability-related absences."

GRIFFITHS V SECRETARY OF STATE FOR WORK AND PENSIONS

Can employers enforce English in the workplace?

The employee in this case was Russian. She worked for a research company that carried out animal testing. The company had previously had animal rights activists work undercover to obtain information. The employer suspected the employee was an undercover animal rights activist because she had long conversations in Russian on her mobile phone in the office toilets. Her manager, therefore, instructed her not to speak Russian at work. The employer later discovered that the employee had also been convicted of benefit fraud and invited her to a disciplinary hearing for failing to disclose this. However, the employee resigned before the disciplinary hearing and brought a claim for race discrimination.

The employee lost her claim. The Employment Appeal Tribunal said that an instruction to an employee not to speak their native language could, in principle, amount to direct race discrimination. However, the employer in this case had a reasonable, non-discriminatory explanation for its actions – namely, it had suspected the employee was an undercover animal rights activist.

The facts of this case are fairly unique but it does highlight the potential pitfalls for employers who insist on English being spoken at work. Such a requirement would amount to race discrimination and would only be justified if the employer had good business reasons for it, eg to ensure all communications are understood for health and safety reasons. Even then, a blanket requirement to speak English at all times is unlikely to be justified, as it would stop colleagues having personal conversations in their native language. A policy requiring all work-related conversations to be in English is perhaps more likely to be appropriate.

Difficult issues arise where an English-speaking employee feels excluded when colleagues have conversations in a foreign language. Where an employee raises such concerns, the employer would be justified in taking action. The best way to deal with this would usually be to speak to the individuals concerned informally to highlight the issue and ask them to be sensitive to colleagues who might feel left out. However, employers

should ensure all nationalities are treated consistently. In a recent case, a Polish employee won a discrimination claim when she was told to stop speaking Polish because a colleague felt excluded, but Italian colleagues continued to speak Italian with each other in their breaks without reproach.

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New Law

National Living Wage

On 1 April 2016, the new National Living Wage will come into force. As reported in the September 2015 edition of **Online Update**, the National Living Wage is a compulsory premium added on top of the national minimum wage for all workers aged 25 and over. From 1 April 2016, the relevant minimum wage rates will be:

- £7.20 per hour for workers aged 25 and over (National Living Wage)
- £6.70 per hour for workers aged 21-24 inclusive
- £5.30 per hour for workers aged 18-20 inclusive, and
- £3.87 per hour for workers aged under 18 years.

Employment Tribunal compensation

The annual increase in Employment Tribunal compensation limits will take effect on 6 April 2016. For dismissals taking effect on or after 6 April 2016:

- the maximum compensatory award for unfair dismissal will increase to the lower of £78,962 and a year's pay (currently the limit is the lower of £78,335 and a year's pay) and
- the maximum amount of a week's pay (used for calculating, for example, the unfair dismissal basic award and statutory redundancy pay) will increase from £475 to £479 per week.

Whistleblowing

New rules on whistleblowing in the financial services sector begin to come into force in March 2016. The rules are binding on large banks, building societies and credit unions, PRA-designated firms, insurers and re-insurers. However, they will also represent best practice for the financial services industry generally. The rules were developed by the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) in response to recommendations from the Parliamentary Commission on Banking Standards in 2013. Under the new rules, in scope firms are required to:

- put in place internal whistleblowing arrangements and inform staff about them
- appoint a 'whistleblowers' champion' – a senior manager or director with responsibility for overseeing the firm's whistleblowing policies and procedures, who must prepare an annual report to the board
- include provisions in new employment contracts and settlement agreements which clarify that nothing in the agreement prevents the employee from making a protected disclosure

"Employers in the financial services sector may wish to consider complying with the new rules as a matter of best practice..."

- establish and maintain an independent whistleblowing channel through which concerns can be disclosed
- take whistleblowing disclosures from any person, not just employees (including agency workers, contractors, suppliers, self-employed consultants and non-executive directors)
- tell employees how they can blow the whistle to the PRA or the FCA, and
- notify the PRA or the FCA of any successful whistleblowing claims against the firm.

In scope firms will have until 7 September 2016 to comply, although firms should have appointed a whistleblowers' champion by 7 March 2016. Employers in the financial services sector may wish to consider complying with the new rules as a matter of best practice, even if they are not in scope.

Modern slavery reporting

Organisations with an annual turnover of at least £36 million will soon have a duty to publish an annual statement on modern slavery and human trafficking. The statement must explain the steps taken to ensure there is no slavery or human trafficking within the organisation or its supply chain. Employers caught by the new reporting requirement must publish the statement in respect of financial years ending on or after 31 March 2016, and will have six months from the end of the relevant financial year to publish. Please see the September 2015 edition of **Online Update** for further details.

"Employers caught by the new reporting requirement must publish the statement in respect of financial years ending on or after 31 March 2016..."

Consultation

Pensions automatic enrolment

The Government is proposing to make some new exceptions from employers' duties to enrol (and re-enrol) workers automatically into a pension scheme. The relevant exceptions would relate to company directors and LLP members:

- **Directors:** Currently, companies have to enrol directors who are also employees of the company, if there is also at least one other employee of the company. However, the Government wants to make an exception for directors of director-only-companies where two or more directors have contracts of employment. It is also considering making an exception for all directors.
- **LLP members:** Currently, there is no exception for LLP members but the way many are remunerated means they do not have "qualifying earnings" and so do not have to be enrolled. The Government is proposing to exempt "genuine partners" – ie LLP members who are not treated as employees or "salaried members" for income tax purposes.

A public consultation over the proposals ran during February 2016 and the Government's response is awaited. The Government had indicated the changes would take effect from April 2016.

Even if directors and LLP members become exempt from enrolment, employers would still have to tell them about their rights to opt-in to an automatic enrolment scheme or join a scheme and have employee contributions deducted.

Watch This Space

New limits on work visas

The Migration Advisory Committee (MAC) has recommended a number of potentially significant changes to Tier 2 of the points-based system. The recommendations follow a review commissioned by the Government to reduce the level of migration from outside the EU. If implemented, key changes would include:

- the minimum salary threshold for all Tier 2 visas would increase from £20,800 to £30,000 per year
- employers would be required to pay a new annual Immigration Skills Charge (ISC) of £1,000 for each individual they employ on a Tier 2 visa
- to qualify for a Tier 2 Intra Company Transfer visa, the individual would need to be employed with the employer abroad for at least two years instead of the current 12 months
- employers would be required to provide a more detailed job description on the sponsorship certificate for Tier 2 Intra Company Transfer migrants to ensure the role is sufficiently specialised, and
- all Tier 2 Intra Company Transfer migrants would need to pay the Immigration Health Surcharge (which currently only applies to Tier 2 General migrants).

"The Migration Advisory Committee (MAC) has recommended a number of potentially significant changes to Tier 2 of the points-based system."

UK Visas and Immigration often follows MAC recommendations but has not yet said whether it will implement some or all of these proposals. **Online Update** will report developments.

Immigration: reminder for sponsors

Employers who are registered sponsors are reminded that their annual allocation of Tier 2 sponsorship certificates will expire on 6 April 2016. Employers who have not already done so should request a renewal of the annual allocation by 5 April 2016 to avoid delays. This is done online via the sponsor management system. When requesting the annual allocation, employers should take into account:

- any potential new hires of non-EU nationals that may be made over the coming year where the base salary will be at least £155,300
- any potential new hires of non-EU nationals over the coming year of individuals who are already working in the UK for another employer
- any existing employees on Tier 2 visas that may be expiring in the coming year, which will need to be extended, and
- any transfers from offices abroad which may need to be made over the coming year under Tier 2 Intra Company Transfer visas.

Our Work

Since the last edition of **Online Update**, our work has included:

- assisting a client with a complex subject access request from an employee, involving questions of privilege and confidentiality
- advising on a large scale, international redundancy process
- running a series of training sessions for managers within a client on key practical areas of employment law
- advising a US client around setting up a UK presence, including issues of immigration and secondment
- advising on the departure and negotiated exit of a board level executive
- advising a financial services client regarding its arrangements with consultants and limited company contractors in the UK and across the rest of EMEA, and
- advising on the performance-based termination of a Managing Director and the associated settlement agreement arrangements.

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

Partners: Siân Keall, Tim Gilbert, Ed Mills

Anna West, Adam Rice, Rebecca Johns, Adam Wyman, Christopher Thomas, Charmaine Pollock, Alex Fisher Xabier Reynoso, James Champness, Will Dixon, David Harford, Zoë Bristow, Sarah Baker

If you have a colleague or a contact in another organisation who would like to receive **Online 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