1 March 2018

ESSENTIAL EMPLOYMENT LAW

HR Seminar 2018

"They are approachable, highly capable individuals who work well as a team."

CHAMBERS & PARTNERS

PROGRAMME

TIME	ACTIVITY
13:30 – 14:00	Registration and refreshments
14:00 – 15:00	**Session 1: Key recent and future employment law developments** Speakers: Amanda Steadman and Sarah Harrop
15:00 – 15:15	Refreshment break
15:15 – 16:00 **Session 2**	**Option A: The GDPR is almost here – what does it mean for HR?** Speaker: Helena Brown **Venue: Auditorium** **Option B: Corporate governance and the role of HR** Speaker: Will Chalk **Venue: Rooms 54-55**
16:00 – 16:15	Refreshment break
16:15 – 17:00	**Session 3: A case study – bringing the latest unfair dismissal developments to life** Speakers: Richard Yeomans, Jessica-Alice Curtis and Isobel Phillips
17:00 – 17:30	**Session 4: Termination payments – are you ready for the new regime?** Speaker: Nicky Griffin
17:30 onwards	**Drinks reception**

ADDLESHAW GODDARD DELEGATES

NAME	DEPARTMENT
Adam Penman	Employee Incentives
Alasdair Simpson	Employment
Amanda Steadman	Employment
Annabel Mackay	Employment
Georgina Callwood	Human Resources
Gun Judge	Human Resources
Hannah Harrison	Employee Incentives
Helena Brown	Commercial
Isobel Phillips	Employment
Jonathan Fletcher-Rogers	Employee Incentives
Jessica-Alice Curtis	Employment
Karl Ashford	Human Resources
Michael Leftley	Employment
Nicky Griffin	Employee Incentives
Richard Yeomans	Employment
Sarah Harrop	Employment
Will Chalk	Corporate Governance

SPEAKER PROFILES

Michael Leftley- Partner and Head of Employment, Incentives and Immigration
020 7788 5079
michael.leftley@addleshawgoddard.com

Michael leads the Firm's Employment, Incentives and Immigration Group. He also sits on the Firm's Governance Board and is a member of its Executive Team. He is a highly experienced employment lawyer with an emphasis on offering practical and pragmatic solutions to the clients he advises. His expertise covers all aspects of contentious and non-contentious employment law but with a focus on resolving issues of strategic or reputational importance.

Michael also has responsibility for managing the Group's client service teams across a diverse range of industry sectors including a number of FTSE 100 companies and global financial institutions.

Michael is a regular commentator on employment issues at business seminars and in the media. He has a Masters in employment law and has lectured on the subject at London School of Economics and Political Science. He is a member of the CBI London Council and sits on the City of London Law Society Employment Committee.

Amanda Steadman – Professional Support Lawyer, Employment
020 7160 3310
amanda.steadman@addleshawgoddard.com

Amanda is responsible for know-how development and training for Addleshaw Goddard's Employment Group and clients. Her role encompasses responsibility for all internal and external training, including devising and delivering training programmes for in-house lawyers, HR and managers within client businesses. Amanda's role also encompasses updating clients on new developments and managing the Group's know-how system and content. Amanda also contributes articles to external publications / websites such as Employer's Law and the Employment Law Alliance. Amanda is also a regular contributor to the CBI's responses to Government consultations on employment law developments.

Prior to joining Addleshaw Goddard, Amanda worked at a top 20 City law firm for 10 years, representing clients in employment disputes in the Employment Tribunal, EAT, Court of Appeal and High Court and providing employment advice on the full range of employment law topics.

Sarah Harrop – Managing Associate, Employment
020 7788 5057
sarah.harrop@addleshawgoddard.com

Sarah advises on all aspects of contentious and non-contentious employment law and leads our business immigration team.

Sarah has extensive experience of advising in relation to significant projects involving TUPE and the collective redundancy obligations, and advising in relation to complex whistleblowing and discrimination Tribunal claims. Sarah leads the Group's Business Immigration team and she advises clients in relation to the whole range of business immigration requirements for employing and engaging non-UK nationals in the UK, along with connected applications for their families.

Helena Brown – Partner and Head of Data Protection
0131 222 9544
helena.brown@addleshawgoddard.com

Helena is Head of the Data Protection team at Addleshaw Goddard and has specialised in data protection, information IT and commercial law for over 15 years. Helena provides support to clients on data across all sectors and is currently leading a number of GDPR compliance projects in the financial services and fintech space, focusing on the unique issues presented by the use of data in financial services and payments.

Helena has extensive experience advising and delivering training to clients in banking and finance, public sector, media, healthcare, sports and charities sector on a full spectrum of data protection matters, including audit and policy implementation, international data transfers, PIAs, security reviews, contractual reviews, consent and database augmentation, subject access and defending Information Commissioner Complaints and investigations.

Helena also specialises in technology procurement and outsourcing, complex commercial contracts and intellectual property protection and exploitation, including database rights in the context of data protection. She is an elected member of the Law Society of Scotland's technology committee, currently leading their guidance on cyber security. She is also a member of Scottish Financial Enterprise, the Society for Computers and Law and the Scottish Charities Finance Group.

Will Chalk – Partner and Head of Corporate Governance
0161 934 6429
will.chalk@addleshawgoddard.com

Will is the Head of the Corporate Governance team as Addleshaw Goddard. Will focuses, and is a regular speaker, on corporate governance, corporate compliance and listed company issues. Will spends a large proportion of his time providing governance and compliance training for, and advice to, directors, general counsel and company secretaries of listed companies. Will was seconded as the acting company secretary of a FTSE 350 telecommunications company. Prior to that he was a corporate finance lawyer specialising in M&A and equity capital markets transactions and spent 18 months on secondment at the UK Listing Authority.

He has contributed to several books including: The Financial Services and Markets Act - A Practical Legal Guide (Sweet & Maxwell) and The Business Case for Corporate Governance (Cambridge University Press) as well as writing A Directors' Guide to The Companies Act 2006 in conjunction with the CBI. He is the editor of our Company Secretary's Checklist – The annual report of a listed company.

Richard Yeomans – Partner, Employment
020 7788 5351
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Richard is an expert in a wide range of employment law issues from senior executive appointments and terminations, large-scale re-organisations/redundancy programmes, Employment Tribunal claims and the employment aspects of corporate transactions (including mergers and acquisitions, outsourcings and restructurings).

Richard provides practical and commercial advice on all employment issues, including those that are complex, strategic and high value. He has had articles published as an employment expert in the national and legal press, contributes to CIPS training and publications and sits on the CBI Employment Law Forum.

Richard is also a member of the Employment Lawyers' Association and European Employment Lawyers Association.

Jessice-Alice Curtis – Associate, Employment
020 7160 3008
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Jessica has experience in a wide range of contentious and non-contentious employment law matters, with a particular focus on the financial services sector. She has worked on whistleblowing and discrimination disputes for numerous investment banks and has advised on senior executive appointments and terminations.

Alongside her employment law practice, Jessica has experience with employee incentives and understands the in-house perspective, having spent six months on secondment in the Global Legal Team at Diageo plc.

Isobel Phillips – Associate, Employment
020 7160 3324
isobel.phillips@addleshawgoddard.com

Isobel has experience across a range of employment law and immigration law matters. Isobel provides practical advice to clients across a range of sectors on issues such as service agreements, terminations and redundancy.

She has worked on contentious matters, including discrimination and victimisation claims, as well as on large-scale data subject access requests. Isobel also works on corporate transactions, with a particular focus on private equity deals. Isobel gained first-hand in-house experience during a six month secondment to an international bank.

In addition to her employment law experience, Isobel is a member of our Immigration team and has assisted with matters across the spectrum of business immigration advice; including sponsorship licences, Tier 2 visa applications and Tier 1 Entrepreneur and Investor visas.

Isobel is a regular author of client briefings as well as articles for external publications such as People Management magazine.

Nicky Griffin – Professional Support Lawyer, Employee Incentives
020 7880 5777
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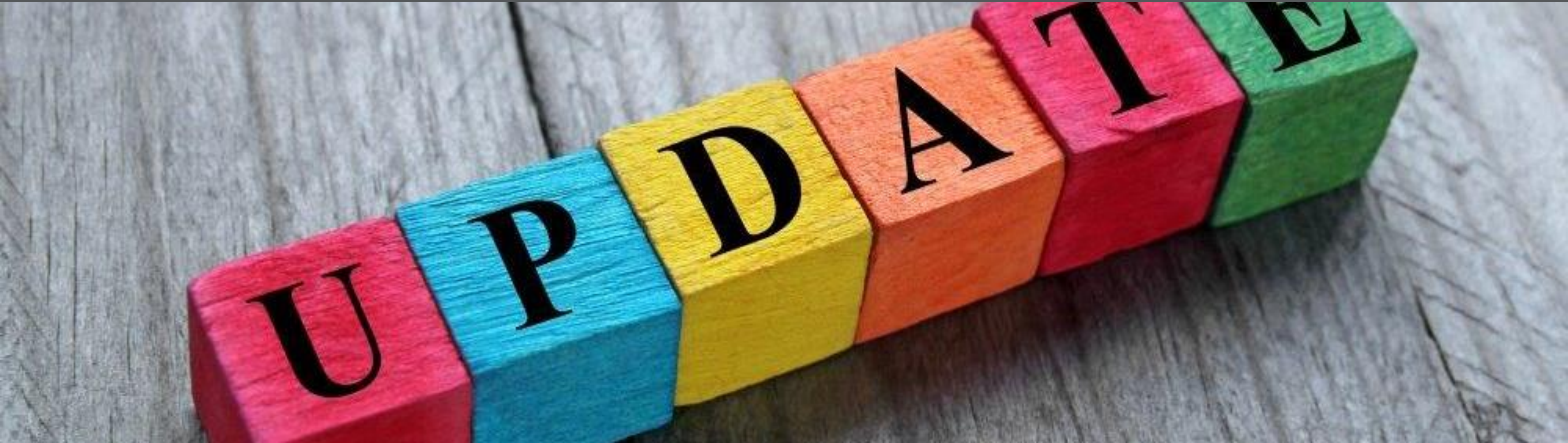
Nicky joined the firm in 2007 as a Professional Support Lawyer.

Prior to that she was a partner and head of the employee share schemes group at West End law firm and was ranked by both major legal directories as a leading lawyer in this area.

She qualified as a solicitor in 1994 and since then has specialised in employee incentives working with a broad range of UK and multinational clients. Nicky works closely with colleagues in our employment team, advising on the taxation of termination payments as well as the consequences of termination on an employee's awards under the employer's share schemes.

KEY RECENT AND FUTURE EMPLOYMENT LAW DEVELOPMENTS

Amanda Steadman, PSL and Sarah Harrop, Managing Associate



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What are we going to cover?

1. Employment status
2. Employment contracts
3. Equality
4. Holiday pay
5. TUPE
6. Whistleblowing
7. What’s on the horizon?

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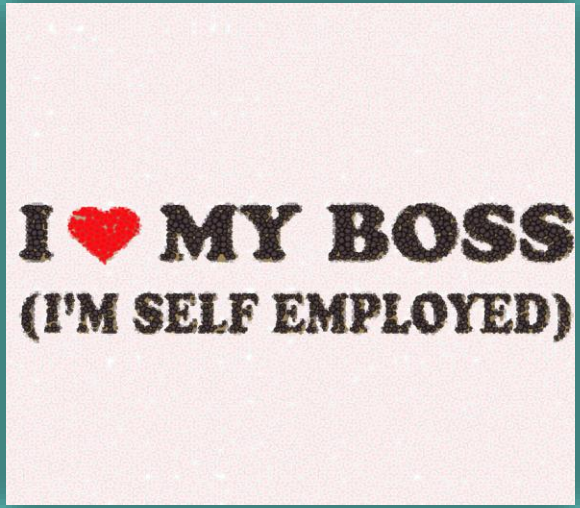

EMPLOYMENT STATUS

Status cases before the Courts and Tribunals

JOB ROLE	CASE	SELF-EMPLOYED	WORKER	EMPLOYEE
Minicab drivers	• Uber BV and ors v Aslam (EAT, 2017) [appealed to CoA] • Lange and ors v Addison Lee (ET, 2017)			
Bicycle couriers	• Dewhurst v CitySprint UK Ltd (ET, 2016) • Gascoigne v Addison Lee (ET, 2017) • Boxer v Excel Group Services Ltd (ET, 2017)			
Plumbers	• Pimlico Plumbers v Smith (CA, 2017) [appealed to SC]			EqA 2010 / ERA 1996
Deliveroo riders	• IWGB v Roo Foods (CAC, 2017)			

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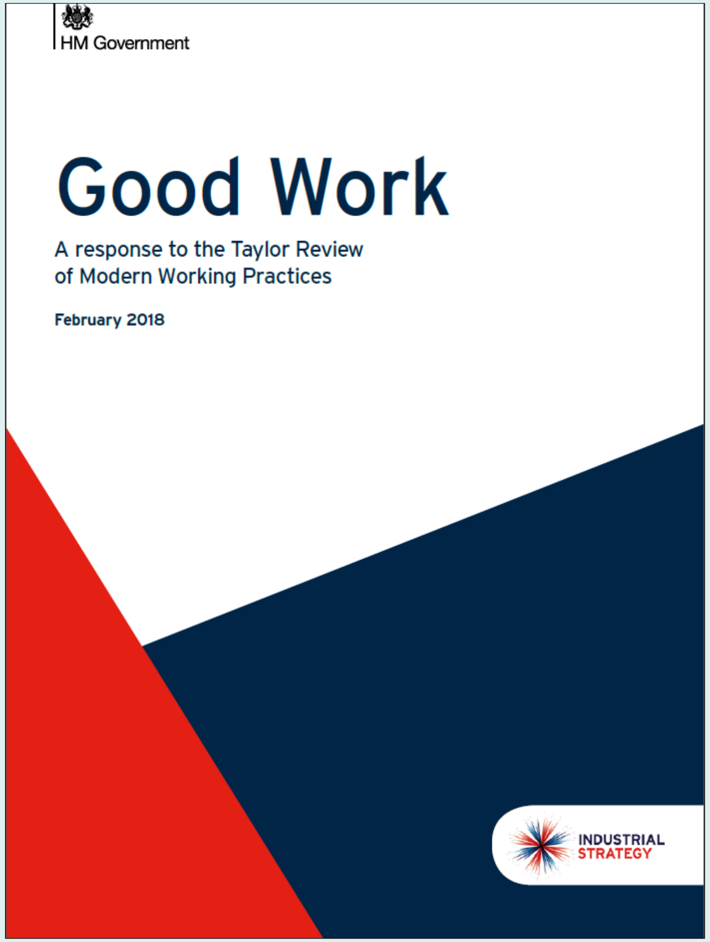
What's on the horizon?



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Proposals affecting employment status

Taylor / Select Committee proposal?	Government approval?	Next steps?
New statutory definitions of different employment statuses and weakening of personal service requirement for workers	?	Under consultation until 1 June 2018
Written statement of particulars to be given to employees and workers within 7 days of starting work	✓	Under consultation until 23 May 2018
Preservation of continuous service where breaks in service of under 1 month (currently, 1 week)	✓	Under consultation until 23 May 2018
Burden of proof on employer in employment status disputes	✗	Rejected for now but will revisit

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EMPLOYMENT CONTRACTS

Watch out for actions that breach the implied contractual term of trust and confidence

Knee-jerk suspensions

- **Before you suspend:**
  - Have you got an express right to suspend?
  - Speak to the employee before deciding to suspend
  - Consider whether there is an alternative to suspension
  - Document the reasons for the suspension – usually needs to be more than just to permit the investigation to take place

Agoreyo v London Borough of Lambeth (HC)

Watch out for actions that breach the implied contractual term of trust and confidence

Rawlinson v Brightside Group Ltd (EAT)

Giving false reasons for dismissal

- **Before you dismiss:**
  - Check whether performance concerns have been communicated to the employee in the past
  - In any event, be transparent and honest with the employee about the reason for dismissal or risk breaching the implied term
  - If you can't give real reason then better to say nothing but be aware that the reason may well surface in future

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When is notice of termination deemed given if the contract is silent?

Newcastle Upon Tyne NHS Foundation Trust v Haywood (CA)

- Contract silent as to how any notices to the other party could be given and deemed received
- Notice of termination had to be given by **26 April** to avoid obligation to pay higher pension

Method of service	Date of receipt	Was it effective to give notice?
By recorded post	Arrived at H's house on 26 April but not seen or read by C until 27 April	• Not effective on date or posting or receipt at house • Effective when H personally took delivery of the letter i.e. 27 April
By email to H's husband's email address	Read by H's husband on 27 April	• Not effective at all as H had not consented to receive communications at husband's email address (or by email at all)

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How can you limit the risk?

1. Identify any “crunch dates” and ensure notice is given in good time to avoid crystallisation of additional right

2. Ideally, serve notice on employee personally

3. Ensure that the employment contract has a thorough notices provision covering:

    - Agreed methods of service (personal service, post, fax, email – which email address?)

    - When service is deemed effective

Post-termination restrictions: non-compete clause was too wide

Tillman v Egon Zehnder (CA)

- 6-month non-compete prohibited being *"interested in"* any competing business
- Did the drafting prevent the employee from having a minor shareholding in competitor?
  - Yes – even minor shareholders are *"interested in"* the company
  - Prohibition meant clause was too wide and was unenforceable

How should you draft your covenants?

- Avoid use of broad terms which may be interpreted widely
- Ensure covenants contain a carve out to allow minimal shareholdings in public companies (and also consider extending to private companies)

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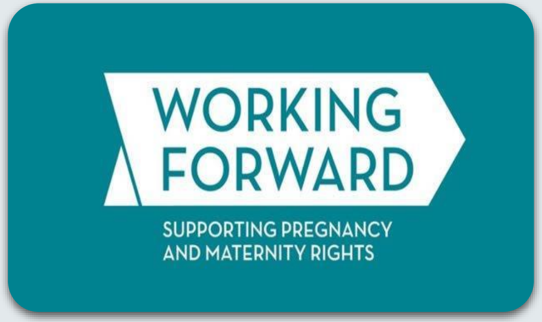
EQUALITY - FAMILY-RELATED DEVELOPMENTS

Expectant and new mothers



Better information and guidance

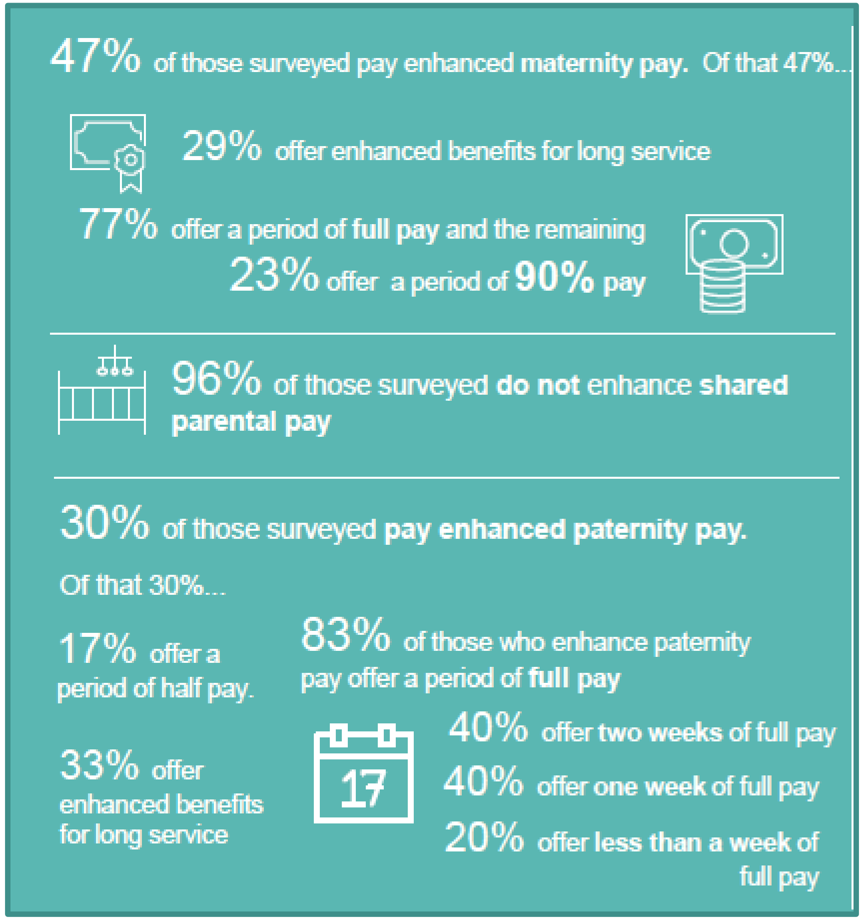
Better protection in redundancy situations?

Expanded flexible working rights?

Risk assessments for breastfeeding mothers

Fathers

- Is it directly discriminatory to pay statutory shared parental pay to fathers and enhanced maternity pay to mothers?
- Conflicting decisions – awaiting EAT judgment
- **What are your options?**
  1. Reduce enhanced maternity pay to statutory rate
  2. Partially reduce enhanced maternity pay and partially uplift statutory shared parental pay to meet in the middle
  3. Uplift shared parental pay to match enhanced maternity pay rate



What’s on the horizon?

2018	2019 and beyond
• **6 April** – Statutory pay rates increase from £140.98 pw to £145.18 pw • **6 April** – Childcare voucher salary sacrifice schemes closed to new entrants but can continue for existing users • **TBC** - Extension of SPL to working grandparents?	• **2019?** - Taylor Review recommendation to extend family leave rights to self-employed • **2020** - Statutory parental bereavement leave and pay

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EQUALITY - PAY ISSUES

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Equal pay: who can an employee use as a comparator?

Asda Stores Limited v Brierley and ors (EAT)

- **Why is it important?**
  - Biggest private sector equal pay claim to date and likely to have ramifications for other employers
  - Female supermarket workers are able to compare themselves to male distribution depot workers at different geographical locations, with separately agreed terms and conditions
  - Whether their work is, in fact, of equal value will be determined at a future hearing

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Gender pay gap reporting: the results so far

Only 11% of employers had reported by mid-February. Will the 89% comply in time?

Large employers reporting early generally reporting favourable results

Large employers reported an average median pay gap of 9% vs. ONS expected gap of 18%

Also true by sector - FS reported average median pay gap of 28% vs. ONS expected gap for this sector of 36%

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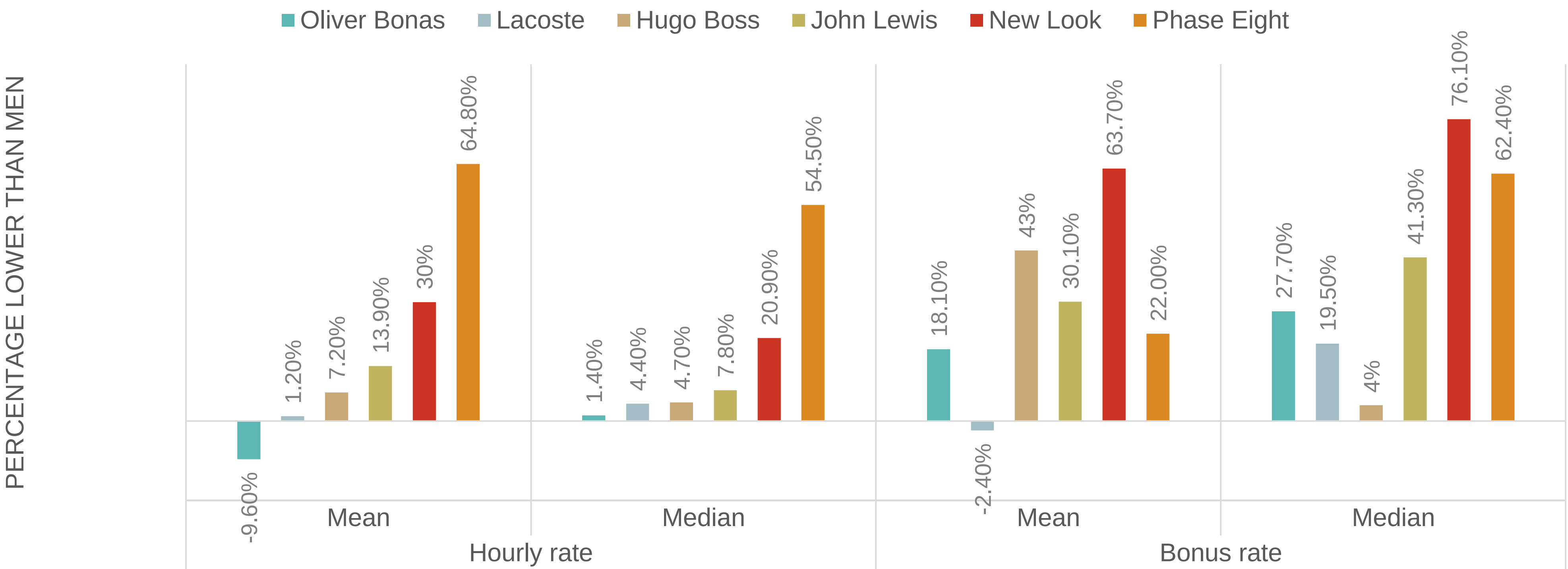
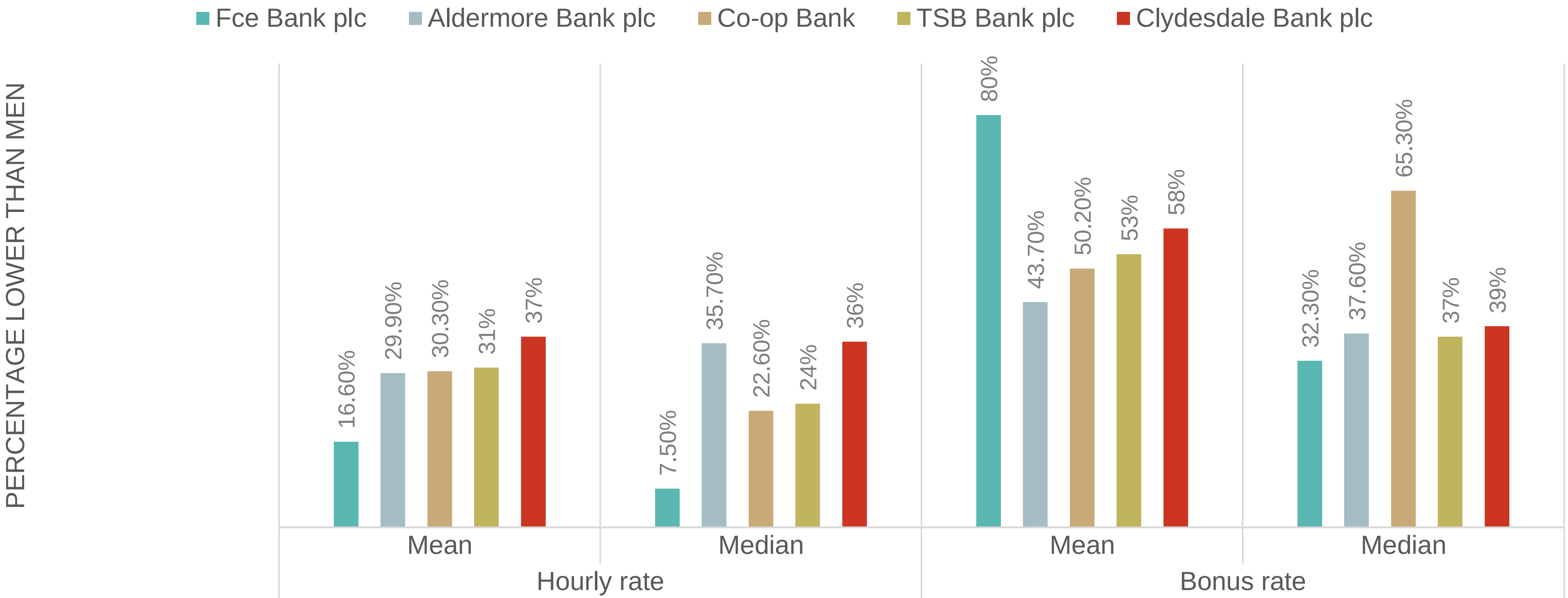
RETAIL



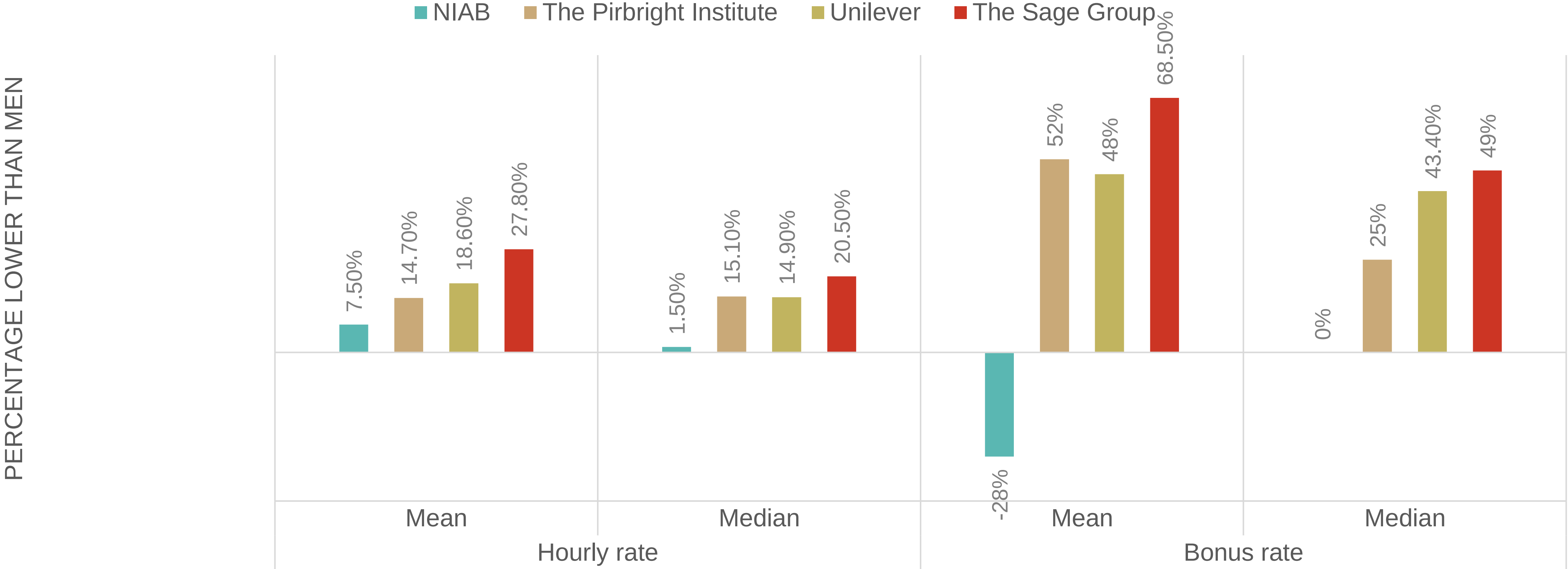
	Hourly rate		Bonus rate	
	Mean	Median	Mean	Median
Oliver Bonas	-9.60%	1.40%	18.10%	27.70%
Lacoste	1.20%	4.40%	-2.40%	19.50%
Hugo Boss	7.20%	4.70%	43%	4%
John Lewis	13.90%	7.80%	30.10%	41.30%
New Look	30%	20.90%	63.70%	76.10%
Phase Eight	64.80%	54.50%	22.00%	62.40%

FINANCIAL SERVICES



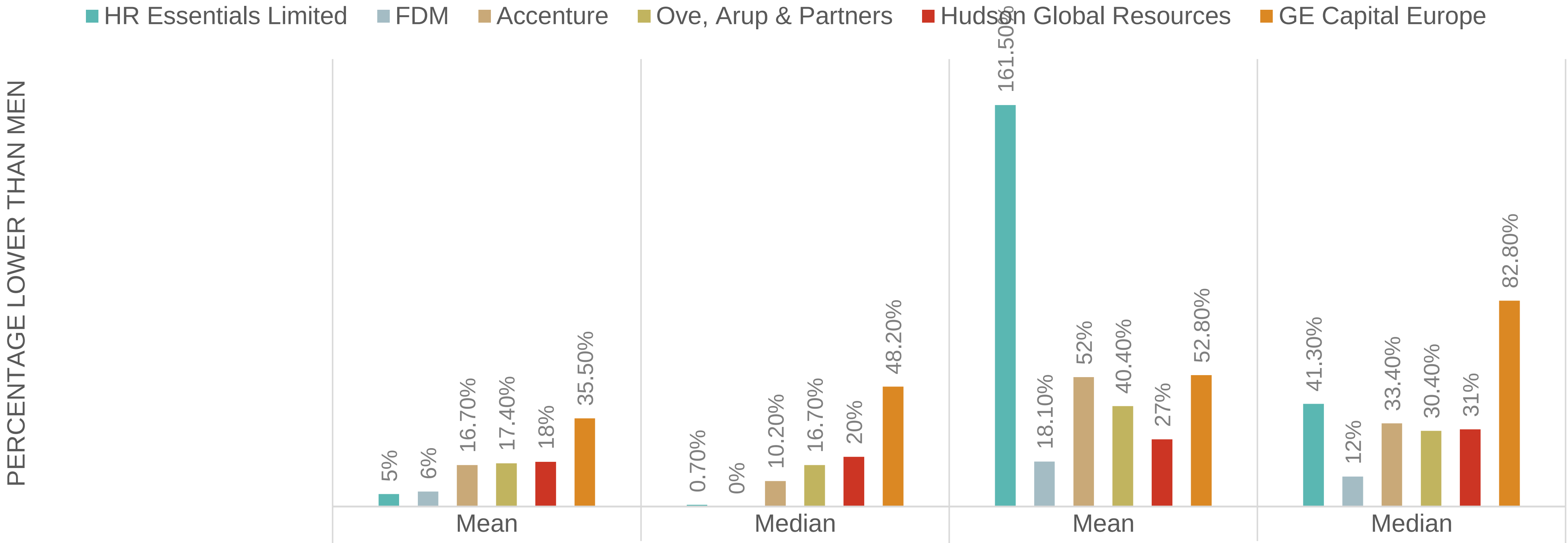
	Hourly rate: Mean	Hourly rate: Median	Bonus rate: Mean	Bonus rate: Median
Fce Bank plc	16.60%	7.50%	80%	32.30%
Aldermore Bank plc	29.90%	35.70%	43.70%	37.60%
Co-op Bank	30.30%	22.60%	50.20%	65.30%
TSB Bank plc	31%	24%	53%	37%
Clydesdale Bank plc	37%	36%	58%	39%

SCIENCE AND TECHNOLOGY



	Hourly rate: Mean	Hourly rate: Median	Bonus rate: Mean	Bonus rate: Median
NIAB	7.50%	1.50%	-28%	0%
The Pirbright Institute	14.70%	15.10%	52%	25%
Unilever	18.60%	14.90%	48%	43.40%
The Sage Group	27.80%	20.50%	68.50%	49%

ADMIN SERVICES (CONSULTANCY/HR)



	Hourly rate: Mean	Hourly rate: Median	Bonus rate: Mean	Bonus rate: Median
HR Essentials Limited	5%	0.70%	161.50%	41.30%
FDM	6%	0%	18.10%	12%
Accenture	16.70%	10.20%	52%	33.40%
Ove, Arup & Partners	17.40%	16.70%	40.40%	30.40%
Hudson Global Resources	18%	20%	27%	31%
GE Capital Europe	35.50%	48.20%	52.80%	82.80%

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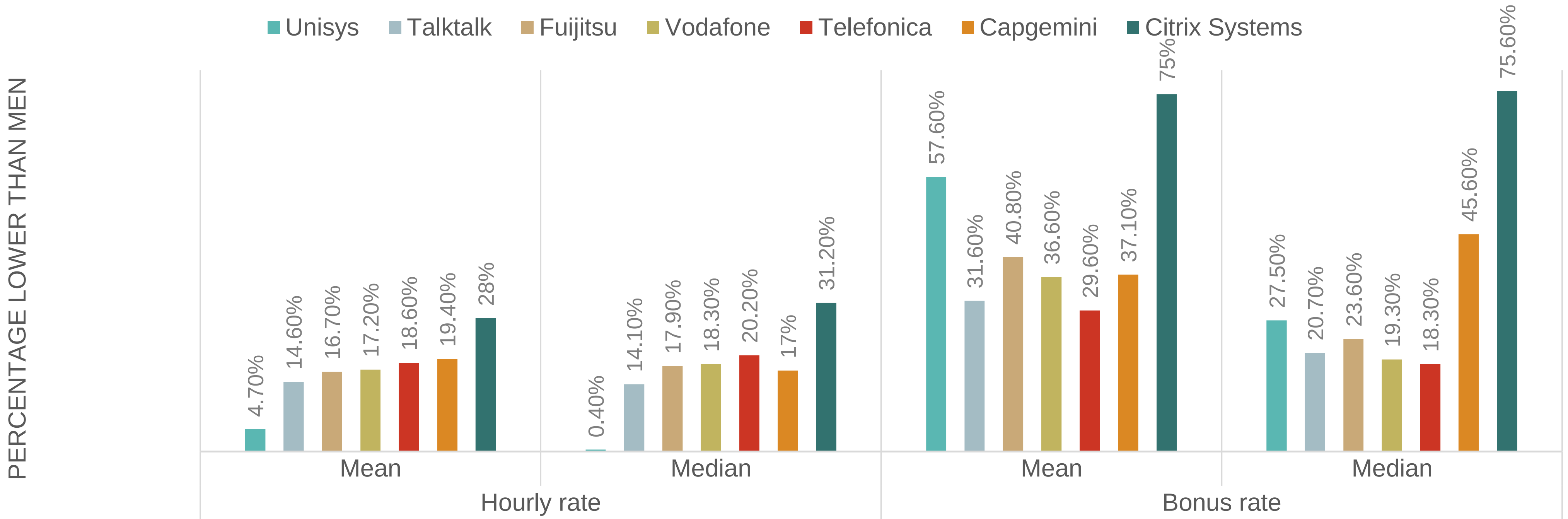
INFORMATION AND COMMUNICATION



	Hourly rate		Bonus rate	
	Mean	Median	Mean	Median
Unisys	4.70%	0.40%	57.60%	27.50%
Talktalk	14.60%	14.10%	31.60%	20.70%
Fuijitsu	16.70%	17.90%	40.80%	23.60%
Vodafone	17.20%	18.30%	36.60%	19.30%
Telefonica	18.60%	20.20%	29.60%	18.30%
Capgemini	19.40%	17%	37.10%	45.60%
Citrix Systems	28%	31.20%	75%	75.60%

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Gender pay gap reporting: your next steps

If you've done nothing
- Call AG and we will help!
- EHRC proposals for enforcement

If you have calculated your figures but not yet reported
- Think carefully about how to construct your narrative
- Consider your action plan for closing any gap

If you have reported and have a gap
- Implement and track initiatives to help close the gap
- Get ready for the 2018 report!

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EQUALITY - DISABILITY AND SICKNESS

When are you deemed to know about a disability?

Donelien v Liberata UK Ltd (CA)

- Employer failed to probe a weak OH report which said the employee was not disabled (she was)
- Employer not fixed with constructive knowledge of disability:
  - Temporary nature of illnesses would not set alarm bells ringing
  - Did all they reasonably could to discover whether D had a disability
  - Had not simply outsourced the question - made up their own mind and had taken sufficient steps

Some dos and don'ts

- ✗ **Don't** pose general questions to OH about whether the employee is disabled
- ✓ **Do** ask specific practical questions tailored to the employee
- ✓ **Do** require OH to provide well-reasoned advice examining the disability test and follow up if not provided
- ✗ **Don't** unquestioningly adopt OH's advice
- ✓ **Do** make your own decision about whether the employee is disabled taking into account all the relevant evidence and watch out for "red flags"

Sickness absence reforms

Statutory sick pay	Fit for Work service
• 6 April 2018 - SSP rate increases to £92.05 per week • Taylor Review proposal to make SSP a Day 1 right which accrues on a length of service basis	• FFW assessments will end due to low employer referral rates • England & Wales: closed to new referrals on 15 December 2017 (ongoing referrals dealt with until 31 March 2018) • Scotland: due to close on 31 May 2018 • Online and telephone advice still available

HOLIDAY PAY

Calculating holiday pay: where are we?

✓

- **Genuinely voluntary overtime is included** provided it amounts to "*normal pay*"
  - Dudley Metropolitan Borough Council v Willetts (EAT)

✓

- **Commission** should be included. Awaiting possible further guidance from the Employment Tribunal about the mechanics of doing so
  - Lock v British Gas Trading Ltd (CA)

Carry over of holiday: what are the limits?

King v The Sash Window Workshop (ECJ)

Paid annual leave not taken due to employer's refusal to pay

- EU leave continues to accrue
  - Unlimited carry forward
- UK leave may continue to accrue (WTR silent and no authority)
  - No carry forward unless provided for in a relevant agreement?
- Additional contractual leave accrual will depend on contract
  - Entitlement to carry forward will depend on the contract

What can you do to limit the risk of claims?

Audit self-employed contractors to ascertain risk they could be found to be workers

Audit holiday pay to ensure it reflects normal pay and adjust if necessary

Ensure workers afforded an opportunity to take paid annual leave

Stipulate that WTD leave is taken first and WTR / contractual leave will not carry over

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TUPE

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Cross-border TUPE transfers: are the employees redundant?

Xerox Business Services Philippines Inc v Zeb (EAT)

Wakefield

?

Philippines

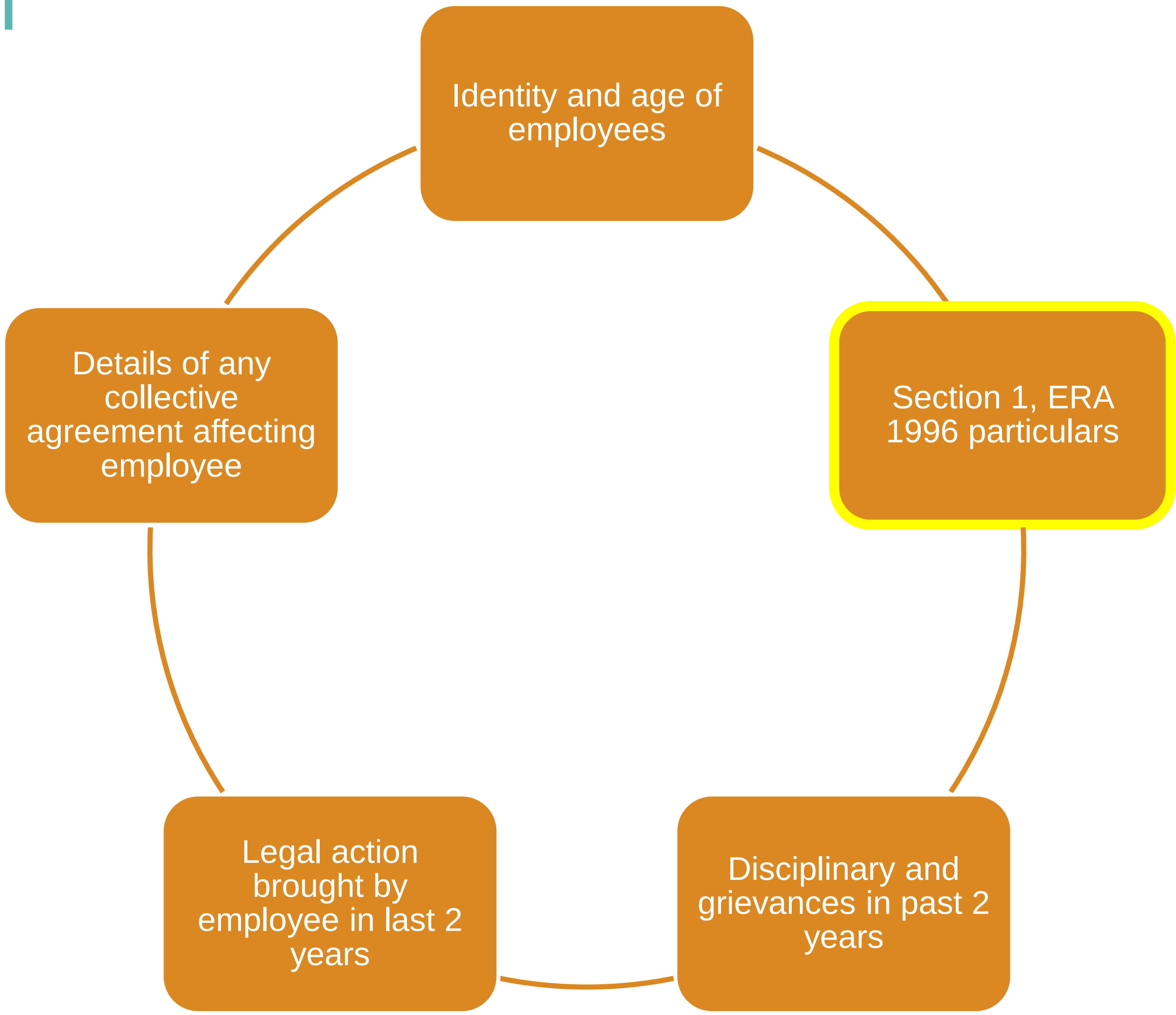
What does it mean for you?

- **If you are transferring business / activities overseas you should:**
  - Check the place of work and mobility clauses in the employment contracts
  - If restricted to the UK, then:
    - The employees cannot insist on relocating overseas on their UK terms and conditions
    - It is very likely that the transferee will be able to fairly dismiss the employees on the grounds of redundancy (provided a fair process is followed)
  - Gives certainty on cost and helps you accurately price the business sale or the outsourcing contract

Employee liability information

[Born London Ltd v
Spire Production Services Ltd (EAT)]

Are the particulars of employment confined to contractual particulars?



What does it mean for you?

If you are the transferor	• Take a broad approach to provision of employment particulars
If you are the transferee	• Due diligence to understand status of entitlements • Obtain warranties and indemnities regarding status of entitlements

If you are the client in a 2nd generation outsourcing	• In original Outsourcing Agreement require contractor to:
	  • respond to the new contractor's due diligence enquiries
	  • provide warranties and/or indemnities to you which mirror what you would give to the new contractor

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WHISTLEBLOWING

Qualifying disclosures – quick reminder of the test

1. A disclosure of information
2. Reasonable belief of the worker that malpractice has taken place (or is likely to take place)
3. Reasonable belief of the worker that the disclosure is in the public interest

Section 43B, Employment Rights Act 1996

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When will a disclosure be in the “public interest”?

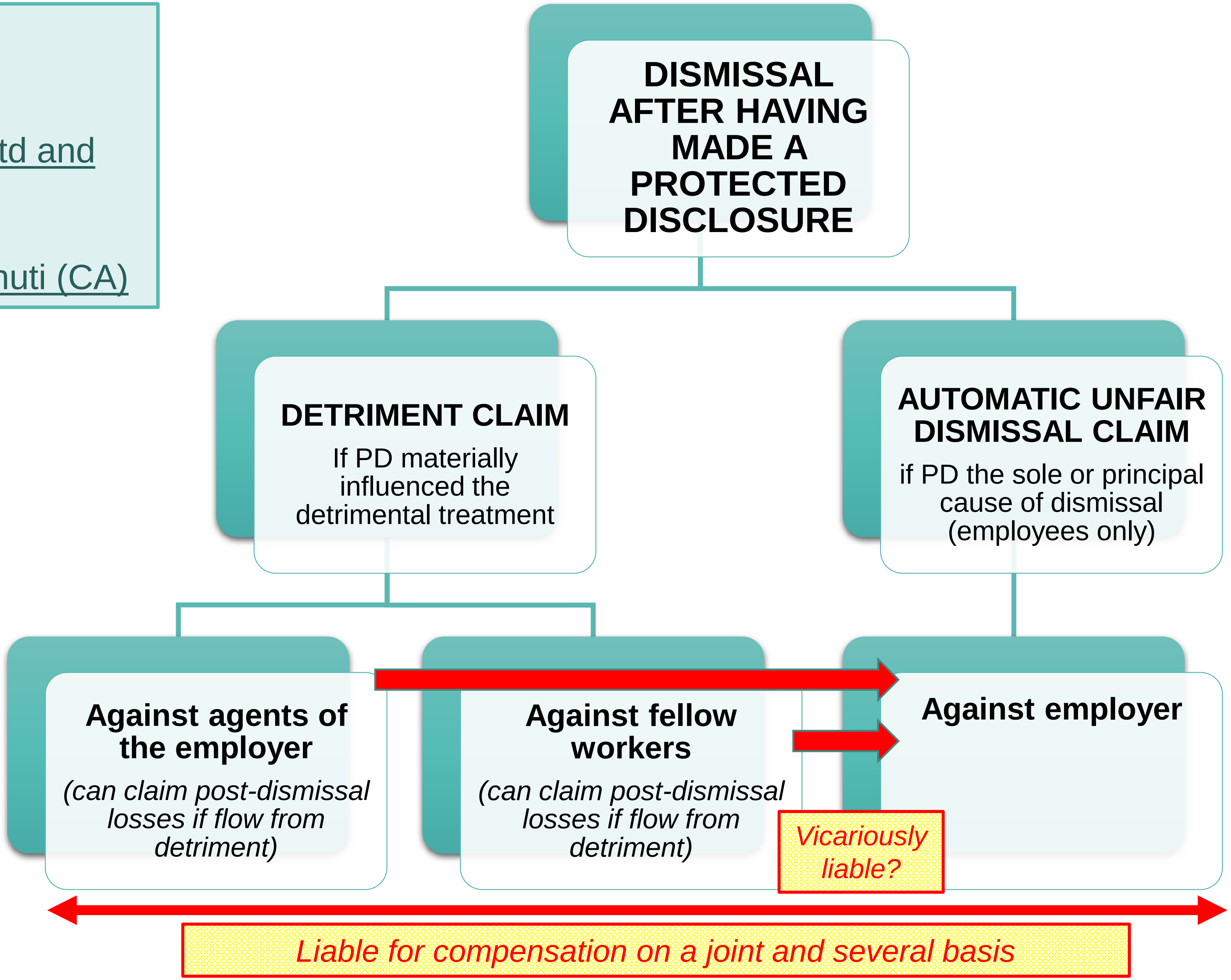
Chesterton Global Ltd v Nurmohamed (CA)

	Factor	More likely to be in the public interest if…
1.	How many people are affected?	Large number of workers affected
2.	What kind of interest has been affected?	An important interest
3.	What is the impact of the wrongdoing?	Wrongdoing has had / could have a serious impact on that interest
4.	What is the nature of the wrongdoing	Deliberate wrongdoing
5.	Who committed the wrongdoing?	Large and prominent employer

Who is liable?

International Petroleum Ltd and others v Osipov (EAT)

Royal Mail Group Ltd v Jhuti (CA)



WHAT’S ON THE HORIZON?

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Legislation on the horizon in 2018

	Reform?	Date?
1.	Trade unions: independent review into the use of e-balloting in industrial disputes	Report to be laid before Parliament by 31 December 2017
2.	Taxation of salary sacrifice scheme – end of certain grandfathering arrangements	6 April 2018
3.	Taxation of termination payments – reforms into force	6 April 2018
4.	GDPR into force	25 May 2018
5.	Caste discrimination – introduction of express protection in the Equality Act 2010	Date TBC in 2018
6.	New statutory right to parental bereavement leave and pay	TBC
7.	Prohibition on certain unpaid internships	TBC
8.	Extension of National Living Wage to those aged between 19-24	TBC

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Cases on the horizon in 2018

	Issue?	Case name?	Stage?
1.	Disability: was a dismissal discriminatory where the dismissing officer did not know about the disability?	Gallop v Newport City Council (No. 2)	Court of Appeal hearing held on 6 July 2017 – judgment awaited
2.	Disability: is an expectation of working long hours a PCP?	Carreras v United First Partners Research	Court of Appeal hearing held on 1-2 November 2017 – judgment awaited
3.	Discrimination: is a failure to enhance shared parental pay discriminatory?	Ali v Capita Customer Management	EAT hearing on 20-21 December 2017 – judgment awaited
4.	Employment status: are self-employed plumbers workers?	Pimlico Plumbers v Smith	Supreme Court hearing on 21-22 February 2018 – judgment awaited
5.	Collective redundancies: what is the territorial scope of TULRCA 1992?	Seahorse v Nautilus	Court of Appeal hearing on 11 – 12 April 2018
6.	Whistleblowing: are individual perpetrators of detriments liable for post-dismissal losses?	IPL v Osipov	Court of Appeal hearing on 3 July 2018
7.	Equal pay: who is the right comparator?	Asda Stores Ltd v Brierley	Court of Appeal hearing on 23 October 2018
8.	Employment status: are “self-employed” minicab drivers workers?	Uber v Aslam and ors	Court of Appeal hearing to be heard by 20 November 2018
9.	Employment status: are workers covered by TUPE?	Boxer v CitySprint	Employment Tribunal hearing to be listed

QUESTIONS?

EAT decides Uber drivers are workers

The Employment Appeal Tribunal (EAT) has, this morning, upheld a previous Employment Tribunal decision that, when the Uber app is switched on, Uber drivers are workers for the purposes of their claims under the Employment Rights Act 1996, Working Time Regulations 1998 and National Minimum Wage Act 1998 (*Uber BV, Uber London Limited and Uber Britannia v Aslam & Ors*, *UKEAT/0056/17/DA)*

Background

In 2016, an Employment Tribunal ruled that taxi drivers engaged by Uber were workers, rather than self-employed contractors. This ruling entitles Uber drivers to certain employment rights such as to be paid in accordance with the National Minimum / Living Wage and protections under the Working Time Regulations (e.g. rest breaks and paid holiday).

However, Uber appealed the Tribunal's decision to the EAT. The EAT hearing took place on 27 and 28 September 2017 and judgment was handed down on Friday 10 November 2017.

Employment Tribunal decision

Uber's business operates via a smartphone app offering taxi services. When the case was originally heard before the Employment Tribunal in 2016, Uber argued that it was merely a linking platform matching would-be passengers with self-employed drivers, rather than a taxi company employing taxi drivers. However, in a fairly scathing judgment, the Tribunal described the suggestion that Uber was a mosaic of 30,000 small businesses linked by a common platform as "*faintly ridiculous*".

Instead, the Tribunal found that Uber exercised a high degree of control over their drivers in a number of different ways, which were all inconsistent with the notion that they were self-employed. The Tribunal also noted that in the documentation surrounding the engagement of the drivers, Uber had resorted to "fictions" (e.g. fake invoices that it generates on behalf of the drivers but which are never sent to customers) and used "twisted language" in the contracts with the drivers which misrepresented the true relationship. Ultimately, the Tribunal decided that when a driver:

- switched on the app;
- was in the territory in which they were authorised to work; and
- was able and willing to accept assignments,

then he was working for Uber London Limited (**ULL**) under a worker contract. The Uber drivers did not argue that they were also employees, so that issue was not determined by the Tribunal. The Tribunal did acknowledge that their decision did not mean that Uber could not devise a business model comprising independent contractors; it is just that their current business model does not achieve that aim. With approximately 40,000 drivers in the UK, it was no surprise when Uber appealed the decision to the EAT.

Points of appeal

At the EAT, Uber contended that:

(1) The Tribunal had been wrong to disregard the written contractual documentation.

In particular, Uber noted that there was no contract between the drivers and ULL (the company registered in the UK and the holder of the private hire vehicle licence in London which makes provision for the invitation and acceptance of private hire vehicle bookings), but only written agreements between the drivers and Uber BV (the Danish parent company which holds the legal rights to the Uber app) and riders, which Uber argued was therefore inconsistent with the existence of any worker relationship.

Uber argued that these agreements made it clear that Uber drivers provided transportation services to riders, and that ULL (as was common within the mini-cab or private hire industry) provided its services to the drivers as their agent. Uber argued that, by finding otherwise, the Tribunal had disregarded the basic principles of agency law.

(2) The Tribunal had been wrong to rely on regulatory requirements as evidence of worker status and had made a number of internally inconsistent and perverse findings of fact in concluding that the drivers were required to work for Uber.

(3) The Tribunal had failed to take into account relevant matters relied on by Uber as inconsistent with worker status, which strongly indicated that the drivers were carrying on a business undertaking on their own account.

EAT decision

In a judgment handed down on Friday 10 November, the EAT rejected Uber's appeal on the following grounds:

(1) The Tribunal had been wrong to disregard the written contractual documentation.

In relation to Uber's first point of appeal, the EAT held that the Tribunal had been entitled to reject the characterisation of the relationship between Uber drivers and Uber (specifically ULL), in the written contractual documentation. Applying *Autoclenz Ltd v Belcher and Ors (2011),* the EAT found that the reality of the situation was that the drivers were incorporated into the Uber business of providing transportation services, subject to arrangements and controls that pointed away from their working in business on their own account in a direct contractual relationship with passengers each time they accepted a trip.

Having determined the true nature of the parties' bargain, the EAT held that the Tribunal was entitled to reject the label of agency used in the written contractual documentation. The EAT was satisfied that the Tribunal had not disregarded the principles of agency law, but had been entitled to consider the true agreement between the parties was not one in which ULL acted as the drivers' agent.

(2) The Tribunal had been wrong to rely on regulatory requirements as evidence of worker status and made a number of internally inconsistent and perverse findings of fact in concluding that the drivers were required to work for Uber.

In carrying out their assessment, the EAT held that the Tribunal was not obliged to disregard factors simply because they might be seen as arising from the relevant regulatory regime, as that was part of the overall factual matrix that the Tribunal had to consider. In any event, in this case, the EAT was satisfied that the Tribunal's findings on control were not limited to matters arising merely as a result of regulation.

In considering the Tribunal's findings, the EAT held that it was necessary to have regard to the Tribunal's judgment as a whole. By taking this approach, it was apparent that the Tribunal's findings were neither inconsistent nor perverse. The Tribunal had been entitled to conclude that there were obligations upon

Uber drivers that they should accept trips offered by ULL and that they should not cancel trips once accepted (given that there were potential penalties for doing so).

(3) The Tribunal had failed to take into account relevant matters relied on by Uber as inconsistent with worker status, which strongly indicated that the drivers were carrying on a business undertaking on their own account.

The EAT also had no objection to the Tribunal's approach of requiring the drivers not only to be in the relevant territory, with the app switched on, but also "*able and willing to accept assignments*", as that was consistent with Uber's own description of a driver's obligation when "on-duty".

These findings had informed the Tribunal's conclusions not just on worker status but also on working time and as to the approach to be taken to their rights to minimum wage. As a result, the EAT concluded that the assessment that the Tribunal had carried out was fact and context specific. To the extent that drivers, in between accepting trips for ULL, might hold themselves out as available to other private hire vehicle operators, the same analysis might not apply; which is why the Tribunal observed that it would be a matter of evidence in each case.

So, although there may be a few gaps when the drivers did not have the Uber app switched on and were not workers for ULL,that was not fatal to the drivers' status as 'workers' when they did have the Uber app switched on.

Comment

In several other 'gig economy' cases before the courts this year, other workers such as cycle couriers and plumbers who were said to be self-employed have also been successful in arguing that they are workers for the purposes of the Employment Rights Act 1996, endowing them with a host of employment rights. In light of this general direction of travel, the EAT's latest decision in this case is perhaps fairly unsurprising. However, we understand that Uber are likely to appeal this decision and may even seek a leapfrog appeal to the Supreme Court so that this case can be heard at the same time as the case of *Pimlico Plumbers v Smith*, which is due to be heard by the Supreme Court on 20-21 February 2018.

In the meantime, a copy of the EAT's judgment in this case can be found here.

Employment status: Court of Appeal decides self-employed plumbers are workers

Following recent Tribunal decisions that self-employed minicab drivers and bicycle couriers had worker status, the Court of Appeal has decided that self-employed plumbers were workers and also employees under the extended definition of employment in the Equality Act 2010. This means that the plumbers acquire various employment rights such as the right to the national minimum wage, paid holiday, rest breaks and pension contributions, as well as whistleblowing and discrimination protections (*Pimlico Plumbers Ltd and anor v Smith CA*).

Background law

Worker status

The test for whether someone is a "worker" is set out in section 230(3) of the Employment Rights Act 1996 (**ERA 1996**) (and, for working time purposes, in regulation 2(1) of the Working Time Regulations). There are three parts to the test, all of which must be satisfied to achieve worker status:

- There must be a contract.
- The contract must require the individual to perform work personally for another party. This will usually involve consideration of whether the employee has a right to send a substitute to perform the work in his or her place.
- The status of the other party (i.e. the putative employer) is not that of a client or customer of any profession or business undertaking operated by the individual. This is a factual question and involves looking at a range of factors to determine the nature of the relationship between the company and the individual. If the relationship is akin to an employment relationship, for example, with the company exerting control over the individual and the individual being integrated into the company's business, then it is more likely that the individual will be a worker.

Employment status under the Equality Act 2010

Individuals will also be viewed as employees for the purposes of the Equality Act 2010 (**EqA 2010**) where they are employed under a contract of employment or a "contract personally to do work". A "contract personally to do work" includes workers. This is wider definition of employment than that contained in the ERA 1996 (which confers employment rights such as the right not to be unfairly dismissed).

Facts

The Claimant was a plumber engaged by Pimlico Plumbers (**PP**). During his engagement, the Claimant worked solely for PP. After his engagement was terminated, the Claimant brought various Employment Tribunal claims which depended upon him being an employee for the purposes of the ERA 1996. At a pre-hearing review the Judge held that the Claimant was <u>not</u> an employee under the ERA 1996 definition and, therefore, the related claims could not proceed.

However, the Claimant had brought other Tribunal claims which depended on him being a worker, rather than an employee (i.e. a claim for unpaid holiday and a claim for unlawful deductions from wages). In addition, he had brought discrimination claims which depended on him being an employee under the extended definition of employee contained in the EqA 2010.

In 2012, the Tribunal held that the Claimant was both a worker under the ERA 1996 and an employee under the EqA 2010. On the question of personal service, the Tribunal found that the main purpose of the contract was for the Claimant to provide work personally for PP for a minimum number of hours per week. Although the contract included a substitution clause, it was not unfettered since the Claimant could only substitute other PP plumbers in his place.

On the question of whether PP was a client or customer of the Claimant's business, the Tribunal weighed up a range of factors. On one hand, PP set rules around the wearing of a uniform and appearance, booking holidays, standards of behaviour and performance and the Claimant was obliged to rent a PP van for work. Further, PP imposed onerous post-termination restrictive covenants including one which said he could not work as a plumber in London for a period of 3 months post-termination.

On the other hand, the Claimant provided his own tools and bore a significant proportion of the financial risk (e.g. if a customer didn't pay then the Claimant would not get paid and he had to procure his own liability insurance). Ultimately, the Tribunal concluded that PP could not be considered to be a client or customer of the Claimant.

The Tribunal's decision was upheld by the EAT and PP appealed to the Court of Appeal.

Decision

The Court of Appeal upheld the Tribunal's decision.

On the issue of personal service, the Court noted that a full right of substitution would be inconsistent with there being personal service. However, a limited right of substitution, as in this case, could still be consistent with there being personal service and point towards worker status.

On the issue of whether PP was a client or customer of the Claimant the Court noted that PP wanted the plumbers to: *"…appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker".* The Court agreed that the Tribunal had been entitled to find that the degree of control exercised by PP was inconsistent with PP being a client or customer of a business run by the Claimant.

PP has indicated that it may seek permission to appeal to the Supreme Court.

Comment

This decision is relevant to all employers who engage independent contractors. It would be wise to take steps to review such relationships to ensure that the contractual documentation and labels used accurately reflect the reality of the relationship on the ground.

There are two key questions to consider:

1. Does the contract imposes an obligation on the individual to work personally?

If the contract contains an **unconditional** substitution clause then this should defeat the notion of personal service, assuming it is a genuine term. However, if it is a "sham" clause i.e. a clause which misrepresents how things work in practice, then the Courts will disregard it. Therefore, if you wish to use an unconditional substitution clause as a means of defeating personal service, then you have to be comfortable with the possibility that it may be used in practice.

If the contract contains a **conditional** substitution clause this may not be enough to defeat personal service. If the right of substitution is only limited by the need to demonstrate the substitute is qualified to do the job then this is still consistent with there being no obligation to work personally. However, if the right of substitution is limited to circumstances where: (i) the individual is unable to work and/or (ii) the employer consents (and has an absolute and unqualified right to withhold consent), then this will be viewed as being consistent with an obligation to work personally.

2. Are you a client or customer of the individual's profession or business?

This will involve a factual assessment of how the relationship operates on the ground. There are various factors to think about here:

- **What degree of control do you exert over the individual?** Do you control when, where and how the work is performed? Do you set standards of behaviour and punish for breaches?

- **Does the individual market to the world at large?** Are they actively marketing their services to other clients or customers? Do they work for other people or have they been recruited by you to work within your business?

- **Is the individual integrated into your business?** Does the individual wear a uniform? Do they attend company social events? Do they have a permanent desk? Do they have a business card and a company email address?

- **Other factors?** Other factors may be relevant, in particular the degree of financial risk assumed by the individual: the higher degree of risk assumed, the more likely they are to be in business on their own account. Another factor is whether the individual is engaged on a per assignment basis or whether there is a continuous "umbrella" contract: worker status is more likely where there is an umbrella contract.

If you carry out this assessment and reach the conclusion that your contractors are workers then you should seek legal advice on the best solution. You may decide to adjust the way in which your contractors are engaged to avoid worker status. Alternatively, you may be prepared to accept that they have worker status and, if so, you should ensure that you comply with relevant laws such as working time, national minimum wage, pensions auto-enrolment and whistleblowing legislation.

Given the importance of this topic at the moment, we would be interested to hear from you about who is working within your business and your views on some of the key issues regarding employment status. If you have a spare couple of minutes, it would be great if you could complete our anonymous Working Practices Survey and we'll get back in touch to share the results.

Pimlico Plumbers and anor v Smith

Employment status: the CAC decides that Deliveroo riders are not workers

In considering an application for statutory trade union recognition, the Central Arbitration Committee (CAC) had to consider whether delivery riders engaged by Deliveroo were workers. If they were not, the application would fail. The CAC concluded that the riders were not workers on the basis that there was a genuine, almost unfettered right of substitution. This meant that there was no requirement to perform the work personally and the worker test had not been satisfied *(Independent Workers' Union of Great Britain v RooFoods Limited t/a Deliveroo).*

Background law

Independent trade unions can apply to be recognised by an employer to conduct collective bargaining on behalf of a group of workers (known as the bargaining unit). They initiate this process by asking the employer to voluntarily recognise them. If the employer resists, then they can make a formal application for recognition under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**) (known as the **statutory recognition procedure**).

For the purposes of the TULRCA, "worker" means an individual who works, or normally works or seeks to work:

(a) under a contract of employment (i.e. an employee); or

(b) under any other contract whereby he undertakes to do or **perform personally** any work or services for another party to the contract who is **not a professional client** of his; or

(c) in employment under, or for the purposes of, a government department in so far as such employment is not covered by the other categories.

(Section 296, TULRCA)

The limb (b) definition of worker in TULRCA is similar to that used in Section 230(3) of the Employment Rights Act 1996 (**ERA**). There, a limb (b) worker is described as: *"an individual who has entered into or works under…any other contract, whether express or implied and whether oral or in writing whereby the individual undertakes to do or **perform personally** any work or services for another party to the contract whose status is **not by virtue of the contract that of a client or customer** of any profession or business undertaking carried on by the individual."*

Under both pieces of legislation, worker status is achieved where work is performed under a contract, it is performed personally for another party to the contract, and that other party is not a client or customer of the individual. Therefore, if an individual is a worker under one, it is likely they will be a worker under the other.

In this case, Independent Workers' Union of Great Britain (**IWGB**) made a request to Deliveroo to recognise them for collective bargaining purposes, in respect of a bargaining unit comprised of motorbike drivers and bicycle riders (**Riders**). In order for the application to succeed, it would need to be shown that the Riders satisfied the definition of "worker" under TULRCA. If they did, then there would be a good chance that they would also be viewed as workers for the purposes of the ERA (and other pieces of employment legislation using similar definitions). This would entitle the Riders to employment rights such as the right to rest breaks and paid annual leave, the right be paid the national minimum wage and the right to be automatically enrolled into a pension scheme.

Facts

Deliveroo's business involves the delivery of food and drink items for restaurants and others to customers' homes or other premises. It enters into "supplier agreements" with Riders who deliver the food and drink items.

The Independent Workers' Union of Great Britain (**IWGB**) made a request to Deliveroo to recognise them for collective bargaining purposes. The request related to a bargaining unit comprising Riders in the Camden zone. Of Deliveroo's 4,500-strong workforce, only 100 fell within the proposed bargaining unit.

Deliveroo rejected the request on the grounds that:

- the Riders were not workers;
- the IWGB did not represent the views of the Riders nationally; and
- the proposed bargaining unity was inappropriate and not compatible with effective management.

The IWGB then submitted an application for statutory recognition under TULRCA. A panel of the Central Arbitration Committee (**CAC**) was convened to decide whether the application should be accepted. A key question was whether the Riders were workers. If they were not, then the application could not be accepted.

Deliveroo's position was that no-one within the proposed bargaining unit (or, indeed, anyone that it engaged to perform deliveries to customers) was a worker within the meaning of section 296 of TULRCA. Rather, Deliveroo considered these individuals were engaged as "suppliers".

Decision

In considering whether the Riders had workers status, the CAC considered the following evidence:

Recruitment

The recruitment process, known as "onboarding", involved several stages including: the completion of an online application form; a telephone interview; a trial delivery session where bike riding competency was assessed; completing an online training course and scoring 100% in a number of multiple choice tests. The process also emphasised that the Riders were the "face of Deliveroo" and advice was given on customer service, food hygiene and health and safety.

Once accepted as a Rider, the individual was required to sign a "Supplier Agreement" and purchase an equipment pack of £150 (which was refunded when the Rider stopped working for Deliveroo if returned in good order).

Substitution

On 11 May 2017, a few weeks before the CAC hearing, Deliveroo revised the Supplier Agreement (the **New Agreement**). The New Agreement was issued to all existing Riders, together with a covering letter which emphasised that Riders were entitled to appoint another person to work on their behalf with Deliveroo at any time. The substitution clause itself provided that the Rider could appoint a substitute without Deliveroo's prior approval. There was no policing of a Rider's use of a substitute. The only restrictions were that they: (i) could not appoint an individual who had been terminated by Deliveroo for a serious breach of contract (or had engaged in conduct that would have been grounds for termination had they been directly engaged by Deliveroo); and (ii) had to notify Deliveroo if the substitute used a different type of vehicle. The rider was responsible for the payment of the substitute.

In practice, however, substitution was rare as if a rider did not want to accept a job or be available for work, he or she would simply not log on to the app, or if logged on, they would mark themselves as unavailable. Even when they were logged on and marked as available, they were not obliged to accept a job offered to them (and if they didn't accept a job offered to them within 3 minutes, it was offered to another rider). There were no adverse consequences for Riders not accepting jobs.

Other noteworthy factors

- Riders were free to work for other companies including competitors.
- Riders were not required to wear a Deliveroo uniform when working for Deliveroo.
- Riders were free to choose their own delivery routes, although there were some restrictions around delivery times (i.e. they couldn't take too long).
- Riders were responsible for providing roadworthy delivery equipment and obtaining third party liability insurance for themselves and any substitute they appointed.
- In terms of payment, invoices would be submitted on a fortnightly basis in respect of services provided by the Rider or their substitute in the previous fortnight. The New Agreement provided that the Riders were responsible for accounting and paying their own tax and national insurance. Deliveroo did not provide a pension or any other benefits.
- Riders were not required to indicate in advance when they intended to work and were not subject to any form of schedule. They were free to log in and out of the delivery app at times of their choosing. The only requirement was that they performed at least one delivery every three months.

The CAC rejected the application for statutory recognition on the grounds that the Riders were not workers for the purposes of section 296 of TULRCA. It found that the substitution right was genuine and there was evidence that it had been used, albeit rarely, in practice. This finding meant that it could not be said that the Riders undertook to work or provide services personally for Deliveroo. This meant that the definition of "worker" was not satisfied.

Notably, the CAC concluded: *"By allowing an almost unfettered right of substitution, Deliveroo loses visibility, and therefore assurance over who is delivering services in its name, thereby creating a reputational risk, and potentially a regulatory risk* [in relation to health, safety and food hygiene]*, but that is a matter for them. The Riders are not workers with the statutory definition of either s.296 TULRCA or s.230(3)(b) of the Employment Rights Act 1996".*

Comment

This decision bucks the trend seen in recent cases involving employers such as Uber, Pimlico Plumbers, Addison Lee, Excel and CitySprint, where ostensibly self-employed individuals were found to be workers. It seems clear that the differentiating factor in this case was the presence of a genuine and largely unfettered right of substitution. Whilst this created other risks for Deliveroo, it meant that the personal service requirement had not been met.

It's worth remembering that the recent Taylor Review on Working Practices recommended that the Government prioritise replacing the existing worker status with a new status of "dependent contractor", which would carry with it a different threshold test. The Review recommended that much greater weight should be placed on the principle of control, than on the requirement for personal service. It went on to say that the absence of a requirement to work personally should not be an automatic barrier to accessing employment rights as a dependent contractor. The Review said this this would *"make it harder for employers to hide behind substitution clauses".* This recommended approach has been endorsed by the House of Commons Work and Pensions and Business, Energy and Industrial Strategy Select Committees in their joint report entitled "A framework for modern employment".

However, in this case, it is not clear whether a focus on control would have generated a different outcome. The Riders had a fairly high degree of autonomy in their day to day activities – they were free to work for other companies, they didn't have to wear a uniform, they could choose when to work and they could choose their own delivery routes.

Independent Workers' Union of Great Britain v RooFoods Limited t/a Deliveroo

ADDLESHAW GODDARD

THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

THE GOVERNMENT'S RESPONSE

The Taylor Review of Modern Working Practices (the Review) was published on 12 July 2017. In our first article on the Review, we explained the proposals of interest to employers. You can read that article here. In our second article, we considered over 40 of the key proposals made in the Review and what they would mean for your business. You can read that article here. In our third article in the series, we consider the Government's Response to the Review (Response), published in February 2018 and the steps you may wish to consider taking as a result.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
PROPOSALS AFFECTING EMPLOYMENT STATUS			
1.	**Definitions of employment status to be enshrined in primary legislation, with further detail in secondary legislation and guidance.**	**Under consultation:** the Government considers that employment status is a complex issue and any potential changes require careful consideration. The Government is concerned that any action preserves flexibility in the labour market and does not impose unnecessary burdens on business. Accordingly, the question of reforming employment status is now the subject of a specific consultation jointly authored by BEIS, HM Treasury and HMRC.	Employers wishing to respond to the Employment Status consultation should do so by 1 June 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event that new status tests are implemented following the consultation, employers should consider conducting an audit to assess which status applies to each member of its workforce.
2.	**Government to produce a free online tool to provide an indication of employment status and information for employers on their associated responsibilities.**	**Accepted but on hold:** the Government agrees that an online tool would help determine employment status and it intends to develop one. However, this will only be taken forward following the final decisions on the legislative framework	There are no immediate actions for employers to take.
3.	**Workers who are not employees to be renamed "dependent contractors" and the test for acquiring this status to place much greater weight on the principle of control than on a requirement for personal service.**	**Under consultation:** as for (1) above.	Employers wishing to respond to the Employment Status consultation should do so by 1 June 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. If the proposed dependent contractor status is implemented, employers should audit their workforce to identify the cohort of individuals (if any) who are deemed to be independent contractors solely because of the presence of a substitution clause. In future, such individuals may qualify as dependent contractors depending on how much control the employer has over them.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
4.	**Employers operating in the gig economy to be able to pay dependent contractors based on the number of tasks performed, provided that an average individual earns the National Minimum Wage with a 20% margin of error.**	**Under consultation:** the Government acknowledges that it is important that those working in the gig economy are protected by the National Minimum and National Living wage, whilst preserving the flexibility that those platforms offer. It will consult on how definitions of working time can and should apply to gig economy platform working.	Employers wishing to respond to the Employment Status consultation should do so by 1 June 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. Gig platform employers should consider auditing their workforce either now or in the near future to assess whether the average individual earns the National Minimum / Living Wage for the work they do. Where this threshold is not being met, such employers may wish to start thinking about how they will plug the gap (e.g. absorbing the additional cost; increasing charges to customers; restructuring the workforce).
5.	**Government to explore options for requiring online platforms to provide real time data of the mean hourly output rate to the dependent contractor.**	**Under consultation:** the Government does not explicitly respond to this point in their Response. However, in the related consultation there is a series of questions around the definition of working time for those working for online platforms. One of the questions asks whether there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and to ensure fairness in the determination of work for the purposes of the National Living Wage.	Employers wishing to respond to the Employment Status consultation should do so by 1 June 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019.
6.	**Employment and tax status frameworks to be aligned so that if someone is employed for tax purposes then they will be either an employee or a dependent contractor for employment status purposes (and vice versa).**	**Under consultation:** as for (1) above.	As for (1) above.
7.	**Employees and dependent contractors to have the right to receive a written statement of particulars on Day 1 of their job, including details of their statutory employment rights. They should have the right to claim compensation where an employer fails to comply.**	**Accepted and under consultation:** the Government accepts that the right to a written statement should be extended to all workers. The question of how best to achieve this and what information should be included in the statement is included in a new consultation on measures to increase transparency in the labour market. Separately from the Review, the Government says it will also implement a recommendation made by the Low Pay Commission in 2016 to extend the right to receive a payslip to	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. It should be relatively easy for employers to comply with this requirement when it comes into force.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
		all workers and to require employers to state the number of paid hours on the payslips of time-paid workers.	
8.	**National Insurance Contributions (NICs) paid by employees and self-employed people to be moved closer to parity.**	**Rejected:** the Government agrees that small differences in contributory benefit entitlement no longer justify the scale of difference in rates of NI contributions paid in respect of employees and the self-employed, however, it does not plan to revisit this issue (having U-turned on proposed reforms in this area outlined in the 2017 Spring Budget).	There are no actions for employers to take.
9.	**Government to "address areas of entitlement" (e.g. parental leave) where self-employed people lose out.**	**Accepted but on hold:** the Government accepts the principle of equalising benefits for the self-employed but will only consider making changes to this area once it has *"carefully considered this in the wider context of tax, benefits and rights over the longer term".*	There are no immediate actions for employers to take.
10.	**Government to consider accrediting a range of platforms designed to move towards cashless transactions. The aim is that this will increase transparency of payments made to self-employed individuals and ensure that they pay the correct amount of tax.**	**To be kept under review:** the Government says that as new technologies develop it will keep under review how these could be used to support the self-employed with their tax obligations. In addition, the Government says it will publish a Call for Evidence on what more digital platforms (i.e. platforms which allow businesses to sell or rent services in new ways) could do to ensure their users are compliant with tax rules.	There are no immediate actions for employers to take.
11.	**Government to consider making certain rights conditional on using a certain payment mechanism. The example given is linking an individual's right to work in the UK to the use of such a payment mechanism.**	**Under assessment:** although the Response does not directly respond to the example of linking an individual's right to work in the UK to the use of a certain payment mechanism, it broadly accepts the recommendation of applying conditionality in the employment sphere. It points to a consultation by HMRC on the proposed introduction of tax-registration checks into the application process for some public sector licences that people need in order to trade. The results of the consultation will set out the sectors in which the new rules could apply.	There are no immediate actions for employers to take.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
PROPOSALS AFFECTING ATYPICAL WORKERS			
12.	**Consider introduction of a new higher National Minimum Wage rate for hours of work that are not guaranteed as part of the contract.**	**Accepted and under assessment:** the Government accepts the recommendation to explore the impacts of introducing a higher National Minimum Wage rate for hours which are not guaranteed as part of the contract. The Low Pay Commission (LPC) will provide their assessment of the impact of this recommendation, as well as alternative means of tackling the issue of "one-sided flexibility", in a report to be published in October 2018.	There are no immediate actions for employers to take, save to note the date of the LPC report in October 2018. If the LPC does recommend an enhanced National Minimum Wage rate and this is implemented by the Government, this would have the effect of enhancing pay for zero hours workers and also many "standard" employees and workers who work non-guaranteed overtime hours. There would be a particular impact for employers operating in sectors such as hospitality, retail and social care. At that point, employers may wish to audit their exposure to any enhanced rate. Some employers may find that they already have this information available following an audit of working practices for the purposes of assessing holiday pay entitlements. Once any proposed enhanced rate is known, employers should then assess whether there is any shortfall in pay and, if so, what remedial action they could take (e.g. convert non-guaranteed overtime to guaranteed overtime; retain non-guaranteed overtime but enhance the rate of pay).
13.	**Government to consider other ways of encouraging employers to guarantee more hours to their staff, including the role of voluntary collective agreements.**	**No response:** the Government does not respond to this recommendation.	There are no actions for employers to take.
14.	**Continuous service in employment should be preserved where any gap in employment is less than 1 month, rather than the current 1 week.**	**Accepted and under consultation:** the Government accepts that the gap should be extended beyond 1 week. However, it has not settled on the period to be used. The question of what that period should be is included in a new consultation on measures to increase transparency in the labour market. The periods offered in the consultation are 2 weeks, 3 weeks, 1 month, 6 weeks or "other".	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event that the gap is increased following the consultation, employers should ensure that they maintain good records detailing periods of work and non-work so that an accurate assessment of service can be made.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
15.	**Zero hours workers who have been engaged for 12 months or more to have the right to request a contract that guarantees the hours which reflect the actual hours worked. Employers to report on how many requests of this nature have been received and how many were agreed.**	**Accepted and under consultation:** the Government accepts the recommendation that zero hours workers should be entitled to request a guaranteed hours contract. However, it commits to going further and creating a right for all workers to *"request a more predictable contract where appropriate"*. The question of how to implement the right to request is under consultation. As to the requirement for employer reporting, the Government favours a voluntary approach. It says that it will work with the Financial Reporting Council (**FRC**), which publishes guidance for companies on the content of annual reports, to consider how the guidance can be revised *"to encourage companies to provide a fuller explanation of their workforce models and practices"*. If this does not provoke a change in company reporting practices then the Government says it will take further action which could include introducing a requirement for companies to publish a "People Report". This could bring together employee-related reporting requirements such as gender pay gap and diversity data, with specific metrics relating to workforce structure.	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event that the proposal is implemented by the Government, employers will need to produce appropriate policies documenting how the procedure will operate within their business. It should be remembered that, as it stands, the proposal is limited to a right for workers to *request* a fixed hours contract, rather than a right to *move* to a fixed hours contract. Although there is no detail yet on how this process might work, it seems possible that it will be along the lines of the right to request a flexible working arrangement. This could mean that an employer could refuse the request provided there was a good business reason for doing so and the request was considered reasonably. Employers should also monitor any changes to the FRC guidance on annual reports.
16.	**On holiday pay, the Government should increase the pay "reference period" used to calculate holiday pay for workers who do not have normal working hours from 12 to 52 weeks to take account of seasonal variations in work.**	**Accepted and under consultation:** the Government agrees that the pay reference period should be increased to 52 weeks. The finer details of this proposal are dealt with in a new consultation on measures to increase transparency in the labour market. The consultation asks whether the reference period should be increased to 52 weeks or another period. It also asks whether employers and workers should be allowed to agree a shorter period.	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event that the reference period is increased following the consultation, employers will need to ensure that their payroll systems are adjusted to take account of the longer reference period, and any associated policy should also be updated to reflect the change in how holiday pay is calculated (if this is covered in the affected policy).
17.	**All dependent contractors to be given the choice of either taking paid holiday or receiving "rolled up holiday pay" (i.e. the practice of not paying holiday**	**Rejected but under consultation:** the Government says it will not take this recommendation forward *"at this time"*	The fact that the rejection is caveated by the phrase "at this time" suggests that the Government may revisit this question after Britain has left the European Union (the expected exit date being 29 March 2019).

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
	pay while the worker is on holiday, but making a compensatory payment during the weeks worked).	because the practice of paying rolled up holiday pay is contrary to EU law. However, there will be consultation on alternative action that could be taken to ensure that atypical workers receive their full holiday pay entitlement. The consultation asks how atypical workers might be offered more choice in how they receive their holiday pay.	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019.
18.	**Agency workers to be given clearer information on the applicable rates of pay and those responsible for paying them.**	**Accepted and under consultation:** the Government accepts the need to amend the law to allow agency workers to receive *"the information they need to make informed choices about the work they accept".* The question of what legislative changes are needed to deliver this reform is included in a consultation on agency worker reforms. In short, the consultation proposes that any contract / terms of business between a work seeker and an employment business should contain a "Key Facts" page which should be provided to the work seeker at the time they register with the organisation	Employers wishing to respond to the Agency Worker consultation should do so by 9 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. Employment businesses which place agency workers with end users should monitor the outcome of this consultation. If the proposals are taken forward, they will need to ensure the documentation they provide to agency workers complies with the new requirements.
19.	**Agency workers to have the right to request a direct contract of employment after 12 months with same hirer, which the hirer would have to reasonably consider. The employer should also be required to report on how many requests of this nature have been received and how many were agreed.**	**Accepted and under consultation:** as for (15) above.	As for (15) above.
20.	**The "Swedish derogation" should be abolished. This is the provision in the Agency Workers Regulations 2010 which allows agencies to avoid matching end-user pay by employing agency workers in a way that allows for pay between assignments.**	**Under consultation:** the Government wishes to consult further to establish the extent of abuse of pay between assignment contracts as a means of avoiding equal pay entitlements for agency workers. If the evidence shows that abuse is limited then the Government's view is that state enforcement may be answer, potentially by extending the remit of the Employment Agency Standards Inspectorate to cover the Agency Workers Regulations 2010. However, if the evidence shows that	Employers wishing to respond to the Agency Workers consultation should do so by 9 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. Employers who engage workers and benefit from the Swedish derogation may wish to assess the potential increase to the cost of engaging such workers. This may lead employers to reconsider their use of agency workers vs. permanent workers.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
		abuse is more widespread then the Government's initial view is that it would be more appropriate to abolish the derogation.	
PROPOSALS AFFECTING THE ENFORCEMENT OF EMPLOYMENT RIGHTS			
21.	**HMRC to be given responsibility for enforcing holiday pay rights (in addition to National Minimum Wage and sick pay rights) for the lowest paid workers. This means that such workers would not have to enforce their rights via the Employment Tribunal.**	**Accepted and under consultation:** the Government accepts the case for the state taking responsibility for enforcing basic employment rights on behalf of the most vulnerable workers. It will consult to gather detailed evidence of the scale and distribution of non-compliance with holiday pay and statutory sick pay obligations, and then evaluate the best way to target enforcement activity.	Employers wishing to respond to the Enforcement of Employment Rights consultation should do so by 16 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event this proposal is implemented, it would affect only those employers of the "lowest paid workers" (i.e. those earning the National Minimum Wage or National Living Wage), meaning we would expect to see a greater impact in sectors such as retail, hospitality and social care. Affected workers would not have to bring claims in the Employment Tribunal to enforce their holiday pay rights. Instead, they would complain to HMRC, who would then be responsible for enforcement. Whilst affected employers could benefit from avoiding the cost of Tribunal litigation, it is not clear how HMRC would determine the validity of a holiday pay claim and what right of appeal would exist from any decision reached.
22.	**Claimants should be able to have their employment status determined at an expedited preliminary hearing without having to pay any fee.**	**Rejected:** since the review was published, the Supreme Court has ruled that the fees system operating in the Tribunals was unlawful, with the result that no fees are currently being charged. Accordingly, the Government rejects this reform on the basis that individuals are currently able to get an authoritative determination of their employment status without paying a fee. Notably, the Government does not rule out reintroducing a fees system in the Tribunals. It says it is considering the Supreme Court's ruling *"very carefully"* and should it decide to reintroduce fees then it would seek to consult on the question of whether to charge fees for proceedings about the determination of employment status.	There are no actions for employers to take.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
23.	**The burden of proof in hearings where employment status is in dispute should be reversed and placed upon the employer, subject to a number of safeguards, such as the use of an online tool to determine employment status.**	**To be kept under review:** the Government says it will return to this recommendation when decisions have been reached on the way forward regarding employment legislation and when an online tool has been developed.	There are no immediate actions for employers to take.
24.	**The Government should seek to enforce Tribunal awards itself without action from the claimant, or payment of any additional fee.** **A "naming and shaming" scheme should be established for employers who do not pay awards within a reasonable time.**	**Accepted and under consultation:** the Government accepts that individuals who win their case at Tribunal and receive an award should get what they are owed. Plans are already afoot to reform the process for dealing with unpaid awards across the Courts and Tribunals system. The Government will consult on how best to ensure these reforms work for Employment Tribunals. The Government says it accepts the value of a naming scheme for employers who do not pay Tribunal awards within a reasonable time and will consult on the best way to implement such a scheme.	Employers wishing to respond to the Enforcement of Employment Rights consultation should do so by 16 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019.
25.	**Tribunals should be obliged to consider the use of awarding aggravated damages and making costs orders if an employer has already lost an employment status case on broadly comparable facts.**	**Under consultation:** the Government accepts that strong action should be taken against employers who repeatedly ignore their responsibilities and the decisions of Tribunals. The Government will consult on this issue and consider how the recommendation can be implemented. Separately, the Government says it will raise the maximum penalty for aggravated breach from £5,000 to £20,000 *"as soon as practicable"*.	Employers wishing to respond to the Enforcement of Employment Rights consultation should do so by 16 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019.
26.	**Tribunals should be allowed to award uplifts in compensation if there are subsequent breaches against workers with the same, or materially the same, working arrangements.**	**Under consultation:** as for (25) above.	As for (25) above.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
PROPOSALS AFFECTING ENGAGEMENT AND TRANSPARENCY			
27.	**The Government should review the Information and Consultation of Employee Regulations 2004 (ICE Regs) and extend the rules to workers and reduce the threshold from 10% to 2% of workforce making the request.**	**Under consultation:** the Government wishes to consult further on this recommendation to extract up to date evidence which can then be used to assess whether or not there is an appetite to expand the ICE Regs. In addition, Ministers and officials will *"engage with interested parties"* to consider the future of the ICE Regs, including whether the thresholds should be lowered.	Employers wishing to respond to the Increasing Transparency in the UK Labour Market consultation should do so by 23 May 2018. We would expect the Government's response to the consultation to be published by the end of 2018, meaning any subsequent legislative reforms would likely be taken forward in 2019. In the event that: (i) the ICE Regs are expanded to cover workers; and/or (ii) the thresholds in the ICE Regs are reduced, the number of employers who could potentially receive a valid request to negotiate an information and consultation framework would increase. Employers who are currently outside the scope of the ICE Regs should then ensure that they understand the framework and are able to respond to a request to negotiate if one was triggered.
28.	**The Government should work with Investors in People, Acas, trade unions and others to promote the development of better employee engagement and workforce relations, particularly in sectors with high levels of casual employment.**	**Accepted and under assessment:** the Government will lead *"stakeholder engagement"* with experts in the coming months aimed at identifying and developing the most effective ways to promote employee engagement and workforce relations.	There are no immediate actions for employers to take.
29.	**Companies above a certain size should be required to be more transparent. Amongst other things, they should be required to publicise their model of employment and use of agency services.**	**To be kept under review:** the Government favours a voluntary approach. It says that it will supplement existing corporate governance reporting measures by working with the FRC, which publishes guidance for companies on the content of annual reports. Together, they will consider how the FRC guidance can be revised *"to encourage companies to provide a fuller explanation of their workforce models and practices"*. If this does not provoke a change in company reporting practices then the Government says it will take further action which could include introducing a requirement for companies to publish a "People Report". This could bring together employee-related reporting requirements such as gender pay gap and diversity data, with specific metrics relating to workforce structure.	Employers should monitor any changes to the FRC guidance on annual reports.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
PROPOSALS AFFECTING OTHER AREAS			
30.	**Apprenticeship Levy: the Government should ask the Institute for Apprenticeships to work with sectors using high levels of lower paying and atypical work to ensure they are making best use of the current apprenticeship framework.**	**To be kept under review:** the Government says it will *"continue to assess the impact of the levy and the apprenticeship reforms on employers, providers and individuals"*. It makes no commitments beyond this.	There are no immediate actions for employers to take.
31.	**Apprenticeship Levy: the Government should consider making the funding generated by the levy available for high quality "off the job" training other than apprenticeships.**	**To be kept under review:** the Government says it will *"continue to work with employers on how the apprenticeship levy can be spent so the levy works effectively and flexibly for the industry and supports productivity across the country".* It makes no commitments beyond this.	There are no immediate actions for employers to take.
32.	**Internships: unpaid internships to be "stamped out" and the Government to clarify the interpretation of the law on employment status for interns and encourage enforcement action by HMRC.**	**Accepted:** the Government promises to take a number of steps to eradicate unpaid internships. It commits to: • engaging with sectors where unpaid internships are prevalent and with bodies that represent interns (e.g. universities) to uncover good practice examples; • raising awareness of the law through better information and updated guidance; and • asking HMRC to prioritise National Minimum Wage enforcement efforts and to focus on employers who use unpaid interns. In the event that these measures do not work, the Government says it will undertake a review of the existing policy and legal framework to consider further action.	Since the Government's Response has been published, it has been reported that HMRC has written to 500 companies to remind them that interns classed as workers should be paid the National Minimum Wage. Given the focus on this area, employers should consider reviewing the use of interns within their businesses. Where these are unpaid, employers should carefully consider the likely employment status of these individuals. If it is concluded they are workers, steps should be taken to ensure that they are paid in line with the National Minimum / Living Wage and receive paid holiday and other worker rights.
33.	**Flexible working: when the flexible working system is evaluated in 2019, the Government should consider whether the system might be used to permit requests for temporary changes to contracts.**	**Accepted and to be reviewed:** the Government accepts this recommendation and says that as part of the 2019 review process it will consider how further to promote genuine flexibility in the workplace.	There are no immediate actions for employers to take.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
34.	**Flexible working: the Government should work with organisations such as Working Families and Timewise to encourage flexible working initiatives such as the use of the "happy to talk about flexible working" strapline in job advertisements.**	**Accepted:** the Government says it will launch a joint taskforce with industry on flexible working to consider how to unlock potential within the labour market amongst women, older workers, carers and the disabled.	There are no immediate actions for employers to take.
35.	**Pregnancy and maternity: guidance on pregnancy and maternity discrimination should be reviewed and consolidated to enable women to more easily spot unlawful discrimination and challenge it.**	**Accepted:** the Government says it will continue to work with Acas and the EHRC to improve advice and guidance on pregnancy and maternity issues so employers are aware of their obligations and employees better understand their rights. Further, the relevant pages on the gov.uk website will be updated by summer 2018.	Employers should review any updated guidance as it is published.
36.	**Pregnancy and maternity: consideration should also be given to "further options for legislative intervention" in this field.**	**Accepted and under review:** the Government says it will review the legislation relating to protection against redundancy and also keep other protections under review.	This is not a new development: the Government had already agreed to review the legislation relating to redundancy protection when it responded to a separate report published by the Women and Equalities Committee in August 2016. Until further details of any reforms are released there are no obvious actions for employers to take.
37.	**Sickness absence: statutory sick pay (SSP) should be reformed so that it is a basic employment right for which all workers are eligible, regardless of income, from Day 1 (and should be payable by the employer and accrued on a length of service basis).**	**Under consultation:** the Government says that reform of SSP was considered as part of another Government initiative on work, health and disability (*Improving Lives: the Future of Work, Health and Disability*). As part of that, the Government has committed to consult on changes to SSP to better enable phased returns to work. In addition, the Work and Health Unit will run a programme of analysis and research examining the wider framework within which employers make their decisions on sickness absence. Their preliminary findings will be reported later in 2018. This research will be taken into account alongside the consultation findings to devise effective policy measures. As part of that process, the Review's recommendations on SSP will be considered.	Employers may wish to respond to the consultation on changes to the SSP regime when it is published. In the event that SSP is extended to all workers this will result in an increase to an employer's pay bill. Employers may wish to consider working out the likely approximate cost per annum of this reform (i.e. number of workers x average number of sick days taken per year) and consider how they would fund this additional cost.
38.	**Sickness absence: employers to do more to support workers who are absent on long-term sickness grounds to return to work and go "above**	**To be assessed:** the Government says that protections for individuals returning to work after a period of prolonged ill health *"require further thought"*. The Fit for Work assessment service has now been closed due to low take up rates, but the	There are no immediate actions for employers to take.

	PROPOSAL	THE GOVERNMENT'S RESPONSE AND NEXT STEPS	ACTION POINTS FOR EMPLOYERS
	and beyond" the duty to make reasonable adjustments.	Government says it will *"consider how engagement with occupational health services can support returns to work".*	
39.	**Sickness absence: individuals who have been absent on "prolonged sick leave" should have the right to return to the same or similar job (conditional upon engagement with the Fit for Work service).**	**To be assessed:** as for (38) above.	There are no immediate actions for employers to take.
40.	**Low pay: the Low Pay Commission's (LPC) remit to be widened so that it can make recommendations to Government on areas of change needed to improve the quality of work in the UK.**	**Rejected:** the Government has concluded that it is not appropriate to give the LPC all of the functions recommended by the Review. The LPC has a specialised role and extra functions could detract from that.	There are no actions for employers to take.
41.	**Low pay: the LPC to work with employers, employees and stakeholders to: (i) promote quality work across all regions and sectors; and (ii) develop sector-specific codes of practice that *"support the provision of quality work".***	**Rejected:** the Government says that BEIS, other Government sector teams and the Labour Market Directorate will work with employers and other stakeholders to improve the quality of work across regions and sectors.	The Government says it is starting a "dialogue" with experts to establish how to evaluate good work in the UK. Businesses are invited to participate in this discussion by contacting the following email address: modernemploymentreview@beis.gov.uk.

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Implied terms: the implied term of trust and confidence includes an obligation not to deliberately mislead.

In *Rawlinson v Brightside Group Ltd, UKEAT 2017,* the Employment Appeal Tribunal ('EAT') held that an employer had breached the implied term of trust and confidence when it gave a false reason for an employee's dismissal, with the effect that the employee was entitled to bring a claim for breach of contract for his notice pay.

Background

- There is an implied term that employers must not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between employer and employee (*Woods v WM Car Services (Peterborough) Ltd [1983] IRLR 413, CA* and *Malik v BCCI SA (In Liquidation) [1998] AC 20*).

- Generally, to establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. However, in *Tullett Prebon plc and others v BGC Brokers LP and others [2010] IRLR 648*, the High Court accepted that, whilst this approach is correct where the employee is seeking compensation for unfair or wrongful dismissal (because the employee has to show that their loss was caused by the employer's repudiatory breach), the situation is different where an employee is merely relying on their employer's conduct to release themselves from their contractual obligations. In that situation, the court in *Tullet* felt that an employee may point to an employer's fundamental breach to justify their refusal to perform their contract, regardless of why they left employment or whether they knew of the employer's breach at the time.

- In *Johnson v Unisys Ltd [2001] IRLR 279 HL*, the House of Lords established that an employee cannot claim common law damages allegedly suffered as a result of the manner of dismissal (commonly referred to as the '**Johnson exclusion zone**'), but, instead, must pursue such loss by way of a statutory unfair dismissal claim.

In this case, the EAT had to consider whether a Tribunal had been wrong to reject a claim for damages for wrongful constructive dismissal of an employee who resigned when he was given a false reason for his termination of employment.

Facts

Mr Rawlinson (**R**) was employed as Group Legal Counsel at an insurance broking business (the **Company**). His contract of employment provided for a three month notice period. However, the CEO who recruited R was dismissed the day after R started employment. A new CEO started one month later, who, behind the scenes, quickly identified concerns with R's performance. Although R was made aware of some matters that needed to be addressed, the Company did not raise any detailed concerns with him about his performance.

Two months later, the Company decided to dismiss R. The Company wanted R to work through his three month notice period to ensure a smooth handover of work, so decided to tell R that the reason for his dismissal was a decision to outsource legal services (thus 'softening the blow'), rather than highlighting their concerns about his performance with him. However, R resigned with immediate effect on the basis that any outsourcing exercise would constitute a 'relevant transfer' under the Transfer of

Undertakings (Protections of Employment) Regulations TUPE 2006 (**TUPE**) and asserted that the Company had acted in breach of its information and consultation obligations.

R brought claims in the Employment Tribunal for breaches of the duty to inform and consult on a service provision change and for breach of the consultation requirements on a collective redundancy. He also claimed damages for constructive wrongful dismissal, contending that he resigned in response to a fundamental breach of contract, namely the implied term obligation to maintain trust and confidence.

Employment Tribunal decision

The Tribunal rejected R's TUPE claims, finding that there was no relevant transfer. It also rejected his claim for breach of the consultation requirements on a collective redundancy, finding that R had not been dismissed for redundancy but for performance.

In relation to R's breach of contract claim, the Tribunal found that the Company's failure to mention any performance concerns (and, consequently, the potential for his dismissal) did not amount to a breach of the implied term of mutual trust and confidence, on the basis that the Company had no obligation to provide this information to him.

The Tribunal considered that R's complaint was really about the manner of his dismissal which meant that it was precluded by the Johnson exclusion zone (that common law damages for breach of contract cannot be awarded in respect of unfair treatment connected to a dismissal).

R appealed to the EAT.

EAT decision

The EAT allowed R's appeal and held that:

1. In all but the most unusual cases, the implied term must import an obligation not to deliberately mislead. Therefore, the Tribunal's finding that the implied term had not been breached was wrong. However, the EAT noted that:

    - This does not mean that employers are necessarily placed under some wider obligation to volunteer information, but where a choice has been made to do so, the implied term must require that it is done in good faith.

    - There will be particular cases where the operation of the implied term would permit some element of deceit (i.e. a "white lie which serves some more benign purpose"), the EAT could not see how that was the case here.

2. The Tribunal had failed to establish that R's complaint did not relate to the dismissal, but to the lie that was told to him with a view to keeping the relationship alive for the notice period. Consequently, R's dismissal did not fall within the Johnson exclusion zone.

    - The EAT referred to the case of *Eastwood and anor v Magnox Electric plc [2004] IRLR 733 HL*, where the House of Lords held that if an employee suffers loss as a result of the employer's breach of the implied term in the steps leading to dismissal, he or she has a common law cause of action that precedes, and is independent of, the subsequent termination of employment.

    - The EAT was satisfied that R had suffered a financial loss as a result of a breach of the implied term, that preceded and stood apart from his dismissal.

The EAT set aside the Tribunal's dismissal of R's claim and substituted a finding that the claim succeeded.

Comment

This case serves as a warning to employers who may be tempted not to be completely honest when providing reasons for dismissing employees. Whilst employers are under no contractual obligation to give reasons for dismissal, if they choose to do so then they must not deliberately mislead employees, or they risk being found to have breached the implied term.

This may be particularly relevant where employees are on substantive contractual packages. A breach of contract claim in these circumstances could prove very costly (even if there is no separate unfair dismissal claim to be concerned about) and may free the employee from contractual post-termination restrictions which the employer would have wished to enforce.

Therefore, it seems that transparency and honesty is key no matter how hard that may be for the employee to hear and for the manager to deliver. However, where employers choose not to be transparent, it is better to say nothing than to mislead (whilst being aware that there is always the risk of further information being exposed in the event of a subject access request).

Rawlinson v Brightside Group Ltd UKEAT/0142/17

Terminations: notice to terminate employment takes effect when employee personally takes delivery of the notice letter

In this case, the Court of Appeal struggled to decide the rules around when notice to terminate an employee's employment takes effect under the contract. They concluded that notice is served only when the employee, personally, has taken delivery of the letter containing notice. Here, the employee was away on holiday and didn't receive the letter until her return. The Court decided that notice was served on her return, notwithstanding that it had also been emailed to her and posted in a letter collected by her father-in-law in her absence. However, there was no requirement that the employee must have read the letter before the notice became effective (*Newcastle upon Tyne NHS Foundation Trust v Haywood, CA).*

Background law

The termination date under the contract of employment is a different legal concept to the "effective date of termination" (**EDT**) for the purposes of employment protection against unfair dismissal – in theory two different dates could apply. In the 2010 case of *Gisda Cuf v Barratt*, the Supreme Court decided that for the purposes of the EDT, notice is only effective once the employee has actually read the notice letter. In this recent case, *Newcastle upon Tyne NHS Foundation Trust v Haywood*, the Court of Appeal reached a different conclusion in relation to the date of termination of the contract of employment.

Facts

Ms Haywood was at risk of redundancy. During the consultation, she told the Trust she would shortly be going on holiday for two weeks. During her holiday, the Trust reached a decision to make her redundant and wrote to her on 20 April 2017 serving her 12 weeks' notice of the termination of her employment. It was important to the Trust that notice to terminate Ms Haywood's employment was served on or before 26 April 2017, because otherwise she would accrue additional pension benefits.

The Trust sent their letter by email, standard mail and recorded delivery. They used her husband's email address, which Ms Haywood had used once to write to them. The recorded delivery letter was picked up by her father-in-law and left at her home on 26 April 2017. Ms Haywood arrived home in the early hours of 27 April 2017, went to bed and then read the letter later that morning.

Ms Haywood's contract did not contain any special terms about notice – it simply said that her employment may be terminated by the employer by a notice period of 12 weeks.

Decision

The Court of Appeal agreed with the lower court's decision that notice was not served until 27 April 2017. They said that, unless there is an express contractual term that sets out when notice of termination is effective, then notice is only served when the employee, personally, has taken delivery of the letter containing notice.

This meant that Ms Haywood received notice on 27 April 2017, when she returned from holiday and received the letter. Here, there was no dispute that Ms Haywood also read the letter that same day; but the Court observed that the notice would still have been effective on receipt, even if she had chosen not to read the letter.

The Court said there was no case authority saying that notice could be served by email. In this case the email service was not effective because it was her husband's email address and she had not agreed to receive communications via the email address. They also said the father-in-law's receipt of the letter on 26 April 2017 could have counted as notice being served if he had been acting as Ms Haywood's agent – but that wasn't the case here.

The Court reached this conclusion by a majority of two judges to one. The dissenting judge disagreed, saying that the notice should have been validly served once the letter arrived at Ms Haywood's address, whether or not she was there to receive it.

Comment

The judges struggled with the facts of this case – a testament to the fact that termination of employment is often messy and normal legal principles can't always be cleanly applied. It's possible that the case will be appealed to the Supreme Court for further guidance and certainty.

For the time being, it would be sensible for employers to include express guidance in the notice clauses of employee contracts, specifying when the notice will take effect and how it can be served. The Court was clear that its conclusions were reached in the absence of express terms in Ms Haywood's contract about this. In particular, in today's business world, it would be sensible to include an express term that notice can be served over email.

Newcastle upon Tyne NHS Foundation Trust v Haywood

Restrictive covenants: non-compete covenant void for preventing the employee from holding minor shareholdings in competing businesses

We recently reported on the High Court decision in *Egon Zehnder Ltd v Tillman* where a 6-month non-compete restriction was upheld against an employee who rose from consultant to partner within a relatively short period of time. However, the Court of Appeal has overturned this decision on the basis that the covenant prohibited the employee from holding a minor shareholding in a competing business for investment purposes. This meant that the covenant was impermissibly wide and unenforceable.

Background Law

Clauses which aim to restrict an employee's freedom after the end of the employment are a common feature of employment contracts covering a wide-range of occupations. For reasons of public policy, concerned principally with the importance of freedom of trade and competition, the general rule is that such covenants are unenforceable unless the employer can show that they protect a legitimate interest and are reasonable in all the circumstances.

What may be considered to be a "reasonable" covenant will depend on the facts of each individual case. For example, the employee's seniority, the extent of his contact with clients or fellow employees and his access or exposure to confidential information, will all be relevant facts. Generally, the Courts are more likely to enforce covenants which are carefully drafted and specifically tailored to the particular employee's circumstances.

Non-compete covenants typically carve out the ability for the employee to hold minor shareholdings in other companies as an investment.

Facts

The Claimant employer, Egon Zehnder (**EZ**), provides a variety of professional services to clients, with a particular focus on executive search and advisory services. EZ was a UK subsidiary of a worldwide group operating in many jurisdictions. The business model involved considerable cross-group engagement between the various entities.

The employee, Mary Tillman (**MT**), was engaged by EZ in 2004 to work in its Financial Services Practice Group. This was a significant group within EZ's operation, generating 17.6% of its global revenue at the time of MT's recruitment. MT was initially employed by EZ at "consultant" level (although her employment status was that of employee). However, because she was a recognised individual within the sector, her remuneration package was higher than that usually offered to a newly-recruited consultant. Her contract of employment contained a 6-month non-compete restriction which prevented her from being "engaged, concerned or interested" in any business which competed with any of the businesses of the Company (or any Group Company) as at the termination date, or the 12 months prior to that date, and with which she was materially concerned.

By 2006, MT was promoted from consultant to "principal" and she also became the Global Head of Investment Banking. By 2009 she was promoted again to "partner", the most senior level within the business. In 2012 she was given the title of co-Global Head of the Financial Services Practice Group. MT did not sign a new version of her contract of employment at any of the promotion points within her career at EZ.

In January 2017, MT gave notice of her resignation. On 30 January 2017 EZ terminated MT's contract with immediate effect and paid her in lieu of notice. MT told EZ that she wished to work for a New York-based competitor as of 1 May 2017. EZ brought a claim, and sought an interim injunction, arguing that MT would be in breach of the 6-month non-compete restriction, which was due to expire on 30 July 2017.

MT argued that the restriction was wider than was necessary to protect EZ's legitimate business interests. On the construction of the covenant, MT argued that:

- First, the global nature of the covenant meant it was unenforceable.

- Second, the covenant prevented her from even being "interested" in a competing business, which would, on the face of it, prevent her from having a minority shareholding in a competing business. This also meant the covenant was too wide and unenforceable.

High Court decision

In June, the High Court upheld the non-compete restriction and granted the injunction. The Court found that EZ's legitimate business interests were its client and candidate connections and company and client confidential information. In the Court's view, the correct approach was to assess the reasonableness of the covenant by reference to MT's initial status as a consultant and what the parties believed that would entail. It was not appropriate to judge the covenant by reference to her more senior role as at termination, even though it was expected at the outset that she would rise to partnership status.

However, the Court did accept that a nuanced approach was required in this case. It was necessary to consider whether the view as to her future prospects resulted in an anticipated closer level of engagement with the protectable interests than would normally be expected from someone operating at that level. The Court went on to find that MT did have more client engagement and made a greater contribution to strategic matters than an "ordinary" consultant and the parties would have anticipated this from Day 1. Taking this into account, the Court concluded that a 6-month non-compete restriction was justified.

On the two construction points, the Court found in EZ's favour:

- First, the global nature of the covenant was acceptable given that it had limited competition only in those areas within which MT had been "materially involved" in the 12 months prior to termination.

- Second, on the prohibition on being "interested in" a competing business, the Court was prepared to construe the clause so that it did not prevent MT from holding a minor shareholding in a competitor business. The Court was persuaded to do so given the existence of other provisions of the contract which expressly permitted such shareholdings *during* the course of employment; it would have been anomalous to seek to impose a more onerous restriction post–termination. The Court noted that the normal principles of construction required them to favour a construction which would validate, rather than invalidate, the clause.

MT appealed on the basis that that the phrase "interested in" covered shareholdings and, therefore, prevented her from holding a minor shareholding in a competing business. EZ argued that the High Court had construed the clause correctly and, if not, the phrase "interested in" could be severed to preserve the restriction.

Court of Appeal decision

The Court upheld MT's appeal.

The Court found that a shareholder in a company could be described as being "interested in" that company. This was the approach taken in previous cases such as *Scully UK Ltd v Lee (CA, 1998)* and *CEF Holdings v Mundey (HC, 2012).* In the *Mundey*, the High Court had said that the words "interested in" would cover holding even one share in a publicly quoted company and a restraint including that phrase would, therefore, be too wide.

Turning to the question of severance, the Court held it was only able to sever separate covenants, which was not the case here. It was not prepared to rewrite the covenant to make it work. In any event, even if the words *"interested in"* could be severed, the remainder of the phrase *"engage or be concerned"* would still be too wide on the grounds that a minor shareholder can be said to be "concerned in" the company.

Comment

This decision reminds us that careful drafting is of the utmost importance when it comes to restrictive covenants. Employers should check their restrictive covenant wording to ensure it is tailored to the individual concerned and not impermissibly wide.

The language used should be carefully thought through, as broad terms such as "interested in" will be interpreted widely and mean the covenant may fail. Non-compete covenants should also include an appropriately worded carve out permitting minimal shareholding in other companies. A failure to do so risks the non-compete being found to be void and releasing the employee to work for a competitor.

Egon Zehnder Ltd v Tillman

Sex discrimination: an employer must conduct a specific risk assessment for a breastfeeding mother or risk a sex discrimination claim

The ECJ has ruled that conducting a general risk assessment of the health and safety risks to pregnant workers and new and breastfeeding mothers is not sufficient to comply with the Pregnant Workers Directive. On top of this, the employer must conduct specific risk assessments for individual workers to identify any particular health and safety risks they may face. These risks will change at different stages of pregnancy and motherhood and may be different for different women performing the same job. A failure by an employer to conduct such a bespoke risk assessment may give rise to a direct sex discrimination claim *(Ramos v Servicio Galego de Saude, ECJ).*

Background law

The European Pregnant Workers Directive (**PWD**) includes measures aimed at improving the health and safety at work for workers who are pregnant, have recently given birth and/or who are breastfeeding. In the UK, these measures are implemented by various pieces of legislation including the Management of Health and Safety at Work Regulations 1999.

In a nutshell, these rules require the employer to conduct risk assessments in the following circumstances:

- **A general workplace risk assessment** – this is required where there are women of child-bearing age in the workforce and the work might place pregnant workers, new mothers or their babies at risk. The employer is required to take steps to eliminate any identified risks

- **A specific risk assessment** – this is required where the employer is notified that a worker is pregnant, has given birth within the previous 6 months or is breastfeeding. If the employer identifies any risks to the health and safety of the individual (or her baby) then, again, they must take steps to eliminate those risks. If the risks cannot be avoided (and there is no suitable alternative work available) then the employer must either: (i) alter the working conditions if this would remove the risk; or (ii) suspend the employee from work for as long as necessary to avoid the risk.

If an employer fails to comply with these duties, this may amount to discrimination on the grounds of sex.

This case concerned risks posed to a breastfeeding worker in Spain, where substantially similar rules apply.

Facts

The Claimant worked as a nurse in the A&E department of a Spanish hospital. She returned to work shortly after the birth of her child and whilst she was still breastfeeding. She told her employer that she was concerned about the effect her job role might have on her ability to breastfeed. In particular, she was worried about the complex shift system and her exposure to ionising radiation, infections and stress. She asked for adjustments to her role to protect her from these risks.

The hospital refused on the basis that they believed her role did not pose any risks to her ability to breastfeed. In accordance with Spanish law, they had previously consulted with workers' representatives and created a list of jobs that were agreed to be "risk free". These were jobs that workers in this situation should be transferred to if their job posed a risk to their health and safety (or that of their child). Because the Claimant already worked in a "risk free" job, the hospital rejected the request to adjust the role.

The Claimant then applied for a special financial assistance grant which was available to breastfeeding mothers who were deemed to be at risk in their jobs. The grant was paid to mothers who had been suspended from work due to the workplace risks. However, the Claimant's application was rejected following receipt of:

- a statement from the hospital's Director of HR which said that her job was on the list of "risk-free" jobs which had been agreed by the hospital and workers' representatives; and

- an occupational health report which said that the Claimant was fit to carry out her job role and there was no risk to breastfeeding.

Although the Claimant appealed, with support from her line manager, her application was ultimately dismissed by the Spanish social court. The Claimant appealed again to the Spanish High Court, which referred the issue to the ECJ.

Decision

In April 2017, Advocate General Sharpston gave an Opinion which concluded that conducting a broad brush generic risk assessment for the average worker was unlikely to satisfy the requirement to conduct a specific risk assessment for a pregnant worker or new or breastfeeding mother. Further, it was said that "less favourable treatment" under the Equal Treatment Directive would cover a failure to conduct a proper risk assessment for a breastfeeding mother. Such a failure could amount to direct sex discrimination.

The ECJ agreed with the Advocate General. The Guidelines on the PWD required an examination of the specific circumstances of an individual breastfeeding mother's working conditions. In other words, it wasn't enough for the employer to point to the generic role of a nurse working with A&E and say that it had been assessed and posed no risks to a breastfeeding mother. It could be the case that the same working conditions (that had been identified as risk free on a generic basis) raised different health and safety issues for different women at different stages of their pregnancy and/or on their return to work and/or whilst breastfeeding. This will depend on their individual circumstances and personal medical history.

The ECJ held that this could amount to direct sex discrimination. The Claimant had provided evidence that backed up her assertions that her particular role placed her at risk (i.e. her line manager's supporting letter). This suggested that the hospital had not carried out a risk assessment specific to the Claimant. Accordingly, the burden of proof had shifted to the hospital to prove that the risk assessment was sufficient.

Comment

This case highlights that a general assessment of risks to pregnant workers or new or breastfeeding mothers is not enough. Employers must go further and assess what particular risks, if any, are faced by a particular employee. Although specific risk assessments are typically triggered upon the notification of a pregnancy, the important lesson from this case is that this duty extends to breastfeeding mothers when different health and safety considerations will arise.

For example, when breastfeeding, a woman is exposed to an increased risk of mastitis if she is not afforded sufficient opportunities to express milk during working hours – this is not a risk a pregnant worker would face (although she may still require frequent breaks to avoid other types of risks). Indeed, the risk of mastitis was an issue raised in the recent Employment Tribunal case of *Macfarlane and anor v easyjet Airline Company Ltd*. You can read our report on that case here. In addition, there are some workplace risks which are associated specifically with breastfeeding. The HSE highlights that these include working with organic mercury or radioactive materials or exposure to lead.

Where does this leave employers? Firstly, it is important to ensure that your health and safety policies are appropriately drafted and clarify that specific risk assessments will be conducted for pregnant workers and new and breastfeeding mothers. Secondly, ensure that those specific risk assessments are actually carried out - both upon notification of pregnancy and on the return to work (and at appropriate intervals thereafter if they continue to breastfeed for some time).

Ramos v Servicio Galego de Saude

ADDLESHAW GODDARD

Shared parental leave: failure to match shared parental pay with enhanced maternity pay was directly discriminatory against male employee

An Employment Tribunal had held that an employer directly discriminated against a male employee by paying enhanced pay to women on maternity leave and statutory pay only to men on shared parental leave. The Tribunal took the controversial step of allowing the Claimant to compare himself to a woman on maternity leave, rather than confine him to a comparison with a woman on shared parental leave. They also held that after the compulsory two-week period, the purpose of maternity leave was detached from pregnancy and childbirth and so the special treatment derogation did not apply (*Ali v Capita Customer Management Ltd*).

Background

Direct and indirect discrimination

Direct sex discrimination occurs where, because of sex, a person treats another less favourably than others (section 13(1), Equality Act 2010 (**EqA 2010**)). However, there is a derogation to this general rule in relation to special treatment given to women in connection with pregnancy or childbirth (section 13(6)(b), EqA). This means that special treatment given on these grounds should be disregarded and a man cannot claim he has been treated less favourably than a woman because he has not received the same treatment. Any such special treatment should be proportionate i.e. limited to that which is reasonably necessary to remove the disadvantages caused by their condition.

Indirect sex discrimination occurs where the employer applies an ostensibly neutral provision, criterion or practice (a **PCP**) which puts persons of the claimant's sex at a particular disadvantage and which also puts the claimant at that disadvantage and the disadvantage cannot be objectively justified by the employer.

Shared parental leave and pay

Shared parental leave (**SPL**) and pay was introduced in 2015. Co-parents are able to share up to 50 weeks' leave and 37 weeks' pay. The pay rate for statutory shared parental pay (**SSPP**) is the same as statutory maternity pay (**SMP**) (save that SSPP is paid at a flat rate throughout and there is no enhancement to 90% of pay for the first 6 weeks as there is for SMP). There is no statutory requirement to equalise shared parental pay with any enhanced maternity pay package offered to female staff. The Government's view is that it is not unlawful for employers to differentiate, yet commentators have argued there is a risk that this would be discriminatory.

However, the limited case law on the subject so far has supported the Government's approach. In the case of *Shuter v Ford Motor Company Ltd* (a case concerning additional paternity leave (**APL**) and pay, the predecessor to SPL), an Employment Tribunal decided that it was neither directly nor indirectly discriminatory to pay a woman 100% of pay for 52 weeks of maternity leave and to pay a man statutory pay only for a period of APL. Similarly, in the case of *Hextall v Chief Constable of Leicestershire Police* an Employment Tribunal decided that it was not discriminatory to pay enhanced pay for maternity leave compared with statutory pay for shared parental leave.

In both *Shuter* and *Hextall*, the direct discrimination claims failed because the Tribunals rejected arguments that the male claimants on APL and SPL were entitled to compare themselves with women on maternity leave. Instead, the correct comparators were said to be a woman on APL (*Shuter*) or SPL (*Hextall*).

Facts

The Claimant began working for the Respondent following a TUPE transfer. Female transferring employees were entitled to an enhanced maternity pay package of 14 weeks' pay, followed by 25 weeks' SMP. Male transferring employees were entitled to 2 weeks' paid ordinary paternity leave and up to 26 weeks' additional paternity leave which was said "may or may not be paid".

After the birth of his daughter the Claimant took 2 weeks' ordinary paternity leave for which he was paid in full. He wanted to take additional time off and was told that he was eligible to take SPL (the system of leave which had replaced APL) and receive SSPP. The Claimant argued that he should be entitled to the same enhanced payments as the female transferring employees i.e. up to 14 weeks' full pay.

The Claimant went on to bring direct and indirect sex discrimination claims in the Employment Tribunal, arguing that the special treatment derogation under section 13(6)(b), EqA only applied in respect of the first 2 weeks of compulsory maternity leave. Thereafter, the parents were free to transfer the leave between them in any arrangement they chose. In other words, there was no material difference between a man taking SPL and a woman taking maternity leave after the expiry of the compulsory 2-week maternity leave period. After that point the purpose of the leave is childcare and no special treatment of women was warranted. The Claimant argued that the provision of statutory pay only to him for the following 12 weeks: *"took away the choice that he and his wife wanted to make as parents for the baby"* and *"this was not a valid assumption to make in 2016".*

The Respondent argued that the Claimant was not entitled to compare himself to a woman who had given birth and was on maternity leave. However, even if he was, the special treatment derogation applied and the treatment was proportionate given that the payment was confined to the minimum period of maternity leave provided for under the Pregnant Workers Directive 92/85/EEC.

Decision

The Employment Tribunal upheld the direct discrimination claim.

Interestingly, they departed from the approach taken in *Shuter* and *Hextall* and allowed the Claimant to compare himself to a woman on maternity leave (after the first 2 weeks' of compulsory maternity leave). The Tribunals in *Shuter* and *Hextall* had rejected the argument that a man on APL or SPL could compare himself to a woman on maternity leave:

- In *Shuter*, the Tribunal's position was that there were substantial differences between a woman on maternity leave and a man on APL e.g. the fact that the woman had been pregnant, given birth and cared for the child since birth and was possibly still breastfeeding.

- In *Hextall*, the Tribunal highlighted the significant differences between maternity leave and SPL including the fact that maternity leave can be taken before birth and the consent of the co-parent to take the leave is not required, whereas the opposite is true for SPL.

Having allowed a comparison between a man taking SPL and a woman taking maternity leave, they went on to find that the differential approach to pay was less favourable treatment because of sex. On the question of the derogation permitting special treatment, the Tribunal accepted that the purpose of leave after the first 2 weeks' of compulsory maternity leave was to care for the child, and this was not exclusively tied to the mother. The Tribunal said: *"In 2016, men are being encouraged to play a greater role in caring for their babies. Whether this happens in practice is a matter of choice for the parents depending on their personal circumstances but the choice made should be free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity".*

The Tribunal concluded that the enhancement of maternity pay was not special treatment in connection with pregnancy or childbirth, meaning that the derogation did not apply.

The Tribunal dismissed the indirect discrimination claim on the grounds that the PCP relied on was the maternity policy. As this was not a gender neutral policy, there was no indirect discrimination.

Comment

It's worth remembering that the Tribunal in *Shuter* had conceded that **if** it could be shown that Parliament intended to detach maternity leave from that necessary to protect health and safety arising from the biological condition of pregnancy then the special treatment derogation would not apply since the purpose of the leave would be childcare alone.

However, the Tribunal in *Shuter* was not prepared to infer that Parliament had, in fact, intended to detach maternity leave from pregnancy or childbirth, because: (i) the APL regulations were silent on that point: (ii) the right to APL was not freestanding but required the mother to end her maternity leave when she was ready to return to work; and (iii) the Government's advice when APL was introduced was that there was no legal requirement to match enhanced maternity pay and additional paternity pay.

All of these same considerations apply in respect of SPL. Nevertheless, the Tribunal in this case was prepared to find that the purpose of maternity leave was childcare and **had** become detached from pregnancy and childbirth. We are now left with conflicting Tribunal decisions on this key issue, neither of which are binding. However, both *Hextall* and *Ali* are to be appealed and the EAT's decision will be binding.

Employers offering differential pay for maternity leave and SPL should follow these appeals and give consideration to their response if the EAT upholds this decision.

- One option would be reduce enhanced maternity pay to statutory pay only, although this may be unacceptable from an employee relations perspective.
- A more palatable option might be to equalise maternity pay and shared parental pay by reducing maternity pay and uplifting shared parental pay.
- The final, but most expensive, option would be to uplift shared parental pay to match existing enhanced maternity pay rates.

Recent CIPD research has indicated that the uptake rates of SPL have been low, with only 5% of eligible fathers opting to take SPL. In light of this, some employers may feel that the cost of uplifting shared parental pay is a price worth paying to avoid discrimination complaints and become an "employer of choice".

Ali v Capita Customer Management Ltd

Equal pay: female retail employees permitted to compare themselves to male distribution depot employees

The EAT has upheld a decision of the Employment Tribunal that 7,000 female retail workers working at supermarkets were entitled to compare themselves to male distribution workers working at depots. This comparison was permitted under the Equality Act 2010 as the workers could be said to have common terms. It was also permitted under Article 157 of the Treaty on the Functioning of the European Union given the presence of a single source responsible for the terms and conditions and any pay inequality *(Asda Stores Ltd v Brierley and others, EAT)*.

Background law

Equal value claims

The Equality Act 2010 contains provisions designed to achieve equality between men and women in pay and other terms of employment, where the work of an employee and his or her opposite sex comparator is "equal". There are three different ways in which an employee's work will be equal to that of their comparator's. This will be the case where their work is:

- like work; or
- rated as equivalent; or
- of equal value.

In equal value claims two apparently quite different jobs can still be of equal value, by reference to factors such as the employee's effort, skill and decision-making. An Employment Tribunal would assess whether the roles are of equal value by way of a 2-stage process, which often involves hearing independent expert evidence.

In addition to our domestic law, Article 157 of the Treaty on the Functioning of the European Union (**TFEU**) sets out the principle that *"men and women should receive equal pay for equal work of equal value".* The scope of this provision is potentially wider than the provisions in the Equality Act 2010. This provision is also vertically and horizontally directly effective, which means it can be directly relied upon by a private sector employee in a dispute with their employer.

Appropriate comparators

An appropriate comparator in an equal pay claim could be:

- Someone of the opposite sex who works in the **same establishment** for the same or associated employer, even if their terms of employment are different. For example, a female retail assistant and a male merchandiser who work at the same clothing store but with different terms and conditions.
- Someone of the opposite sex who works at a **different establishment**, but for the same or associated employer, provided that common terms and conditions of employment apply (in this context "common terms" means broadly similar terms – there is no need for them to be identical). For example, a female retail supervisor at a high street store and a male shift

supervisor at an out of town warehouse, both employed by the same company and with broadly similar terms and conditions.

Where "common terms" are required, the test is to look at the terms and conditions of the proposed comparator on one hand and the terms and conditions that the proposed comparator is, or would be, on if employed at the employee's establishment (this test is known as the "North hypothetical"). For example, would the terms of the male shift supervisor at the out of town warehouse still be the same if he worked at the same place as the female retail supervisor working at the high street store.

Where a claim is founded on Article 157 of the TFEU the potential comparators are wider. Here, employees must show that they work in the same "establishment or service" as the proposed comparator, but they do not have the same employer or even an associated employer. The comparison is allowed provided that their terms and conditions and any differences in pay are attributable to a "single source" who is responsible for any inequality in pay and capable of remedying it.

Facts

In the biggest equal pay claim in the private sector to date, some 7,000 female supermarket workers brought equal pay claims against Asda. The claimants allege that their work is of equal value to male distribution workers based at depots located elsewhere.

A key preliminary issue is whether the female workers are entitled to compare themselves to the male distribution workers. Asda's position was that they are not appropriate comparators because they were subject to distinct pay regimes and did not share common terms. They also argued that the claimants could not rely on Article 157 of the TFEU as it was not directly effective but, in any event: (i) a single establishment was still needed and this was not present; and (ii) there was no single source responsible for any pay inequality.

At a Preliminary Hearing, the Employment Judge found that the proposed male comparators were appropriate under both domestic and EU law. It was held that:

- Applying the "North hypothetical", broadly similar terms would apply if the distribution staff did their work at the retail store locations. In other words, the claimants and the comparators could be said to have common terms. The Employment Judge reached this conclusion notwithstanding the fact that the female retail workforce did not have their terms set through collective bargaining, whereas the male distribution workforce worked under terms collectively agreed by the GMB union.

- Article 157 was directly effective, there would be no need for a single establishment and there was a "single source" of terms and conditions. The Employment Judge found that the terms and conditions of both workers were implemented and operated by Asda's Executive Board. All those responsible for setting terms in both the retail and distribution parts of the business were authorised by, and ultimately answerable to, the Executive Board.

EAT decision

Asda appealed, arguing that the distribution workers were not appropriate comparators for several reasons, including because the two pay regimes were distinct; Article 157 could not be applied in an equal value claim when equal value had not yet been determined; the "single source" argument on its own was insufficient and there needed to also be a single establishment, collective agreement or statutory framework; and that various findings of facts were perverse.

The EAT dismissed all of Asda's grounds of appeal and agreed with the Employment Judge that the female supermarket workers were able to compare themselves to the male distribution depot workers at different geographical locations, even though they had separately agreed terms and conditions.

Comment

As the biggest equal pay claim in the private sector to date, it is likely to be in the minds of unions and employees, particularly those operating within the retail sector. However, it is important to remember that this decision is limited to one specific preliminary issue about appropriate comparators in equal value claims.

It does not address the issue of whether the work of a female supermarket worker at Asda is of equal value to the work of a male distribution depot worker at Asda. Instead, it says that the female supermarket worker can use the male distribution depot worker as her comparator in an equal value claim. The complex question of whether their work is, in fact, of equal value is yet to be determined by an Employment Tribunal.

Asda has been given permission to appeal this decision to the Court of Appeal and there is also a possibility of a reference to the ECJ. Therefore, it is likely to be some time before we have final decision on the substantive claims.

In the meantime, employers who have any segregation in its workforce (i.e. where there has been physical separation between lower paid female roles and higher paid male roles) should consider auditing the respective terms and conditions to understand whether it could be said that there are "common terms" of employment. It should also consider who is responsible for setting those terms and whether a single source can be identified.

Asda Stores Ltd v Brierley and others

ADDLESHAW GODDARD

Gender pay gap reporting: EHRC publishes proposals for enforcing the regulations

The Equalities and Human Rights Commission (EHRC) has published a draft policy paper outlining how it will seek to enforce the gender pay gap reporting regulations. The EHRC's primary focus in the first year will on employers who have failed to publish their results. However, they indicate that, if capacity allows, they will also scrutinise the accuracy of the results and take enforcement action where necessary. In a worst case scenario, a non-compliant employer would have to comply with an EHRC investigation, have that investigation report made public and be forced to comply with an unlawful act notice or face an unlimited fine.

Background

The Equality Act (Gender Pay Gap Information) Regulations 2017 came into force on 6 April 2017. They require all private and voluntary sector employers with 250 or more employees to publicly report a range of gender pay information each year. The first reporting deadline falls on 4 April 2018. Similar regulations apply to public sector employers with 250 or more employees, although the reporting deadline falls slightly earlier on 30 March 2018 (together, **the Regulations**)

When the Regulations were introduced there was no express mention of civil or criminal penalties for employers who failed to comply with the reporting obligations. However, the Explanatory Notes to the Regulations stated that it was the Government's view that a failure to comply with the Regulations would constitute an "unlawful act" within the meaning of section 34 of the Equality Act 2006. This, in turn, empowers the EHRC (the regulator with responsibility for enforcing the Equality Act 2010) to take enforcement action against offending employers.

The EHRC has recently published a draft policy paper on their intended approach to enforcement action for non-compliance with the Regulations. We report below on how the proposed enforcement action would affect private and voluntary sector employers.

How will the EHRC encourage employers to comply?

The paper stresses that enforcement action will only be necessary where employers do not comply with their reporting obligations despite "encouragement" from the EHRC to do so. The EHRC will take the following steps to encourage compliance:

- **Promoting awareness:** there will be a campaign targeted at employers and the EHRC will input into correspondence from the Government Equalities Office (**GEO**) to employers.

- **Education:** the primary focus here will be the provision of information - including real life case studies of employers who have reported their gender pay gap information - on the EHRC website

- **Monitoring compliance:** in conjunction with the GEO, the EHRC will monitor which employers have complied with the reporting obligations. Importantly, the monitoring is said to include both the publication and **accuracy** of the relevant information. It's not yet clear how the EHRC will be able to ascertain whether results are accurate from a superficial review of the published results. Perhaps where a zero or very low gender pay gap is reported, this will trigger scrutiny by the EHRC. Indeed, a number of employers who reported a 0% gender pay gap attracted attention from the press due to the statistical improbability of such results. In some cases, this led to the figures being corrected and re-submitted.

- **Publicising compliance rates:** the EHRC propose to publish the total number of compliant and non-compliant employers on social media just before and after the reporting deadlines.

- **Promotion of enforcement work:** the results of the EHRC's enforcement work will be promoted to encourage other employers to comply with their obligations.

Where will the EHRC focus their attention?

In 2018/19 the primary focus will be on employers who have failed to publish their gender pay information at all by the reporting deadlines. Following the reporting deadlines, the EHRC will assess the scale of non-compliance and, if necessary, take a "staged approach". This will involve looking at employers by sector and contacting a random selection of non-compliant employers from each sector. The number of employers to be contacted will turn on the scale of non-compliance in each industry.

However, even in this first year, the EHRC says that it may also take enforcement action against employers for publication of **inaccurate data** if they have the capacity and it is "necessary, proportionate and feasible" to do so. Once the Regulations are embedded, it seems likely that the EHRC's focus will increasingly move towards the accuracy of an employer's published results.

What means of enforcement are available?

(i) Informal resolution:

The paper highlights that the EHRC's preferred option is to seek an informal resolution with any non-compliant employers. In a nutshell, the informal procedure involves the EHRC writing to the employer to remind them of their reporting obligations.

The employer will then have 14 days to respond and confirm that they will: (i) publish the results for the previous reporting year within 42 days of the EHRC's letter; and (ii) they will comply with their reporting obligations for the forthcoming year. Where these assurances are given, the EHRC will simply check that the employer complies in both reporting years. If they do, then no further enforcement action will be taken.

(ii) Section 20 investigation:

If a non-compliant employer fails to comply at the informal resolution stage, the EHRC will commence an investigation into whether they have committed an "unlawful act". The employer will be provided with terms of reference for the investigation and have the opportunity to make representations before the investigation begins. The employer will be provided with a copy of the draft investigation report and given 28 days to make representations on it. A final report will usually be published on the EHRC's website within 14 days of any such representations. You can view an example of a section 20 investigation report here.

Employers can be served with a notice requiring them to disclose documents or give oral evidence as part of the investigation process. If the employer then fails to comply with that notice, or provides false documentation or oral evidence, it will commit an offence attracting an unlimited fine.

(iii) Section 23 agreement:

Where an employer is under investigation, they will be given a second chance to comply with their reporting obligations. The EHRC will offer the employer the chance of entering into a written "section 23 agreement" under which the employer must agree to: (i) publish the results for the previous reporting year; and (ii) comply with their reporting obligations for the forthcoming year.

The EHRC will give the employer two chances to enter into a section 23 agreement. First, it will be offered alongside the terms of reference for the investigation, and, second, it will be offered alongside the draft investigation report. In both cases, the employer will have a limited period of time to accept the offer.

Where a section 23 agreement is reached, the EHRC will simply check that the employer complies in both reporting years. If they do, then no further enforcement action will be taken. However, if the employer fails to comply, the EHRC will usually apply to the County Court in England and Wales (or the Sheriff Court in Scotland) for an Order requiring the employer to comply with the undertakings in the section 23 agreement.

(v) Unlawful act notices and action plans:

If a non-compliant private or voluntary sector employer does not accept the offer of a section 23 agreement the EHRC will issue an "unlawful act notice". This will require the employer to prepare a draft action plan within a specified time frame, explaining how they will remedy the continuing breach of the Regulations and prevent future breaches. If the employer fails to produce the action plan, the EHRC will apply to Court for an Order requiring this to be produced.

Once the action plan is produced, the EHRC will either approve it or serve a further notice stating it is inadequate and requiring a further draft to be submitted.

If the employer then fails to comply with an action plan the EHRC can, again, apply to Court for an Order requiring compliance. If an employer fails to comply with such an Order then they will commit an offence attracting an unlimited fine.

Comment

Firstly, employers with 250 or more employees should ensure they have gathered their data and are ready to report their gender pay gap information by no later than 4 April 2018 (or 30 March if a public sector employer). A failure to do so could lead to enforcement action by the EHRC as outlined above. Employers will usually wish to avoid the time and expense of managing such action and would be well advised to either resolve the matter informally, or by way of a section 23 agreement. A failure to do could result in a time-consuming investigation, with the final report being made public. Inevitably, this would attract negative press coverage and damage employee relations.

Secondly, employers need to be confident that the results they report are accurate. The EHRC have said they will probe the accuracy of the results where they have capacity to do so and will, in appropriate cases, take enforcement action. Even the EHRC doesn't have capacity to do this in the first year post the Regulations, it is already clear that there is a high level of media interest in the gender pay gap results and any very unusual results are likely to be scrutinised. In addition, once the reporting deadline has passed, it is likely that the GEO and/or industry-specific press will look to compare the results of employers operating within the same sector. This exercise will throw further light on any atypical results.

Closing the gap: enforcing the gender pay gap regulations

THE COUNTDOWN BEGINS: GETTING YOUR GENDER PAY GAP REPORTS READY FOR PUBLICATION

The Equality Act (Gender Pay Gap Information) Regulations 2017 (Regulations) came into force on 6 April 2017, requiring all private and voluntary sector employers with 250 or more employees to publicly report a range of gender pay information each year. The first reporting deadline falls on 4 April 2018, leaving employers with only two months to get their gender pay information into shape. We look at how the land currently lies, what you can do to prepare for the publication of your results and measures to consider for the future.

AS THE REPORTING DEADLINE APPROACHES, HOW DOES THE LAND LIE?

An estimated 9,000 UK employers must publish their gender pay gap information by 4 April 2018. At the time of writing, 734 employers have published their results – only 8% of those required to do so. What can we learn from those who have reported their results so far?

Recent analysis by Deloitte of the large, private sector employers (i.e. those with 2,000 or more employees) who have reported so far reveals median gender pay gaps ranging from -15% to 45.5%. However, within this broad range, the middle half of employers reported median pay gaps ranging between 4% - 21%, with the average median gender pay gap at 9%. This is notable because the Office of National Statistics (**ONS**) expects the average median pay gap across UK businesses to be 18%. This shows that the cohort of large employers who are reporting early tend to have relatively good pay gap results.

This is also broadly true when viewed by sector. For example, the average median pay gap reported to date by large financial and insurance sector employers was approximately 28%, which compares favourably with the expected ONS average median pay gap figure of 36% for this sector. Similarly, in the manufacturing sector, the average median pay gap was 5%, compared to the ONS expected figure of 32%. Indeed, of the 19 sectors looked at by Deloitte, 13 outperformed the expected ONS median pay gap figure for their sector.

What we can take away from this is that the less impressive results have yet to be published and these will come in a wave over the course of the next eight weeks. It also seems possible that not all of the 92% of outstanding employers will publish their reports in time suggesting there will be some degree of non-compliance. The EHRC are currently consulting on new proposals for tackling non-compliance by employers.

The other point to note is the media clearly has the appetite to scrutinise the reported results. Predictably, the focus has been on employers who are household names and it seems likely this will continue. However, the media scrutiny has extended to analysis of the credibility of the figures reported, with the Financial Times highlighting sixteen companies who had reported a "statistically improbable" nil gender pay gap. This led to some companies adjusting their reported figures. Furthermore, a persistent problem with the media reporting is the conflation of the gender pay gap with unequal pay – seen most recently in the reporting of the scandal concerning the BBC and Carrie Gracie.

The take away here is that you should expect scrutiny from the national media and, in due course, industry-specific media, who will inevitably look to compare employers operating within the same sector. Given the misreporting of the gender pay gap, it is important that you explain the distinction between the two concepts in your voluntary narrative (see below) and your internal and external communications.

WHAT AREAS SHOULD YOU ADDRESS IN YOUR VOLUNTARY NARRATIVE?

If you haven't reported your results yet, you are probably at the stage of beginning to prepare your voluntary narrative to accompany the results. What areas should you think about including to create a really compelling narrative?

- **Opening statement from a senior stakeholder**: an opening statement from a senior stakeholder gives you the chance to set the tone and demonstrate support for gender pay gap reporting at senior level. This helps to add credibility to the report, show that it is being taken seriously by the business and is more than just a compliance exercise.

- **Getting across the culture of the business**: in the opening statement or elsewhere you might wish to highlight any relevant diversity awards or commendations that the business has received, as well as any relevant memberships or initiatives to which you are a signatory (e.g. Think, Act, Report). Again, this will help to show that diversity is taken seriously within the business. Another way of delivering a positive message about the business culture would be to include profiles of employees who have a relevant story to tell.

- **Explain the difference between the gender pay gap and unequal pay**: we would strongly recommend that an explanation of the difference between the equal pay and the gender pay gap is included in your narrative. An equal pay audit compares men and women performing the same, similar or like work. It reveals unequal pay, which is unlawful (unless there is a material factor defence). The gender pay gap analysis compares the mean and median rates of pay of all men and women within an organisation regardless of job role. It typically reveals an underrepresentation of women in highly paid roles. The presence of a gender pay gap does not necessarily mean an employer is paying men and women unequally (although this may be a contributory factor). The two terms are still regularly conflated by the press (see above). It's important to clarify this distinction, not least because main readership of the report is likely to be your employee population. The Deloitte analysis revealed that 69% of the large employers who had reported included this explanation in their narrative.

- **Set the scene for the results**: it's worth explaining which entity is covered by the report and whether you are reporting only on that basis, or whether you intend to go further and provide additional group-wide figures. Again, given that the main readership will be your employee population, it's a good idea to explain the different types of gender pay information being reported and what they show. It's also a good idea to flag the difference between mean and median and why the median figure is the better indicator of the pay gap. This should help promote a better understanding of what the results show.

- **Set out your results and explain the underlying causes**: having set out your results, you should go on to provide an explanation of the underlying causes for any gaps, perhaps providing additional data on a voluntary basis if helpful. For example:

  - Is the gap partly attributable to a predominance of women in lower paid roles and a lack of women in higher paid roles within the entity reported on? If so, and the position is improved when viewed from a group-wide perspective, then you might want to supplement your figures with group-wide results.

  - Is the gap partly attributable to the location of staff? If so, consider breaking up your results by location to demonstrate this.

  - Is your bonus gap related to the fact that you have higher numbers of female part-time workers? If so, then you should explain that actual bonus payments are used in the calculations, rather than full-time equivalent amounts, which will have the effect of inflating the bonus gap where you have a high number of part-time, female staff.

  - You may also be able to point to sector-specific causes of the pay gap within your industry (e.g. fewer women entering STEM professions). If helpful, you could also benchmark your results against peers within your industry (this will be easier in to do in the second year of reporting when you can look back at the previous year's figures).

- **Explain your action plan to close the gap**: having identified the causes for the gap within your business, the next step is to explain what initiatives you already have in place and plan to put in place to help you achieve the closure of the gap. We discuss some examples of relevant initiatives in more detail below. It's worth noting that the Government's advice is to focus your efforts on three key areas where you can make traction, rather than opting for a scatter gun approach. When setting out your action plan, it's also a good idea to manage expectations on how quickly you will be able to reduce the gender pay gap. Most of the initiatives you are likely to adopt will not generate an overnight improvement (e.g. recruiting more female graduates at relatively lower rates of pay may have the immediate impact of inflating your pay gap but, in the longer term, will improve the results as they rise to more senior roles).

WHAT SORTS OF INITIATIVES MIGHT HELP TO CLOSE YOUR PAY GAP?

Below is a non-exhaustive list of some of the strategies that might help you tackle the pay gap within your business. The Government Equalities Office has recently published a toolkit for employers with further suggestions on how to close the gender pay gap.

- **Ensuring your recruitment strategy is focused on reaching a diverse mix of candidates**: if your results have identified a need to attract more women to your business, particularly at senior level, then consider how your recruitment strategy could be adjusted to enhance female recruitment. For example:
  - Advertise all job roles in a gender neutral way and as being open to flexible working.
  - Recruit through a variety of different channels to reach a wider pool.
  - Ask recruitment agencies to provide you with a diverse mix of candidates.
  - Train all those involved in recruitment on unconscious gender bias.
  - Ensure you can justify recruitment decisions (e.g. by reference to objective skills-based tests and/or panel interviews).
- **Measures to help women rise to senior positions**: if your results have identified a need to improve female representation at senior levels, then consider what support you can offer your female staff to rise to those positions. For example:
  - Provide female staff with appropriate technical and soft skills training.
  - Offer mentoring and networking opportunities.
  - Implement a targeted female development programme.
  - Review the distribution of performance ratings between male and female staff and ensure development opportunities are offered to those with similar performance levels.
  - Monitor the level of female lateral hires and internal promotions and identify any barriers that exist.
  - Where appropriate you could consider using the positive action provisions in relation to recruitment and promotion under the Equality Act 2010. In broad terms these provisions would potentially permit an employer to select a woman as part of a recruitment or promotion decision in preference to a man, when the man and woman are as qualified for the particular role.
- **Ensure you have a robust pay and reward structure**: if your results have indicated there may be an issue with men and women being paid fairly then consider what you can do to improve your pay and reward structure:
  - Conduct a job evaluation to understand which job roles should be treated as the same, similar or equivalent.
  - Consider introducing annual equal pay audits to check for gender discrimination in pay.
  - Train managers who are responsible for making decisions about performance and pay on unconscious gender bias.
  - Ensure your pay and reward system is transparent and objective and decisions are capable of justification.
- **Family friendly initiatives**: if your results have identified an issue in retaining female employees after having children (thereby affecting the pipeline of women for senior roles) then consider how you can support working mothers and also encourage working fathers to play a more equal role in childcare: For example:
  - Champion flexible working for all staff and make it available from Day 1 of employment.
  - Equalise shared parental pay with maternity pay and allow it to be paid in a fully flexible way.
  - Provide support for colleagues on family leave (e.g. maintain contact; use KIT days; implement a buddy scheme).
  - Introduce a returner programme for women who have taken a career break.
  - Promote these initiatives to your staff to encourage uptake.

CONTACT

If you would like to discuss your gender pay gap report or your future strategy for closing your gender pay gap, please contact **Amanda Steadman** or your usual AG contact.

Constructive knowledge of disability: employer did not have knowledge of disability despite failure to follow up on occupational health advice

The Court of Appeal has held that an employer was not fixed with constructive knowledge of an employee's disability despite a failure to follow up on a weak occupational health report. Overall, the employer had taken reasonable steps to reach its own decision on the employee's disability status. In addition, the fact that the employer had made adjustments to the employee's working hours did not necessarily imply knowledge of a disability (*Donelien v Liberata UK Ltd*).

Background

The Equality Act 2010 obliges employers to make reasonable adjustments for disabled employees where a provision, criterion or practice applied by the employer puts the disabled person at a substantial disadvantage compared to non-disabled persons. This duty is only triggered when employer has actual or constructive knowledge of the disability.

Constructive knowledge captures those things that an employer can be fixed as knowing about had they been reasonably diligent. In other words, if it was reasonable for the employer to have made efforts to have known about it, then they will be deemed to have knowledge of that fact.

In the case of *Gallop v Newport City Council* the Court of Appeal confirmed that employers are not entitled to unquestioningly rely on occupational health advice when determining whether or not an employee is disabled. Instead, a reasonable employer must make its own judgement on whether an employee is disabled, with the assistance of occupational health or medical advice. Where the advice is that the employee is disabled, this will usually be respected. However, where the advice is that the employee is not disabled the employer has responsibility for making the final factual judgment and cannot simply "rubber stamp" the external advice.

This case concerned whether an employer could be said to have constructive knowledge of an employee's disability where it relied, in part, on weak occupational health advice which had suggested the employee was not disabled.

Facts

The Claimant was employed by Liberata UK Ltd (**Liberata**) as a court officer for nearly 11 years. She had a poor absence record. In the last year of her employment she was absent on approximately 20 occasions for a total of 128 days. The Claimant reported that she suffered from ongoing conditions including hypertension and work-related stress. She also offered a variety of other reasons for her absences including: viral infections, dizziness, breathing difficulties, adverse reactions to medication, colds, wrist pain and stomach upsets.

The Claimant initially refused to be seen by the employer's occupational health advisor, but eventually agreed to an assessment in June 2009. In the instruction letter, the employer asked the occupational health advisor (Dr Bellamy) to offer a view on whether the Claimant was disabled for the purposes of the Disability Discrimination Act 1995 (the applicable legislation at the time). Dr Bellamy's report highlighted that the Claimant's conditions appeared to be triggered by underlying problems at work, but did not offer a view on whether she was disabled.

Accordingly, the employer followed up with the occupational health provider to seek an answer to that question. In July 2009, a further report was provided by a different occupational health advisor (Dr Brennan), who had not met with, or spoken to, the Claimant. Dr Brennan advised that the Claimant was not disabled, however, it failed to answer the specific questions the employer had raised (for example, whether there was any medical condition which would explain the Claimant's absences).

The employer failed to probe the second occupational health report by seeking responses to the specific questions it had raised. However, they had taken other steps relevant to the assessment of the Claimant's disability status. In particular, they had held regular return to work meetings with her after her spells of absence, had ongoing discussions with her, and had corresponded with her GP (although the Claimant had refused consent for the occupational health advisors to also liaise with her GP).

The Claimant was ultimately dismissed in October 2009 for persistent short term absence and failure to comply with the employer's absence notification process. The Claimant brought various Employment Tribunal claims including that there had been a failure to make reasonable adjustments for her.

Employment Tribunal decision

It was decided that the Claimant was not disabled at the time the second occupational health report was issued (July 2009), but that she had become disabled shortly thereafter and before her dismissal. It was accepted that the employer did not have actual knowledge of the Claimant's disability and so the question was whether they had constructive knowledge.

The Tribunal held that they did not: it was reasonable for the employer to conclude that the Claimant was not disabled on the basis of the facts before it at the time. In particular, it was unlikely that any of the Claimant's medical problems were, or would have been, sufficiently "long-term" to qualify as a disability. Further, many of the absences were not attributable to physical or mental impairments but temporary illnesses such as colds. These types of illnesses would not normally set alarm bells ringing as to the possibility of a disability.

Although the Tribunal was critical of the overall quality of the occupational health report, it was satisfied that the employer had done all it reasonably could to discover whether the Claimant had a disability. In other words, they had not unquestioningly relied on the advice contained in the report, but had taken further steps.

The Claimant appealed to the EAT, arguing that the employer *had* unreasonably relied on the occupational health report and that it should have done more to investigate her health. The EAT dismissed the appeal. They concluded that whilst a different employer may have chosen to revisit the questions posed to the occupational health advisor, the failure to do so was not fatal. The test was one of reasonableness, not perfection. The Claimant appealed again to the Court of Appeal.

Court of Appeal decision

The Claimant had four key grounds of appeal, each of which were dismissed by the Court of Appeal:

(i) A reasonable reading of the GP's letters should have led to the conclusion that she was disabled:

The Court rejected this on the basis that:

- the GP's letters referred to a wide range of symptoms and conditions and did not provide a clear or consistent picture of the Claimant's state of health. The Court acknowledged that it would have been *"hard for a layman to know what to make of all that"*; and

- the employer was not dependent on the GP's letters, having sought advice from external occupational health advisors. The advice the employer received from these advisors was *"highly relevant to the question of what it could reasonably have been expected to conclude from the GP letters".*

(ii) The employer did not take up the Claimant's invitation to approach her GP if they required more information about her health:

The Court said this point was only relevant from the point at which she was found to be disabled (August 2009). By that time, the employer had reasonably declined the Claimant's invitation on the grounds that the matter was in the hands of their occupational health advisors. The Claimant had refused to allow the occupational health advisors to communicate with her GP.

(iii) The employer had unquestioningly relied upon the occupational health advice:

The Court said the Employment Tribunal had correctly identified that the employer had not simply rubber stamped the occupational health advice it had received. It had gone further than this by corresponding with her GP and holding regular meetings with the Claimant. The advice they had received from occupational health cohered with their own experience and the GP advice they had received. Importantly, the HR Manager's letters of instruction to occupational health were accurate and the employer had sought clarification after Dr Bellamy's report had been found wanting.

(iv) The employer had made adjustments for her which should have led them to conclude that she was disabled

The Claimant argued that the fact that her manager had adjusted her hours of work should have led the employer to the conclusion that she was disabled. The Court rejected this: an agreement to adjust working hours did not necessarily imply knowledge of an impairment sufficient to amount to a disability.

Comment

This decision helpfully reminds us that constructive knowledge will only be fixed on the employer where it has failed to take *reasonable* steps to discover an employee's disability status. The requirement is not to act perfectly. What should do in practice to ensure you have taken such reasonable steps?

- Gather as much information as you can to help you understand the employee's condition. This will include GP certificates and correspondence and notes of your own interactions and discussions with the employee. Regular return to work meetings should be arranged after periods of absence.

- When instructing occupational health advisors, ensure care is taken to accurately summarise your knowledge of the employee's health and ask the advisor to provide a view on whether the employee is disabled by reference to the different elements of the disability test (i.e. Do they have a physical or mental impairment? Does that impairment have a substantial effect on their day to day activities? Is that effect also long-term (or is it likely to be))?

- Do not accept occupational health reports at face value. Critique them against your own knowledge of the employee and their circumstances.

- Reports should be followed up where necessary to avoid an inference that they have been unquestioningly relied upon. This will be the case where the advice is imprecise or incomplete or otherwise contradicts the other evidence that you have about the employee's state of health.

The decision is also helpful for employers dealing with employees who have extensive sickness absence rooted in many different causes. It acknowledges that the assessment of disability status is much more difficult for employers where the absences are short-term, persistent and for a variety of different reasons. Had the absence been in longer blocks and/or for a single reason, this would normally set "alarm bells" ringing as to the likelihood of a disability and may mean that an employer needs to do more to satisfy the test of taking all reasonable steps. Helpfully, the case also indicates that making adjustments for such employees will not necessarily be viewed as a concession that the employee is disabled.

Donelien v Liberata UK Ltd

EAT rules that voluntary overtime payments must be included in holiday pay

The EAT has upheld a Tribunal decision that voluntary overtime, stand-by and call out payments must be reflected in holiday pay, provided such payments amount to "normal remuneration". Importantly, the EAT held that the worker does not have to be contractually obliged to carry out the work in order for the related payment to be included in holiday pay *(Dudley Metropolitan Borough Council v Willetts and others).*

Background

Under Article 7 of the Working Time Directive (**WTD**), EU Member States must ensure that workers have the right to at least 4 weeks' paid annual leave. The WTD is implemented into UK law by the Working Time Regulations (**WTR**). The WTR provides workers with 5.6 weeks' annual leave, of which 4 weeks' is derived from the WTD.

Workers are entitled to be paid at the rate of a "week's pay" for each week of leave, calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996. For workers with normal working hours, a "week's pay" includes basic salary, but excludes payments for commission and overtime. Although the WTD does not specify how statutory holiday pay should be calculated, European case law suggested that the UK's approach to calculating annual leave wass insufficient. For example:

- In *Williams and others v British Airways plc (2011)* (**Williams**), the ECJ ruled that *"workers must receive their normal remuneration for that period of rest".* The ECJ expanded on the concept of "normal remuneration" to hold that a worker on holiday is entitled not only to basic salary, but also to any aspect of pay which is *"linked intrinsically to the performance of the tasks which he is required to carry out under his contract of employment".* This opened the door for workers with normal working hours to seek to include other components of pay in their holiday pay.

- In *Lock v British Gas Trading Limited (2014)* (**Lock**), the ECJ held that where a worker was paid commission calculated on the basis of the sale that he had made, that commission must also be included.

In November 2014, in the combined cases of *Bear Scotland Ltd v Fulton and Baxter; Hertel (UK) Ltd v Wood and others; and Amex Group Ltd v Law and others* (**Bear Scotland**), the Employment Appeal Tribunal (**EAT**) held that non-guaranteed but compulsory overtime should be included in holiday pay provided that it was "normal remuneration". However, the EAT did not make any findings in relation to purely voluntary overtime, because the issue was not engaged in any of the cases in question.

This decision is the first appellate decision on the question of voluntary overtime.

Facts

The 56 claimants were employed by Dudley Metropolitan Borough Council (**Dudley**) as tradesman involved in the repair and maintenance of Dudley's housing stock. The claimants had fixed contractual working hours (a few also worked a some additional hours of compulsory and guaranteed overtime). All of the claimants worked additional voluntary overtime. They also volunteered to be placed on a "standby" and "call out" rota for out-of-hours emergency work. The claimants were paid for their voluntary overtime and their voluntary standby and call out time. They also received a mileage allowance.

Dudley calculated holiday pay based on contractual hours only. They excluded the voluntary overtime, standby and call out payments and also the mileage allowance. The claimants brought Tribunal claims arguing that these additional sums should have been included in their holiday pay.

Employment Tribunal decision

The Tribunal decided that in some cases the additional payments had been paid with sufficient regularity that they were part of the claimants' normal pay. However, it is worth noting that voluntary overtime was not considered to be normal pay for one lead claimant where it was performed only rarely.

Where the payments were normal pay, the Tribunal concluded that they should be included in holiday pay in respect of the 20 days' annual leave arising under the WTD. The additional payments did not have to be included in holiday pay in respect of: (i) the additional 8 days' arising under the WTR; or (ii) any additional contractual entitlement. Following the EAT's obiter comments in Bear Scotland, the Tribunal also held that workers accrued their WTD leave before the additional WTR leave.

EAT decision

Dudley appealed to the EAT (where the lead claimant changed from Mr Brettle to Mr Willetts). They argued that voluntary overtime payments (and other payments) should not count as "normal remuneration" because the necessary "intrinsic link" to the performance of the contractual tasks was missing. It was argued that voluntary overtime was not performed under the contract of employment but by reference to a separate agreement between the parties.

Dismissing the appeal, the EAT Judge held that the overarching principle was that normal - not contractual - remuneration must be paid during the annual leave guaranteed by Article 7 of the WTD. In Williams the presence of an intrinsic link between the payments and the performance of tasks under the contract meant that they had to be treated as normal remuneration. However, the decision in Williams reflected the ECJ's assessment of the specific payments at issue in that case and was only one example of a decisive criterion of normal remuneration – it was not the only decisive criterion.

The EAT Judge noted that: *"The absence of such as intrinsic link does not automatically exclude such a payment from counting".* And later in the judgment: *"The question in every case, irrespective of the label put on the payment, is whether the payment forms part of the worker's normal remuneration. If payments for voluntary shifts, standby or callout payments are normally paid, they must be included in pay for holiday leave"*

However, the EAT Judge also said that if she was wrong on this and an intrinsic link was required, then that test would have been satisfied here because:

- whenever a claimant was working a period of voluntary overtime they were performing tasks required of them under their contracts of employment (even if there was also a separate agreement);
- the payments made were all directly linked to the tasks they were required to perform under their contracts; and
- once a period of voluntary overtime had begun the claimants were in no different position to an employee working compulsory overtime.

The EAT Judge said it would be for the fact-finding tribunal to determine whether the payments were sufficiently regular and settled as to amount to normal remuneration. Although the decision did not extend to what reference period should be used in calculating holiday pay in such circumstances, the Judge did remark that: *"Fluctuations in the amount paid would be catered for by the 12 week average".*

Comment

This is the first appellate decision on the inclusion of voluntary overtime payments in holiday pay. Does this mean that employers should adjust the calculation of holiday pay to include voluntary overtime payments if they have not already done so? Absent a further appeal, this decision is binding and employers should consider adjusting holiday pay. However, uncertainties remain as to how such an adjustment should be effected.

First, it is not clear what reference period should be used to calculate holiday pay. Is a 12-week reference period appropriate (as is used for workers without normal pay), or would a longer reference period be more suitable in certain cases given the need to comply with overarching principle of paying normal pay? In the absence of any guidance from the Tribunals or the Government, employers will have to make their own judgement on what reference period to use. In this context, it is worth noting that the recently-published Taylor Review recommended the use of longer reference periods for workers with irregular hours. However, it is unclear if, or when, this proposal will be taken forward.

Second, uncertainty remains as to when a payment is considered to be paid regularly over a sufficient period of time to warrant inclusion in holiday pay. The EAT Judge suggested a payment once every four or five weeks would meet the threshold if paid over a sufficient period of time. But how irregular does a payment have to be to fall out of scope (e.g. is once a year, every year, regular or irregular)? Again, employers will have to make their own judgement on whether a payment is in or out of scope.

Where a decision is taken to adjust the calculation of holiday pay it should be remembered that these payments only strictly need to be included for WTD-derived holiday (i.e. 20 days per year for a full time worker) and not the additional WTR-derived holiday (i.e. 8 days per year for a full time worker). However, some employers may opt to make the changes on a wholesale basis on the grounds of administrative simplicity.

Further, if the UK leaves the EU and does not have to comply with EU working time laws, it is possible that the Government will rewrite the WTR to provide that holiday pay should be basic pay only. Therefore, employers may wish to preserve a degree of flexibility by reserving the right to adjust the calculation of holiday pay in accordance with applicable law.

Dudley Metropolitan Borough Council v Willetts and others

ADDLESHAW GODDARD

Court of Appeal says Working Time Regulations 1998 can be interpreted to include commission in holiday pay

The Court of Appeal has dismissed British Gas's appeal and ruled that the Working Time Regulations 1998 can be interpreted to provide that holiday pay must include relevant commission payments.

Background and facts

The European Working Time Directive (**WTD**) provides that workers have the right to paid annual leave. Whilst the WTD does not specify how such payments are to be calculated, our domestic Working Time Regulations 1998 (**WTR**) provide that workers will be paid at the rate of a "week's pay" for each week of leave (which is calculated in accordance with ss. 221-224 of the Employment Rights Act 1996 (**ERA**)).

In this case, Mr Lock was employed as a Sales Consultant and was remunerated by way of a basic salary payment, plus a sales-based commission payment which accounted for approximately 60% of his total pay. The commission payment was variable and was paid several weeks or months after the sale to which it related was achieved. When Mr. Lock was on holiday, he was unable to make any sales. This, in turn, meant that he was unable to accrue any sales-based commission payments to be paid in the subsequent weeks or months. Consequently, his income was reduced in the weeks or months following a period of holiday.

Mr. Lock brought an Employment Tribunal claim for unpaid holiday pay in respect of the lost holiday commission payments. Given conflicting domestic and ECJ case authorities on this area, the Tribunal elected to refer a number of questions to the ECJ. In essence, the ECJ was asked whether annual leave should include commission payments that Mr. Lock would have accrued had he not been on annual leave.

ECJ decision – May 2014

The ECJ ruled that the WTD requires that during annual leave workers must receive their normal remuneration. It ruled that where pay is made up of different components and a component is "intrinsically linked" to the worker's contractual duties, then holiday pay should be calculated to include such payments.

Employment Tribunal decision – March 2015

The case then returned to the Employment Tribunal to decide whether the WTR could be interpreted in line with the ECJ's decision. If it could not, then employees of private sector employers would not be able to enforce their rights to have such payments included in their holiday pay and the Government would be required to amend the WTR.

The Tribunal decided that the WTR **could** be interpreted to comply with the WTD, noting that the EAT had taken a similar step in *Bear Scotland Ltd v Fulton and Baxter, Hertel (UK) Ltd v Wood and others, Amec Group Limited v Law and others* (**Bear Scotland**), which concerned the inclusion of overtime within holiday pay.

The Tribunal decided that additional words should be inserted into the WTR to provide that any worker who has normal working hours, and whose remuneration includes "commission or a similar payment", should be treated **in the same way** as employees who have normal working hours and whose remuneration varies with the amount of work done. This meant that their holiday pay should be calculated by reference to weekly average pay over a 12-week reference period. This averaging process would capture all of the payments made to the worker within the reference period.

EAT decision – February 2016

British Gas's appeal to the EAT was dismissed. The EAT decided that Bear Scotland was not distinguishable from Lock, and there was no basis upon which commission and overtime should be treated differently.

They also held that the EAT in Bear Scotland had already decided that the WTR legislation could be interpreted to conform with the WTD, and this was of persuasive authority. That decision could not be said to be "manifestly wrong" nor were there any other exceptional circumstances to justify taking a different approach. The EAT ended its decision noting that: *"…if Bear Scotland was wrongly decided then it must be for the Court of Appeal to say so…".*

Court of Appeal decision – October 2016

British Gas appealed again to the Court of Appeal arguing that Bear Scotland was wrongly decided and it was not possible to read the WTR to conform with the WTD.

The Court decided that when faced with the question of whether a conforming interpretation can be adopted, the Courts should not confine themselves to the literal meaning of the legislation. Instead, they must consider whether a conforming interpretation is in line with the "grain" of the law.

In answering the question of whether the WTR could be interpreted in this way, the Court decided that it could be presumed that the UK Government intended to fulfil *entirely* the obligations arising under the WTD. This included any obligations which were not apparent at the time the WTD was implemented, such as the requirement for holiday pay to be "normal" pay.

The Court concluded that the WTR properly implemented the WTD in nearly all respects, but failed to address either commission or non-guaranteed overtime payments. The Court decided that this differential treatment was more likely to be an oversight than a deliberate exclusion. As a result, the Court was able to interpret the WTR as providing that Mr Lock was entitled to have his commission earnings reflected in his holiday pay.

Comment

If British Gas does not appeal further, then we have a Court of Appeal authority confirming that the WTR can be read to conform with the WTD in respect of commission payments. This greater level of certainty may encourage some employers who have not yet adjusted holiday pay calculations to consider doing so now. Any employer wishing to adjust holiday should take legal advice before doing so, given the uncertainties surrounding the precise method of calculating holiday pay (e.g. how to draw the line between regular and irregular payments and which reference period to use).

However, British Gas may be minded to seek permission to appeal to the Supreme Court, particularly given the Court's comments that the question at the heart of this case was not "easy" and was one on which their answer had "wavered".

Holiday pay: what are the implications of the Supreme Court's refusal of permission to appeal in Lock v British Gas Trading Ltd?

In October 2016, the Court of Appeal decided that the Working Time Regulations 1998 could be interpreted to include results-based commission payments in holiday pay. The Court of Appeal indicated that it had "wavered" in reaching its decision. It was, therefore, widely expected that a further appeal would be heard by the Supreme Court. However, on 28 February 2017 the Supreme Court refused British Gas' application for permission to appeal. What does this mean for the calculation of holiday pay?

What does the Supreme Court's decision mean?

The Supreme Court's rejection of British Gas' application to appeal means that the Court of Appeal's decision stands: the Working Time Regulations 1998 (**WTR**) can interpreted to include results-based commission payments in holiday pay. You can read our detailed report on the Court of Appeal's decision here. Although the Court of Appeal's decision could be overturned by the Supreme Court in another case in future, we are not aware of any cases on this point before the Tribunals and Courts at present.

The consequence is that sums in respect of results-based commission may have to be included in the calculation of holiday pay for the first 4 weeks of holiday under the WTR. Such payments will only need to be included where it can be said they represent "normal pay" – this means that they are intrinsically linked to the worker's contractual duties and are paid on a regular basis.

However, even where this threshold is met, there is no obligation to include such payments in the extra 1.6 weeks' UK holiday not derived from the Working Time Directive (**WTD**), although some employers may elect to do so for consistency and/or administrative reasons.

Does this affect the question of whether overtime payments should be included in holiday pay?

This development also means that the EAT's decision in case of *Bear Scotland* concerning the inclusion of non-guaranteed compulsory overtime in holiday pay also stands. Had the outcome of *Lock* been that the WTR could not be interpreted to conform to the WTD, then this would have conflicted with the decision in *Bear Scotland* and re-opened the issue of whether such overtime payments should be included in holiday pay.

It is worth remembering that the position regarding genuinely voluntary overtime is not yet settled. Here, the key question is whether such payments can ever be considered to be "normal pay" given that they are special payments for work undertaken voluntarily. There are two first-instance Employment Tribunal decisions (*Neal v Freightliner; Brettle v Dudley Metropolitan Borough Council*) and a Northern Irish Court of Appeal decision (*Patterson v Castlereagh Borough Council*) which suggest that voluntary overtime payments should be included. However, none of these decisions are binding and another Tribunal could take a different view.

Should employers adjust holiday pay now?

The *Lock* case will now return to the Employment Tribunal for a further hearing to decide what compensation should be paid to Mr. Lock. It is hoped that the Tribunal will offer some general guidance on the mechanics of including results-based commission payments in holiday pay. In the meantime, what should employers do?

Many employers have refrained from adjusting the calculation of holiday pay whilst the interpretation issue was under consideration in *Lock*. Although this latest development means the principle is now settled, two important practical questions remain unanswered:

- **What is the correct reference period to be used when including results-based commission payments in holiday pay?** In *Lock* the parties agreed that a 12-week reference period should be used. However, this may not be appropriate in all cases. Indeed, when this case was before the European Courts, the Advocate General suggested that a 12-month reference period might be appropriate. However, the ECJ did not go on to offer any guidance on this issue.

- **When will a payment be considered sufficiently regular to warrant inclusion in holiday pay?** Case law has confirmed that such payments should only be included in holiday pay where they have been paid over a sufficient period of time to justify being viewed as "normal pay". Therefore, regular payments will be caught (e.g. weekly or monthly payments or other regular intervals). What is not yet clear is how irregular or ad hoc a payment must be for it to fall out of scope. For example, would an annual commission payment be considered "normal pay"?

Affected employers may feel these uncertainties justify a continuation of a "wait and see" approach. However, where an employer decides to take this approach it should make provision to cover the cost of adjustments in future.

Alternatively, an employer could decide to proceed with making adjustments notwithstanding these uncertainties. Where an employer decides to take this approach, they will need to make decisions on: (i) what the appropriate reference period is in the context of their business and reward structure; and (ii) what payments are considered to be sufficiently regular to amount to "normal pay".

Could Brexit change things?

The future relationship between Britain and the EU will affect the extent to which we can adjust EU-derived law, such as the WTR. If Britain were to remain within, or have a high degree of access to, the Single Market then the scope for change is likely to be very limited. This would mean that the WTR would probably stay as it is and require the inclusion of components of pay such as results-based commission and non-guaranteed compulsory overtime.

On the other hand, if Britain is wholly outside, or has very limited access to, the Single Market then the scope for change to EU-derived law would be greater. In such circumstances, it is possible that the Government would adjust the WTR to provide that holiday pay should be basic pay only and does not require the payment of additional components of pay.

However, the Government's Brexit White Paper suggests that the Government does not intend to pare back workers' rights after Brexit, whatever the future relationship with the EU. Nevertheless, employers would be wise to preserve a degree of flexibility in how they calculate holiday pay. For example, holiday pay policies could provide that the employer reserves the right to adjust the calculation of holiday pay in accordance with applicable law and that this may include excluding certain components of pay.

Holiday pay: worker entitled to payment in lieu of accrued leave for whole period that the right to take paid leave was denied, potentially up to 13 years

The ECJ has ruled that workers who are denied the right to take paid annual leave are entitled to bring claims in respect of accrued but untaken leave. There is no requirement on them to take the leave on an unpaid basis in order to bring a claim. Further, the right to paid annual leave for such workers accrues and carries over without limitation. This case has important implications for employers who have not yet adjusted holiday pay to include variable payments such as overtime and commission. It is also of concern to employers who engage individuals on a self-employed basis but who could be deemed to be "workers" for employment law purposes (King v The Sash Window Workshop, ECJ).

Background law

The ECJ has previously held that sick workers continue to accrue their annual leave during a period of sick leave and are entitled to carry it over to another leave year if desired. In the case of *KHS AG v Schulte* the ECJ held that there could be a limitation on the carry over period, although the carry over period should be significantly longer than the leave year. In that case the ECJ held that a carry over period of 15 months was lawful. In *Plumb v Duncan Print Group* the EAT concluded that the Working Time Directive (**WTD**) does not require indefinite carry over of leave, but "at most" required carry over of 18 months.

Facts

The Claimant worked as a salesman for the Respondent for 13 years, engaged under a "self-employed commission-only contract". He was not paid a salary and nor did he receive any paid annual leave. When he did take annual leave, it was unpaid. Nine years into the engagement, the Respondent offered to engage the Claimant on an employment contract (which would have provided for paid annual leave), however, the Claimant refused and continued under the "self-employed" contract.

After the termination of his contract, the Claimant brought a Tribunal claim alleging he was a worker and claiming unpaid holiday pay, arguing that he had not taken his full entitlement of annual leave because it would have been unpaid. The Tribunal found that the Claimant was a worker and proceeded to award holiday pay in respect of both taken and untaken holiday in the previous 13 leave years.

The Respondent accepted that the Claimant was entitled to be paid in respect of leave which had been taken, and also leave which was accrued but untaken in the final leave year (2012 - 2013). However, the Respondent appealed the Tribunal's decision to award holiday pay in respect of the **untaken** holiday from the previous 13 leave years (1999 – 2012). The EAT overturned the Tribunal's decision on the basis that it was not clear that the Claimant had been prevented from taking annual leave due to reasons beyond his control.

The Claimant appealed. The Court of Appeal referred a number of questions to the ECJ. In a nutshell, the Court asked whether a worker can claim that an employer's failure to pay for periods of annual leave meant that they had been "prevented" from taking their leave (and, in which case, the leave should carry over). The Court also asked about the length of any such carry over: was it indefinite or would an 18-month carry over period be lawful?

Advocate General's Opinion

Ahead of the ECJ's decision, Advocate General Tanchev issued a non-binding opinion earlier this year. In summary, the opinion said that where a worker was deterred from taking annual leave because it was unpaid they could say that they have been prevented from exercising their right to paid leave. In such circumstances, the right to leave will accrue and carry over, without limitation, until the worker is permitted to exercise the right.

A limitation on carry over would only be lawful where the employer had permitted the worker to take paid annual leave. This opinion meant that the Claimant was potentially be entitled to payments in lieu of accrued but untaken annual leave for the entirety of his 13-year engagement.

ECJ decision

The ECJ agreed with the Advocate General and ruled as follows:

Does a worker have to first take the unpaid annual leave in order to make a claim for payment in respect of that leave?

A failure to pay a worker for a period of annual leave would dissuade them from taking that leave and would be incompatible with the purpose of the right to paid annual leave under the Working Time Directive i.e. to enable the worker to rest and enjoy a period of relaxation and leisure.

However, the ECJ noted that the EAT had said that a worker can only bring a claim for breach of the right to a period of annual leave (under Regulation 13 of the Working Time Regulations 1998 (**WTR**)) where the employer had not permitted them to take the leave. That was not the case here. The Claimant had been permitted to take annual leave, it was just that it he would not be paid for it. The alternative remedy is to bring a claim for a breach of the right to be paid for a period of annual leave (under Regulation 16 of the WTR). However, this route was only available where the leave had already been taken. The result was that a worker such as the Claimant would be forced to take the unpaid leave, in order to then bring a claim for payment.

The ECJ said this was incompatible with the WTD and workers are **not** required to first take the unpaid leave in order to be entitled make a claim for payment in respect of that leave.

Where annual leave is unpaid, can a worker claim that he has been prevented from exercising his right to paid leave (meaning that the right then carries over until they are given the opportunity to exercise it)?

The ECJ said that the Claimant did not exercise his right to paid annual leave for *"reasons beyond his control"*. In other words, he was "prevented" from taking paid annual leave. It was irrelevant whether the Claimant was offered the opportunity to move to a different contractual relationship which would have provided for paid annual leave. The Court had to consider the employment relationship as it *"existed and persisted".*

If the leave does carry over for workers in this position, is the carry over period indefinite or limited (as it is for workers who do not take their leave due to sickness)?

In the context of sick workers absent for several consecutive holiday years, the ECJ had previously ruled that unlimited accumulation of annual leave would no longer reflect the actual purpose of paid annual leave i.e. to enable the worker to rest and enjoy a period of relaxation and leisure. Therefore, the ECJ had permitted a derogation from the right by allowing a limitation of the carry over of annual leave for sick workers (see "Background law" above - in *KHS v Schulte* a 15-month carry over period was held to be lawful). This limitation balanced the need to protect the worker's entitlements and the risk to the employer that a worker could accumulate a large amount of leave and the consequent difficulties in organising work around this.

The question was then whether a worker who had been prevented from taking leave because it was unpaid was comparable to a sick worker. The ECJ said no. They highlighted that the right to paid annual leave cannot be interpreted *"restrictively"* and any derogation must be *"limited to what is strictly necessary to safeguard the interests which that derogation protects"*. In a case where an employer has failed to provide payment for annual leave the Court said the protection of the employer's interests was not *"strictly necessary"* and would not justify a derogation from a worker's entitlement to paid annual leave. Employers that do not allow their workers to exercise their right to paid annual leave must *"bear the consequences".* This meant that there should be no limitation on the right to accumulate and carry over paid annual leave rights for workers in this position.

Comment

At first blush, an employer who provides paid annual leave to their workforce might think this decision is of little relevance to them. However, it has very important implications for many employers in three key ways:

Workers who do not take their annual leave at all because it is underpaid

The ECJ said that failing to pay a worker for a period of annual leave would be incompatible with the purpose of the right to paid annual leave under the Working Time Directive and that such workers could carry over their annual leave entitlements without limitation.

However, they actually went further and said: *"…any practice or omission of an employer that may potentially deter a worker from taking his annual leave is equally incompatible with the purpose of the right to paid annual leave".* This is a potentially crucial point for employers who have not yet adjusted holiday pay to include variable payments such as overtime and commission. A worker could argue that the practice of excluding such items from holiday pay deterred them from taking their annual leave. In such circumstances, the employer could find that the worker has the right to accrue and carry over their unpaid annual leave rights without limitation until the point of termination. However, it is not clear exactly how such losses would be calculated in practice (as the worker would have continued to work and be paid).

Workers who take their annual leave despite it being unpaid or underpaid

The second issue concerns workers who elect to take their annual leave, despite it being unpaid or being underpaid (e.g. if it does not include elements of variable pay), and then bring a claim for an historic series of such non-payments or underpayments. Workers in this position would need to bring a claim for unlawful deductions from wages under s.23 of the Employment Rights Act 1996. After the *Bear Scotland* decision, the Deduction from Wages (Limitation) Regulations 2014 (**2014 Regulations**) introduced a 2-year limitation on such claims. Further, any such claims must be brought within 3 months of the last in the series of deductions and where there is a gap of more than 3 months between any two separate deductions (as there often will be between periods of holiday), the series of deductions is broken.

Although the ECJ was not asked to rule on this scenario (i.e. they were ruling on *untaken* leave only, rather than *taken* leave), in light of their comments that the right to paid annual leave cannot be interpreted *"restrictively"* it arguably follows that the 2-year limitation in the 2014 Regulations is incompatible with the WTD. However, even if this is the case, private sector employers should be able to rely on the 2-year limitation for the time being given the explicit nature of the restriction of the 2014 Regulations. By contrast, public sector workers should be able to rely directly on the WTD to argue that there should be no limitation on their right to claim unpaid or underpaid holiday back pay.

It also seems possible that the requirement for there to be a gap of not more than 3 months between separate deductions is incompatible with the WTD. For example:

- A worker is paid basic holiday pay only. The employer does not include variable payments such as overtime and commission.
- Because of this the worker limits his annual leave to 2 weeks' in July and 1 week in December each year. They do not take their remaining 2 weeks' annual leave entitlement (only 1 week of which is derived from the WTD).
- The worker brings a claim in the following January for unlawful deductions from wages in respect of the underpaid annual leave which he has taken.
- There would be a gap of more than 3 months between the July and December deductions, meaning that they would not be a "series" and the worker would not be able to claim for the July deduction.
- It is possible that the worker may successfully be able to argue that the reason for the large gap was because the employer's practice of underpaying for annual leave deterred him from using his full entitlement and meant that the leave he did take was spaced throughout the year. By denying him the right to claim for the July deduction, the employer would be benefiting from their non-compliance with the WTD.

However, there is no suggestion that the 3-month limitation period within which such a claim must be brought would be at risk. Indeed, a 3-month limitation period exists for claims brought under the WTR for untaken leave (the claim brought by the Claimant) and this was not criticised by the ECJ.

Risk of claims from wrongly-classified workers

Third, the decision will also be of particular concern to employers who purport to engage people on a self-employed basis who may, in reality, have worker status and be entitled to paid annual leave. Clearly, this could be an issue for businesses operating in the "gig economy", but it could also affect mainstream businesses who engage self-employed contractors. Employers should carefully assess their contractor relationships and assess the risk of their having worker status.

King v The Sash Window Workshop Ltd

TUPE: employee liability information extends beyond contractual particulars of employment

This important decision concerns the scope of the information that the outgoing employer has to supply to the incoming employer in the context of a TUPE transfer. Here, the EAT decided that information about the employment particulars of the transferring employees is not confined to contractual employment particulars, but could also encompass non-contractual entitlements *(Born London Ltd v Spire Production Services Ltd, EAT).*

Background Law

Regulation 11 of TUPE 2006 provides that the outgoing employer (**the transferor**) must provide the incoming employer (**the transferee**) with certain classes of information about the transferring employees. This information is known as the "employee liability information" (**ELI**). A failure by the transferor to provide the ELI within the relevant timescale would permit the transferee to bring a claim in the Employment Tribunal, seeking compensation of not less than £500 per employee (unless a lesser sum is justified).

The ELI is defined as:

- the identity and age of the employee;
- the particulars of employment that the transferor is obliged to give to the employee under s.1 of the Employment Rights Act 1996 (**ERA 1996**) (this includes particulars about the remuneration paid to the employee);
- details of any disciplinary or grievance procedures concerning the employee within the previous 2 years;
- information about any legal action brought by the employee against the transferor within the previous 2 years (or which the transferor has reasonable grounds to believe may be brought); and
- information of any collective agreement which will have effect after the transfer in its application in relation to the employee.

It is not clear whether the requirement to provide "particulars of employment" is confined to contractual entitlements or not. Neither Regulation 11 of TUPE, nor s.1 of the ERA 1996, address this point.

Facts

This case concerned a second generation outsourcing service provision change, whereby the transferee was taking over a printing contract from the transferor. When communicating the ELI to the transferee, the transferor elected to break down the particulars of employment of the transferring employees into contractual and non-contractual particulars. Notably, it stated that the 32 transferring employees were entitled to a non-contractual annual bonus of one week's pay plus £7.50 per year of service. However, after the transfer had taken place, it became clear that this bonus entitlement was contractual, rather than non-contractual.

The transferee employer brought a claim against the transferor on the grounds that inaccurate ELI had been provided. Essentially, the transferee's position was that if the bonus had been truly non-contractual then it would not have been bound to pay it to the employees (and would not have done so). The discovery that it was, in fact, a contractual bonus had resulted in losses of around £100,000 over the life of the contract. The transferee argued that the particulars of employment to be provided concerned **contractual** entitlements only, and that the mislabelling of the bonus as non-contractual meant that the transferor had failed to provide accurate ELI.

The transferor successfully applied to strike out the claim. The Employment Tribunal concluded that the employment particulars required by s.1 of the ERA 1996 are not restricted to contractual entitlements only. Furthermore, Regulation 11 of TUPE 2006 did not oblige the transferor to state whether the s.1 ERA 1996 particulars were considered to be contractual or non-contractual. By doing so in this case, the transferor had actually gone further than it needed to. Accordingly, there was no reasonable prospect of showing that the transferor had failed to provide the ELI. The transferee appealed to the EAT.

EAT's decision

The transferee argued that it was that it was implicit in s.1 of the ERA 1996 that the employer was required to state whether remuneration was contractual. In the alternative, they argued that this was required by the relevant European Directives.

However, the Judge concluded that some components of remuneration will be non-contractual and she was not persuaded that these were intended to fall outside the scope of s.1 of the ERA 1996. In turn, this meant that: *"...the notification required by regulation 11* [of TUPE 2006] *is not limited to contractual terms; it means what it says: the transferor is to notify the transferee of those matters required to be included in a section 1 statement, regardless of their contractual effect."*

Further, the EAT concluded that the European Directives did not assist the transferee and did not confine the employment particulars to contractual entitlements only. The EAT also declined to refer the issue to the ECJ. The appeal was dismissed.

Comment

This decision highlights that transferor employers need to take a broad approach to the provision of employment particulars, to cover both contractual and non-contractual entitlements. Upon receipt of the ELI, the transferee employer will need to assess the information and may need to undertake further due diligence to obtain comfort as to the correct nature of the entitlements. The transferee may also be able to rely on contractual warranties and/or indemnities from the transferor regarding the contractual status of the employees' entitlements.

However, these solutions may not be readily available to a transferee in a second generation outsourcing situation where there is usually:

- no incentive for the outgoing contractor to assist the competing, incoming contractor by providing detailed responses to questions in excess of what is strictly required under TUPE; and

- no direct contractual relationship between the parties.

This, in turn, can be problematic for the client looking to reassign the contract, since the incoming contractor may insist on relevant indemnities to be given directly by the client. In these situations, the best approach for clients is to ensure such issues are addressed in the original outsourcing agreement. The original outsourcing agreement should ensure that the contractor: (i) is obliged to comply with an incoming contractor's due diligence questions; and (ii) provides warranties and/or indemnities to the client in respect of any inaccurate ELI information which, at least, mirror the warranties and/or indemnities that the client will provide to the incoming contractor.

Born London Ltd v Spire Production Services Ltd

Purposive approaches and protection – why employers cannot afford to ignore whistleblowing in the workplace

In an article written for Thomson Reuters, Managing Associate, Annabel Mackay, discusses two recent decisions on whistleblowing which have significant implications for employers. First, in *Chesterton Global Limited v Nurmohamed* (Chesterton), the Court of Appeal considered the public interest test for the first time. Second, in *International Petroleum Limited and others v Osipov* (Osipov), it was decided that two non-executive directors could be jointly and severally liable with an employer for dismissal–related detriments.

Chesterton: The public interest test

The whistleblowing regime is highly technical. Claimants must satisfy a number of tests to show that they have made a protected disclosure. One element of the test is the requirement that an individual reasonably believes that their disclosure is made in the public interest and tends to show specified categories of wrongdoing.

The public interest test was introduced with effect from 25 June 2013 in response to a concern that claims were being brought which related to their personal concerns. It was intended to restore the original meaning of the whistleblowing legislation which was to encourage disclosures to be made in the public interest. Chesterton concerned the meaning of the public interest test and the charity, Public Concern at Work, was given permission to intervene.

The claimant, Mr Nurmohamed, had raised concerns that monthly management accounts were being manipulated with the result that inaccurate profit and loss figures were being used to calculate commission and bonus payments. He told his employer that this affected over 100 senior managers and that the misstatement was between £2-£3million of costs and liabilities across the entire office and department network. The Court of Appeal was asked to consider whether this disclosure satisfied the public interest test.

Three alternative formulations of the public interest test were advanced. The employer argued that in order to qualify for protection, the significance of the disclosure had to extend outside of the workplace (i.e. it had to further the interests of persons other than the workers themselves). Public Concern at Work argued for a broader test whereby a disclosure would qualify if it served the interests of anyone else besides the person making the disclosure. The Court of Appeal favoured the approach put forward on behalf of Mr Nurmohamed.

The Court of Appeal found that where a disclosure relates to a breach of a worker's own contract or a personal interest, it is necessary to examine whether it is reasonable to regard that disclosure as being made in the public interest, as well as the worker's individual interest. In reaching the decision, all the circumstances of the case must be considered but four factors put forward on behalf of Mr Nurmohamed will be "a useful tool." The four-fold test will make it challenging for employers to run a technical argument that the public interest test is not satisfied.

- The first factor is the numbers in the group whose interests the disclosure served. A large employer will encounter greater difficulties in arguing that the significance of the disclosure is confined to the personal interests of an individual worker.

- The second factor is the nature of the affected interests and the extent to which they are affected by the wrongdoing. The disclosures that take place in a financial services sector context typically involve regulatory breaches, which would qualify as an important interest.

- The third factor is the nature of the wrongdoing disclosed with deliberate wrongdoing more likely to qualify than inadvertent wrongdoing affecting small numbers.

- Finally, and perhaps most significantly for financial services employers, the identity of the alleged wrongdoer is key. This factor had been foreshadowed in earlier decisions such as Smania v. Standard Chartered Bank, but the Court of Appeal agreed with the proposition that a disclosure is more likely to qualify where the employer is large or prominent (in terms of its staff, suppliers or clients).

Each factor must be weighed in the balance carefully but even disclosures which concern, say, bullying or breach of equal opportunities policies, may qualify where they involve a large employer with a public commitment to fostering diversity. The public interest test does not, therefore, represent a significant obstacle for claimants in the financial services sector.

Osipov: Joint and several liability

Osipov has perhaps even greater implications for employers. Although it has been possible to join co-workers to a whistleblowing complaint since the 2013 reforms, this has not been widely taken up when compared to discrimination complaints. This is likely to change following Osipov, with the result that employers may find themselves under greater pressure to settle such disputes.

Mr Osipov was dismissed after raising a series of concerns about his employer's operations. Prior to his dismissal he was excluded from business meetings and key aspects of his role were removed. He brought a claim against his employer and four individuals. Two of the individuals, Mr Timis and Mr Sage, were found to be workers. Although they were non-executive directors, Mr Timis held a majority shareholding in the employer and Mr Sage had managerial functions. Mr Timis gave Mr Sage the instruction to dismiss Mr Osipov and that instruction was implemented. The Tribunal found that he had been subjected to whistleblowing detriments and that his dismissal was automatically unfair.

Mr Timis and Mr Sage were found to be jointly and severally liable with the employer for dismissal-related detriment. This was significant because the employer was insolvent. On appeal, the individuals argued that claims for detriment amounting to dismissal could only be brought against the employer.

The EAT considered the scope and extent of the provisions governing individual liability for whistleblowing detriment and the award of compensation that could be made. It noted that, *"the express purpose of the whistleblowing legislation is to protect individuals from victimisation"* and that it was important to construe the legislative provisions *"to provide protection, rather than to deny it."* Having conducted a purposive analysis, the Employment Appeal Tribunal found that there was nothing to exclude an individual's liability for detriments which amounted to the termination of the employment relationship.

The EAT recognised that an instruction or a recommendation to terminate the employment contract could be the most serious type of detriment, causing the most substantial losses. This decision will therefore increase the likelihood of individuals being joined to such complaints, particularly as the threshold for proving detriment claims is lower (requiring the detriment to have a material impact rather than to be the reason or principal reason for dismissal).

Comment: cultural change through a purposive approach

These recent cases, along with others concerning the status of doctors in training, show that a purposive interpretation of the legislation will be applied to protect workers from victimisation. In that respect, it follows a similar approach to that taken in the FCA and PRA rules on whistleblowing which emphasise the importance of outlawing victimisation and providing training at all levels of the organisation to achieve that objective. These training initiatives, as well as other communication strategies and the role played by the whistleblowers' champion, will become even more important for employers in circumstances where individuals can be jointly and severally liable for dismissal-related detriment.

Employers should ensure that managers are aware of the reputational and financial consequences of decisions that they take in relation to workers who raise concerns about wrongdoing. Of course, the problem of distinguishing between a whistleblowing complaint and general grievances remains but from an FCA and PRA perspective, the definition of reportable concerns is extremely wide and there will often be an overlap. Just as the Courts adopted a purposive approach, employers need to ensure that they follow the spirit of both the legislation and the FCA and PRA rules which is to encourage concerns to be raised without fear of reprisals.

Chesterton Global Ltd v Nurmohamed

International Petroleum Limited and others v Osipov

ADDLESHAW GODDARD

EMPLOYMENT, INCENTIVES AND IMMIGRATION HORIZON SCANNER

1 MARCH 2018 ONWARDS

FUTURE KEY LEGISLATIVE DEVELOPMENTS

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
1.	Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017	**Trade unions: public authorities to be subject to check off restrictions** Relevant public authorities will be the subject of restrictions on the circumstances in which deductions of union subscriptions from wages may be made.	**10 March 2018**
2.	National Minimum Wage (Amendment) Regulations 2018	**National Living and minimum wage rate increases** The minimum wage rates are to be increased as follows: • Workers aged 25 or over: from £7.50 to £7.83 per hour. • Workers aged 21 – 25: from £7.05 to £7.38 per hour. • Workers aged 18 – 20: from £5.60 to £5.90 per hour. • Workers aged 16 – 17: from £4.05 to £4.20 per hour. • Apprentices: from £3.50 to £3.70 per hour.	**1 April 2018**
3.	Employment Rights (Increase of Limits) Order 2018	**Employment Tribunals compensation limits increase** Various increased compensation limits for Employment Tribunal claims come into force: • Maximum amount of a week's pay: from £489 to £508 • Maximum compensatory award for unfair dismissal: from £80,541 to £83.682	**6 April 2018**
4.	Social Security Benefits Up-rating Order 2018	**Statutory maternity, paternity, adoption, shared parental and sick pay increases** The rates are to be increased as follows: • Statutory maternity, paternity, adoption, and shared parental pay will increase from £140.98 to £145.18 per week.	**6 April 2018 (date tbc for family leave pay increases)**

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
		• Statutory sick pay will increase from £89.35 to £92.05 per week.	
5.	Pensions auto-enrolment legislation	**Pensions: increase to minimum auto-enrolment contributions** The minimum contribution rates for defined contribution schemes will increase to 2% for employers (previously 1%) and an overall total of 5% (previously 2%) of the jobholder's qualifying earnings. On the same date, changes will also be made to the qualifying earnings figures.	**6 April 2018**
6.	The Finance Bill 2017	**Taxation of salary sacrifice schemes** From April 2017 the majority of salary sacrifice schemes became subject to tax in the same way as cash income (save that arrangements in respect of: employer pensions contributions; childcare benefits; equipment provided under a cycle to work scheme; and ultra-low emission cars were permanently ring-fenced). However, some salary sacrifice arrangements were protected for a certain period: • All arrangements in place before 6 April 2017 were protected until 5 April 2018 (or before if the arrangement ends, changes, is modified or due for renewal at an earlier date). • Arrangements in place before 6 April 2017 for cars, accommodation and school fees were protected until 5 April 2021 (or before if the arrangement ends, changes, is modified or due for renewal at an earlier date). Therefore, any salary sacrifice arrangement put in place before 6 April 2017 that does not concern cars, accommodation or school fees (or is not one of the permanently ring-fenced benefits) will become subject to tax by 6 April 2018 at the latest.	**6 April 2018**
7.	Finance (No.2) Act 2017 Amendments will be made to the Income Tax (Earnings and Pensions) Act 2003	**Termination payments: changes to the taxation of termination payments** The following changes will come into force on 6 April 2018. • All types of payments in lieu of notice will be taxable and subject to Class 1 NICs. • Removal of foreign service relief. • Clarification that the exemption for injury does not apply in cases of injured feelings.	**6 April 2018** The introduction of employer NICs on termination payments above £30,000 will come

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		A further reform, the introduction of employer NICs on all termination payments above £30,000 (which are currently only subject to income tax), has been delayed until April 2019. The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs.	into force in **April 2019**.
8.	General Data Protection Regulation EU 2016/679 Data Protection Bill 2017 - 2019	**Data protection: compliance with the General Data Protection Regulation (GDPR)** The GDPR is a directly effective EU regulation which applies from 25 May 2018. It will introduce important changes to data privacy compliance. The Data Protection Bill was published in September 2017. It will implement the GDPR and replace the Data Protection Act 1998. For our guide on the impact of the GDPR on managing employee data, you can read our guide here.	**25 May 2018**
9.	Trade Secrets Directive (EU) 2016/943 Trade Secrets (Enforcement etc) Regulations 2018	**Trade secrets** A new European Directive introducing an EU-wide definition of "trade secret" and setting out rules on the unlawful acquisition, disclosure and use of trade secrets came into force in June 2016. The definition is potentially wider than what is regarded as a "trade secret" under English common law, but somewhat narrower than the types of "confidential information" that may qualify for protection in the domestic courts. The Directive prohibits the acquisition of a trade secret through unlawful access to materials or other conduct which is contrary to "honest commercial practices" (a term that is not defined in the Directive); the use or disclosure of a trade secret where this would breach any contractual or other duty, or where the trade secret was acquired unlawfully; and the exploitation of goods produced using the trade secret where the user (for example, a subsequent employer) knew or ought to have known that the trade secret was acquired unlawfully. The Directive also includes enforcement measures, procedures and civil remedies, including interim injunctions and precautionary seizure of infringing goods. The proposal also covers the preservation of confidentiality during the litigation process.	**By 9 June 2018** The Trade Secrets Directive came into force in June 2016. Member States have 2 years from this date to implement the Directive into national legislation, meaning the UK must comply by 9 June 2018.

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
		On 19 February 2018, the Intellectual Property Office launched a technical consultation on draft regulations to implement the Directive into UK law. The consultation closes on 16 March 2018.	
10.	The Small Business, Enterprise and Employment Act 2015 (**SBEEA**) will amend the Companies Act 2006 (sections 87)	**Company directors** All company directors must be natural persons and not corporate entities (s.87 SBEEA).	**Was due in 2017 - date to be confirmed in 2018** Section 87 was due to come into force in October 2016 but has been delayed.
11.	***Cap:*** The Enterprise Act 2016 inserts new sections 153A-C into the SBEEA which will permit the introduction of new regulations Public Sector Exit Payments Regulations 2016 ***Repayment:*** The SBEEA (sections 154-157) permits the introduction of new regulations The Small Business, Enterprise and Employment Act 2015 (Commencement No 3) Regulations 2015 The Repayment of Public Sector Exit Payments Regulations 2016	**Termination payments: restrictions on public sector exit payments** ***Cap:*** The Enterprise Act 2016 will introduce a cap on the pre-tax value of public sector exit payments (including voluntary and compulsory redundancy and severance payments) of £95,000. This will apply broadly across the public sector as defined by the list of public sector bodies set down by the Office of National Statistics (although some bodies may be exempted). ***Repayment:*** New regulations will be introduced by way of the SBEEA to require the repayment of exit payments (e.g. redundancy payments) where a high earning public sector employee or office holder (defined as any individual earning above £100,000) is subsequently re-employed in the public sector within 12 months, on a pro rata basis. A consultation on this issue closed on 25 January 2016. Amongst other things, this consultation proposed reducing the minimum earnings threshold to £80,000. Draft regulations have been published but are not yet in force.	**Was due in 2017 - date to be confirmed in 2018** ***Cap:*** The power to make regulations under the Enterprise Act 2016 came into force on 1 February 2017. The Public Sector Exit Payments Regulations 2016 are intended to come into force on

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
			a date to be confirmed. ***Repayment:*** Sections 154-157 of the SBEEA were brought into force on 1 January 2016. This gives the Secretary of State the power to make the relevant regulations. It is not yet known when The Repayment of Public Sector Exit Payments Regulations 2016 will come into force.
12.	Enterprise Act 2016 (section 33, schedule 5)	**Sunday trading: protection for shop workers** There will be an extension of rights of shop workers in respect of Sunday working: • They will be given the right to opt out of working compulsory additional hours (in excess of normal working hours) on a Sunday. • The duties on employers to notify workers of their rights about Sunday working will be extended.	**Was due in 2017 - date to be confirmed in 2018**

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
13.	The Trade Union Act 2016 (section 19) will amend the Trade Union and Labour Relations (Consolidation) Act 1992 to allow regulations to be introduced The Trade Union (Financial Penalties) Regulations	**Trade unions: financial penalties** Regulations will be introduced which will empower the Certification Officer to impose financial penalties of up to £20,000 on trade unions if they fail to comply with certain statutory requirements.	**Was due in 2017 - date to be confirmed in 2018**
14.	Regulations will be required	**Caste discrimination: introduction of express statutory protection against caste discrimination** An order will be introduced to provide for caste to be an aspect of race under the Equality Act 2010. This will provide express statutory protection against caste discrimination. A consultation and feasibility study on measuring caste discrimination was published on 28 March 2017. The consultation closed on 18 September 2017. At the time of writing the order has not yet been made.	**Was due in 2017 - date to be confirmed in 2018**
15.	Gender Representation on Public Boards (Scotland) Bill	**Gender representation on boards: Scottish public authorities** The aim of the Bill is to improve the representation of women in non-executive positions on the boards of Scottish public authorities. The Bill would introduce a "gender representation objective" that women should make up 50% of non-executive board membership. It also includes measures to increase under representation of different groups. The Bill passed the final consideration stage in the Scottish Parliament on 30 January 2018, meaning it is likely to be passed into law during 2018.	**During 2018**
16.	Various shared parental leave and pay regulations	**Shared parental leave: extension of leave and pay to working grandparents** In 2015 the Government announced plans to extend shared parental leave and pay to working grandparents by 2018. A public consultation on this proposal was due to commence in May 2016, but was postponed until after the EU referendum. It is not yet clear when the consultation will commence.	**During 2018**

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
17.	Employment Rights Act 1996 (NHS Recruitment – Protected Disclosure) Regulations New regulations will be required to extend the protection to children's social care job applicants	**Whistleblowing: protection for job applicants for NHS and children's social care positions** Regulations will be introduced which prohibit relevant NHS and children's social care employers from discriminating against a job applicant because it is thought they have previously made a protected disclosure.	**During 2018**
18.	Unpaid Work Experience (Prohibition) Bill 2017 – 19	**Private Members' Bill prohibiting unpaid internships** This Private Members' Bill was introduced by Stewart Malcolm McDonald MP and will prohibit unpaid trial work periods in certain circumstances. The Bill provides that individuals undertaking work experience for a period exceeding 4 weeks must be paid the national minimum wage rate for their age group.	**During 2018** The second reading of the bill is expected to take place on 16 March 2018.
19.	Workers (Definitions and Rights) Bill	**Private Members' Bill amending the definition of worker** This Private Members' Bill was introduced by Chris Stephens MP and seeks amendments to the definition of worker by defining what rights are available and creating a single statutory definition of worker.	**During 2018** The second reading of the bill is due to take place on 27 April 2018.
20.	Employment and Workers' Rights Bill 2017 - 2019	**Private Members' Bill on employment and workers' rights** This Private Members' Bill was introduced by Stephanie Peacock MP and seeks to make provision about employment conditions and workers' rights.	**During 2018** The second reading of the bill is expected to take place on 27 April 2018.

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
21.	Shared Parental Leave and Pay (Extension) Bill	**Private Members' Bill on extended to shared parental leave and pay to self-employed contractors** This Private Members' Bill was introduced by Tracy Brabin MP and seeks to extend shared parental leave and pay to self-employed contractors.	**During 2018** The second reading of the bill is expected to take place on 11 May 2018.
22.	National Living Wage (Extension to Young People) Bill 2017 - 19	**Private Members' Bill extending the National Living Wage to young people** This Private Members' Bill was introduced by Holly Lynch MP and seeks to extend the higher National Living Wage rate (currently £7.50 per hour and due to rise to £7.83 per hour on 1 April 2018) to those aged between 19 and 24.	**During 2018** The second reading of the bill is due to take place on 6 July 2018.
23.	The Employment Rights (Amendment) (EU Exit) Regulations 2018 (draft) The Employment Rights (Amendment) (EU Exit) (No.2) Regulations 2018 (draft)	**Brexit: technical changes to employment law** These draft regulations specify the technical changes to be made to employment laws once Britain has left the European Union. The changes are technical in nature only, for example, removing EU-related references that will no longer be valid. The aim of the amendments is to ensure that the existing statutory framework continues to operate effectively in its current form after Brexit. However, as far as European Works Councils are concerned, the Government acknowledges that a reciprocal agreement from the EU would be required for the statutory framework to continue as it presently does. You can read the Government's explanatory note here.	**During 2018**
24.	Pensions auto-enrolment legislation	**Pensions: auto-enrolment** From 6 April 2019 the minimum contribution rates for defined contribution schemes will increase to 3% for employers (previously 2% as of 6 April 2018) and an overall total of 8% (previously 5% as of 6 April 2018) of the jobholder's qualifying earnings.	**6 April 2019**

NO.	ACT OR STATUTORY INSTRUMENT	SUMMARY AND IMPACTS	IMPACT DATE
25.	The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 will amend the Employment Rights Act 1996 (section 8)	**Itemised pay statements** These regulations will require itemised pay statements to contain information regarding the number of hours worked by an employee for which they are being paid. However, this will only apply where the employee's pay varies according to the number of hours worked.	**6 April 2019**
26.	National Insurance Contributions Bill	**Termination payments: changes to the national insurance treatment of termination payments** Employer NICs will become payable on all termination payments above £30,000 (which are currently only subject to income tax). The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs.	**6 April 2019**
27.	Parental Bereavement (Leave and Pay) Bill 2017 - 19	**Private Members' Bill on statutory parental bereavement leave and pay** This Private Members' Bill was introduced by Kevin Hollinrake MP and would entitle employed parents who lose a child below the age of 18 (including a still birth after 24 weeks) to 2 weeks' statutory leave to be taken within 56 days of the child's death. Employees who have at least 26 weeks' service at the time would also be entitled to receive 2 weeks' statutory pay at the lower of either the prescribed rate or 90% of their average earnings. Employers will be able to recover some or all of this payment from the Government. You can read our full report on the Bill here.	**During 2020** The second reading of the bill took place on 20 October 2017. The bill was considered by the Public Bill Committee on 17 January 2018.

FUTURE KEY CASES

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
1.	Pimlico Plumbers Ltd v Smith	**Worker status: were plumbers self-employed, workers or employees?** This case concerns whether plumbers engaged by Pimlico Plumbers are employees, workers or neither. The Court of Appeal held that the claimant plumber was a worker under the Employment Rights Act 1996 and an employee for the purposes of the Equality Act 2010 (which uses an extended definition of employment covering workers). You can read our full report on the decision here. An appeal of the decision was heard by the Supreme Court in 2018 and judgment is awaited.	The Court of Appeal judgment was handed on 10 February 2017. The Supreme Court hearing took place on 20 and 21 February 2018. Judgment awaited.
2.	Uber B.V. v Aslam	**Worker status: are Uber taxi drivers workers?** The EAT decided that taxi drivers engaged by Uber were workers, rather than self-employed contractors. The consequence is that the drivers will be entitled to certain employment rights such as to be paid in accordance with the National Minimum / Living Wage and protections under the Working Time Regulations (e.g. rest breaks and paid holiday). You can read our full report on the decision here. Uber applied for permission to appeal directly to the Supreme Court (a "leapfrog appeal"). Permission was refused on 4 December 2017 and so the appeal will now proceed to the Court of Appeal.	The Court of Appeal hearing is due to take place by 20 November 2018.

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
3.	Boxer v CitySprint	**Worker status and TUPE: was cycle courier a worker or self-employed and, if a worker, did he automatically transfer under TUPE?** A claim has been lodged by a cycle courier seeking determination of whether he had worker status and, if so, whether he automatically transferred to the transferee under the TUPE regulations.	A Preliminary Hearing to determine employment status took place on 2 and 5 February 2018. Awaiting Employment Tribunal listing of full merits hearing.
4.	Independent Workers of Great Britain (IWGB) and University of London	**Worker status: are outsourced staff also workers of the end-user?** The IWGB applied to the Central Arbitration Committee (**CAC**) for trade union recognition. As part of that application the CAC will need to decide whether outsourced staff (security guards, porters, receptionists, post-room staff and AV staff) employed by Cordant Security were also workers engaged by the University of London. If they were not workers of the University then the application for trade union recognition would fail. On 10 January 2018, rejected the application on the grounds that the staff were not workers of the University due to the absence of a contract between the parties. You can read our full report on the CAC decision here.	The CAC decision handed down on 10 January 2018.
5.	Jones Meads v Roofoods Ltd t/a Deliveroo	**Worker status: are Deliveroo riders workers?** Deliveroo riders have brought claims in the Employment Tribunal that are predicated on their being workers. If they are not workers then the claims will fail.	The Employment Tribunal hearing is due to take

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		This action is separate to the application made to the CAC in 2017 by the IWGB for trade union recognition. In order for that application to proceed, the Deliveroo riders had to be workers for the purposes of TULRCA 1992. The CAC decided that the riders were self-employed and were not workers. You can read our full report on the CAC decision here. On 12 February 2018, the IWGB applied for permission to have the CAC's decision judicially reviewed.	place in July 2018. Awaiting decision on permission to proceed with judicial review proceedings.
6.	The Sash Window Workshop Ltd v King	**Holiday pay: can a worker carry over paid annual leave where they have been deterred from taking it because it is unpaid?** The ECJ has ruled that workers who are denied the right to take paid annual leave are entitled to bring claims in respect of accrued but untaken leave. There is no requirement on them to take the leave on an unpaid basis in order to bring a claim. Further, the right to paid annual leave for such workers accrues and carries over without limitation. This case has important implications for employers who have not yet adjusted holiday pay to include variable payments such as overtime and commission. It is also of concern to employers who engage individuals on a self-employed basis but who could be deemed to be "workers" for employment law purposes. You can read our full report on the decision here. The case will now return to the Court of Appeal.	The ECJ judgment was handed down on 29 November 2017. The Court of Appeal hearing is due to take place on 20 – 21 November 2018.
7.	Lock v British Gas Trading Ltd	**Holiday pay: inclusion of commission payments in holiday pay** The Court of Appeal ruled that the Working Time Regulations 1998 can be interpreted to provide that holiday pay must include relevant commission payments. The Court decided that when faced with the question of whether a conforming interpretation can be adopted, the Courts should not confine themselves to the literal meaning of the legislation, but should consider whether such an interpretation is in line with the "grain" of the law. The Court decided	Awaiting Employment Tribunal listing

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		that it could be presumed that the UK Government intended to fulfill entirely the obligations arising under the Working Time Directive, including those which were not apparent at the time the Directive was implemented such as the requirement for holiday pay to be "normal pay". You can read our full report on the decision here. British Gas was refused permission to appeal to the Supreme Court. You can read our report on the implications of the refusal here. The case is due to return to the Employment Tribunal to assess how Mr. Lock's holiday pay should have been calculated, however, there has been speculation that the parties are close to settling.	
8.	International Petroleum Ltd v Osipov	**Whistleblowing: are co-workers personally liable for post-dismissal losses flowing from a detriment?** The EAT held that fellow workers, including non-executive directors, could be liable for whistleblowing detriment where the detriment is a dismissal. This was the case where the non-executive directors were instrumental in the decision to dismiss the employee who had made the protected disclosure. It was also held that the non-executive directors were jointly and severally liable with the employer for post-dismissal losses. You can read our full report on the decision here. An appeal of the decision will be heard by the Court of Appeal in 2018.	The Court of Appeal hearing is due to take place on 3 July 2018.
9.	Royal Mail Group Ltd v Jhuti	**Whistleblowing: knowledge of a protected disclosure and detriment claims** The Court of Appeal held that a dismissal will not be automatically unfair for having made a protected disclosure where the dismissing officer: (i) did not know that protected disclosures had been made; and (ii) had been misled by the employee's line manager to believe that the reason for dismissal was poor performance. Separately, the Court also decided that a claimant can bring a detriment claim in respect of a co-worker's actions which led to the dismissal (in this case, the line manager's alleged manipulation of	The Court of Appeal decision was handed down on 20 October 2017. Awaiting decision on application for

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		the process) and they could pursue post-dismissal losses against the colleague and/or the employer (who is potentially vicariously liable for a co-worker's detriments unless there is a "reasonable steps" defence). On 16 November 2017 the employer applied for permission to appeal to the Supreme Court.	permission to appeal to the Supreme Court.
10.	Asda Stores Ltd v Brierley	**Equal pay: female supermarket workers able to compare themselves to male depot workers** This case concerns whether women working in Asda stores should be paid the same as men working in its distribution warehouses on the grounds that the roles are of equal value. The case is notable as it is the first large-scale equal pay claim brought against a private-sector employer. A Preliminary Hearing was held in June 2016, and judgment delivered in October 2016, where it was decided that the female retail workers were entitled to compare themselves to the male depot workers. The Tribunal's decision was subsequently upheld by the EAT who decided that the male depot workers were appropriate comparators for an equal value claim both under the Equality Act 2010 and under EU law. You can read our full report on the decision here. An appeal of the decision will be heard by the Court of Appeal in 2018.	EAT judgment handed down on 31 August 2017. The Court of Appeal hearing is due to take place on 10 October 2018.
11.	Porras Guisado v Bankia SA and others	**Pregnancy and maternity discrimination: protection against dismissal crystallises from conception and before the employer is notified** The Advocate General considered the dismissal of a pregnant worker in line with the provisions in the Collective Redundancies Directive (**CRD**) and the Pregnant Workers Directive 92/85/EEC (**PWD**). The Advocate General concluded that a collective redundancy situation is not necessarily an "exceptional case" which can be used to justify the dismissal of a pregnant worker. Further, the PWD should protect workers against dismissal from the moment they are	The Advocate General's Opinion was handed down on 14 September 2017.

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		pregnant, even if they have not yet informed their employer of their pregnancy. You can read our full report on the decision here. The ECJ's judgment is awaited.	Judgment awaited.
12.	Gallop v Newport City Council	**Disability discrimination: knowledge of disability** The EAT held that an employee's dismissal was not direct disability discrimination because the dismissing officer had no knowledge of the employee's disability. It was also found that the knowledge of the employer's occupational health advisor could not be imputed to the dismissing officer. An appeal of the decision was heard by the Court of Appeal in 2017.	The Court of Appeal hearing took place on 6 July 2017. Judgment awaited.
13.	Carreras v United First Partners Research	**Disability discrimination: whether expectation of working long hours amounts to a PCP?** The EAT held that an informal expectation that an employee work long hours was capable of amounting to a PCP requiring adjustment for the purposes of a claim for failure to make reasonable adjustments. You can read our full report on this decision here. An appeal of the decision was heard by the Court of Appeal in 2017.	The Court of Appeal took place on 1 and 2 November 2017. Judgment awaited.
14.	Capita Customer Management Ltd v Ali	**Sex discrimination and shared parental leave: is it directly discriminatory to pay enhanced maternity pay to women and statutory shared parental pay to men?** An Employment Tribunal held that an employer directly discriminated against a male employee by paying enhanced pay to women on maternity leave and statutory pay only to men on shared parental leave. The Tribunal took the controversial step of allowing the claimant to compare himself to a woman on maternity leave, rather than confine him to a comparison with a woman	The EAT hearing took place 20 and 21 December 2017. Judgment awaited.

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		on shared parental leave. They also held that after the compulsory two-week period, the purpose of maternity leave was detached from pregnancy and childbirth and so the special treatment derogation did not apply. You can read our full report on the decision here. An appeal of the decision was heard by the EAT in 2017.	
15.	Hextall v Chief Constable of Leicestershire Police	**Sex discrimination and shared parental leave: is it directly discriminatory to pay enhanced maternity pay to women and statutory shared parental pay to men?** An Employment Tribunal held that a police force's policy of paying enhanced pay to women on maternity leave and statutory pay only to men on shared parental leave was not discriminatory. An appeal of the decision was heard by the EAT in 2018.	The EAT hearing took place on 16 January 2018. Judgment awaited.
16.	Morris-Garner v One Step (Support) Ltd	**Restrictive covenants: the scope of Wrotham Park damages** The Court of Appeal upheld findings of breaches of non-compete and non-solicitation covenants connected to the sale of a business and made an award of damages on a "Wrotham Park" basis. The Court held that Wrotham Park damages are not restricted to exceptional cases and/or cases where there is no identifiable financial loss. Instead, the test is whether an award on such a basis would be a just response. An appeal of the decision was heard by the Supreme Court in 2017.	The Supreme Court hearing took place on 11 and 12 October 2017. Judgment awaited.
17.	Newcastle upon Tyne NHS Foundation Trust v Haywood	**Notice to terminate employment takes effect when employee personally takes delivery of the notice letter** The Court of Appeal struggled to decide the rules around when notice to terminate an employee's employment takes effect under the contract (in the absence of any express terms	The Supreme Court hearing took place on 20 November 2017.

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		addressing this). They concluded that notice is served only when the employee, personally, has taken delivery of the letter containing notice. Here, the employee was away on holiday and didn't receive the letter until her return. The Court decided that notice was served on her return, notwithstanding that it had also been emailed to her and posted in a letter collected by her father-in-law in her absence. However, there was no requirement that the employee must have read the letter before the notice became effective. You can read our full report on the decision here. An appeal of the decision was heard by the Supreme Court in 2017.	Judgment awaited.
18.	Colino Sigüenza v Ayuntamiento de Valladolid and others	**TUPE: is there a transfer of an undertaking where there is a gap of 5 months between the cessation of the old contract and the start of the new contract?** The Advocate General has given an opinion that there was no transfer of an undertaking under the Acquired Rights Directive (**ARD**) where there was a gap of 5 months between the termination of a contract with contractor 1 and the beginning of a new contract for the same service with contractor 2. This was in circumstances where the service, premises, equipment and resources used remained the same, but the staff changed. The Advocate General decided that following the termination of the contract with contractor 1 there was no entity that was capable of transferring for the purposes of the ARD. The ECJ's judgment is awaited.	The Advocate General's Opinion was handed down on 6 December 2017. ECJ judgment awaited
19.	Seahorse Maritime Ltd v Nautilus International (a trade union)	**Collective redundancy consultation: the territorial scope of TULRCA 1992** The EAT held that the *Lawson v Serco* principles which apply to determining the territorial scope of rights under the Employment Rights Act 1996, also apply to the territorial scope of rights to a protective award for failure to consult under s.188 of TULRCA 1992. In this case it meant that seafarers employed under employment contracts governed by English law and living on ships stationed in the UK were international commuters who had a "sufficiently strong connection" to the UK to be able to	The Court of Appeal hearing is due to take place on 11 and 12 April 2018.

NO	CASE	SUMMARY AND IMPACTS	DATE JUDGMENT HANDED DOWN / EXPECTED
		bring claims before the Employment Tribunal. In practice, this means that employers will be obliged to carry out a collective consultation exercise if, at any one establishment anywhere in the world, it is proposing to dismiss as redundant 20 or more employees within a period of 90 days, who each individually have a sufficiently strong connection with the United Kingdom. An appeal of the decision will be heard by the Court of Appeal in 2018.	
20.	Bellman v Northampton Recruitment Limited	**Vicarious liability: was employer liable for assault on employee at ad hoc drinks party following official Christmas party?** The High Court held that an employer was not liable for an assault by an employee on a co-worker at a drinks party which took place directly after the official Christmas party at a separate location. Although many employees were present, attendance was voluntary and third parties were also present. You can read our detailed report on the decision here. An appeal of the decision will be heard by the Court of Appeal in 2018.	The Court of Appeal hearing is due to take place on 12 – 13 June 2018.
21.	Various claimants v WM Morrison Supermarkets Plc	**Vicarious liability: was employer liable for data breach committed by a rogue employee?** The High Court held that the employer was vicariously liable for a data breach committed by a rogue employee which resulted in the personal data of almost 100,000 of the employer's staff being shared online. The information shared online include employees' bank, salary and national insurance details. An appeal of the decision will be heard by the Court of Appeal in 2018.	The Court of Appeal hearing is due to be heard by 12 December 2018.

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THE GDPR: WHAT DOES IT MEAN FOR HR?

Helena Brown, Partner

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What am I going to cover?

1. Consent and employment contracts
2. Privacy notices
3. New and enhanced employee rights
4. Impact on DSARs
5. Profiling in recruitment
6. Conducting DBS checks
7. Data breaches
8. Questions and discussion

But first…what's the fuss about?

- The same as we have now….but bigger!
- Headlines
- Human rights
- Some changes specific to employment

…and don't forget Brexit in the mix…

Consent and employment contracts

- **Consent is not always needed, but where it is, there are new rules:**
  - Demonstrated
  - Unbundled
  - Can be withdrawn at any time – as easily as given
  - Freely given

" Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment"

…Impacts our strategy for employment contracts and practices

Privacy notices

- **GDPR requires more detail in privacy notices:**
  - Kinds of data collected and how it is collected (monitoring?)
  - Controller identity
  - DPO contact
  - Purpose and legal basis of processing
  - Who data is shared with
  - Overseas transfers
  - How long data is retained
  - Rights to object / access / rectify / erase / restrict / complain
  - Automated decision making detail, incl logic, significance and consequences

Privacy notices

- Practicalities of updating privacy notices
- Layering privacy notices
- Separate notices for:
  - job applicants?
  - new employees?
  - legacy employees?
- Interaction with other policies

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New and enhanced employee rights

RIGHT	WHAT DOES IT MEAN?
Enhanced DSAR	Less time (1 month); no fee; no ‘disproportionate effort’
Rectification	If inaccurate or incomplete; within 1 month; must contact third parties
Erasure	‘Without undue delay’; must contact third parties; not absolute - only if data no longer needed, consent withdrawn, no legitimate basis, unlawful, legal obligation, or online service
Restriction	e.g. Reducing system access to data; if accuracy, contested, unlawful, required by data subject for legal rights, verification of an objection – in practice restriction may be requested where there has been an objection, to enable investigation time
Portability	Focus is on service enhancement; applies only where processing based on consent, contract, and is automated – competition law through the back door

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Enhanced DSARs: concerns

- **Increase in volume of DSARs:**
  - Trend in big brother concerns and wanting to protect confidential information
  - Informal, cheap and without repercussions
  - Easy way to gain potentially helpful material in pursuing a grievance or litigation
- **Increase in volume of data:**
  - More to look at to properly respond - hard to "see the wood for the trees"
  - Diverse sources of data through innovation and increasing use of technology – each source may need interrogating
- **Increase disproportionate impact:**
  - Searches and reviews can be a drain on time and resources
  - Law is complex and developing and not always easy to apply – no "one size fits all"
  - It is increasingly hard to map data held by organisations
- **Increase consequences:**
  - Incorrect/inadequate responses risk court action, action by the regulator and damage to reputation
  - Excessive responses risk disclosing organisation's own or third party's confidential information

Controlling DSARs: exemptions

General exemptions are in Art 23 of GDPR and specific UK exemptions in s14 Schedule 2 of the Data Protection Bill (HL)(draft) and include:

- Prevention and detection of crime (to the extent that would be prejudiced)
- Immigration control
- Where disclosure would prejudice a statutory function designed to protect members of the public
- 3rd party information (except where third party is a healthcare, social work or education professional acting in an official capacity)
- Legal professional privilege
- Price sensitive corporate information
- Management forecasting
- Prejudice to negotiations with requester
- References given in confidence by the data controller
- Information recorded in an exam

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Controlling DSARs: purpose

- The **purpose** of a DSAR is at least a factor relevant to the exercise of the Court's discretion under s. §7(9). *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd & Ors* provides an illustrative list of potentially relevant factors:
  - Whether there's a more appropriate route to obtain the information, e.g. disclosure in proceedings;
  - The nature and the gravity of the breach;
  - Whether the application is an abuse of rights (e.g. merely to impose a burden on the Data Controller);
  - Whether the application is procedurally abusive;
  - Whether the real quest is for documents rather than personal data;
  - The potential benefit of the information to the data subject;
  - Whether the data subject has already received the data, or document containing the data.
- However, a collateral purpose of assisting will **not** be an absolute bar / render a DSAR invalid (*Dawson-Damer; Ittihadieh*)

Profiling in recruitment

“Individuals have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her”

- **Relevant exceptions…**
  - ‘Necessary’ for entering into or performance of a contract
  - Authorised by law
  - Explicit consent

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Conducting DBS checks

- DBS checking is permitted by law only in specific cases (Rehabilitation of Offenders Act 1974)
- Art 10 GDPR: convictions data can only be processed in accordance with national laws
- Data Protection Bill classes convictions as ‘special categories’: legal basis for processing? Not consent
- Also consider: transparency, proportionality, security, storage, retention
- What about other pre-employment screening?

Data breaches

- **New compulsory breach reporting under GDPR:** within 72 hours of breach awareness – **include in staff policies and training** – only if there is a **likely** risk to individual rights and freedoms
- Inform individuals if ‘a high risk of adversely affecting rights and freedoms’
- Assess likelihood of damage to employee interests
- Don’t ‘over notify’
- Will notifying help individuals to manage the impact of the breach?
- Is there a plan to provide assistance?

ICO Data breaches checklist: preparing

Preparing for a personal data breach:

☐ We know how to recognise a personal data breach

☐ We understand that a personal data breach isn't only about loss or theft of personal data

☐ We have prepared a response plan for addressing any personal data breaches that occur

☐ We have allocated responsibility for managing breaches to a dedicated person or team

☐ Our staff know how to escalate a security incident to the appropriate person or team in our organisation to determine whether a breach has occurred

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ICO Data breaches checklist: responding

☐ We have in place a process to assess the likely risk to individuals as a result of a breach

☐ We know who is the relevant supervisory authority for our processing activities

☐ We have a process to notify the ICO of a breach within 72 hours of becoming aware of it, even if we do not have all the details yet

☐ We know what information we must give the ICO about a breach

☐ We have a process to inform affected individuals about a breach when it is likely to result in a high risk to their rights and freedoms

☐ We know we must inform affected individuals without undue delay

☐ We know what information about a breach we must provide to individuals, and that we should provide advice to help them protect themselves from its effects

☐ We document all breaches, even if they don't all need to be reported

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QUESTIONS AND DISCUSSION

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GDPR

Guidance on Employee Personal Data

Introduction

The General Data Protection Regulation (**GDPR**), due to come into force on 25 May 2018, will impose significant new burdens on organisations across Europe including a substantial amount of additional reporting requirements and increased fines and penalties. It is understood that post-Brexit, the UK will continue to adopt a similar standard for data protection as set out in the GDPR. This guide sets out the key changes under the GDPR and the considerations and actions to take in relation to employee personal data.

Why implement new legislation?

The aim of the GDPR is to bring a unified approach to data privacy law in line with modern use of and the international transfer of personal data.

The GDPR is not intended to restrict the processing of personal data, but rather align it to the modern digital world and ensure that such processing is done in a way that protects data subject's rights. For example many organisations outsource services to third parties (e.g. payroll or training services), use cloud hosting services (rather than onsite data racks) and engage with data subject (e.g. through training/surveys) to collect and analyse workforce demographic, knowledge and expertise. Such behaviour will need to be reviewed (but not necessarily restricted) in light of the upcoming GDPR.

What is the scope of the GDPR?

Many of the existing core concepts under the Data Protection Act 1998 (**DPA**) which implements the EU Data Protection Directive 95/46/EC (**Directive**) are reflected in the GDPR. Familiar concepts of personal data, data controllers, and data processors are broadly similar in both the DPA and the GDPR. HR teams will be well aware of how the broad definition of processing under the DPA captures their retrieval, management, transmission, destruction and retention of employee personal data and this will be the case under the GDPR as well.

Under the GDPR **personal data** now includes information relating to a living person, who can be identified directly or indirectly by such information (e.g. name, ID number, location data, an online identifier, one or more factors specific to the physical, physiological, genetic, mental, economic or social identity of that person). Under the GDPR, **sensitive personal data** (which has a higher threshold of protection) will include genetic data, biometric data and data concerning sexual orientation in addition to the previous categories such as race/ethnic origin, trade union membership, health and criminal records.

The GDPR extends the obligations and territorial reach of current data protection legislation. Going forward, data processors who process personal information on behalf of a data controller will have direct statutory obligations. Specific processing terms set out in the GDPR will need to be incorporated in any written agreements between data controllers and data processors. Additionally the GDPR will apply to non-EU companies processing EU individual's personal data for example by selling to, or monitoring the behaviour of, EU citizens.

From a human resource/employment team perspective, the first step is to understand the flow of personal data within the business. For international organisations this will require a further understanding as to how such data flows across borders within the group. For example where employers outsource a particular function, perhaps data hosting (which includes HR data) and/or management of payroll service, such services will be subject to the more stringent obligations under GDPR. Moreover, non-EU affiliates using shared resources and/or centralised functions are likely to be directly affected by the GDPR given its further territorial scope. Organisations should review their existing contracts in light of GDPR, assessing current policies and procedures in place in light of the flow of data across the business. Going forward, the increased obligations and liability under GDPR should be considered in future negotiations to ensure an adequate risk allocation with suppliers. In general, businesses should expect more lengthy and difficult negotiations with suppliers as they try to address their new exposure under GDPR.

Can consent be relied on?

Similar to the DPA, the GDPR also requires the processing of personal data to be in accordance with certain **conditions of processing**. One of these conditions, which is often relied on, is the data subject's consent, with wording in privacy notices and/or employment contracts confirming the employee's consent to the processing of their personal data. The strength of such consent is already questionable under the DPA due to the imbalance of the employer and employee relationship. Furthermore, the consent is often obtained in conjunction with the employment, i.e. to get the job, the employee must sign the employment contract and consent to the processing of personal data.

The GDPR introduces a higher burden for **consent** - it must be freely given, specific, informed and clearly indicated by a statement or positive action. If consent is given through a written declaration it must be clearly distinguishable from other matters and easy to understand.

To obtain specific consent, when processing has multiple purposes and consent is being relied on for each purpose, consent needs to be obtained each purpose. Additionally, prior to giving consent, the employee must be informed they have the right to withdraw consent at any time.

Employers should review the justifications that are relied on for processing employee data and, where relevant, consider whether it will still be appropriate to rely on consent. This should be considered in light of that, even if freely given, consent can be withdrawn. An alternative would be for an employer to rely on the condition that the processing is necessary for legitimate interests (for example when processing personal data for administrative purposes). It is not yet clear as to the higher threshold for sensitive personal data of **explicit consent,** however, it is understood that this will also be required to be freely given, specific, informed and unambiguous.

What is a fair processing notice?

The **transparency** requirements under the GDPR require companies to provide individuals with extensive information about how their personal data is collected, stored and used. This information must be easily accessible, transparent and presented using clear and plain language. In practice, this means that companies will need to include more information in their privacy policies and fair processing notices, as well as retaining more detailed records of their data processing activities in relation to its employees.

In accordance with the concept that personal data must be processed fairly and lawfully, the GDPR requires employers to provide employees and job applicants with detailed fair processing notices. These notices should set out the personal data collected, the type of processing that occurs, retention periods, any international transfer of data; data subject rights such as subject access requests, right to data rectification, erasure, objection to processing and data portability.

GDPR compliance requires an ongoing assessment of processing activities. Any fair processing notices and privacy policies will need to be kept under review to ensure they accurately capture any new types of data collected or any additional or different processing of such data.

Are there additional employee rights?

The rights of future, current and former employees, as data subjects, are extended under the GDPR, presenting greater obligations on employers and HR teams. For example, employees will have a new right of portability, a right to erasure and additional rights in relation to subject access requests.

Right of portability

Data subjects will have the right to request that their personal data be provided to them (or a third party) in a machine readable portable format free of charge. Employers should consider how and where the personal data is held and if such data can be easily transferred in a safe, secure manner without impacting the usability of such data by the data subject. The employer will need to comply with such requests without undue delay, and in any event within one month.

Right to be forgotten (right to erasure)

Data subjects have the right to request for the removal or erasure of personal data, for example if it is no longer necessary, the individual objects to such processing and/or the individual withdraws consent. Not only will employers need to comply with such requests, but it will need to ensure that any third party with whom such employee data was shared, also deletes such data.

Data subject access requests

Under the GDPR the right of data subjects to request information about the personal data processed by employers remains largely the same. However, under the new regime employers must respond without undue delay and in any case within one month of receipt of the request. Additionally, the £10 fee for making a request will also be abolished.

The new data subject rights may present practical issues for employers and HR teams, especially where employee data is spread across multiple or complex systems. Employers will need to update the relevant policies and procedures to reflect the new GDPR requirements. HR teams should review existing procedures in place when responding to data subject access requests to ensure the new time scales can be met.

What is privacy by design and default?

The GDPR requires data controllers to implement appropriate technical and organisational measures to protect a data subject's rights. This can include anonymising or pseudonymisation of data and restricting the amount of personal data processed, the access granted and/or any retention period. Coupled with this, there is an **accountability** principle under the GDPR requiring organisations to be able to demonstrate how they comply with the GDPR.

This requires a cultural shift in approach to personal data protection going forward rather than something that can be done in isolation or as a one-off. HR teams should encourage across the organisation a focus on awareness and training in relation to the new GDPR requirements. Documenting current processing activities on an ongoing basis, conducting **data privacy impact assessments** where necessary and auditing third party providers to ensure that the GDPR requirements are being met.

What are the consequences of breach?

Under the GDPR organisations will be required to report a **personal data breach** within 72 hours to the Information Commissioner. In line with the accountability requirements, all data breaches must be recorded along with details of actions taken. Employers should appoint a data breach response team, outline a response plan and set out a detailed reporting procedure in the updated privacy policy detailing how, when and to whom employees should report data breaches. Employers should also review any reporting requirements and assistance set out in outsourced services agreements.

Depending on the type of GDPR breach, a fine can be imposed of up to the greater of **€20,000,000 or 4% of the total worldwide annual turnover** of the preceding financial year. This is significantly higher than the maximum fine under the DPA of £500,000 for serious breaches.

In addition there may be financial liability to the individual in damages for losses suffered and/or criminal liability.

Lastly, it is worth remembering additional costs that can be incurred as well. Similar to a breach of current data protection legislation, a breach of the GDPR could expose organisations to substantial internal resource spent on responding to requests for information, enforcement notices, internal and external press releases and minimising any negative PR. In relation to employee personal data, HR teams will have to be able to respond quickly and effectively to minimise any exposure of the business.

Next steps

Please see below our GDPR Action Points for HR Teams which will provide you with a useful starting point when considering your organisation's approach to GDPR compliance.

GDPR Action Points for HR Teams

1. Ensure **awareness** within the organisation and amongst key stakeholders as to implications of the upcoming GDPR.

2. Given the broader definition of personal data (including sensitive personal data) and processing and the emphasis on accountability, **document the personal data processed** (e.g. by making an inventory of such data) with particular focus on:

    - what personal data is processed;
    - why such data is processed;
    - where it is located;
    - to and from where it is transferred (internally, externally and outside the EEA); and
    - how long it will be retained.

3. Adopt a **privacy by design approach** and conduct a **Data Protection Impact Assessment**

4. Understand the **legal basis for processing** the different types of personal data. Check fair processing notices, employment contracts and privacy policies. Consider if, as an employer, you are relying on employee consent alone. For example, when obtaining employee health records, we recommend that you outline the reasons for processing, being as transparent as possible through privacy policies and processing notices.

5. **Communicate the privacy information** (such as an updated privacy policy and/or fair processing notice) to employees, providing further detail as required under the GDPR.

6. If you are part of an **international organisation**, consider which jurisdiction you fall under in terms of data protection. Would Binding Corporate Rules or the EU Model Clauses be the right approach for you?

7. Consider **reviewing the organisation's** policies, such as email usage, social media and IT.

8. Given the increased number of **data subject rights**, ensure that operationally the business can comply with individuals' rights and that such rights are communicated to them (for example the right to be forgotten and that copies of personal data must be provided in a portable format). Plan **how to respond to and process subject access requests** in light of the GDPR amendments to requests for fees and response times.

9. Teams should be given **training** as to the changes coming into force.

10. Appoint a **data protection officer** if relevant.

11. Given the new timeframes for breach response, put in place a **data breach reporting plan and response plan/team**.

12. Review the organisation's **data security** (including the security measures adopted by third parties).

The Addleshaw Goddard Team

If you have any further questions or require additional support please feel free to contact AG. In addition to providing you advice, we can arm you with various documents such as GDPR compliant fair processing notices templates and/or privacy policies.

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Corporate governance reform and the role of HR

Will Chalk, Partner and Head of Corporate Governance

What am I going to cover?

- Directors' duties – a brief reminder
- Corporate governance reform and the role of HR
  - The story so far
  - Key issues for HR teams

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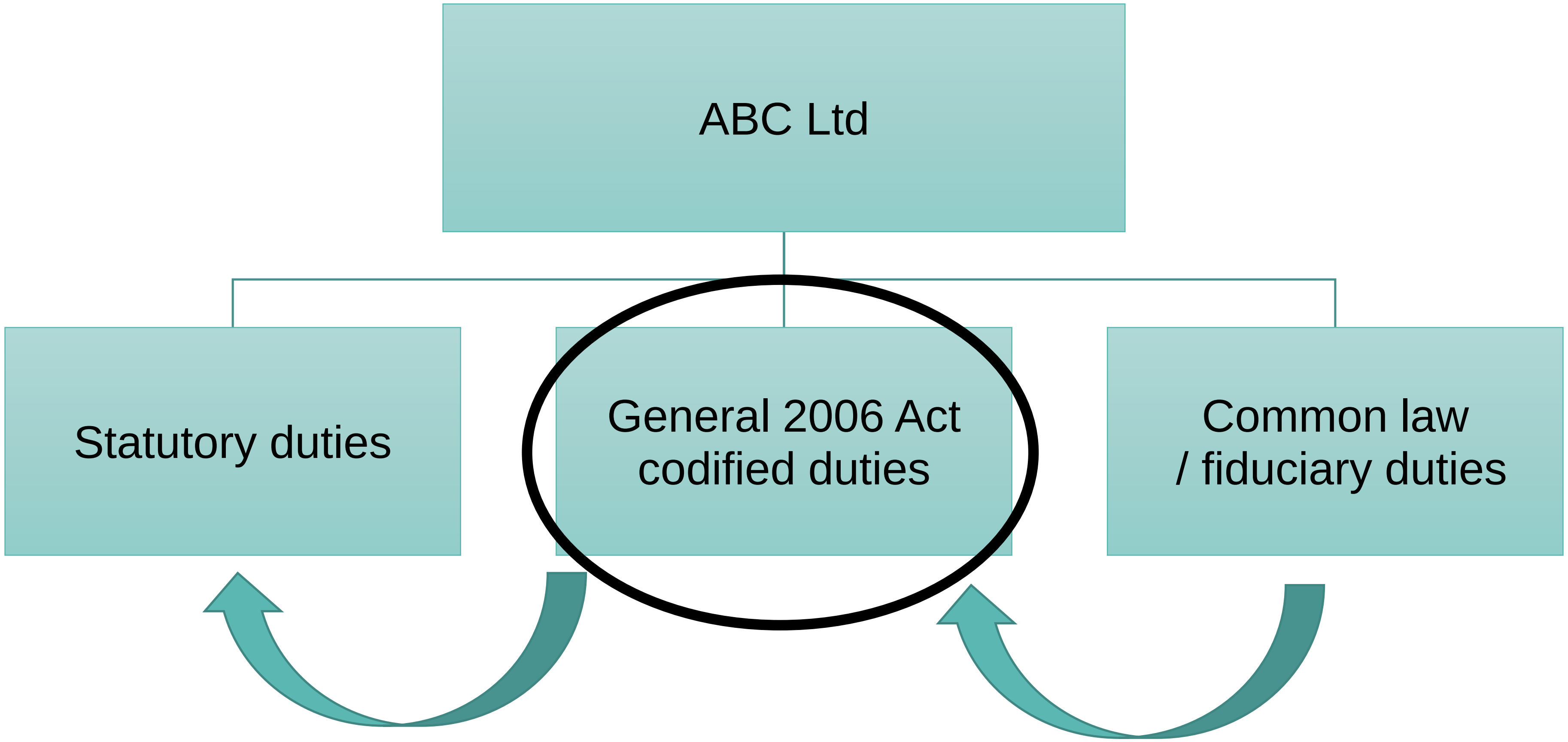
Directors' duties - a brief reminder

The landscape of directors' duties



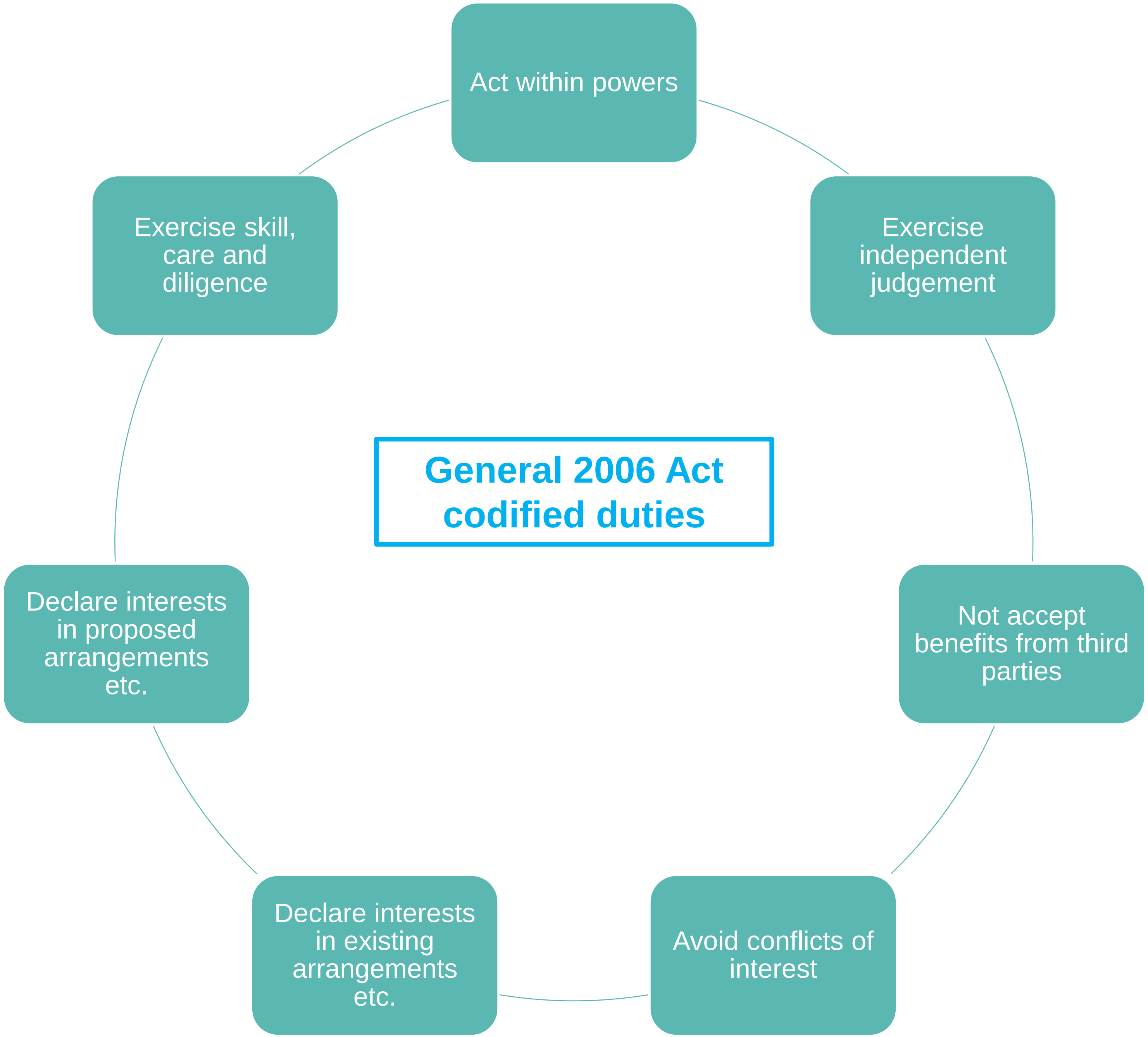
General 2006 Act codified duties

- **Application – When?**
  - The decision-making process
- **Application – Who and What?**
  - Legal directors
    - Execs and Non-execs equally
  - Shadow directors
  - Nationality / contractual execution irrelevant
- **Enforcement?**
  - Claims for breach of trust, duty & negligence
  - Duties are owed to the company
  - Derivative claims by shareholders

BEIS Select Committee Report – An area of potential reform?

Protecting directors

Indemnities
D&O



Act within powers
Exercise independent judgement
Not accept benefits from third parties
Avoid conflicts of interest
Declare interests in existing arrangements etc.
Declare interests in proposed arrangements etc.
Exercise skill, care and diligence
General 2006 Act codified duties

“Section 172”

General 2006 Act directors’ duties

- **Promote the success of the company…**

  In good faith, act in a way s/he considers would be most likely to promote the success of the company for the benefit of members as a whole…

  …and in doing so have regard to, <u>among other things</u>

  - the consequences of decision in the long term
  - the interests of employees
  - business relationships with suppliers, customers etc.
  - the impact on the community and the environment
  - maintaining reputation for high standards of conduct
  - the need to act fairly between members

  “Enlightened shareholder value”

- **Decision-making and recording**
  - Information flows and governance procedures

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Corporate governance reform and the role of HR

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Corporate governance reform – the story so far

“Creating a society that works for everyone”

“In whose interests should businesses be run?”

Greater focus on consideration of stakeholders, not just shareholders

More transparency?

Greater accountability?

Focus of Govt Green Paper
- Stakeholder voice
- Remuneration
- Governance in larger private companies

Governance reform – the story so far

Oct 2016
BEIS Select Committee launches Governance inquiry

Nov 2016
Government Green Paper

Feb 2017
FRC: UK Corporate Governance Code (plcs) to be reviewed

April 2017
BEIS Select Committee report

August 2017
Government "Response" to Green Paper

Dec 2017
FRC launches Code consultation + Investment Association launches register of shareholder dissent

Governance reform – what happens next?

Pre-Mar 2018

Secondary legislation laid before Parliament

Q2 2018

Governance Code for larger private companies published for consultation

June 2018

Secondary legislation in force

June 2018

Final form Governance Code (plcs) published

1 Jan 2019

Governance Code (plcs) in force

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Governance reform – how?

- **Revised UK Corporate Governance Code**
  - Produced by the Financial Reporting Council (“FRC”)
  - Application: Main Market of the LSE (premium segment) + possibly AIM
  - “Comply or explain” operating principle retained
  - FRC guidance on Board Effectiveness etc. will contain “suggestions” for best practice
- **A governance code for “larger private companies” (>2,000 employees)**
  - Produced by FRC, IoD, CBI, BVCA
  - Application: “comply or explain” basis
  - Guidance?
- **Transparency: regard for stakeholder issues?**
  - Public and private companies (>1,000 employees)
  - Further Rem related disclosures

Taylor Review of Modern Working Practices

- Duty to report on “workforce structure”
- Publicise model of employment + use of agencies
- Report on requests received + agreed to from zero hour workers for fixed hours
- Report on requests received + agreed to for permanent positions from agency workers
- <u>Gvt response</u>: Working with FRC to determine if workforce model and practices should be disclosed. Considering “People Report”

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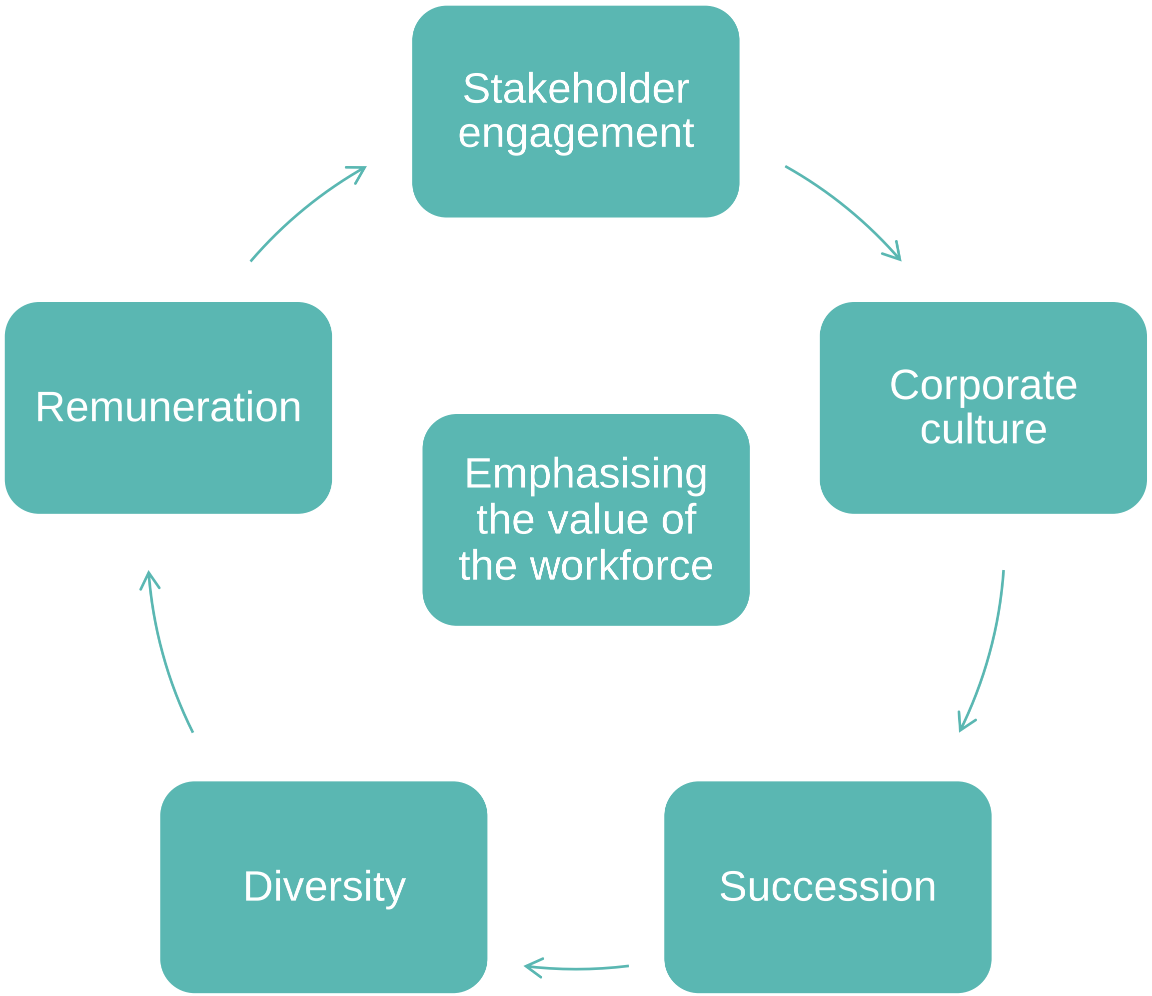
Governance reform – where HR will be key



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Stakeholder engagement - relations with the “workforce”

- **Section 172 Companies Act 2006**
  - Decision-making…and “employee voice”
- **Revised Governance Code, “normal” methods of engagement**
  - Director appointed from the “workforce”
  - Designated NED
  - Formal workforce advisory council
  - Others?
- **Importance of whistle-blowing / ABC policies / speak-up**
  - Impact on culture and risk profiles

“Workforce”?
- Employees
- Remote workers
- Agency workers
- Contractors

Proposed Governance Code

Workforce engagement?
- Director breakfasts
- Listening / focus groups
- Social media updates
- Town halls
- Annual & “Pulse” surveys
- Employees AGMs
- Meet the board days
- Digital sharing platforms

Proposed Board Effectiveness Guidance

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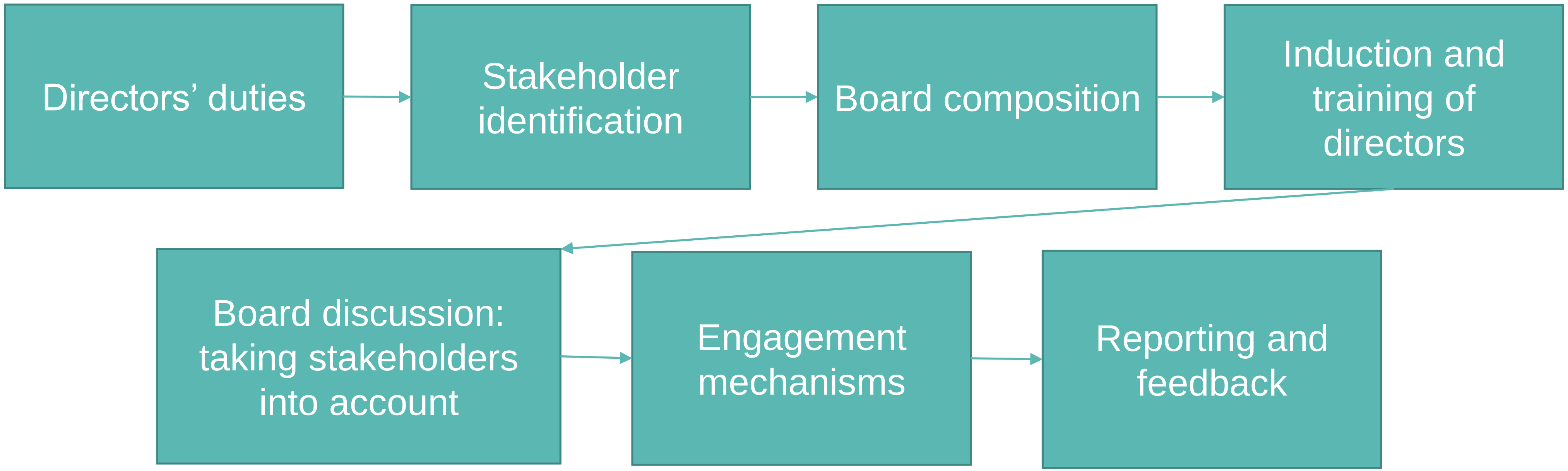
Designated directors
*"Consideration could be given, for example, to appointing one or more of the **HR director**, the chief risk officer or chief ethics officer, where they exist, as full board members. In any event, the chairman should ensure that these individuals and/or other members of senior management with relevant responsibilities have regular access to the board (and vice versa)."*

Guidance: Stakeholder Voice

- Produced by the ICSA and Investment Association (Sept 2017)
- Help directors / boards understand + factor in views of employees / other stakeholders
- Ten core principles under the seven themes



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Corporate culture

"Directors should embody and promote the desired culture of the company. The board should monitor and assess [it] to satisfy itself that behaviour throughout the business is aligned with the company's values. Where it finds misalignment, it should take corrective action."
Proposed Governance Code Provision 2

"The workforce should be able to raise concerns in relation to the management and colleagues where they consider that conduct is not consistent with the company's values and responsibilities."
Proposed UK Corporate Governance Code Principle D

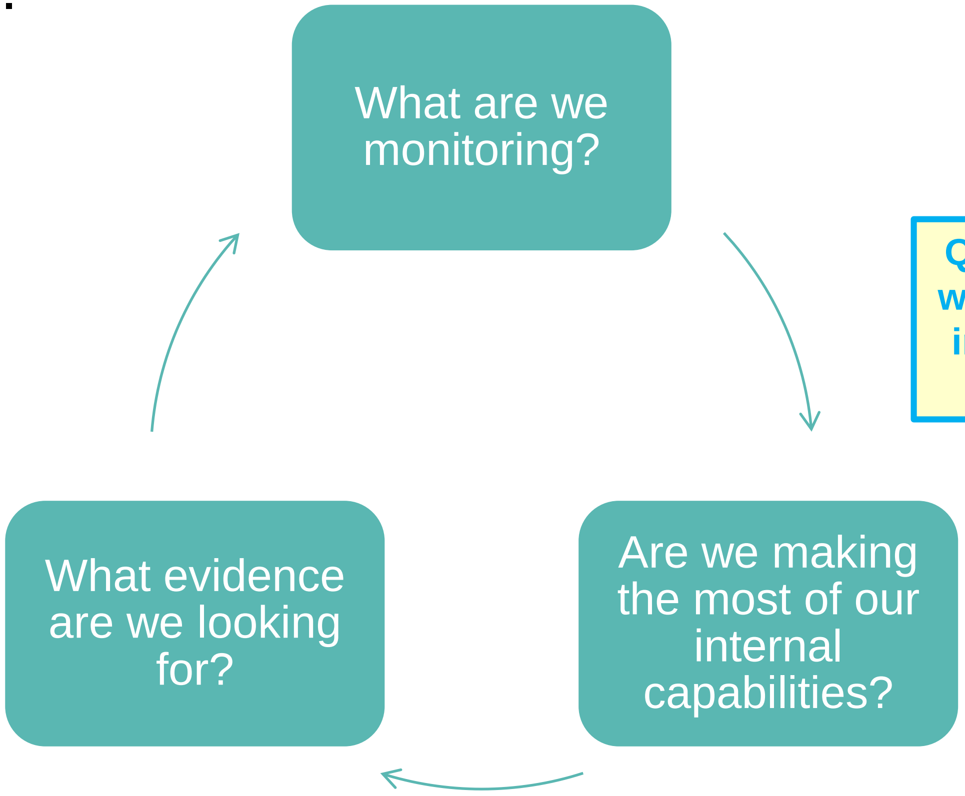
- **Boards should** (according to the proposed Board Effectiveness Guidance):
  - Determine their company's purpose
  - Clearly define values aligned to purpose and company strategy
  - Embed those values at all levels of the organisation
- **Boards should seek assurance that management has put in appropriate mechanisms to implement and embed company purpose, strategy and values**
  - Align incentives and rewards, promotion and development decisions
  - Clearly embed culture in policies and apply in practice
- **Role of HR in evaluating culture, embedding it and monitoring it**

Corporate culture

- "Boards should seek assurance about corporate "health" by taking the temperature in the organisation on a regular basis…by engaging different parts of the business, including HR, internal audit , risk and compliance."

Sources of culture insights

- Turnover and absenteeism rates
- Training data
- Recruitment, reward and promotion decisions
- Grievance and "speak up" data
- Poor compliance – e.g. H&S
- Regulatory and ethical breaches



Questions that HR will have a key role in helping boards to answer

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Succession and diversity

> "Both appointments and succession plans should be based on merit and objective criteria, and promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths."
> *Proposed Governance Code Principle J*

- **Role of the Nominations Committee in listed companies**
  - Private company equivalent?
- **A broadening focus…what do we mean by "diversity"?**
  - Governance Code (currently)…"diversity, including gender…"
  - Governance Code (proposed)…"gender, social and ethnic backgrounds, cognitive and personal strengths…"
  - EU legislation…"gender, age, educational or professional backgrounds…"
- **Publish a diversity policy**
  - Description, objectives and outcomes
- **Other policies and outcomes…..impact of the "Non-Financial Reporting Statement" (larger listed plcs)**
  - Testing and monitoring

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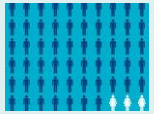
Succession and diversity – aspirational targets

BEIS Select Committee wanted

- **At least half of all new appointments to board / exec in FTSE 350 to be women by 2020**
- **Publication of workforce data broken down by race / pay band**
- **Government does not want to mandate……for now**

Davies Report (2016)



- 33% women on boards by 2020

Hampton-Alexander (Nov 2016 / Nov 2017)

- 33% women on board in FTSE 350 by 2020 + more female Chairs, SIDs and execs
- FTSE Women Leaders (so Exec strata + direct reports)
  - 33% voluntary target for FTSE 250 by 2020 (was FTSE 100)
  - FTSE 350 should voluntarily publish stats in ARA or on website
  - **Greater role for the Nom Com as regards pipeline development**
  - **"HRDs have an important role to play in bridging the gender diversity gap"**

Parker Review (Oct 2017)

- FTSE 100 – one director of colour by 2021
- FTSE 250 – one director of colour by 2024
- FTSE 100 / 250 focus also on pipeline and succession planning
- Disclosure of actions in ARA. Companies not meeting targets should explain why
- **Board to require HR teams to identify and present ethnically diverse candidates**
- **HR relationships with search agencies and role in mentoring and sponsoring candidates**

MacGregor-Smith (April 17)

- Focus on companies with >50 employees
- Board level sponsor + publication on data in ARA + on website
- Should publish 5-year aspirational targets and report on them
- Should publish breakdown of employees by race / pay band
- **HR role:**
  - **unconscious bias training**
  - **challenging traditional candidate lists**
  - **supporting progress of ethnically diverse workforce in career, pay etc.**
  - **oversight of tools and resources to ensure race is discussed in the workplace**
- CBI / IoD to ensure that free, online unconscious bias training is available

Business Diversity and Inclusion Group chaired by Margot James

ADDLESHAW GODDARD

Not forgetting Gender Pay disclosures!!

Succession and diversity – possible disclosures

- **FTSE 350:** Number of women on executive committee and direct reports (H-A – Rec 2.4)
- **FTSE 350:** Include description of board policy on diversity, inc. steps taken to increase ethnic diversity (Parker – Rec 3.1)
- **Listed companies** with >50 employees should report annually against their published 5 year aspirational diversity targets (McG-S Rec 1)
- **Listed companies** with >50 employees should publish a breakdown of employees by race, and by pay band, on website and in their ARA (McG-S Rec 2)
- **Large businesses** should identify a board-level sponsor who is accountable for diversity issues and Chairs, CEOs and CFOs should reference steps taken on diversity in their ARA statements (McG-S Rec 8)

How do you collect the data?! Impact of GDPR?

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Remuneration

BEIS Select Committee wanted binding annual vote on executive pay

Government rejected it

- **Expanded role for the Remuneration Committee**
  - How pay and incentives align across the organisation
  - Explain to workforce how decisions on exec pay reflect wider pay policy

- **Legislation to require reporting of ratio of CEO pay to average pay of UK workforce + changes**

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UNFAIR DISMISSAL DEVELOPMENTS: A CASE STUDY

Richard Yeomans, Jessica-Alice Curtis and Isobel Phillips

ADDLESHAW GODDARD

The business…

AGRIMACHINES LTD (AML)

Manufacturers of agricultural machinery – 3 UK plants

Telford

200 employees

Wrexham

75 employees

Crewe

90 employees

The proposed reorganisation…

Redundancies	Robotics	Premises
		
Redundancies at all 3 plants	Increased use of robotics in the manufacturing process	Reduction of square footage by 25% at each plant

Scenario 1

John takes the news badly…

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Why is John unhappy?

- **John is a Senior Electrical Engineer at AML. He is very unhappy with the plans to reorganise. What are his concerns?**
  - Robots are the thin end of the wedge and will lead to negative outcomes for workers
  - Loss of expertise amongst the workforce will jeopardise health and safety
  - Reduced plant sizes will degrade the safe working environment

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John refuses to co-operate

Poor attitude in planning meetings → Track record for resisting change – but not previously disciplined → AML start disciplinary proceedings

→ Refuse John's request to be accompanied by chosen TU rep → John is ultimately dismissed on misconduct grounds → John claims unfair dismissal and breach of right to be accompanied

Over to you!

1. Was John's poor attitude a potentially fair reason for dismissal?
2. Was it unfair to take into account John's previous track record?
3. Was there a breach of the right to be accompanied to the hearing?

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Q.1. Was John's poor attitude a potentially fair reason for dismissal?

- **YES**
- Potentially fair ground for dismissal?
  - Negative personality ✗
  - Negativity manifesting itself in unacceptable behaviour ✓
- Could be a one-off "flare up" or more persistent attitude problems

- Adeshina v St George's University Hospitals NHS Foundation Trust (CA, 2017)
  - Senior employee involved in leading an organisational change project lacked commitment and failed to co-operate, support and lead the project
  - Capable of amounting to gross misconduct

Q.2. Was it fair to take into account John's previous track record?

- **MAYBE**

NHS 24 v Pillar (EAT, 2017) – distinction between:

- Relying on past misconduct as **principal reason** for dismissal
  - Live warning = FAIR
  - Expired warning = UNFAIR
- Including past misconduct in an investigation report on the basis it is **relevant background**
  - Fair to include any past conduct issues as relevant background information BUT the new misconduct must alone justify the sanction

Q.3. Was there a breach of the right to be accompanied to the hearing?

- **YES:** Gnahoua v Abellio London Ltd (ET, 2017)

Employees have an absolute and unfettered to right to choose their companion, provided they fall into one of the permitted categories (trade union rep or colleague)

But compensation for breach is designed to compensate employee's loss or detriment, not punish the employer

If no loss or detriment to the employee, then only nominal damages will be awarded – in this case £2

Scenario 2

Tackling the redundancy consultation

ADDLESHAW GODDARD

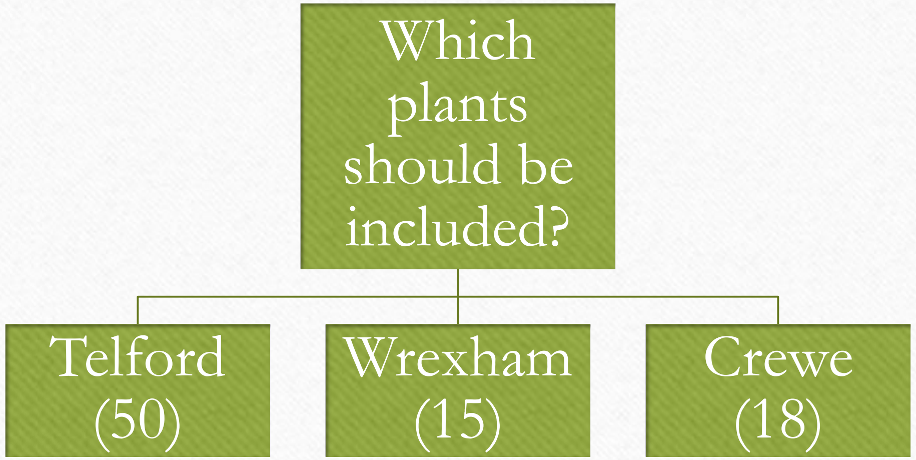
Meet Shirley and Giovanni

Shirley – Director

Giovanni – HR

ADDLESHAW GODDARD

Who is in the scope of the collective consultation exercise?



- Telford only?
- Or should they all be treated as one establishment? Factors to consider:
  - Same management and accounts
  - Central support functions
  - Geographically close
  - Same activities at each plant for shared customers
  - Employees and equipment sometimes shared

Giovanni's email…

To: Tonioli, Bruno (Telford); Bussell, Darcy (Wrexham); Revell-Horwood, Craig (Crewe)
Cc: Ballas, Shirley
Subject: Redundancy consultation
Importance: High

- *Hi all, Just a quick line to confirm our approach for the forthcoming redundancy exercise. We have to collectively consult for Telford as we are at 50. But I think the best course of action is to park Wrexham and Crewe until the Telford HR1 is in and the consultation is underway. We then deal with them separately and outside the collective process. Should make the process much smoother for us all! Regards, Giovanni*

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The situation unravels…

- Shirley fails to intervene
- Giovanni files the HR1 for Telford only
- The email falls into the hands of the Telford trade union rep who reports AML to BEIS
- AML receive notification of prosecution
- AML investigate and dismiss Shirley and Giovanni for gross misconduct
- Shirley and Giovanni claim they have been unfairly dismissed

ADDLESHAW GODDARD

Over to you!

1. Giovanni thought he was acting in the best interests of AML. Can he still be guilty of gross misconduct?
2. Can Shirley be guilty of gross misconduct?
3. What else could happen to Shirley?

Q.1. Giovanni thought he was acting in the best interests of AML. Could he still be guilty of gross misconduct?

- **YES**

JP Morgan v Ktorza (EAT, 2017)

Step 1: Establish the reason

No need to show the employee was culpable or aware that employer would disapprove

Step 2: Is it reasonable to treat that reason as sufficient grounds for dismissal?

Lack of culpability or knowledge of wrongdoing may be relevant to question of whether it is reasonable to dismiss

Q.2. Could Shirley be guilty of gross misconduct?

Adesokan v Sainsbury's Supermarkets Ltd (CA, 2017)

- **YES**
- What amounts to gross misconduct is a question of fact:
  - Not limited to cases of dishonesty or intentional wrongdoing
  - Focus is on the damage between the parties
  - Gross negligence can "poison the relationship"

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Q.3. What else could happen to Shirley?

- Criminal prosecution for failure to notify BEIS of the redundancies at Wrexham and Crewe which was attributable to her neglect
- Personally liable for an unlimited fine
- AML cannot indemnify Shirley for the fine or the defence of the criminal prosecution

Scenario 3

Problems with some of the redundant employees

It's not as easy as A, B, C…

ALICE

- Alice is one of 3 Plant Managers at the Telford Plant. One of the roles is to be made redundant
- She is selected for redundancy after achieving the lowest score in an assessment process
- The day after she is dismissed she discovers she is 3 months pregnant
- Alice claims she has been unfairly dismissed and discriminated against on the grounds of her pregnancy

BRYAN

- Bryan's role is redundant. He is offered an alternative vacancy that involves some additional physical duties. Bryan has arthritis
- Bryan turns down the alternative role. He tells AML that the role does not match his skill set and would not be cost effective for business
- AML dismiss Bryan without paying a statutory redundancy payment. Bryan claims he refused the role because his arthritis prevented him from taking on a physical role and he is entitled to a SRP

COLIN

- Colin is a Senior Sales Manager and has worked for AML for 30 years
- He is placed on garden leave and told not to contact clients or colleagues. In correspondence, AML get his name wrong
- AML hold two short consultation meetings with Colin before he is dismissed. In his termination letter, AML get the termination date wrong
- Colin claims he has been unfairly dismissed

Over to you!

1. Was Alice protected from dismissal as a pregnant worker even though AML did not know she was pregnant?
2. Was AML entitled not to pay a statutory redundancy payment given Bryan's reasons for refusing the alternative role?
3. Could an insensitive redundancy consultation make the overall dismissal unfair?

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Q.1. Was Alice protected from dismissal as a pregnant worker even though AML did not know she was pregnant?

YES:

Porras Guisado v Bankia SA (Advocate General, 2017)

Pregnant workers are protected from dismissal save in "exceptional circumstances"

Protection **applies from point of conception** even if employer not aware of pregnancy

A collective redundancy will only be an "exceptional circumstance" if there is no possibility of reassignment to another suitable post

If possibility of reassignment then pregnant worker **must be reassigned**, rather than being made redundant, even if it means bumping another employee out of the post

If employer unwittingly dismisses before learning of pregnancy, then can rectify by offering to re-engage the employee

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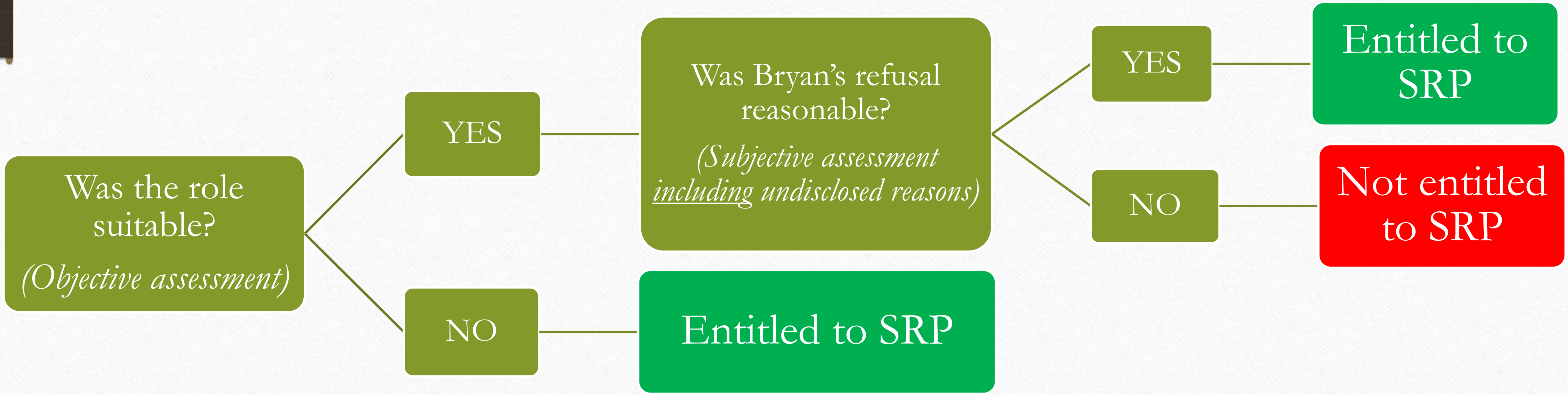
Q.2. Was AML entitled not to pay a statutory redundancy payment given Bryan's reasons for refusing the alternative role?

- **MAYBE:** Dunne v Colin & Avril Ltd t/a card Outlet (EAT, 2017)



Q.3. Could an insensitive redundancy consultation make the overall dismissal unfair?

- **MAYBE:** Thomas v BNP Paribas Real Estate (EAT, 2016)
- Actions which might militate against a fair process:
  - Perfunctory and insensitive dealings with employee
  - Placing employee on garden leave as a knee jerk reaction
  - Forbidding contact with clients and colleagues before consultation has begun

Any questions?

Taxation of termination payments

Changes from 6 April 2018

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What's happening?

Changes to what's within the £30,000 exemption

- £30,000 threshold for payments (and other benefits) received in connection with the termination of employment retained
- PILONs will not benefit from £30,000 tax-free threshold
- Applies to termination dates on after 6 April 2018

Changes to foreign service relief

- Foreign service relief on termination payments abolished for employees who are UK tax resident in the year of termination
- Applies to termination dates on after 6 April 2018

Clarification on taxation of injury to feelings payments

- Payments for injury to feelings connected with termination will be fully taxable
- Clarification of existing HMRC position?

Termination payments above £30,000 threshold subject to employer's NICs from 6 April 2019

£30,000 tax-free threshold

- £30,000 tax-free threshold retained. BUT……
- “post-employment notice pay” excluded

What is “post-employment notice pay”?

- It’s a relatively simple concept but the calculation can be more complicated
- In essence, PENP is the basic pay equivalent for any unworked notice period calculated using a specified formula
- It’s irrelevant whether or not the payment was made under a payment-in-lieu of notice clause in the individual's contract of employment

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Quick question

Do your standard employment contracts include a PILON clause?

A – Yes

B – No

C – It varies depending on employee

D – I'm not sure/don't know

The PENP formula

$$\frac{BP \times D}{P} \text{ minus } T$$

Where:

BP = employee's basic pay in respect of the last pay period of the employee before the "trigger date"

P = the number of days in that pay period

D = the number of days in the post-employment notice period

T = other taxable payments (that are not holiday pay or a bonus payment)

Relevant termination award

- A “relevant termination award” is any amount of a termination payment left over after deducting any statutory redundancy payment
- Where an enhanced contractual redundancy payment is made, only the amount equal to the statutory redundancy payment can be deducted

Calculating basic pay

All pay ✓

Any salary which was given up under a salary sacrifice arrangement ✓

Excluding:

Overtime payments ✗	Commission ✗
Benefit in kind ✗	Bonus ✗
Gratuity or allowance ✗	Any termination-related bonus payment ✗

Income relating to securities and securities options ✗

Quick question

Which statement best represents your company's position?

A – We don't have any salary sacrifice arrangements

B – We have salary sacrifice arrangements and maintain records of "notional pay"

C - We have salary sacrifice arrangements but don't maintain records of "notional pay"

D – I'm not sure

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Unworked notice period

- You need to know the “trigger date”
- Where notice is given by either the employer or the employee = the day the notice is given
- If no notice is given = the last day of employment

Post-employment notice period

- Period beginning on the last day of employment and ending on the earliest lawful termination date i.e. the length of the unworked notice period
- The earliest lawful termination date is the last day of the period which is equal in length to the minimum notice and begins on the trigger date
- Example:
  - An employee who has a 90 day notice period resigns on 1 January 2019 (the trigger date) and leaves employment on 31 January
  - Her earliest lawful termination date is 31 March 2019
  - Therefore, her the post-employment notice period will be 59 days

The PENP formula

$$\frac{BP \times D}{P} \text{ minus } T$$

Where:

BP = employee's basic pay in respect of the last pay period of the employee before the "trigger date"

P = the number of days in that pay period

D = the number of days in the post-employment notice period

T = other taxable payments (that are not holiday pay or a bonus payment)

An example…

No notice period worked

Alex earns £34,000 a year basic pay which is equivalent to £2,833.33 per month. He is paid monthly and his last pay period was November which has 30 days. His notice period is 90 days. His employment is terminated and he works none of his notice period. His relevant termination award is £20,000. He is not redundant.

PENP is calculated as follows:

$$\frac{\text{£2,833.33 (basic pay for the last pay period) x 90 (number of days in post-employment notice period)}}{\text{30 (number of days in the last pay period before the trigger date)}} = \textbf{£8,500}$$

The PENP is taxed as general earnings (subject to income tax and employer's and employee's NI) with the remaining £11,500 potentially benefiting from the £30,000 tax-free threshold.

How much tax?

Given the facts in the previous example, approximately how much more income tax and NI (including employer NI) would be paid under the new tax regime than under the current tax regime (assuming: no PILON clause and a 40% marginal income tax rate)?

A - £1,743

B - £2,743

C - £3,743

D - £4,743

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Another example…

Some notice period worked

Beth earns £40,000 a year basic pay which is equivalent to £3,333.33 per month. She is paid monthly and her last pay period was March which had 31 days. Her notice period is 90 days. Her employment is terminated and she works 32 days of her notice period. Her relevant termination award is £20,000. She is not redundant.

PENP is calculated as follows:

$$\frac{\text{£3,333.33 (basic pay for the last pay period) x 58 (number of days in post-employment notice period)}}{\text{31 (number of days in the last pay period before the trigger date)}} = \textbf{£6,237}$$

The PENP is taxed as general earnings (subject to income tax and employer's and employee's NI) with the remaining £13,763 potentially benefiting from the £30,000 tax-free threshold.

Another example…

Some notice period worked – salary sacrifice

Carmen earns £28,000 a year. However, she has previously sacrificed £2,000 of her salary for enhanced pension contributions. Her basic pay is therefore £30,000 which is equivalent to £2,500 per month. She is paid monthly and her last pay period was February which has 28 days. Her notice period is 90 days. Her employment is terminated and she works 48 days of her notice period. Her relevant termination award is £20,000. She is not redundant.

PENP is calculated as follows:

$$\frac{\text{£2,500 (basic pay for last pay period) x 42 (number of days in post-employment notice period)}}{\text{28 (number of days in the last pay period before the trigger date)}} = \textbf{£3,750}$$

The PENP is taxed as general earnings (subject to income tax and employer's and employee's NI) with the remaining £16,250 potentially benefiting from the £30,000 tax-free threshold.

Another example…

Some notice period worked – redundancy

Dahus earns £38,500 a year basic pay which is equivalent to £3,208.33 per month. He is paid monthly and his last pay period was April which has 30 days. His notice period is 90 days. His employment is terminated and he works 14 days of his notice period. He is paid £15,000 on termination of his employment of which £7,335 is statutory redundancy pay. His relevant termination award is therefore £7,665 (£15,000 - £7,335).

PENP is calculated as follows:

$$\frac{\text{£3,208.33 (basic pay for last pay period) x 76 (number of days in post-employment notice period)}}{\text{30 (number of days in the last pay period before the trigger date)}} = \textbf{£8,128}$$

The PENP is less than the relevant termination award. The relevant termination award of £7,665 is taxed as general earnings (subject to income tax and employer's and employee's NI) with the statutory redundancy payment of £7,335 benefiting from the £30,000 tax-free threshold.

Changes to foreign service relief

- Foreign service relief on termination payments abolished for employees who are UK tax resident in the year of termination
- Affects employees who have worked overseas during their employment
  - Under current legislation they would expect a full or partial exemption (depending on the length and timing of the overseas service) from income tax in respect of any termination payment which falls within section 401 ITEPA

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Changes to foreign service relief

- Employers - additional employer's NI cost
  - From 6 April 2019 if the termination payment is above the £30,000 tax-free threshold
- Employees - consider the terms of the relevant Double Tax Treaty
  - To the extent that payment is also taxable in another jurisdiction, a foreign tax credit may be available against UK tax in order to avoid a double tax charge
- Applies to termination dates on after 6 April 2018

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Payments for injury to feelings

- Full exemption from tax for payments made in connection with the termination of employment due to death or payments on account of injury to, or disability of, an employee remains
- New sub-paragraph will be introduced to clarify that "injury" includes psychiatric injury (or other recognised medical condition) but not injured feelings
- Payments for injury to feelings connected to termination will be taxable in full
- However, payments for injury to feelings that arise outside of a termination can continue to be paid tax-free

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In a nutshell…

- £30,000 tax-free threshold retained
- New concept of "post-employment notice pay" introduced which will be taxable and will not benefit from £30,000 tax-free threshold. Applies to termination dates on after 6 April 2018
- Employer's class 1 National Insurance payable on all taxable payments made in connection with the termination of employment, including payments above the £30,000 tax-free threshold (delayed until 6 April 2019)
- Foreign service relief on termination payments abolished for employees who are UK tax resident in the year of termination
- Payments for injury to feelings connected with termination will be fully taxable
- HMRC guidance on the new rules – still outstanding

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Practical pointers

- Keep an audit trail to prove the notice date
- “Notional” (i.e. pre-salary sacrifice) salary levels need to be kept and used in the PENP calculation
- Even if you have contractual PILONs, you will still need to run the PENP calculation if you are making any additional payments
- If you don’t have contractual PILONs, now may be the time to consider amending your standard form contracts