



DoyleClayton
Workplace Lawyers

Workplace Law Review 2017

Welcome to the 2017 edition of Doyle Clayton's workplace law review providing you with an overview of key legal issues affecting the workplace and the workforce. We take a look at what happened in 2016 and what we can expect for 2017 in the fields of employment law, business immigration, pensions, share incentive arrangements and health and safety.

EMPLOYMENT

Brexit

Following the vote of the British people to leave the EU, there has been a good deal of speculation about the impact that Brexit might have on employment law and, in particular, whether laws derived from EU law will be retained or repealed. The first clue as to the Government's approach came from comments made by David Davis, before his appointment as Secretary of State for Exiting the European Union, when he said:

"The great British industrial working classes voted overwhelmingly for Brexit. I am not at all attracted by the idea of rewarding them by cutting their rights."

In her speech to the Conservative Party Conference, Theresa May made it clear that workers' existing legal rights will be guaranteed in law, for as long as she is Prime Minister. We do not therefore expect to see significant changes to employment law as a consequence of Brexit, at least in the short to medium term.

Employment status

Last year big names such as Uber, Asos, Deliveroo, Sports Direct, Amazon and Hermes all hit the headlines, amidst allegations of bad working practices and failure to pay the National Minimum Wage (NMW). In employment tribunal proceedings issued against Uber, it sought to argue that its drivers were self-employed and so not entitled to the NMW, which is only payable to workers. Its arguments were roundly rejected by the employment tribunal judge, although it has sought leave to appeal. The decision comes against the backdrop of a government inquiry, expected to last until July 2017, into new working models and the status and rights of agency workers, the self-employed, and those working in the gig economy.

Tax and NICs

In April, the Government announced changes to the way termination payments will be taxed. From April 2018, all notice pay (whether provided for in the contract or not) will be taxed as earnings, so employers will have to deduct income tax and employer and employee National Insurance Contributions (NICs) from notice pay. The £30,000 exemption for termination payments will remain, whilst termination payments exceeding £30,000 will be subject to both income tax and employer (but

not employee) NICs. Salary sacrifice schemes were a victim of the Chancellor's Autumn Statement, with confirmation that from April 2017 the only benefits that will continue to benefit from tax and NICs relief are enhanced employer pension contributions, childcare vouchers, bicycles provided under the cycle to work scheme and ultra-low emission cars.

Employment tribunal fees

Following on from the introduction of employment tribunal fees in 2014, the number of employment tribunal claims continues to fall. The Government's post-implementation review of fees has still not been completed, but we are promised we can expect it early in the New Year. In the meantime, the Government is consulting on plans to reform employment tribunals, including digitising the claim process, delegating tasks from judges to caseworkers and tailoring the composition of tribunal panels. We can also expect to see employment tribunal decisions available online shortly.

Gender pay gap reporting

The big change for 2017 is the introduction of annual gender pay gap reporting for larger employers. Any employer who employs 250 or more employees will have to publish details of the difference in the average hourly pay and bonuses of men and women in their organisation. The first report will have to be published on the company's UK website (as well as a government website) by no later than 4 April 2018, based on pay data as at 5 April 2017. Affected employers should be preparing now and if they have not done so already, identify who will be responsible for preparing the report and who, at the requisite level of seniority, will have ultimate responsibility for sign-off and confirming its accuracy.

Data protection

Organisations also need to start preparing for the EU General Data Protection Regulation (GDPR) which comes into force in May 2018, before the UK exits the EU. Full compliance with the GDPR is likely to be a condition of remaining within the Single Market, but even if that is not the deal ultimately sought or reached, the UK will still need to provide an adequate level of protection for EU citizens' data. The Information Commissioner's Office is clear that organisations should continue to prepare for and comply with the GDPR. The GDPR requires greater focus on the legal basis for processing personal data, extends the rights of data subjects, imposes greater penalties for non-compliance and requires employers to provide more extensive information and policies.

Discrimination

Looking back at important cases from 2016, the Employment Appeal Tribunal (EAT) ruled that an employer may be required as a reasonable adjustment to continue employing a disabled employee in a more junior role on their existing pay rate on an indefinite basis (*G4S Cash Solutions (UK) Ltd v Powell*). Whether they are required to do will be determined on a case by case basis, taking account of the factors set out in the EHRC Code, including the cost of making the adjustment and the employer's financial resources. However, the EAT emphasised that the fact that pay protection might cause discontent amongst other employees is not a relevant factor.

An employment tribunal ruled that easyJet had indirectly discriminated against two members of cabin crew when it refused to allow them to restrict their hours so that they could continue breastfeeding on their return to work from maternity leave (*McFarlane and Ambacher v easyJet Airline Company Limited*). In what is thought to be one of the first cases on enhanced shared parental pay, Network Rail was ordered to pay a father £27,000 after it admitted that its shared parental pay scheme, which enhanced pay for mothers but not fathers, was indirectly discriminatory (*Snell v Network Rail Infrastructure*). Network Rail's Scheme was unusual as most employers who have decided to enhance

shared parental pay do so for both mothers and fathers. Unfortunately for its other employees, Network Rail changed its shared parental leave policy before the employment tribunal hearing so that it no longer enhances shared parental pay at all.

Dress Codes were another hot topic in 2016, with two different Advocate Generals of the European Court of Justice (ECJ) issuing apparently conflicting opinions on whether employers had discriminated on religious grounds when they dismissed Muslim women for wearing headscarves at work. The ECJ's decisions in these cases can be expected in 2017 (*Bougnaoui v Micropole SA* and *Achbita v G4S Secure Solutions NV*).

Whistleblowing

Whistleblowing claims continue to be popular ones for employees to bring, as they do not need two years' service and if whistleblowing is found to be the reason for dismissal, the dismissal is automatically unfair. The EAT upheld a whistleblowing claim in circumstances where the person who decided to dismiss was unaware that the employee had made a protected disclosure. It ruled that as the decision-maker had been manipulated by someone in a managerial position who was in possession of the true facts, the manager's reasons and motivations could be attributed to the employer so as to make it liable (*Jhuti v Royal Mail Group Limited*). The Court of Appeal was due to consider the important question of the scope of the public interest test in whistleblowing cases (*Chesterton Global Limited v Nurmohamed*). However, the hearing was delayed and will now be heard in 2017. The public interest test, introduced in June 2013, means that workers who blow the whistle are only be protected if they reasonably believe that their disclosure is in the public interest. The Court of Appeal will consider whether a disclosure made in the interest of 100 senior managers satisfies this test.

Holiday pay

Holiday pay issues continued to trouble the courts, with the Court of Appeal confirming that an employment tribunal had been correct to construe the Working Time Regulations 1998 (WTR) purposively so that an employee could enforce his right to have a sum included in his holiday pay to reflect commission he was unable to earn whilst on holiday (*Lock v British Gas*). It is understood that British Gas intends to seek leave to appeal to the Supreme Court, so a further hearing on the issue can be expected in 2017. An employment tribunal also ruled that voluntary overtime and other payments associated with rotas worked voluntarily should have been included in employees' statutory holiday pay as the payments formed part of normal pay (*Brettle v Dudley Metropolitan Borough Council*). However, in the case of one claimant who worked voluntary overtime only rarely, it ruled that overtime pay did not have to be included.

Working time

In a decision which has serious implications for those employing mobile workers with no fixed workplace, the ECJ ruled that time spent by mobile workers travelling between home and their first and last appointments counts as working time for the purposes of the Working Time Directive. The decision will impact on issues such as whether these workers are working more than 48 hours per week on average and whether they are being provided with the correct rest breaks and rest periods. However, it does not mean that these workers have to be paid for this travel time. Under the National Minimum Wage Regulations 2015, a worker is not normally considered to be working when they are travelling between home and a place of work or between home and a place where an assignment is carried out and so they are not entitled to the National minimum Wage for travel time. However contractual pay provisions may be relevant here and employers should check what they say.

Financial services and insurance

The financial services sector also saw significant changes in 2016 with the new Senior Managers and Certification Regime (SM & CR) coming into force on 7 March. The SM & CR replaces the Approved Persons regime for individuals working in banks, building societies, credit unions and PRA-designated investment firms, and branches of foreign banks operating in the UK (relevant firms). New whistleblowing rules came into force on 7 September, designed to encourage a culture change in firms in which individuals feel able to raise concerns about poor practice and behaviour without fear of reprisals. There were also changes to the rules on regulatory references which will be followed by further changes in 2017. From 7 March 2017, relevant firms will have to take reasonable steps to obtain references going back over six years of employment, use the mandatory reference template when requesting and providing references and update regulatory references they have given for a period of six years.

A similar regime, the Senior Insurance Managers regime (SIMR), was introduced at the same time for the insurance sector.

BUSINESS IMMIGRATION

Immigration law continues to develop at rapid speed as more Rule changes took place in 2016. It is unsurprising new businesses struggle to keep up to date. We highlight a few key changes below. Brexit is at the forefront of these changes, whilst issues surrounding sponsored migrants, compliance and illegal workers are close behind. It is of course the Government's focus on reducing net migration numbers which still drives much of the immigration system.

Brexit

2016 saw a great deal of change in the UK immigration law landscape and the UK's historic vote to leave the European Union will lead to more. In the short-term there should not be any immediate changes to the UK's immigration laws insofar as they relate to EU membership and no changes are likely to be made until at least the end of the Article 50 negotiation process, which Teresa May is planning on starting in March this year.

Nevertheless, European Economic Area (EEA) and Swiss citizens in the UK (and their family members) who wish to remain in the UK should be taking steps now to protect their immigration status and insure themselves as best they can against the vagaries of the outcome of the Brexit negotiations. Those who have lived in the UK for five years, and can evidence they have been exercising their Treaty Rights in the UK (such as through work, studies or self-employment) may be entitled to apply for a Permanent Residence card, which is proof of their right to live in the UK permanently. Once an individual has obtained their Permanent Residence card, they may be entitled to apply to naturalise for British citizenship. Those who are not yet eligible to apply for a Permanent Residence card may wish to apply for a Registration Certificate to evidence their stay in the UK.

We expect that EEA and Swiss nationals currently working in the UK will continue to have the right to work here in future due to transitional arrangements that will hopefully be agreed, although at some stage they will be required to obtain some documentation evidencing that right to work (if they do not qualify for UK citizenship). The 'right to work' legislation will need to change to require UK businesses to inspect this documentation before employing EU nationals. Given that there are some three million EU nationals currently in the UK, there could well be even greater delays than are already and we advise people to apply early to beat the queues. The demand for Residence Cards and

Naturalisation had already spiked pre-referendum and we are currently working on many such applications.

Following the UK's departure, we anticipate that businesses wishing to employ EEA nationals will be required to sponsor them in the same way that businesses currently sponsor workers from outside of the EEA. Those businesses that do not already possess a sponsor licence from the Home Office should consider applying for one if they wish to have the flexibility to employ EEA nationals once Britain officially leaves.

Also, UK nationals needing to visit EU countries for business trips are likely to require visas following the UK's departure. This could be in the form of Schengen visas or another new visa route. In any event, we expect the administration and planning of trips to create a degree of red tape for UK businesses.

Changes affecting Tier 2 sponsored workers

Some significant changes to Tier 2 of the points based system were introduced in November 2016, with the salary threshold for both Tier 2 (General) experienced worker visas and Tier 2 (Intra-Company Transfer) short term staff visas being increased to £25,000 and £30,000 respectively. The salary threshold for Tier 2 (General) experienced worker visas will increase further to £30,000 from April 2017. The Tier 2 (ICT) skills transfer sub-category was closed and there were changes to the Tier 2 (ICT) graduate trainee category.

More changes are expected in April 2017:

- A new "skills levy" will be introduced and it is expected that employers who sponsor workers on Tier 2 visas will have to pay £1,000 per worker per year (save for small and charitable sponsors who will pay a lower charge of £364 per worker per year), although some migrants will be exempt.
- The Tier 2 ICT Short Term route will also be closed, meaning that Intra-Company Transferees will be required to qualify under the Long Term Staff category with a minimum salary threshold of £41,500. However, the 12 months' previous employment requirement will also be removed for all applications where the Tier 2 ICT worker is paid over £73,900.
- The minimum salary threshold for Intra-Company Transferees working in the UK for between five and nine years will be reduced from £155,300 to £120,000.

Those applying for Tier 2 (ICT) visas will also be required to pay the Immigration Health Surcharge of £200 per year from a date which is yet to be confirmed. There will also be some changes in relation to overseas graduates applying for a Tier 2 (General) visa and those relocating high-value business to the UK. We await the detail of how and when this will be implemented.

If your business relies on recruiting or transferring employees from outside of the EEA then you may have to review your recruitment practices, as well as budget for the increased costs of sponsoring workers once these changes take effect.

Increased scrutiny by the Home Office

In the year in which the burger chain Byron was in the press after 35 of its employees were arrested for not having the right to work in the UK, we saw the Home Office take an increasingly hard line in relation to illegal workers.

In 2016, tougher measures were introduced in the Immigration Act 2016 which placed a greater risk of criminal action being taken against companies seen to be knowingly hiring illegal workers and allows

for the temporary closure of businesses whilst the Home Office carries out an investigation. It is now a criminal offence to work illegally and the Home Office can seize wages from an illegal worker. In addition to the £20,000 civil penalty for employers found to have employed someone illegally without a statutory excuse, if the Home Office considers the employer had 'reasonable cause to believe' that the person was an illegal worker, the employer may face an unlimited fine and up to 5 years in prison. Landlords have greater powers to evict tenants who are illegally in the UK and it is also an offence to drive whilst living illegally in the UK.

Further penalties are also to be introduced. From April 2018, employers will be excluded from claiming the £3,000 national insurance contributions (NICs) employment allowance where they have employed illegal workers and received a civil penalty in the tax year 2017/18.

The government is therefore sending out a clear message to illegal workers and businesses that the UK will leave no stone unturned and will take criminal action where illegal workers are found. Businesses therefore need to ensure that measures are in place to protect themselves from being identified by the Home Office as hiring illegal workers, ensuring that robust 'right to work checks' are in place.

The future

The squeeze on the number of migrants coming to the UK is set to continue. In particular, the Government is making it more expensive for businesses to employ sponsored migrants. There is still a lot of uncertainty about how we will Brexit (hard/soft) and how this will impact businesses with a majority EU workforce. The way forward is to think more creatively and to find alternative solutions to employ non UK nationals.

PENSIONS

Pension tax changes

With effect from 6 April 2016, further changes were made to the Lifetime Allowance (LA) and Annual Allowance (AA) limits as the Government sought to reduce its pension tax relief bill, which currently stands at £35billion. The LA is a limit on the amount of pension benefit that can be drawn from pension schemes, whether lump sums or retirement income, that can be paid without triggering an extra tax charge. The AA is a limit on the total amount of contributions that can be paid to defined contribution pension schemes and the total amount of benefits that you can build up in defined benefit pension schemes each year, for tax relief purposes.

The LA was reduced to £1m for everyone (regardless of what they earn). However, changes to the AA only affect those who have a threshold income of at least £110k and tapering only starts on any amount of their adjusted income over £150k, at which point the AA available is tapered from the standard amount of £40k down to £10k.

These changes severely curtail a person's ability to make adequate pension provision for their retirement through their current pension arrangements. Whilst the general perception is that the changes affect only high earners, critics of these changes say that reducing tax incentives to save for old age is a bad idea (and counterintuitive to government policy) because it sets a limit on people's ambition to get a decent pension without having to rely on the state. The constant lowering of the tax free limits means that more people will reach the limit more quickly, a disincentive to long-term saving. Broadly, if an individual exceeds the annual allowance in a year, they will not receive tax relief

on any contributions they paid that exceed the limit and they will be faced with an AA charge, which can be considerable.

As regards the LA, any pension savings above the LA are subject to the LA charge, which continues to be levied at a rate of 55%, if the excess is taken as a lump sum, or 25% if the excess is taken as income.

End of contracting-out

6 April 2016 also saw the end of contracting out of the State Second Pension (S2P) for defined benefit pension schemes as a result of government reforms that have done away with S2P and replaced it with a single tier basic pension. Defined benefit schemes that were contracted out automatically ceased to be contracted out from 6 April 2016. Defined contribution schemes lost their ability to contract out of S2P some time ago.

As a result of these changes, NICs for employers increased by 3.4% of earnings in respect of each employee. For employees, NICs increased by 1.4% of earnings. For an employer this could mean finding an extra £1,600 per employee a year and an employee will find themselves with £479 less in their pay packet over the year.

Employers who prefer not to absorb this additional cost can offset the increased employer NICs by using either the scheme amendment power (which may require trustee agreement/consultation, depending on the specific rule) or a statutory override power (which does not require trustee consent or consultation) to reduce future accrual and/ or increase member contributions, but only to the extent that it offsets the increase in costs.

GMP methodology

2017 may be the year a correct or rather accepted methodology for equalising GMPs is agreed. At the centre of GMP equalisation is section 62 of the Pensions Act 1995, which enshrines the equal treatment rule into the rules of occupational pension schemes. At issue is the scope of the equal treatment rule and whether schemes can equalise GMPs by converting them to benefits on a one-off basis. However, Brexit might just help here as there is an argument that the requirement to equalise may no longer apply, as there would be no requirement to enshrine EU legislation.

Personal Pension Schemes

The government has indicated that it will review the governance requirements relating to Personal Pension Schemes in 2017. The Pensions Regulator encourages employers to use management committees as a means of ensuring their pension provider delivers and operates the Personal Pension Scheme for their employee members in line with current guidance and provides good value for money. However, the government may have bigger fish to fry in 2017 negotiating Brexit.

Case law

2016 was dominated by two important cases in pension law. The BHS Pension Scheme and TATA Steel. Both concern key concepts and will have a ripple effect in the pensions industry. Both cases could be seen as another nail in the coffin for defined benefit pensions.

BHS Pension Scheme

In 2015, Retail Acquisitions purchased BHS for a nominal £1 and with it came the BHS Pension Scheme with a significant deficit. The Pension Protection Fund (PPF) and Pensions Regulator (tPR) are working with the trustees and former owner Sir Philip Green to resolve the issue of the £570m deficit. If the Scheme ends up in the PPF, members will receive greatly reduced benefits and essentially the debt

will have to be paid by the taxpayer. As former employer, Sir Philip Green could be on the hook for the whole debt. It is likely that this matter will rumble on well into 2017 before it is resolved. It has been reported that to date the PPF has spent around £1.3m on trying to resolve the issue. The case will determine if the existing legislation is robust enough to prevent employers abandoning defined benefit schemes and test the resolve of the PPF and tPR.

Tata Steel

The British Steel Pension Scheme (BSPS) has a whopping £700m deficit and the Government has agreed to take action to assist. Various options have been proposed, but at stake is not only the pension scheme but a major part of the steel industry.

The Trustee believes that entry into the PPF remains the most likely outcome for the Scheme, so as with the BHS Pension Scheme members would receive greatly reduced benefits. This is unless benefits are modified so that the Scheme no longer has a deficit and has adequate reserves to cover residual risks. Closing the BSPS to future accrual is an important step in preparing the Scheme for the future and securing a better outcome for Members than entry into the PPF can offer. This case is also set to continue into 2017.

SHARE INCENTIVE ARRANGEMENTS

During the course of 2016, there were a number of legislative changes to the operation of employee share plans in the UK. With one notable exception (removal of Employee Shareholder Shares benefits), the majority of these changes were introduced to provide clarity on certain aspects associated with tax-advantaged schemes. Whilst such changes are always welcome, they are likely to have only limited application to the majority of companies operating equity based incentive arrangements in the UK.

Employee Shareholder Shares regime ("ESS")

One of the most significant changes in 2016 was the removal of the ESS benefits. ESS has been beset with controversy since its introduction in 2013 with a view to providing more flexible workforces. In practice, many companies used ESS where the benefits of Enterprise Management Incentive (EMI) schemes were not available to their employees due to their ownership structure.

The very generous tax reliefs which participants received in exchange for relinquishing a bundle of employment rights meant that ESS plans became very popular, but perhaps not with the groups for which the legislation was originally intended. This led to the introduction in the 2016 Budget of new limits providing a substantial reduction in the capital gains tax relief, which in practice meant that using the arrangement for tax planning purposes was far less widespread. The unwelcome changes were compounded by the Autumn Statement, where the Chancellor announced that tax relief was being withdrawn in respect of ESS agreements entered into on or after 1 December 2016. This unexpected measure will leave many companies needing to consider alternative share acquisition arrangements if the intention remains to take advantage of the more favourable capital gains tax rates in the UK, but without significant up-front costs for participants.

Restricted share units and other conditional share awards

The Finance Act 2016 included provisions to clarify the taxation of restricted stock units (RSUs) and similar instruments. The legislation now provides that any instrument which is a genuine right to acquire shares will always be taxed as a securities option under Chapter 5 of Part 7 of the Income Tax

(Earnings and Pensions) Act 2003 (“ITEPA”), by including a clear exemption from a charge to tax under the general earnings provisions (section 62 of ITEPA) for securities options. This will serve to clarify taxation in a number of specific circumstances, including the taxation of internationally mobile employees.

However, general earnings treatment may still apply where the employer has a high degree of discretion over the award so that it cannot truly be said that the employee has a right to the shares.

The legislation took effect from 6 April 2016 and applies to all shares delivered on or after that date, even if the employer had previously agreed with HMRC to tax the RSUs as general earnings.

Enterprise management incentives (EMI) options

There were a number of measures aimed at “tidying-up” the implementation and operation of EMI options, including new legislative provisions:

- (i) concerning a takeover by an employee-ownership trust. Since 1 October 2014, companies controlled by the corporate trustee of a qualifying employee-ownership trust (EOT), which would otherwise be unable to grant EMI options, have been able to grant EMI options (provided all the other relevant conditions are met). However, if a company operating an existing EMI scheme comes under the control of an EOT, this used to be a disqualifying event for EMI purposes. However, following the introduction of Finance Act 2016, this is no longer intended to be the case;
- (ii) extending the definition of a company reorganisation to include a sell-out. This brings the EMI legislation in line with the company share option plan (CSOP) and SAYE option scheme legislation, and now allows a qualifying exchange of options in the event that minority shareholders exercise rights to be bought out; and
- (iii) aligning capital gains tax provisions with the current 90 day limit during which EMI options may be exercised in a tax-favoured manner following a disqualifying event.

Share incentive plans (SIPs): disqualifying events

Further legislative changes have been introduced to target specific avoidance arrangements involving SIPs, which may have previously taken advantage of the fact that rights and values attaching to shares held under a SIP could potentially be adjusted after they are awarded.

Notification of tax-advantaged CSOPs, SAYE option schemes and SIPs: reasonable excuse

Finance Act 2016 includes provisions to allow companies to make a late notification to HMRC of the establishment of a tax-advantaged CSOP, SAYE option scheme or SIP if there is a reasonable excuse for the delay. The rules now provide a timetable for HMRC to consider the reasonable excuse claim and notify the company of its decision. They also provide for the company to appeal HMRC's decision to the tribunal.

HEALTH AND SAFETY

We saw large fines throughout 2016 as a result of new sentencing guidelines for health and safety, corporate manslaughter and food safety offences, which came into force on 1 February.

New legislation included the Control of Electromagnetic Fields at Work Regulations 2016 which came into effect on 1 July. Employers must now assess employees' potential exposure to electromagnetic fields (EMFs) by reference to action levels (ALs) and exposure limit values (ELVs). If EMFs are of a high enough intensity employers may need to take action to protect workers from any adverse effects. EMFs are produced by electrical and electronic equipment and are present in virtually all workplaces.

The Health and Safety Executive continues to consult on reviewing and updating legislation. The most recent consultation is on changes to the Gas Safety (Installation and Use) Regulations 1998 (GSIUR), which ends on 27 January 2017.

Deaths at work continued to occur in 2016. According to the HSE figures, the provisional figure for the number of workers fatally injured in 2015/16 was 144, corresponding to a rate of 0.46 deaths per 100,000 workers. In addition, 67 members of the public were fatally injured in accidents connected to work (excluding incidents relating to railways, and those enforced by the Care Quality Commission).

Looking forward to 2017, one of the biggest developments is expected to be the revision of BS OHSAS 18001 to a new ISO standard ISO 45001. BS OHSAS 18001, an internationally recognised standard, is the method of auditing a health and safety management system. The standard enables organisations to put in place structured systems and processes to ensure the optimum management of health and safety, which leads to a better identification and control of organisational safety risk. The revised standard will align with the environmental standard ISO 14001 and the quality standard ISO 9001.

We hope that you have enjoyed reading our annual review and that you have found it helpful. Please do not hesitate to contact us if you would like to discuss or need help with any of the issues highlighted.

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