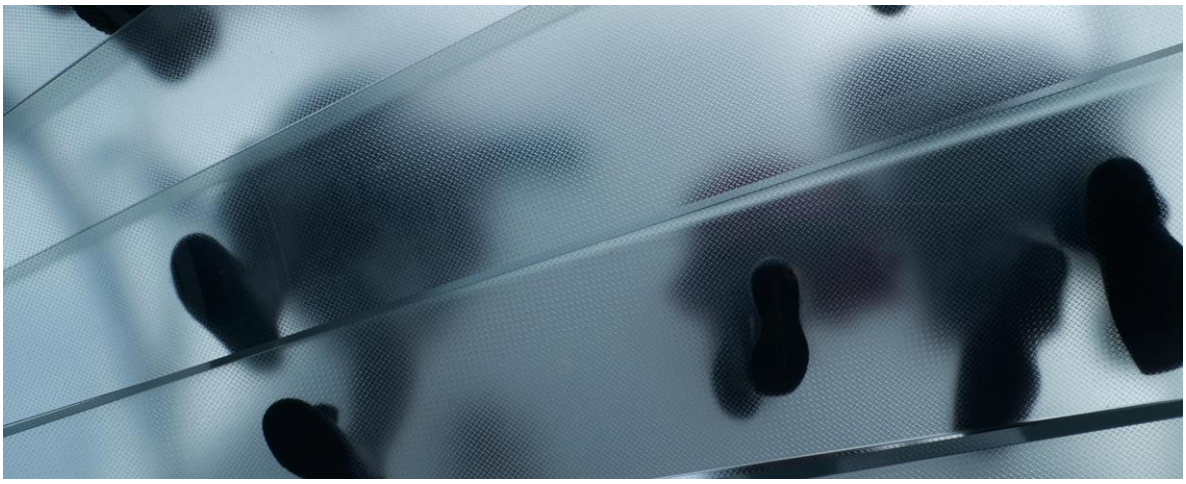

May 2018

Employment Update

Key employment and business immigration developments for employers

In the News

Right to work checks

The Windrush scandal has highlighted some of the complexities around establishing an individual's right to work in the UK. In the wake of the uncertainty, the Home Office has issued new guidance on right to work checks for undocumented Commonwealth citizens. Employers may wish to take the opportunity to review their processes in this area to ensure compliance.

Employers have a duty to prevent illegal working and can face fines of up to £20,000 per worker for employing an illegal worker. To avoid liability, employers must conduct prescribed checks on all employees before they start work. Employers must see an original document or combination of documents from the Home Office's right to work checklist for each employee. The original documents must be viewed in the presence of the individual, copied and retained on file throughout employment and for two years after it ends. The employer must also record the date of the check and that the original document was seen on this date.

"Employers have a duty to prevent illegal working and can face fines of up to £20,000 per worker for employing an illegal worker."

Employers can only accept documents which appear on List A or List B of the Home Office's right to work checklist. List A documents show a permanent right to work in the UK (eg a British passport) whereas List B documents show a temporary right (eg a Tier 2 visa or spousal visa). For List B documents, in addition to checks at recruitment, the employer must diarise the expiry date of the visa and repeat the check before expiry to ensure the employee's right to work has been extended.

Where the Home Office advises that it is lawful to employ someone without the prescribed right to work documents – as may be the case for some members of the Windrush generation – the employer should always obtain written confirmation from the Home Office to ensure it has a justification should the Home Office advice turn out to be incorrect.

Skilled visas at the limit?

As reported in the press, the UK has hit the cap on skilled work visas for a fifth month in a row. This has reportedly contributed to a staffing crisis in the NHS, with doctors and healthcare staff unable to get the necessary work visas. It has also created problems for employers outside the healthcare industry.

The UK operates a quota on skilled visas for non-EEA nationals (known as Tier 2 visas). The quota is set at 20,700 visas per year and operates on a monthly basis. Employers looking to sponsor a skilled worker must request a sponsorship certificate from the monthly quota. Requests for sponsorship certificates are given a points allocation, with greater points given for a higher salary. In months where the quota is oversubscribed, requests below a certain points/salary threshold are rejected.

The minimum salary for a Tier 2 visa is normally £30,000 but in April 2018, for example, £50,000 was required to come within the quota. The pressure on allocations is having a real impact on employers recruiting at the more junior or at entry level, where salaries tend to be lower. Employers who have their sponsorship certificate requests rejected can reapply the following month and could also consider increasing the salary on offer to increase the chances of coming within the monthly quota. We are working with a number of employers to reapply following rejections, as well as considering contingency options. However, the issue is perhaps likely to intensify as Brexit approaches and the demand for non-EEA labour increases.

"...the issue is perhaps likely to intensify as Brexit approaches..."

Case Watch

Shared parental leave – what's the cost?

Two recent rulings on pay for shared parental leave highlight the issues faced by employers who offer enhanced pay for mothers on maternity leave but statutory pay only (or a lesser enhancement) for employees on shared parental leave.

Case 1: The employee in this case had taken two weeks of paid paternity leave and two weeks of paid holiday when his daughter was born prematurely. He wanted to take more time off and was told that he could take shared parental leave but this would be at the statutory rate only, so he decided not to apply. An Employment Tribunal ruled this amounted to direct sex discrimination because the employer's policy offered 14 weeks' full pay for women on maternity leave. However, on appeal, the Employment Appeal Tribunal disagreed. The EAT said that there was no direct sex discrimination because a man on shared parental leave is not comparable to a women on maternity leave. The purpose of maternity leave (at least the first 14 weeks guaranteed by European law) is to protect the health and wellbeing of the mother, whereas the purpose of parental leave is to care for the child. In addition, women as well as men can take shared parental leave and, since a woman on shared parental leave would have been treated the same, there was no direct discrimination. The case did not deal with indirect sex discrimination, which arose in Case 2 below.

Case 2: The employee in this case, a police officer, brought a claim of indirect sex discrimination on the basis that shared parental leave for police officers was paid at the statutory rate but mothers on maternity leave received full pay for 18 weeks. An Employment Tribunal initially ruled that there was no direct or indirect sex discrimination. However, the Employment Appeal Tribunal has now ruled that such a policy could potentially give rise to indirect sex discrimination on the basis that fathers in the police force only have the option of taking shared parental leave (at statutory pay), whereas mothers have the additional option of taking maternity leave (at full pay for 18 weeks). The EAT has sent the case back to the Employment Tribunal to reconsider.

The question of whether employers can safely pay employees on shared parental leave less than mothers on maternity leave remains unresolved. Case 1 makes it clear that doing so does not constitute direct sex discrimination, as the two types of leave serve different purposes and shared parental leave can be taken by both men and women. However, Case 2 confirms that such a policy could constitute indirect sex discrimination because of the disparate impact on fathers compared with mothers. Enhancing maternity pay but not shared parental pay therefore needs to be justified – eg by the need to recruit and retain female talent or the desire to protect the mother/child bond in the early weeks of maternity. Employers adopting such a policy should carefully consider the reasons for doing so and ideally document these internally. Wherever available, any evidence which backs up the employer's rationale will also be helpful in the event of a future challenge.

"Enhancing maternity pay but not shared parental pay therefore needs to be justified..."

ALI V CAPITA CUSTOMER MANAGEMENT LTD; HEXTALL V CHIEF CONSTABLE OF LEICESTERSHIRE POLICE & ANOTHER

Changing terms – have employees agreed?

This case involved several hundred employees who worked for a City Council. They were paid according to pay grades, which had several pay points within each band and were contractually entitled to move up each year to the next pay point in their grade (until they hit the top of the band). Following austerity cuts, the Council decided to freeze incremental pay progression for two years. The trade unions representing the employees strenuously opposed the proposal and threatened industrial action but ultimately did not get the turnout required in an industrial action ballot. The Council said the pay freeze was necessary to avoid additional redundancies and so went ahead with it. The employees continued to work throughout the pay freeze but, when the Council sought to impose a further freeze two years later, the employees brought claims for unlawful deductions from wages covering the previous two-year period.

The Council argued that the employees had accepted the pay freeze by continuing to work and by choosing not to take industrial action. However, the Court of Appeal disagreed. The Court said that the trade unions had strenuously objected to the pay freeze on behalf of employees prior to its implementation. Accordingly, it could not be said that employees had impliedly agreed the pay freeze by continuing to work. Nor could it be said that the employees impliedly agreed by choosing not to take industrial action.

The facts of this case are unusual in that it is rare for employees to have a contractual entitlement to a pay rise. However, the case is a reminder that changes to contractual terms and conditions of employment require employee consent. Where an employer unilaterally imposes a change, employees can:

- ***accept it and continue working***
- ***refuse to work under the new terms (leaving it up to the employer to respond)***
- ***resign and claim constructive unfair dismissal or***
- ***continue to work but register their protest and retain the right to sue for compensation.***

"Employers should be careful not to assume employees have agreed to a change..."

Employers should be careful not to assume employees have agreed to a change, even when they continue working. This will only be the case where the change has an immediate

impact (such as a pay cut or change in hours) and where there is no other explanation for employees continuing to work. As this case shows, employees who register their protest (either individually or collectively) will not be taken to have agreed a change even if they continue to work. Provided employees make clear they are working under protest from the outset, they can turn around at a later date and sue for any loss they have suffered. Employees do not need to keep repeating their objection. While the best approach will always depend on the circumstances, where a change involves some financial loss to employees, it is often safer for the employer to give notice to terminate the employees' contracts and offer re-engagement on the new terms. This will trigger unfair dismissal claims (for employees with at least two years' service) and a duty to consult collectively with employee representatives (where 20 or more dismissals are involved) but will usually prevent employees from being able to sue for the difference in pay months or even years later.

ABRAHALL & ANOTHER V NOTTINGHAM CITY COUNCIL & ANOTHER

New Law

Data protection

Employers now only have a matter of days to finalise preparations for key changes to data protection law. The EU General Data Protection Regulation (GDPR) comes into force on 25 May 2018, making significant changes to data protection law. The key changes for employers include:

- an increase in the maximum fine for breach of data protection law from the current £500,000 to up to €20 million or four percent of the organisation's global annual turnover, whichever is higher
- consent to the processing of personal data will be more difficult to obtain in the employment context so employers will need to rely on other grounds for processing
- employers will be required to give employees more detailed information about the personal data they hold and how it is processed, so many employers are updating handbooks, policies and privacy notices to staff.

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

We have been working on projects with a number of clients to get ready for GDPR implementation, including revising template employment contracts, policies and data collection notices. Please get in touch with your usual Employment Department contact if you would like to discuss.

Visas for Croatian nationals

Croatia is a member of the EU but Croatian nationals do not currently have the same freedom of movement rights as other EU nationals. Currently, Croatian nationals generally require sponsorship from a licensed employer sponsor in order to work in the UK. This is about to change. From 30 June 2018, Croatian nationals will have the same rights to work in the UK as other EU nationals.

As previously reported in **Employment Update**, the rights of all EU nationals (including Croatians) will change again when the UK leaves the EU in March 2019. However, until then, from 30 June 2018 employers can rely on a Croatian passport or national identity card as proof of the right to work in the UK.

Consultations

Employee, self-employed or worker?

The Government is considering introducing new legislation to help employers determine whether someone is an employee or self-employed, or in the intermediate category of "worker". A consultation on the proposal is open until 1 June 2018.

This follows the key finding of the Taylor Review that there is a lack of clarity around what employment rights individuals have and which category they fit into. In response, the Government launched a consultation paper earlier this year on proposals to introduce into legislation statutory tests for employee and worker (and possibly the self-employed). The Government is also seeking views from the public on whether the tests for employment status should reflect the current case law or whether changes should be made. Consideration is also being given to introducing an online tool to help individuals determine their status.

We are of the view that the current framework is broadly fit for purpose (subject to some minor amendments) and that wholesale changes are likely to create more confusion and have unintended consequences. Our experience of online tools is that they are not always helpful when it comes to complex questions such as this. We will be responding to the consultation on this basis – if there are any thoughts or comments you would like us to include on behalf of your business, please speak to your usual Employment Department contact.

Parental bereavement leave

The Government plans to introduce a right for employed parents to bereavement leave on the loss of a child. Under the proposal, parents who have lost a child below the age of 18 would be entitled to two weeks' leave to allow them time to grieve (irrespective of their length of service) and two weeks' statutory pay (provided they have 26 weeks' service). A consultation paper has been published seeking views on issues such as who should be considered a parent for these purposes, and when and how the leave should be taken. The consultation closes on 8 June 2018, with the right expected to be introduced in 2020.

Watch this space

Pay disclosure

Listed companies will soon be required to publish the ratio of what they pay their CEO compared to the average worker. Employees will also need to be given a stronger voice at board level by the company choosing one of three options – designating a non-executive director to represent the workforce, creating a formal advisory council or appointing a director directly from the workforce to the board. Large private companies will also, for the first time, be required to explain their approach to corporate governance. The proposals were first announced in August 2017 with a view to them coming into force in June 2018 (as reported in the September 2017 edition of **Employment Update**). It is now expected that legislation will be introduced in the coming weeks and **Employment Update** will report developments.

"Listed companies will soon be required to publish the ratio of what they pay their CEO compared to the average worker."

Our Work

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

- drafting casual worker contracts for a client operating in the gig economy
- conducting an investigation for a client in relation to allegations of wrongdoing by a member of the board
- advising a client on options available to it in the face of an employee on long term sickness absence, and related disability discrimination considerations
- supporting a client on the TUPE aspects of bringing a current outsourced service agreement to an end and bringing those services back in-house
- advising a FTSE 250 company on the employment, regulatory and corporate governance aspects arising in connection with the departure of a listed company board director
- advising a number of clients on the employment and HR aspects of their GDPR compliance programme, including advising on data protection policies and employee handbooks, staff and candidate data collection notices, data retention policies and training.

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

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