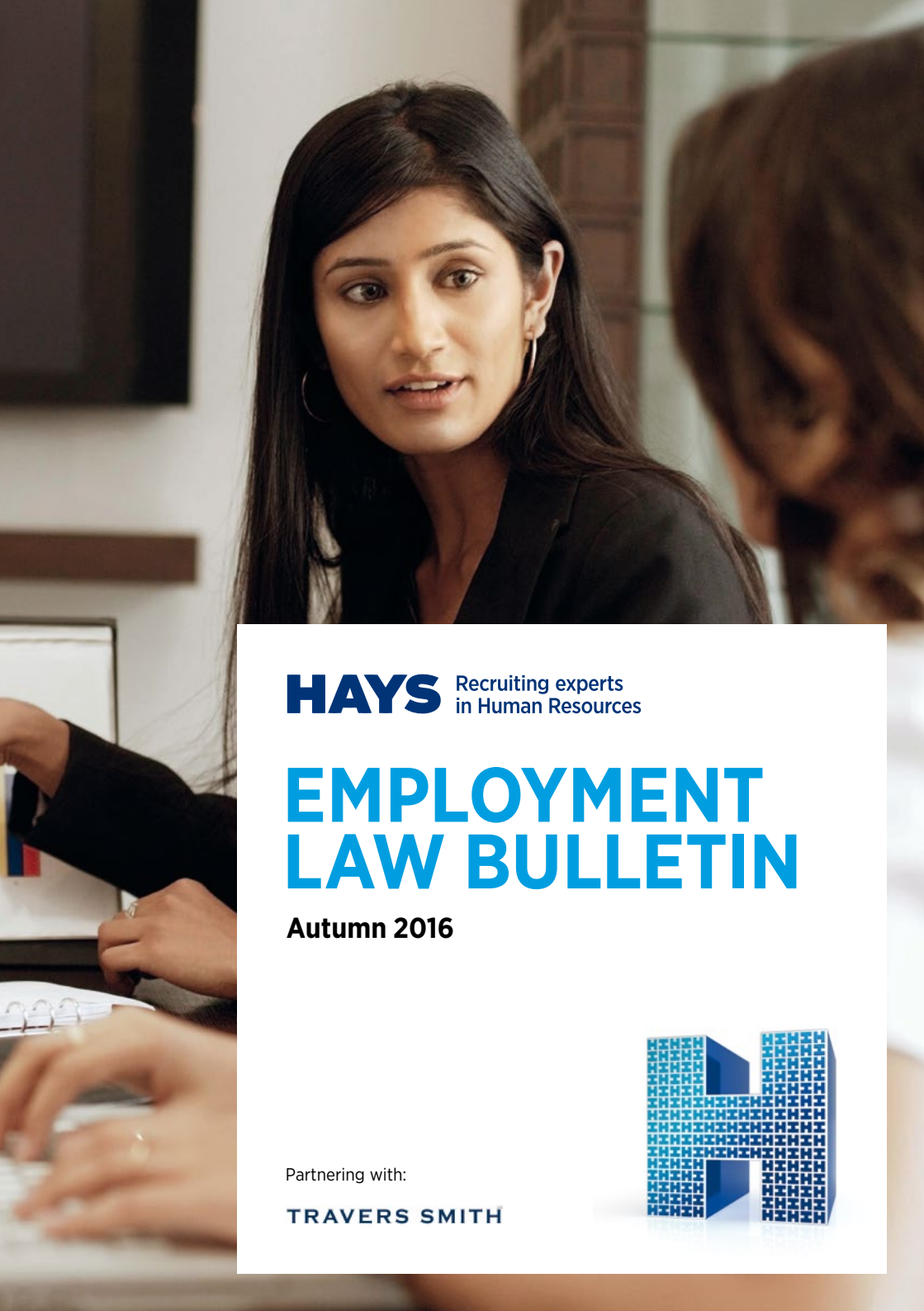

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EMPLOYMENT LAW BULLETIN

Autumn 2016

Partnering with:

TRAVERS SMITH

WELCOME

Welcome to the Autumn 2016 edition of the Hays Employment Law Bulletin which has been produced with the assistance of the London law firm, Travers Smith LLP. It features comprehensive detail on changes to employment law and legislation.

We understand that keeping abreast of changes in employment law can be challenging so we hope you find this instructive and revealing. Your feedback will be most welcome.

Thank you to Travers Smith LLP for their insight.

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GENDER PAY GAP REPORTING – ARE YOU READY?

New rules will require employers with at least 250 employees to publish figures on the gap between male and female pay in their organisation. The rules, which are due to come into force in April 2017, will require an organisation to make the pay gap figures available on its website. Sector-specific tables will also be published so that clients, job applicants and the public can compare organisations.

In scope employers should begin preparing for the new reporting requirement now.

Although the first reports are not due until April 2018, the pay gap figures will need to be based on data from April 2017 and, in respect of bonuses, the period from 1 May 2016 to 30 April 2017. Employers therefore only have until April 2017 to correct any pay discrepancies which exist before the figures must be made public.

In scope employers will be required to publish:

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

The figures will need to be published on the employer's website annually and left there for at least three years.

Whilst not a requirement, many employers will want to include a narrative along with the figures, to provide some context and explain any discrepancies. This will be allowed under the new rules.

GENDER PAY GAP REPORTING – ARE YOU READY?

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

Employers should begin preparing for the new reporting requirement now by:

- analysing whether current payroll systems can produce the relevant data or whether new systems and processes are required;
- considering whether the organisation has sufficient personnel to undertake the necessary analysis, on an ongoing basis;
- examining the reasons for any pay gaps which exist within the business and how these might be explained in any narrative to accompany the figures on the website;
- considering whether additional figures should be published to provide a more accurate picture of pay across the organisation, such as a breakdown by grade or seniority; and
- considering what measures can be implemented to reduce any gaps between male and female pay.

Hays Human Resources, in conjunction with law firm Travers Smith LLP, recently ran a webinar on the pay gap reporting requirements and their practical implications. Please contact your consultant if you would like a recording of the webinar.

BYRON GRILLING OVER IMMIGRATION RAIDS

Hamburger chain Byron received a public grilling for cooperating with Home Office arrests of illegal workers in late July 2016. Thousands took to social media to encourage a boycott, criticising Byron for 'misleading' workers into attending a health and safety briefing at which Home Office officials arrested suspected illegal workers. Two London branches were also forced to close temporarily after activists released cockroaches, locusts and crickets in protest.

The incident highlights the difficulties employers face when dealing with illegal working and Home Office investigations.

Employers have a duty to prevent illegal working and can face fines of up to £20,000 per worker for failing to do so. As part of this, employers must conduct 'right to work' checks of prescribed identity documents for all employees before they start work. Employers must also repeat such checks on the expiry of any work visa.

Where there are suspicions of illegal working, reporting concerns to the Home Office and cooperating with any investigation will go a long way towards mitigating any potential fines the employer might receive.

Employers who are registered immigration sponsors also have a positive duty to report any suspicions and cooperate fully with the Home Office. Byron escaped fines here because it cooperated with the Home Office and had carried out the correct checks on staff; the illegal workers had 'sophisticated' forged documents.

However, cooperating with the Home Office can also lead to significant adverse publicity, as this case shows. Misleading staff could also potentially lead to claims for unfair dismissal or race discrimination from employees sacked or, perhaps more likely, affect the morale of those left behind. Byron was clearly caught between a rock and a hard place but the case shows the range of employee and public relations issues employers need to consider in these circumstances on top of the employment law issues, typically in a very short space of time.

DISCRETIONARY BONUSES CAN THEY BE CHALLENGED?

The employee in this case was a trader on the money market derivatives desk of a large bank. He was entitled to a discretionary bonus, a portion of which was required to be consistent with peers at a similar level of compensation. For two years, he received a bonus of one percent of the profits he generated, while two other members of the money market derivatives desk received bonuses of eight percent and eleven percent respectively. The employee brought a claim arguing that the bank had breached his contract by awarding a bonus much less than his peers. He also claimed that he had been told at interview to expect a bonus of at least five percent of profits even in 'bad' years. He claimed that the bonus of one percent awarded breached his reasonable expectations based on the interview.

The High Court rejected the employee's claim and awarded summary judgment in favour of the employer. Although the employee was entitled to a bonus consistent with peers of a similar level of compensation, the two colleagues who received higher bonuses were not on a similar level of compensation. Their bonuses were based on a set formula, which had been individually negotiated with them in order to retain them. The bank, therefore, had good reasons for paying different bonuses and its decision could not be said to be irrational. The Court also said that, whatever the employee had been told at interview, he did not have a reasonable expectation of a minimum five percent bonus because his employment contract made it clear that it superseded any prior verbal offers or representations.

While this case is fact-specific, it is helpful as it shows that employees will usually have an uphill struggle when seeking to challenge the amount of a discretionary bonus. The employee would generally have to show that the employer's decision was irrational or perverse, in that no rational employer would have awarded a bonus of that amount. Where an employee is entitled to a discretionary bonus, it will generally be easier for the employer to defend awarding a small bonus than nothing at all. In any event, to reduce the risk of a successful challenge, employers should ensure they have clear reasons for any bonus decision and, wherever possible, should ensure these are documented.

Ideally, the bonus terms would be drafted as widely as possible, to allow the employer to take into account any factors it considers relevant. However, where the bonus scheme specifies particular factors to be considered (eg the employee's performance, bonuses awarded to peers etc), the employer should ensure these are taken into account, as failure to do so would leave the bonus decision exposed to challenge.

Patural v DG Group Services (UK) Limited

REASONABLE ADJUSTMENTS HOW FAR DOES THE DUTY GO?

The employee in this case worked for a security company as an engineer maintaining automatic teller machines. He suffered from a back injury, which constituted a disability and meant he was unfit for heavy lifting and working in confined spaces. After a period of sickness absence, he began working in a new role as a 'key runner', delivering materials to engineers at various locations. His salary as an engineer was maintained initially. However, the employer decided to make the key runner role permanent, with a 10 per cent reduction in pay to reflect the fact that it did not require engineering skills. The employee refused to agree to the pay reduction and was dismissed. He brought a claim of failure to make reasonable adjustments and discrimination arising from his disability.

The employee succeeded in his claim. The Employment Tribunal ruled that that the employer was required to maintain the employee's salary as an engineer as a reasonable adjustment, even though he was performing a different role. The employer was a large company with substantial resources and it had, in fact, maintained the employee's salary for around a year and had led him to believe this would be long-term. On appeal, the Employment Appeal Tribunal (EAT) agreed. The EAT said that employers are not required to maintain an employee's salary in every case where a disabled employee is moved to a different role. However, protecting the employee's pay in such circumstances can amount to a reasonable adjustment and should, therefore, be considered.

Where an employee is prevented from doing their job because of a disability, the employer must consider whether there is other suitable work available for the employee to do. The employer does not necessarily need to create a role but must consider what potential vacancies exist within the organisation. Where the new role involves a reduction in pay, this case confirms that the employer must consider maintaining the employee's pay, as part of its duty to make reasonable adjustments. However, this does not mean that employers must protect the employee's pay indefinitely in every case; rather, this is something that must be considered as a potential adjustment.

The costs of doing so must be weighed alongside other factors such as the practicability of the adjustment, the resources available to the employer and the potential impact on other staff. In some cases, it may be appropriate to protect the employee's pay for a period as a reasonable adjustment, perhaps with a gradual reduction over time. However, as this case shows, the employer must be clear at the outset what the arrangements are. It was unhelpful here that the employer had not been clear whether maintaining the employee's original salary was a temporary or permanent arrangement.

G4S Cash Solutions (UK) Limited V Powell

REFERENCES
TOO MUCH INFORMATION?

Case 1: The employee, who suffered from a disability, worked for a city council. She was made redundant and left under a settlement agreement, which included an agreed reference. She was subsequently offered a role with NHS England, subject to satisfactory references. The employee's former manager provided the agreed reference but also offered to discuss matters over the phone. During this conversation, the manager stated that the employee had significant periods of sickness absence due to a long-term condition and that she did not think the employee would be suitable for the new role. The manager claimed that the 'unsuitable' comment was because the new role involved more responsibility. NHS England subsequently withdrew the job offer, and the employee claimed disability discrimination against both the council and NHS England.

The Employment Appeal Tribunal ruled that both the council and NHS England were liable for disability discrimination. Regarding the reference, the Employment Tribunal inferred that the employee's disability-related absence played at least a part in the 'unsuitable' comment, and the manager giving the reference failed to prove otherwise. Since the withdrawal of the offer was based on the unfavourable reference, this could also be linked back to the employee's absence and therefore the employee's disability. Accordingly, both the unfavourable reference and the withdrawal of the offer amounted to discrimination arising from disability.

Case 2: The employee was a consultant ophthalmic surgeon, who was offered a role at an NHS trust. When approached for a reference, a colleague said that the rate of complications with the employee's surgery was higher than would be expected. He also suggested that about half a dozen of the employee's patients had complications, that one patient had sued and that another was expected to do so. The NHS trust withdrew the offer. The employee sued the colleague who gave the reference.

The Court of Appeal rejected the claim ruling that the reference had been misleading in two ways. First, there had been only three patients with complications, not half a dozen. Second, only one patient had sued and there was no basis for saying a second would do so. Despite these inaccuracies, the Court ruled that the NHS trust would have withdrawn its offer in any event. The basic statement that the complication rate was higher than expected had been true and this was the real reason the NHS trust had withdrawn the offer.

The cases highlight the dangers of giving too much information when providing a reference. Case 1 shows the risks to an employer when discussing an employee's previous absence record, and that a prospective employer could equally face a claim for withdrawing the offer. Where there is an underlying disability, this could amount to discrimination arising from disability. It is, therefore, safer for employers to provide a basic reference confirming dates of employment and job title. Any policy on references should be communicated clearly to managers who should be told not to give references and that personal references they give are made in a personal capacity and do not represent the views of the organisation. Case 2 is a reminder that individuals giving references can be personally liable for what they say but that, to succeed with a claim, the employee needs to show that the reference caused a subsequent job offer to be withdrawn.

Where a reference has been agreed under a settlement agreement, this should also be made clear to relevant managers and members of HR so that they keep to the agreed terms. Case 1 highlights the dangers of straying beyond the terms of an agreed reference.

Pnaiser V NHS England and Coventry City Council; Abdel-Khalek V Ali

NEW LAW

Immigration

On 12 July 2016, the criminal offence of knowingly employing an illegal worker was extended so that:

- employers are liable for the offence not only where they actively know an employee is an illegal worker but also where there is 'reasonable cause to believe' an employee does not have the right to work in the UK; and
- the maximum penalty for any manager or director involved in the offence has increased from two to five years imprisonment.

The change underlines the importance for employers of getting immigration identity checks right. Under the new regime, an employer who fails to follow up with an employee whose visa is expiring could face criminal liability for continuing to employ the individual with 'reasonable cause' for believing he or she no longer has the right to work in the UK.

In addition, UK Visas and Immigration has announced changes to sponsored work visas under the points-based system. Key changes for sponsor employers to consider include:

- from autumn 2016 (date to be confirmed), applicants for a Tier 2 Intra Company Transfer visa will be required to pay the Immigration Health Surcharge of £200 per year of the visa. The Immigration Health Surcharge is paid upfront at the time of applying for the visa. Currently, Tier 2 Intra Company Transfer applicants are exempt from the surcharge, so this change will increase the cost of such visas; and
- from April 2017, all employer sponsors will be required to pay an Immigration Skills Charge of £1,000 per year for each employee on a Tier 2 visa. This represents another additional cost for employers looking to sponsor non-EU nationals for Tier 2 work visas.

National minimum wage

On 1 October 2016, the annual increase in the rates of the national minimum wage took effect. The rates from 1 October 2016 are:

- £7.20 per hour for workers aged 25 and over (no change from the National Living Wage introduced in April 2016)
- £6.95 per hour for workers aged 21 to 24 (increased from £6.70 per hour)
- £5.55 per hour for workers aged 18 to 20 (increased from £5.30 per hour), and
- £4.00 per hour for workers aged under 18 years (increased from £3.87 per hour).

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, also increased from £3.30 per hour to £3.40 per hour.

CONTACT US

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For more information on our range of services, please call 020 3465 0113 or contact your local Hays office at hays.co.uk/offices

This Employment Law Bulletin has been produced with the assistance of the London law firm, Travers Smith LLP. If you have any queries about the Bulletin, or employment law generally, please contact Travers Smith LLP employment law specialists:

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