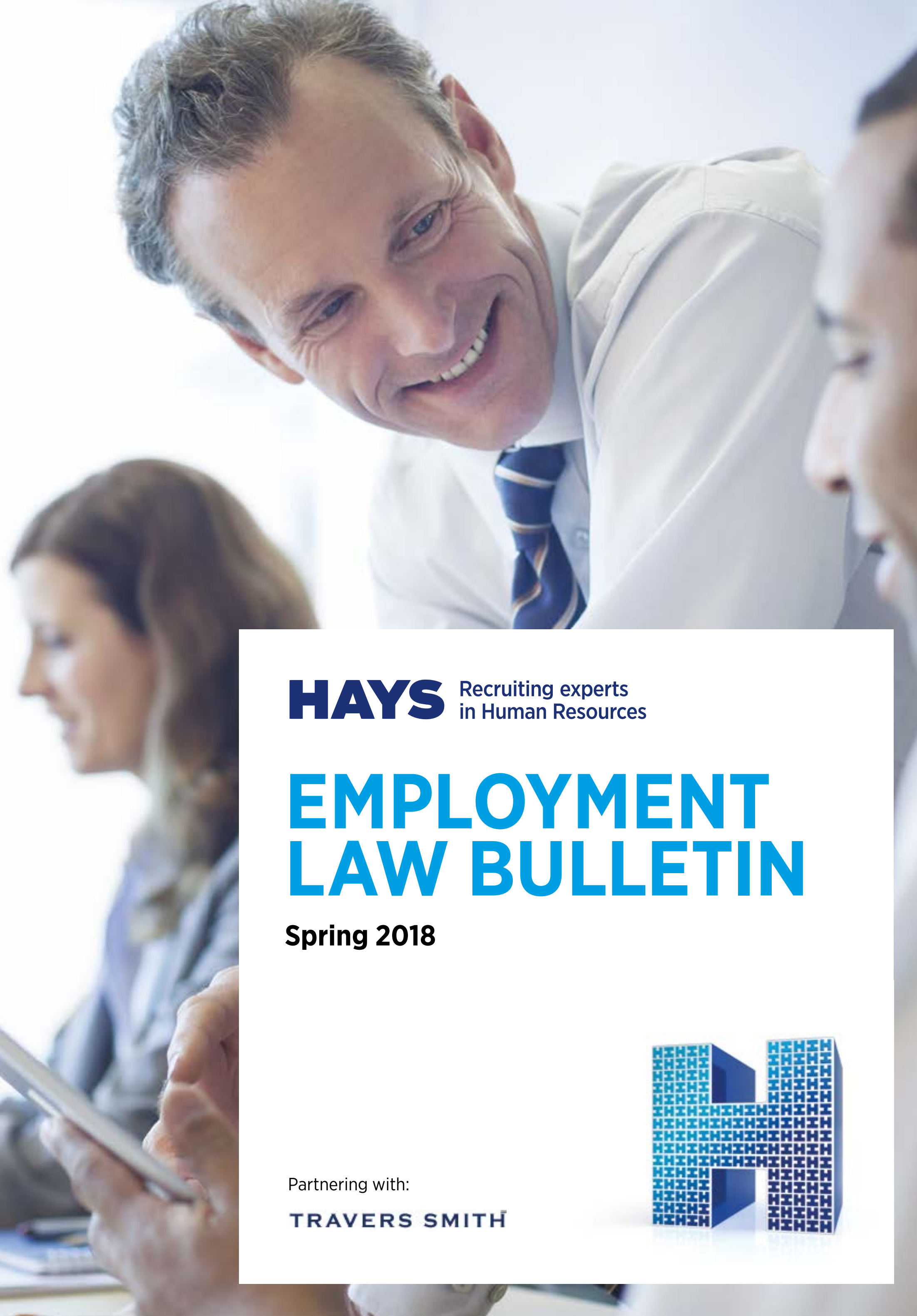
HAYS
Recruiting experts in Human Resources
EMPLOYMENT LAW BULLETIN
Spring 2018
Partnering with:
TRAVERS SMITH

WELCOME

Welcome to the Spring 2018 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.

Barney Ely
Director
Hays Human Resources
T: 01483 564 692
E: barney.ely@hays.com

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TAYLOR REVIEW THE GOVERNMENT'S GOOD WORK?

The Government has published 'Good Work', its response to the Taylor Review on employment status and modern working practices. The review was commissioned by the Government in 2016 to consider how employment law might keep pace with modern business models, particularly in the gig economy.

The Government has accepted, or is consulting on, the overwhelming majority of the Taylor Review recommendations. Four consultation papers have been launched which cover the following: the test for employment status; measures to increase transparency over employment rights; improving protection for agency workers; and enforcing employment rights. However, any changes in this area are likely to take some time.

The key proposals being considered are:

- **Employment status**
  A key finding of the Taylor Review was the need for greater clarity on the distinction between employees, the self-employed and the hybrid category of 'worker'. The Government believes the current three categories are still appropriate but is considering making the tests for employee and worker clearer in legislation.
- **Casuals**
  Currently, a break of at least a week between assignments for genuine casuals usually means the individual does not have continuous service for the purposes of employment rights like unfair dismissal or statutory redundancy pay. The Government will increase the period required to break continuity and is consulting on what the break should be. The Government is also consulting on proposals to give all workers, including casuals and zero-hours workers, a right to request a more stable contract that guarantees hours.
- **Written statements of particulars**
  The Government is consulting on proposals to require all employers to provide a written statement of terms to all workers, not just employees.
- **Payslips**
  From 6 April 2019, employers will be required to provide payslips for all workers, not just employees. In addition, employers will be required to specify the hours worked and rates paid on payslips for workers paid by the hour. Draft regulations effecting these changes have already been published.
- **Works councils**
  Employers are currently required to set up a works council where ten percent or more of the workforce requests this. The Government is consulting on whether to lower the threshold from ten to two percent of the workforce, making it easier for a minority of workers to insist on a works council.

- **Enforcement**
  The Government plans to ask HMRC to enforce statutory holiday pay and sick pay and is consulting on how this will work in practice. It is also consulting on proposals to simplify the enforcement of tribunal awards, and to name and shame those who fail to pay.
- **Penalties**
  Currently, Employment Tribunals can impose financial penalties of up to £5,000 on employers that flagrantly breach employment rights. The Government plans to increase the maximum penalty to at least £20,000.
- **Agency workers**
  The Government is consulting on proposals to give agency workers the right to request a direct employment contract after 12 months in a role and to require more information to be given to agency workers about their pay at the start of an assignment. The Government is also considering proposals to remove the 'Swedish Derogation' – which exempts agency workers from the entitlement to equal pay where they are employed by the agency and paid a minimum rate between assignments – but it is first seeking evidence on the extent of abuse of this exemption.

The employment status consultation is open until 1 June 2018; the consultation on agency workers is open until 9 May 2018; the consultation on enforcement is open until 16 May 2018; and the consultation on increasing transparency is open until 23 May 2018.

“From 6 April 2019, employers will be required to provide payslips for all workers.”

TAX CHANGES FOR THE PRIVATE SECTOR?

The Government plans to launch a consultation on extending public sector rules on taxing contractors to the private sector. The so-called 'off-payroll working rules' were introduced in the public sector in April 2017. Under the rules, where an individual contractor or consultant supplies their services to a public sector client via a personal services company, the public sector client must decide whether the 'IR35 legislation' applies. This broadly involves the public sector client asking whether, without the personal services company, the individual would be regarded as an employee of the client for tax purposes.

If so, the public sector client must deduct income tax and national insurance contributions from payments to the contractor's company. Currently, the rules only apply in the public sector but the Government intends to consult on extending the rules to the private sector. The consultation will run over the summer, with no date yet for the proposed changes to be implemented.

BREXIT UPDATE GOOD NEWS FOR EU NATIONALS

The UK and the EU have made significant progress towards reaching agreement on the rights of EU nationals on Brexit.

In December 2017, an agreement was reached in principle that EU nationals living and working in the UK as at the date the UK leaves the EU – 29 March 2019 – would be allowed to stay indefinitely. EU nationals who have been in the UK for five years or more as at 29 March 2019 will be required to apply for a new 'settled status' giving them indefinite rights to live in the UK. Those with less than five years as at 29 March 2019 would be eligible for a 'temporary status' document which would allow them to remain until they have reached the five years necessary for 'settled status'.

> "The UK and the EU have now reached an agreement on what happens during the period immediately after Brexit. There will be an 'implementation period' running from 29 March 2019 until 31 December 2020."

The UK and the EU have now reached an agreement on what happens during the period immediately after Brexit. There will be an 'implementation period' running from 29 March 2019 until 31 December 2020. EU nationals arriving in the UK during this period will need to apply for a 'temporary status' document if they plan to stay beyond three months. Once they have reached five years in the UK, they will be able to apply for 'indefinite leave to remain' which would allow them to settle in the UK indefinitely. Those arriving during the implementation period could, therefore, be granted essentially the same rights as those already living in the UK prior to Brexit. The key elements of this agreement have now been put into a draft text which will form the basis of the final 'Withdrawal Agreement' between the UK and the EU.

While the UK and EU have made it clear that 'nothing is agreed until everything is agreed', the latest announcement provides some welcome clarity for employers. However, the Government has not yet published its proposals for EU nationals arriving in the UK after the end of the implementation period and is unlikely to do so until autumn at the earliest.

DISABILITY
THE WIDER SCOPE

Can someone bring a disability discrimination claim if they are not disabled? The employee in this case was a police constable in Wiltshire. She had some hearing loss which put her just outside the acceptable range for police service. However, she passed a practical hearing test on recruitment and was allowed to perform police duties in Wiltshire. When she applied to transfer, a different constabulary rejected her application on the basis she did not meet the national standards for hearing. The Acting Chief Inspector was concerned about the risk that the employee might need to go on restricted duties in the future and did not carry out a further practical hearing test, despite a recommendation from a pre-employment medical adviser to do so.

The employee brought a disability discrimination claim. She accepted that she did not have a disability but argued that she was treated less favourably because she was perceived to have a hearing disability or an impairment that could get worse over time. The employee succeeded. The Employment Appeal Tribunal ruled that her rejection was based on a belief she had either an actual or potential disability and therefore amounted to direct disability discrimination.

This case shows how wide the protection against disability discrimination goes. An employee who is not disabled can succeed in a disability discrimination claim if they are treated differently because the employer perceives that they either have a disability or may develop one in the future. Clearly employers should avoid making assumptions about employees or job applicants and, where there are concerns about capability, obtain medical advice. The case also highlights that, having obtained advice, employers should follow it. Here, the employer may have avoided landing in hot water if they followed the medical adviser's recommendation to carry out a further pre-employment hearing assessment.

Chief Constable of Norfolk v Coffey

REASONS FOR DISMISSAL THE DANGERS OF SUGAR-COATING

The employee in this case was the Group Legal Counsel for an insurance broking business. Following concerns about his performance, the employer gave him three months' notice of dismissal in accordance with his employment contract. To soften the blow, and to keep things amicable during the notice period, the employee was told that the reason for dismissal was a decision to outsource legal services (as opposed to the employee's poor performance). The employee responded saying that he believed this would constitute a TUPE transfer and asked the employer for information about the transfer. When no information was forthcoming, the employee resigned claiming constructive dismissal. With less than two years' service, he could not bring an unfair dismissal claim and was not entitled to written reasons for his dismissal but claimed notice pay for his three-month contractual notice period.

The employee initially lost in the Employment Tribunal but won in the Employment Appeal Tribunal (EAT). According to the EAT, although the employer did not have to provide reasons for dismissal to the employee, once it chose to do so, it had an obligation not to mislead him. Deliberately giving a false reason for dismissal was a breach of the implied duty of trust and confidence, particularly where this was done to encourage him to continue working during his notice to ensure a smooth handover.

As this case shows, employers must be careful not to mislead an employee about the true reasons for a dismissal. Employers should be wary of 'sugar-coating' the reasons, even where this is done for the employee's benefit. Employees with at least two years' service would have an unfair dismissal claim if false reasons were given. Even where the employee does not have service for unfair dismissal, providing false reasons could be a breach of trust and confidence, which could give rise to a constructive dismissal claim. In turn this could also mean that any post-termination restrictions and confidentiality obligations could fall away. Also, providing a false reason will make it more difficult to defend a claim that discrimination or whistleblowing is the real reason behind the dismissal.

Rawlinson v Brightside Group Ltd

“Employers should be wary of 'sugar-coating' the reasons for dismissal, even where this is done for the employee's benefit.”

NEW LAW

National minimum wage

On 1 April 2018, the rates of the national minimum wage and national living wage increased as follows:

- **£7.83 per hour for workers aged 25 and over** (rising from the national living wage rate of £7.50 per hour)
- **£7.38 per hour for workers aged 21 to 24** (rising from £7.05 per hour)
- **£5.90 per hour for workers aged 18 to 20** (rising from £5.60 per hour)
- **£4.20 per hour for workers aged under 18** (rising from £4.05 per hour)

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, also increased from £3.50 to £3.70 per hour.

Statutory sick pay

On 1 April 2018, the rate of statutory sick pay increased from £89.35 to £92.05 per week.

Maternity pay rates

On 1 April 2018, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay increased from £140.98 to £145.18 per week (or 90% of the employee's average weekly earnings if lower).

Gender pay gap reporting

The deadline for employers to publish their gender pay gap information was 4 April 2018. Under rules introduced in 2017, employers with 250 or more employees are required to publish information on the gender pay gap in their organisation as at 5 April each year. The information must include the average difference between male and female pay, as well as the average difference between bonuses and the proportions of male and female employees in different pay bands. Employers are required to report by 4 April each year on the previous year's pay gap data. Attention is now turning to those employers who have not published their data with the Equality and Human Rights Commission set to take enforcement action.

Employment Tribunal compensation

The annual increase in Employment Tribunal compensation limits took effect on 6 April 2018. For dismissals taking effect on or after 6 April 2018:

- the maximum compensatory award for unfair dismissal is now the lower of £83,682 and a year's pay (previously the limit was the lower of £80,541 and a year's pay)
- the maximum amount of a week's pay (used for calculating, for example, the unfair dismissal basic award and statutory redundancy pay) has increased from £489 to £508 per week.

Pensions automatic enrolment

On 6 April 2018, the minimum contributions required to be paid to a defined contribution scheme used for automatic enrolment (including contractual enrolment) increased. The minimum contributions required depend on what pay counts as pensionable pay under the relevant pension scheme. There will be further increases from 6 April 2019. This applies to all employers but it is most likely to require action by employers who:

- pay only the minimum required contributions
- have a contribution matching structure that starts at a low level, or
- have an age-related contribution structure that starts at a low level.

Tax on termination payments

On 6 April 2018, changes were made to the way that termination payments are taxed.

Previously, the tax treatment of a notice payment depended on whether there was a payment in lieu of notice (PILON) clause in the employee's contract. Where there was a PILON clause, the payment was subject to income tax and national insurance contributions (NICs). In contrast, where there was no PILON clause, the first £30,000 was usually free of income tax and the entire amount free of NICs.

Since 6 April 2018, all notice payments are subject to income tax and NICs on the entire amount, regardless of whether there is a PILON clause in the contract. Where the employee is receiving a termination payment but has not received their full notice or a payment in lieu, employers will need to calculate how much notice is due to the employee and ensure income tax and NICs are deducted from this portion of the termination payment. Calculations can be particularly complex where the employer operates salary sacrifice arrangements.

NEW DATA PROTECTION RULES

Employers now only have a matter of weeks to finalise preparations for key changes to data protection law. The EU General Data Protection Regulation (GDPR) and the UK Data Protection Bill both come into force on 25 May 2018, making significant changes to data protection law.

The key changes include:

- an increase in the maximum fine for breach of data protection law 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.

The Information Commissioner is expected to produce further guidance in the coming weeks to help employers finalise their preparations.

“The EU General Data Protection Regulation (GDPR) and the UK Data Protection Bill both come into force on 25 May 2018, making significant changes to data protection law.”

CONTACT US

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For more information on our range of services, find 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:

Ed Mills
T: 020 7295 3424
E: ed.mills@traverssmith.com

Adam Rice
T: 020 7295 3224
E: adam.rice@traverssmith.com

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