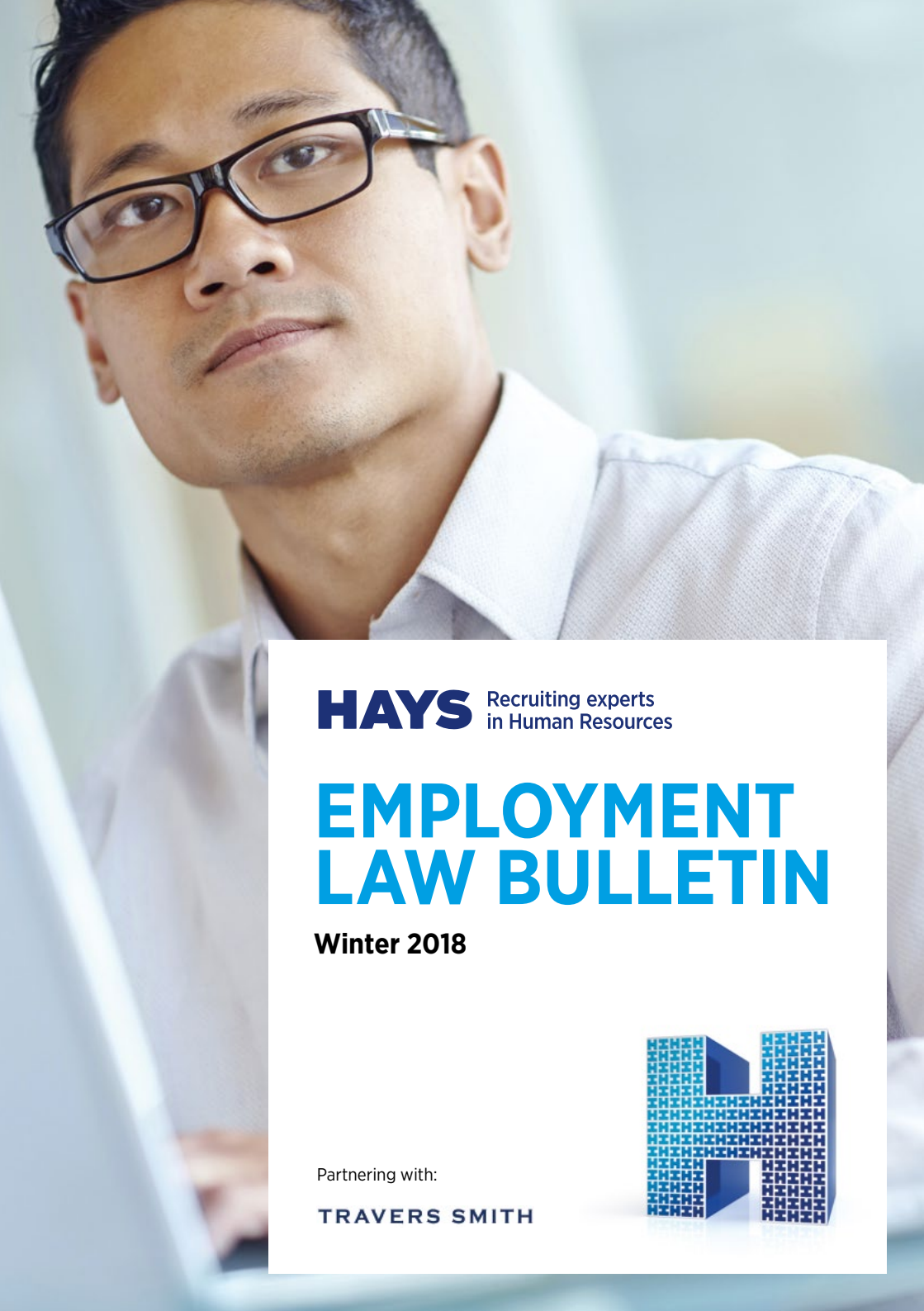

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EMPLOYMENT LAW BULLETIN

Winter 2018

Partnering with:

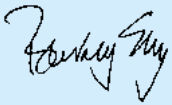
TRAVERS SMITH

WELCOME

Welcome to the Winter 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.



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DIVERSITY: WHEN IS ACTION POSITIVE?

All-male shortlists should have "no place" in organisations seeking to improve their gender balance, according to the CEO of the Hampton-Alexander Review. The review, launched in 2016, is looking at ways to ensure talented women at the top of business are promoted and has set a target of 33 percent female representation on FTSE 350 boards by 2020. But how far can employers go in meeting such targets?

UK law draws a distinction between "positive action", which is lawful, and "positive discrimination", which is not. Positive action involves taking steps to address underrepresentation, such as targeted networking opportunities, encouraging women to apply for senior roles or providing mentoring programmes.

In contrast, favouring someone form a protected minority in recruitment or promotion would constitute "positive discrimination". The only exception is in a genuine "tie break" situation – where an employer faces a choice between two equally qualified candidates, it can choose someone from an underrepresented group.

Having female quotas for senior roles or shortlists for recruitment and promotion could well fall on the wrong side of the line. In contrast, implementing "soft targets" or "aims" to avoid all-male shortlists is more likely to constitute lawful positive action. Given the subtleties here, employers should carefully consider their diversity initiatives to ensure that, despite the best intentions, they do not fall foul of discrimination law.

BREXIT UPDATE: DEAL OR NO DEAL?

The Government has issued a technical note covering what happens to employment law in the event that there is no deal on Brexit. The note confirms that most workplace rights will be preserved unchanged. However, employers with European Works Councils should review their arrangements as there will no longer be reciprocal EWC arrangements between the UK and EU in the event of no deal. The more significant issue for most employers is what happens to the rights of EU nationals in the UK in the event of no deal – the Government had previously suggested the same proposals for EU nationals would apply in the event of either a deal or no deal scenario but has so far given no firm guarantee.

Settlement scheme for EU nationals

The Government has launched a trial of the new EU Settlement Scheme that will apply in relation to Brexit for EU nationals. Under the scheme, EU nationals (and their family members) who are living in the UK on the day it officially leaves the EU will need to apply either for "settled status" or "pre-settled status". Settled status is equivalent to indefinite leave to remain and is for those who have been resident in the UK for at least five years. Those who have been resident for less than five years will need to apply for "pre-settled status" to allow them to obtain the five years necessary to qualify for settled status.

It is proposed that EU nationals will have until 30 June 2021 to apply under the EU Settlement Scheme, although this could change in the event of no deal.

On 28 August 2018, the EU Settlement Scheme opened on a limited trial basis, originally only for specified NHS Trusts and selected universities in Liverpool.

The second phase of the pilot is set to run from 1 November to 21 December 2018. However, the pilot will be limited to staff working in the higher education, health and social care sectors. The scheme is expected to open fully by 30 March 2019.

It is also expected that, when the scheme opens fully:

- applications will be made online, with a unique reference number issued to evidence settled or pre-settled status (rather than a hard copy document or visa)
- those applying will need to prove their identity, demonstrate their UK residence and declare they have no serious criminal convictions
- proof of residence will be automatic for many as the Home Office will check employment and benefits records
- the application will cost £65, but those already with a permanent residence document will be able to exchange it for settled status for free.

Although EU nationals will have until 30 June 2021 to apply, employers should be engaging with staff now to prepare for the process and the prospect of no deal.

> "The more significant issue for most employers is what happens to the rights of EU nationals in the UK in the event of no deal."

CHANGING TERMS HAVE EMPLOYEES AGREED?

Can employees who continue working in response to a change in terms and conditions be taken to have agreed to the change? 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 even when they continue working. This will usually 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.

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

DISABILITY: WHAT TO ASK OCCUPATIONAL HEALTH?

The employee in this case had frequent periods of sick leave, all for different ill health issues, including stress, viral infections and high blood pressure. The employer referred the employee to occupational health (OH) and asked if she had a condition which could be a disability. The OH report stated that the employee did not have a disability and her problems were "managerial not medical". After further sickness absences, the employer began disciplinary proceedings and subsequently dismissed the employee for unsatisfactory attendance and failure to comply with absence notification procedures (as she had not always informed the employer when she was absent through illness). The employee brought a claim of disability discrimination, including a failure to make reasonable adjustments.

The Tribunal decided that the employee did have a disability, but that the employer had not known, and could not reasonably be expected to have known, that the employee was disabled, which meant it was not required to make reasonable adjustments. The employee appealed unsuccessfully to the Employment Appeal Tribunal (EAT) and then to the Court of Appeal. She argued that the employer should not just have accepted the OH report that she was not disabled, but carried out further investigation and reached its own decision.

The Court of Appeal confirmed that an employer should not simply adopt an unreasoned OH opinion without question, and should form its own view on whether an employee is disabled. In this case the employer had, in addition to consulting occupational health, had discussions with the employee and correspondence with her GP, and there had not been any information arising from this which suggested a disability. In the circumstances the employer could not have been expected to do more,and the employee's appeal failed.

This case is a reminder of the importance of obtaining a full occupational health report and considering it carefully. Employers should ask detailed questions of occupational health when referring the employee, and should review the report thoroughly. If the report is unclear in any way, or if questions have not been answered, then further information and clarification should be sought. Employers should also ensure that they speak to the employee on an ongoing basis about their condition, and whether there are any adjustments which might enable the employee to return to work. In some cases, for example if the employee has a complex or unusual condition, it may also be advisable to obtain a report from a specialist independent medical adviser as well.

Donelien v Liberata UK Ltd

"The Tribunal decided that the employee did have a disability, but that the employer had not known, and could not reasonably be expected to have known, that the employee was disabled."

NEW LAW

Pay ratio disclosure

Listed companies with more than 250 UK employees will soon be required to report on the ratio of CEO to average worker pay. The pay ratio information will need to compare, annually, the total remuneration of the company's CEO with the remuneration of employees at the 25th, 50th and 75th percentiles of the workforce. Going forward, it is intended that the ratio information should cover a ten-year period. In scope companies will also need to include a narrative explaining changes to the ratios from year to year, and whether the ratio is consistent with the company's policies on employee pay. The requirement will apply to financial years starting on or after 1 January 2019, meaning that reporting will begin in 2020 to cover pay information from 2019.

Childcare vouchers

In April 2017, the Government introduced a new tax-free childcare scheme to replace the previous employer-supported childcare voucher scheme. The new scheme allows working families to claim 20 percent of childcare costs for children under 12 up to a maximum of £2,000 per child each year. Unlike the old childcare voucher scheme, the new scheme does not depend on participation by employers, as it is open to all eligible working couples, where both parents are employed or self-employed and each earns at least £120 per week but no more than £100,000 a year. Existing childcare voucher schemes will be closed to new joiners from 4 October 2018. Any employee who is already a member of a childcare voucher scheme can choose whether to stay within that scheme or join the new tax-free childcare scheme instead.

National Minimum Wage

As part of the Autumn 2018 Budget, the Government announced that the rates of the National Minimum Wage and National Living Wage will increase from April 2019 as follows:

- **National living wage (workers aged 25 and over):** £8.21 an hour (rising from £7.83 an hour)
- **21-24 year olds:** £7.70 an hour (rising from £7.38 an hour)
- **18-20 year olds:** £6.15 an hour (rising from £5.90 an hour)
- **16-17 year olds:** £4.35 an hour (rising from £4.20 an hour)
- **Apprentices under 19 years or in the first year of their apprenticeship:** £3.90 an hour (rising from £3.70 an hour)

“Any employee who is already a member of a childcare voucher scheme can choose whether to stay within that scheme or join the new tax-free childcare scheme instead.”

Workers on boards?

While campaigning to be Prime Minister in 2016, Theresa May promised to put workers on company boards. The UK Corporate Governance Code has now been revised to require listed companies to engage with the workforce by either appointing a director from the workforce, creating a workforce advisory panel or designating a specific non-executive director. The requirement does not quite go as far as requiring companies to have workers on boards, and only applies to listed companies, but is a step forward in giving workers a greater voice at board level.

New regulations also require all companies with at least 250 UK employees to report on employee engagement as part of their annual directors' reports. The report will need to describe what measures were taken during the financial year to introduce or develop arrangements for providing information to employees and consulting them about decisions likely to affect them. Directors will also need to explain how they had engaged with employees and had regard to their interests, and how this has impacted on key decisions of the company. The new requirement will apply to financial years starting on or after 1 January 2019, meaning that the first reports will be published in 2020.

WATCH THIS SPACE

Off-payroll in the private sector

As part of the Autumn 2018 Budget, the Government has announced that the public sector off-payroll working rules will be extended to the private sector in April 2020. The extension will mean private sector employers may need to change the way they engage and tax contractors.

Under the public sector rules, introduced in April 2017, where an individual contractor or consultant provides their services to a public sector client via a personal services company, the client must decide whether the "IR35 legislation" applies. This broadly involves asking whether, without the personal services company, the individual would be regarded as an employee of the client. If so, the client (or body responsible for paying the contractor's company) must deduct income tax and NICs from payments to the contractor's company as if the contractor were an employee. The client must also pay the relevant employer's NICs.

The Government has said that, from April 2020, the rules will apply to medium and large private sector employers (likely those with more than 50 employees and/or above certain balance sheet and turnover thresholds). A further consultation will be launched in 2019 on the detail of the proposal. While April 2020 may seem a long way off, in scope employers should begin auditing their use of contractors and consultants and planning for the changes during 2019 in order to be ready for implementation.

Termination payments

The Government has announced that planned changes to the treatment of national insurance contributions (NICs) on termination payments will be delayed until April 2020. Currently, where an ex gratia termination payment is made on top of notice pay, the first £30,000 can be paid free of income tax and any amount above this is taxable. However, the entire payment is exempt from NICs. From April 2020, the first £30,000 of the ex gratia termination payment will still be free of income tax and NICs but any amount above this will be subject to both income tax and NICs. The change was originally scheduled for April 2019 but has been delayed until April 2020 as part of the Autumn 2018 Budget.

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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