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# EMPLOYMENT LAW BULLETIN

**Autumn 2019**

Partnering with:

TRAVERS SMITH

# WELCOME

Welcome to the Autumn 2019 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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# CONTENTS

# BREXIT
# WHAT'S THE DEAL?

The EU has agreed to extend Brexit until 31 January 2020, with the possibility of leaving earlier if a withdrawal agreement is approved by Parliament. So, what does the announcement mean for employers and their EU employees?

## Existing employees

The announcement does not change the position for existing EU employees. All EU nationals in the UK at the date of Brexit will need to apply for the right to remain under the EU Settlement Scheme, as has been the case for some time. The Government has previously said that, even if the UK leaves the EU with no deal, EU nationals would still have until 31 December 2020 to apply under the EU Settlement Scheme. Under the proposed withdrawal agreement, EU nationals would have until 30 June 2021 to apply. Nevertheless, given the current political uncertainty many employers are encouraging staff to apply sooner rather than later, to avoid any issues in the future.

## Recruitment post-Brexit

The Government has committed to ending free movement rules in the UK after Brexit. However, it has also previously said that, in a no-deal scenario, there would be a transition period lasting up until 31 December 2020 during which EU nationals would be able to come to the UK for work without a visa. EU nationals arriving during this transition period would then have to apply for a temporary visa which would allow them to stay for up to three years beyond 31 December 2020. They would need to apply for this so-called European Temporary Leave to Remain (Euro TLR) before the transition period ends on 31 December 2020.

The UK Government has stated that it then intends to introduce a new single skills-based immigration system covering both EEA and non-EEA nationals from 1 January 2021. It has commissioned the independent Migration Advisory Committee (MAC) to consider salary thresholds as well as conduct a review of the Australian immigration system and similar systems to make recommendations for the new immigration system. The MAC has been asked to report in January 2020.

## Right to work

The Government has also clarified that there will be no changes to the right to work checks required for EU nationals until at least 1 January 2021, when the new immigration system is introduced. In the meantime, employers will be able to continue to rely on EU/EEA passports to evidence right to work.

# EMPLOYEES RECORDING MEETINGS IS IT MISCONDUCT?

The employee in this case worked in the finance department of a charity. She complained to the Head of Finance about her treatment by the Finance Director. When the Head of Finance and Finance Director met to discuss the complaint, the employee interrupted the meeting and refused to leave when asked. She was subsequently invited to a meeting with HR, which she secretly recorded. A disciplinary process then followed in relation to the employee's conduct at the earlier meeting and the employee was given a formal written warning. She also raised a grievance citing various issues with management which was rejected. Following a period of sickness absence and an unsuccessful mediation, the employee was dismissed due to an irretrievable breakdown in working relationships.

The employee brought an unfair dismissal claim and won. It only emerged during the hearing that the employee had secretly recorded the initial conversation with HR. The employer argued that had it known about the recording, it would have dismissed the employee for gross misconduct and therefore she should not receive any compensation for her dismissal. The Employment Tribunal ruled that there was a ten percent chance the employee would have been dismissed fairly had the employer known about the secret recording and so reduced the employee's compensation by ten percent. On appeal, the Employment Appeal Tribunal agreed and said that secretly recording meetings will usually constitute misconduct but not necessarily gross misconduct.

*It is relatively easy for employees to record meetings secretly nowadays given the technology available on mobile phones. However, as this case shows, recording a meeting without telling the employer will usually amount to misconduct. Whether or not this could also amount to gross misconduct will depend on the circumstances, including the employee's reason for making the recording, what is ultimately recorded, any damage done to the employer by the recording and the employer's attitude to the recording.*

*Employers should consider stating in their policies that recording of meetings without the knowledge or consent of those involved constitutes misconduct and, in some circumstances, may amount to gross misconduct. Practically, managers conducting disciplinary or grievance meetings may wish to confirm at the outset that no recording is being made and should also generally leave the room to conduct their deliberations to avoid these being recorded secretly.*

**Phoenix House Ltd v Stockman**

> "Employers should consider stating in their policies that recording of meetings without the knowledge or consent of those involved constitutes misconduct."

# EMPLOYER LIABILITY FOR SOCIAL MEDIA POSTS

The employee in this case was a security officer at an airport. One of his colleagues posted an image of a golliwog on Facebook with the comment "Let's see how far he can travel before Facebook takes him off". The employee was shown the post by another colleague (as the employee himself was not a Facebook friend of the colleague who posted the image). The employee raised a grievance. The grievance was upheld and the colleague who posted the image offered an apology and received a final written warning. The employee brought a claim of harassment against his employer. One of the issues in the case was whether the employer could be liable for a Facebook post made by an employee outside work on their personal account.

The Employment Tribunal and the Employment Appeal Tribunal ruled that the employer was not liable. An employer can only be liable for harassment by an employee which occurs in the "course of employment". The posting of an image on a private Facebook page, outside work, where few work colleagues were Facebook friends, could not be considered to be in the course of employment.

*This case highlights some of the workplace challenges posed by social media. It can be difficult to draw the line between what is "in the course of employment" and what is not, and social media can make the distinction even more difficult. It was relevant in this case that the colleague who posted the offending image on Facebook did not have many work colleagues as Facebook friends but the position could be different where a large number of colleagues are all friends on Facebook. More importantly, the employee in this case argued that the employer should be responsible for the actions of the colleague who posted the image on Facebook, rather than the colleague who showed the employee the image. Had he argued the case differently, the employer may have been liable.*

*As this case shows, an employer would usually be justified in taking action against an employee who posts offensive or harassing comments or images on social media outside work where colleagues take offence or are themselves the target of such posts.*

**Forbes v LHR Airport Ltd**

"The posting of an image on a private Facebook page, outside work, where few work colleagues were Facebook friends, could not be considered to be in the course of employment."

# NEW LAW

## Off payroll working

As previously reported, the public sector off payroll working rules are being amended and extend to the private sector from 6 April 2020. The Government has now published draft legislation to implement the changes. The draft legislation confirms the following:

- The new rules will apply to all payments made on or after 6 April 2020 even if they relate to services provided before that date.
- Clients that are "small" businesses in the private sector will be exempt from the rules. The changes also apply to all clients in the public sector (regardless of size).
- Where a business engages contractors or consultants through a personal services company, the business, as the end user client, will be required to decide whether without the personal services company, the individual would be regarded as an employee of the client.
- The business as end user client will be obliged to provide its determination and its reasons for the determination to the individual contractor via a "Status Determination Statement". The client must take reasonable care in making this determination.
- Where the contractor or consultant is engaged through other parties such as an agency or series of agencies, the client will also need to provide the Status Determination Statement to the party with which it contracts.
- The client will also have to establish a process for considering challenges from the contractor to its status determination.

Where the client decides that the off payroll rules apply, it must account for income tax and national insurance (including employer national insurance) as if the contractor were an employee. If there is another party in the supply chain, such as an agency, it will be the body responsible for paying the contractor's company (usually the agency) which must account for income tax and national insurance (but the end user client will still be responsible for making the status determination).

In scope businesses will need to establish a process for providing Status Determination Statements for contractors they engage and responding to challenges to the determinations. The requirement to provide reasons for the determination at the outset in the Status Determination Statement is new and will require more work for businesses engaging contractors.

Failure to comply with IR35 reforms could leave you open to extra expense and extensive fines. Now is the time to start preparing to ensure you're able to access the talent you need in the future.

Working with a third-party partner like Hays can help you secure peace of mind, save time and remove the cost and burden of tackling it yourself. Hays has a proven track record implementing the IR35 reforms in the public sector and working with around 122,000 contractors each year.

**Contact a Hays consultant to find out more or email IR35@hays.com**

## Good Work Plan

The Government has introduced legislation to bring into force a number of changes as part of its Good Work Plan. The Good Work Plan was published in December 2018 and aims to enhance workers' rights in a number of areas, following recommendations made by the Taylor Review.

The changes coming into force on 6 April 2020 are:

**Employment contracts**
From 6 April 2020, employers will be required to provide a written statement of terms and conditions for all workers (e.g. casuals, freelancers and some contractors and consultants), not just employees. The statement will also need to be provided on or before the first day of work. Currently, a statement of terms only needs to be provided to employees (and not workers) and within two months of employment starting (rather than by day one).

In addition, there are also some changes to the particulars required (e.g. the statement will need to contain details of any terms and conditions of employment relating to benefits, training requirements and paid leave other than just holiday and sick leave). Employers should therefore review their template employment contracts before April 2020 to ensure any necessary changes are made.

**Works councils**
Currently employers with 50 or more employees are required to set up a national works council for informing and consulting employees if at least ten percent of the workforce request this (subject to a minimum of 15 employees). From 6 April 2020, this threshold will be reduced to two percent.

**Holiday pay**
Currently holiday pay for a worker with variable hours or pay is calculated by taking an average of pay over the previous 12 weeks. This lookback period will be increased to 52 weeks from 6 April 2020 as part of the Government's Good Work Plan.

**Agency workers**
Agency workers have the right to receive the same pay as comparable permanent employees after 12 weeks with a hirer. There is an exception to this right, known as the "Swedish derogation", where the agency worker's contract provides for minimum pay between assignments. The Swedish derogation will be abolished, as part of the Good Work Plan, from 6 April 2020. Also from 6 April 2020, agencies will be required to provide agency workers with a key information document detailing the type of contract and minimum pay rates..

## Termination payments

From 6 April 2020, changes will be made to the national insurance due on termination payments, including redundancy payments. Currently, where an ex gratia payment is made on termination of employment (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 currently exempt from national insurance contributions.

From 6 April 2020, the first £30,000 of any ex gratia termination payment (including any redundancy payment) will still be free of income tax and national insurance but any amount above this will be subject to employers' national insurance contributions.

# CONSULTATION PAPERS

## Improving casual worker rights

The Government recently ran a public consultation on measures to tackle so-called "one-sided flexibility" faced by casual workers – i.e. unpredictable working patterns and employers cancelling shifts at short notice or sending workers home early without compensation. The consultation follows recommendations made by the Low Pay Commission in response to the findings of the Taylor Review.

As part of the consultation, the Government says it plans to introduce a right for casual workers to switch to a contract that reflects their normal working hours if they are regularly working more than their contract suggests. Employers would only be able to refuse to switch contracts on limited business grounds (e.g. it would cause significant, adverse change to the business).

The consultation also sought views on:

- a new requirement for casual workers to be given "reasonable notice" of a shift
- a new right for workers to receive compensation if a shift is cancelled or cut short without "reasonable notice"
- what "reasonable notice" in this context should be and whether this should vary depending on the type of work done or the industry

The consultation closed on 11 October 2019. The Government is analysing feedback and will respond in due course.

## Managing sickness absence

The Government also recently ran a consultation seeking views on a number of proposals aimed at reducing job loss due to ill-health.

The proposals included:

- giving non-disabled employees a right to request workplace adjustments to accommodate a health condition (in addition to the rights which disabled employees already have)
- enabling statutory sick pay to be paid during a phased return to work, so that the employee could receive part salary and part statutory sick pay according to the time worked
- extending the right to statutory sick pay to those earning below the lower earnings limit
- requiring employers to give four weeks' notice that statutory sick pay is due to end

The consultation closed on 7 October 2019 and the Government is currently analysing feedback.

# WATCH THIS SPACE

## Confidentiality clauses

As previously reported, the Government ran a consultation earlier this year on confidentiality clauses in settlement agreements and employment contracts.

The Government has now published its response to the consultation, confirming that it will:

- introduce a ban on any provision that prevents someone from making a disclosure to the police or regulated healthcare or legal professionals
- require settlement agreements and employment contracts to state expressly that any confidentiality provisions do not prevent the worker from making certain disclosures (e.g. whistleblowing disclosures and reporting matters to the police)
- make confidentiality clauses in settlement agreements void if they fail to specify which disclosures a worker can still make
- require employees who enter a settlement agreement to receive independent advice, not just on the terms and effect of the agreement, but also the nature and limitations of any confidentiality clause
- require employers to summarise the limits of any confidentiality clause in the written statement of employment particulars that must be given to all workers at the start of employment

The Government has not said when these changes would be introduced, other than to say they will be implemented "when Parliamentary time allows".

## Pregnant workers and new parents

The Government ran a consultation earlier this year on extending redundancy protection for pregnant women and new parents. The Government has now published its response confirming that it plans to press ahead with its proposals.

Currently, before making a woman who is on maternity leave redundant, an employer must offer her any suitable alternative vacancies which exist within the employer's business. The Government will extend this protection so that it begins when the mother notifies the employer of her pregnancy and ends six months after she has returned to work (as opposed to only applying during maternity leave). The same extension will apply in relation to adoption leave. Similar rules will apply in relation to shared parental leave, although the Government will consult further on how this will work, given shared parental leave can be taken in small blocks of a week at a time.

The Government has not said when these changes would be introduced, other than to say they will be implemented "when Parliamentary time allows".

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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