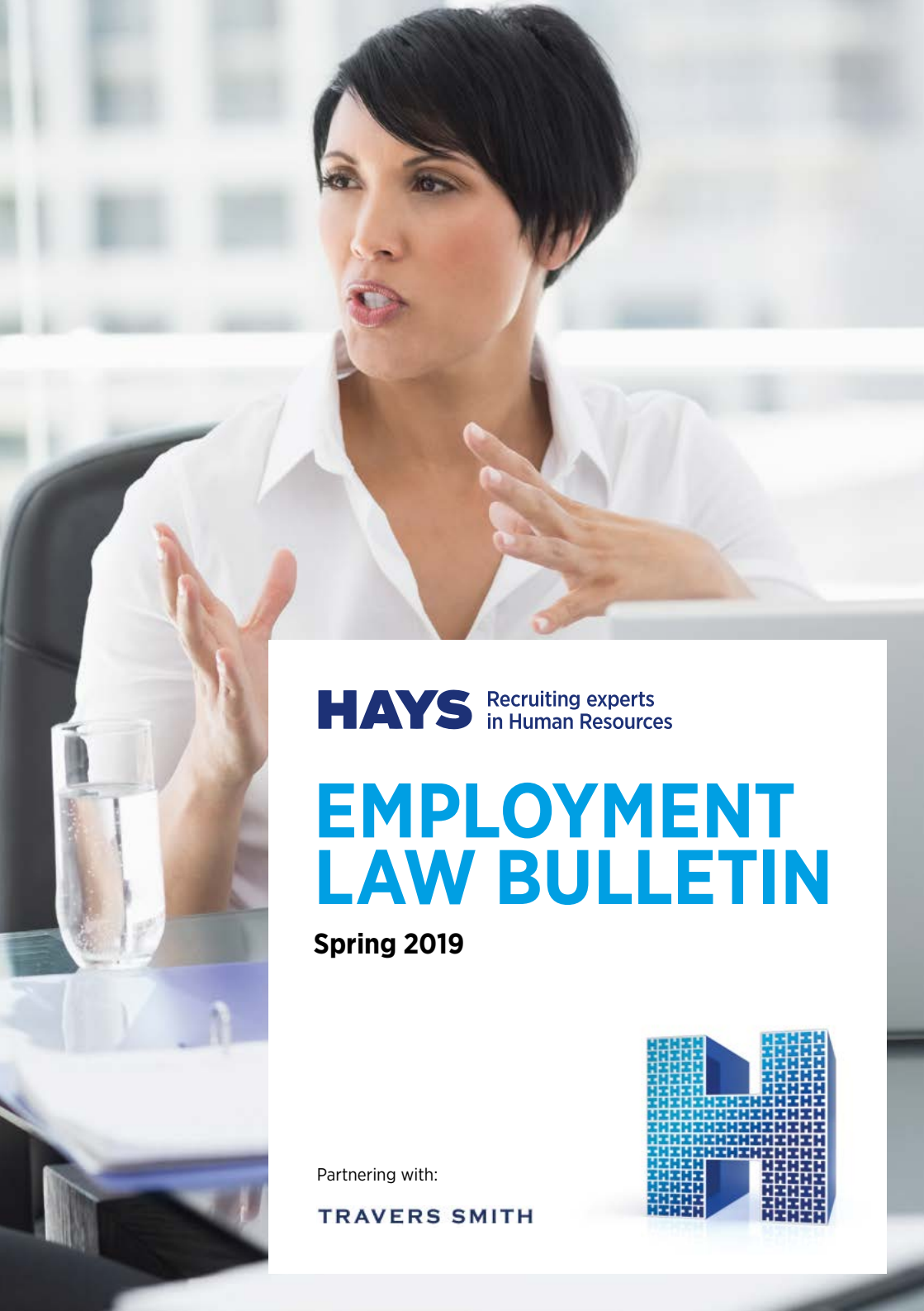

HAYS Recruiting experts in Human Resources

EMPLOYMENT LAW BULLETIN

Spring 2019

Partnering with:

TRAVERS SMITH

WELCOME

Welcome to the Spring 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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BREXIT UPDATE

The EU and the UK have agreed to delay Brexit until 31 October 2019, with the possibility of an earlier exit date if the proposed withdrawal agreement can be agreed sooner. But what does this mean for employers and their EU national employees?

Existing staff

The Government has said that, whether the UK leaves with or without a deal, all EEA and Swiss nationals and their family members living in the UK on the date of Brexit will be able to stay indefinitely provided they apply for status under its new EU Settlement Scheme. The date of Brexit will be 31 October 2019 or whatever earlier date the UK actually leaves the EU. The EU Settlement Scheme opened fully on 30 March 2019, with over 50,000 applications in the first weekend of opening. The Government's proposed withdrawal agreement would give EEA and Swiss nationals (and their family members) until 30 June 2021 to apply. In a 'no deal' scenario, the Government has previously said EEA and Swiss nationals (and their family members) would still have until 31 December 2020 to apply. EU nationals therefore have some breathing space but many employers are encouraging staff to apply as soon as they can in order to avoid delays.

Future recruitment

The position for employees who come to the UK after Brexit date depends on whether the UK leaves with or without a deal. Under the Government's proposed withdrawal agreement, EEA and Swiss nationals would be able to come to the UK and work here visa-free, as is currently the case, up until 31 December 2020. Anyone who arrives during this time would have to apply under the EU Settlement Scheme for pre-settled status initially and then settled status after five years, which would allow them to remain indefinitely.

In a 'no deal' scenario, EEA and Swiss nationals would only be able to come to the UK after Brexit date for up to three months at a time without a visa. For stays longer than three months, EEA and Swiss nationals would need to apply for European Temporary Leave to Remain, which would allow them to stay and work in the UK for up to three years. However, this would not be extendable nor would it lead to indefinite leave or settled status. To stay longer than three years, EEA and Swiss nationals would need to apply for a visa under a new immigration regime which is expected to be in place from 1 January 2021.

Whatever the case, the Government has confirmed that there will be no change to the way employers check the right to work of EEA and Swiss nationals until 1 January 2021 when the new immigration regime is in place.

Under the new regime, there would be no preferential treatment for EU nationals, so any new recruits arriving in the UK from 1 January 2021 will need a work permit.

The detail of the new regime is yet to be announced, and the timing could shift as the Brexit process unfolds, so employers will need to keep an eye on developments. However, there is no suggestion that any delay to Brexit would affect the position of EEA and Swiss nationals already living and working in the UK.

HOLIDAY
USE IT OR LOSE IT?

Can employers rely on the 'use it or lose it' principle in relation to staff holiday?

This was considered in two cases, joined together before the European Court of Justice (ECJ). Both cases featured employees in Germany who had left their employment with accrued untaken holiday. The employers refused to pay them for the holiday, relying on national laws. Both employees were seeking pay in lieu for untaken holiday which had accrued in the same year as termination but one was also seeking payment for untaken holiday which had accrued in the previous holiday year. The employees brought claims in the German court, and the German courts asked the ECJ whether the German 'use it or lose it' law was compatible with the Working Time Directive.

The ECJ decided that the 'use it or lose it' law could only apply if the employee had been given an opportunity to take the holiday. This does not mean the employer has to force employees to take holiday, but it should encourage them to do so, and inform them in good time of the risk of losing that holiday at the end of the holiday year. If employees have not been given the opportunity to take holiday, then they will not lose that holiday at the end of the year.

Employers should ensure that they warn employees, in good time before the end of the holiday year, to take their holiday in time (and remind them of how much, if any, they would be allowed to carry over). This could be done for example by a business-wide email, or message on the organisation's intranet. Employees who are on long term sick leave can take holiday during their sick leave if they wish and should be reminded of this. This case only applies to the four week holiday entitlement under the Working Time Directive. The additional 1.6 weeks under the UK's Working Time Regulations, and any additional contractual holiday entitlement, may be forfeited at the end of a leave year, even if the employee had not been encouraged to take it in time.

Kreuziger v Land Berlin; Max-Planck-Gesellschaft Zur Förderung Der Wissenschaften Ev V Shimizu

"The ECJ decided that the 'use it or lose it' law could only apply if the employee had been given an opportunity to take the holiday... If employees have not been given the opportunity to take holiday, then they will not lose that holiday at the end of the year."

WHISTLEBLOWING: IS IT IN THE PUBLIC INTEREST?

To be protected as a whistleblower, a worker must make a "protected disclosure" – i.e. a disclosure of information which, in the worker's reasonable belief, tends to show a breach of a legal obligation and is in the public interest.

The worker in this case was an interpreter at a private hospital. He asked a member of senior management to investigate false rumours among patients and their families that he was responsible for breaching patient confidentiality. He followed up with an email saying that he needed to clear his name. The issue was referred to the hospital's HR team and the worker met with the Chief Human Resources Officer. He reiterated that he believed there were false rumours circulating about him and that he wanted to clear his name. When the worker was later dismissed, he claimed that he had been dismissed for blowing the whistle, relying on the two complaints about false rumours.

The Employment Tribunal ruled that he was not a whistleblower because his complaints did not tend to show a breach of a legal obligation and were not made in the public interest. On appeal, the Employment Appeal Tribunal took a slightly different view. It ruled that the complaints did tend to show a breach of a legal obligation. The worker had complained about rumours of him breaching patient confidentiality, which he said were damaging and false. Although he did not use the term "defamation", this was essentially what he was complaining about. However, the EAT agreed that the disclosures were not in the public interest, as the worker was only concerned about the effect of the rumours on him and with clearing his name. The worker was therefore not protected as a whistleblower.

On one hand, this case shows how wide the protection for whistleblowers potentially goes. A worker does not necessarily need to articulate the piece of law being breached to be protected. Nor does it matter if the worker is ultimately wrong, and there is in fact no breach, so long as the worker reasonably believed there was one.

However, the case also highlights that a worker must reasonably believe what they are disclosing is in the public interest. If the worker is seeking to protect their own personal interests only, they are unlikely to be a whistleblower. A word of caution, though – the worker does not need to be motivated by the public interest. A worker would be protected as a whistleblower if their primary aim is to protect their own interests but they believe what they are disclosing is in the public interest. This might be the case, for example, if the worker is alleging sexual harassment or that employees are being underpaid or overworked. It is, therefore, safer to assume that a worker making a disclosure of this nature is a whistleblower and is protected from any detriment or dismissal for having blown the whistle.

Ibrahim v HCA International Ltd

NEW LAW

National Minimum Wage

The rates of the National Minimum Wage and National Living Wage increased 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)

Unfair dismissal compensation

For dismissals taking effect on or after 6 April 2019, the maximum compensatory award for unfair dismissal increases to the lower of £86,444 and a year's pay. (Previously, the maximum compensatory award was the lower of £83,682 and a year's pay.)

Statutory redundancy pay

For dismissals taking effect on or after 6 April 2019, the limit on a week's pay used for calculating the unfair dismissal basic award and statutory redundancy pay increases from £508 to £525 per week.

Employment Tribunal penalties

Employment Tribunals can award penalties against employers for aggravated breaches of employment law. On 6 April 2019, the maximum penalty increased from £5,000 to £20,000, as part of the Government's Good Work Plan which takes forward the recommendations of the Taylor Review.

> "For dismissals taking effect on or after 6 April 2019, the maximum compensatory award for unfair dismissal increases to the lower of £86,444 and a year's pay."

Payslips

From 6 April 2019, employers are required to provide itemised payslips to all workers (not just employees). Where workers are paid by the hour, the payslip is also required to specify the number of hours paid. This is also part of the Government's Good Work Plan.

Statutory sick pay

On 6 April 2019, the rate of statutory sick pay increased from £92.05 to £94.25 per week.

Maternity pay rates

On 6 April 2019, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay increased from £145.18 per week to £148.68 (or 90% of the employee's average weekly earnings if lower).

WATCH THIS SPACE

Crackdown on confidentiality clauses

The Government is consulting on what limitations might be put on confidentiality clauses in settlement agreements and employment contracts. This follows recommendations made in the wake of the #MeToo movement that tighter controls should be placed on confidentiality clauses and non-disclosure agreements, particularly in discrimination and harassment cases.

The Government is considering the following measures:

- introducing a ban on any provision in a settlement agreement or employment contract that prevents someone from making any kind of disclosure to the police
- requiring 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)
- making confidentiality clauses in settlement agreements void if they fail to specify which disclosures the worker can still make
- requiring employees who enter into 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
- requiring any terms and conditions about confidentiality to be summarised in the written statement of employment particulars that employees must give all employees at the start of employment.

The consultation, Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination, closed on 29 April 2019.

Off-payroll rules in the private sector

Last year, the Government announced that the public sector off-payroll working rules will be extended to the private sector in April 2020. The Government has now launched a consultation seeking views about how the rules will apply in the private sector.

Under the proposals, where a business engages contractors or consultants through a personal services company, the business, as the end client, will be required to 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 the 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. Where the client engages an agency, the agency will be responsible for paying the contractor's company and therefore deducting income tax and NICs. However, the client will remain responsible for making the determination about the contractor's IR35 status. The consultation paper proposes that the client would have to give its determination to the agency and the individual contractor, and establish a process for considering challenges from the contractor.

Small businesses will be exempt from the rules. Under the proposals, a business will qualify as small if it meets two or more of the following criteria: (i) annual turnover of not more than £10.2 million; (ii) a balance sheet total of not more than £5.1 million and (iii) no more than 50 employees.

The consultation, Off-payroll working rules from April 2020, closes on 28 May 2019.

Pregnant workers and new parents

The Government is considering proposals that would give greater protection from redundancy to pregnant women and new parents. Currently women who are at risk of redundancy while on maternity leave have a right to be offered any suitable alternative vacancies which exist in the employer's business ahead of any other employees who are at risk. The Government is proposing to extend this protection to cover not only redundancies during maternity leave, but also during the six months after the mother returns to work. This would give new mothers who have recently returned the same protection as those on maternity leave. The Government also proposes that the redundancy protection should begin as soon as the mother notifies her employer in writing of her pregnancy, rather than when her maternity leave starts.

For consistency, the Government is also seeking views on whether to extend this protection to employees on other forms of leave, including adoption leave, shared parental leave and longer periods of unpaid parental leave. The Government ran a public consultation on the proposals, which closed on 5 April 2019. It will now consider the responses and report back later this year.

Ethnicity pay gap reporting

Following on from gender pay gap reporting, the Government is considering introducing mandatory reporting on the ethnicity pay gap. The proposal is that this would apply to employers with 250 or more employees. The Government launched a public consultation in late 2018, which ran until 11 January 2019, seeking feedback on the sort of information employers should be required to publish and whether ethnicity pay reporting should mirror the gender pay gap reporting requirements. The consultation asked whether employers should report a single "white versus not white" figure or a breakdown of different ethnic groups. It is not yet clear when the requirement would be introduced (or whether, for example, it would be introduced in phases). The Government is now considering responses to the consultation and is likely to report back later this year. In the meantime, employers may consider responding to the consultation and/or starting to think about what ethnicity data they collect.

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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