MARCH 2017

Welcome to our March edition. We focus on likely Brexit impact, key employment law themes for 2017 and significant case law developments; including on whistleblowing and data protection.

LIKELY BREXIT IMPACT

Potentially, the biggest driver for change to UK employment law over the next few years could be Brexit. This is because a significant portion of UK employment law is derived from EU directives. For example, much of discrimination legislation, TUPE and legislation on collective redundancies, working time and agency workers (See our *QuickStudy*, Brexit UK Employment Law Implications, for further detail).

Given this, therefore, what is the likely impact as and when Brexit takes place?

The current position seems to be that there will not be significant change and the major body of UK employment law deriving from EU directives will continue in force without substantive change. Support for this comes from Theresa May's speech to the Conservative party conference in October last year, during which she stated,

> *"existing workers' [EU] legal rights will continue to be guaranteed in law [after Brexit] – and they will be guaranteed as long as I am Prime Minster."*

One issue which is not yet certain, however, is the extent to which European Court of Justice decisions on the EU Directives from which UK legislation is derived will be binding on UK Courts and Tribunals applying the UK legislation.

It is also possible that some changes may be made to particular EU derived legislation, which is seen as unnecessarily burdensome to business where this can be done without being seen to reduce worker rights and, therefore, renege from the above promise. For example, legislation on agency workers requiring no less favourable terms for temporary agency staff than for permanent employees, after a 12 week qualifying period, has always been unpopular with business, and could be subject to change.

Key Employment Law Themes for 2017

It is often the case that certain identifiable employment law issues are subject to particular focus by the courts and/or employers/advisers as a result of particular legislation, the impact of case law or other developments. Applying this approach, our tips for key areas of focus in 2017 are:

- employment status;
- equal pay; and
- data protection.

Employment Status

Recent months have already seen significant and highly publicised cases on this issue. For example, the Uber case (see our *QuickStudy* article, Uber case – status of UK Uber drivers); where Uber drivers were found to be workers rather than self-employed, as argued by Uber.

More recently, in the case of *Pimlico Plumbers –v- Smith*, the UK Court of Appeal also turned down an argument that individuals were self-employed; in this case plumbers, again, finding that they had worker status. In this particular case, the Court of Appeal found that the degree of control exercised by Pimlico Plumbers over the individual plumbers was inconsistent with Pimlico Plumbers being a customer or client of a business run by the individual plumbers.

Last month also saw further scrutiny of the issue of employment status as a result of well publicised analysis from the Resolution Foundation suggesting that high earners, in particular sectors, such as advertising and banking, have been engaged on a self-employed basis with a view to avoiding tax liabilities, impacting on public finances. This has now been followed with the Spring budget and controversial employers' national insurance changes, now not to be implemented following a swift government u turn.

Lastly, there is a review currently being carried out, commissioned by UK government; *the Taylor Review into Modern Employment Practices*, which will consider the issue of employment status and the current state of the law on this, which is scheduled to report later this year.

As a result of these factors, it seems likely that the issue of employment status will remain in the spotlight. Also, insofar as, there is a theme from the judgments in the *Uber* and *Pimlico Plumber's* cases, it is that courts and employment tribunals will carefully scrutinise status in order to ascertain the reality of the relationship, so that the label used by the parties will not necessarily be determinative. Also that "clever lawyers drafting," for example, in the Pimlico Plumber's case, providing a right to provide a replacement; a "substitution right," will not in itself, preclude there being found to be a worker or employee relationship where the reality is that work has been undertaken by a particular individual.

The practical impact for those taking on labour and seeking to do so in a way that avoids employee or worker status is that they should anticipate potential challenge from individuals, no doubt, most likely on the relationship coming to an end, and possibly, HMRC regarding tax status, if the reality of the relationship does not accord with the label and classification used. Also, to watch this space for potential legislative change.

Equal Pay

The issue of equal pay remains a live issue, in many sectors, where an equal pay gap continues. Most recent UK government statistics show the gender pay gap (the difference between hourly earnings of men and women) at 9.4% for full time employees in 2016. Whilst the trend has been for the gap to reduce since the government started to survey the gap in 1997, there has been little change in the gap over the last 6 years. Significantly, also there are major variations in the size of the gap within different industry sectors; the gap being largest in the financial and insurance sector where it is 33.6%. Within the financial services sector, there has long been an issue about the impact of discretionary bonuses and, as a result, major banks will, as part of their annual remuneration processes, carry out careful reviews of proposed bonus payments to ensure there is no evidence of gender bias.

Also, whilst traditionally UK equal pay claims have been pursued against public sector employers, currently, a very high profile claim is being pursued against a private sector employer, Asda. This involves multiple applicants (reports suggest as many as 700) arguing that predominately female supermarket staff should receive equal pay to predominately male staff working in distribution depots. It is reported that the sums at stake, if the case succeeded, could be as much as £100 million.

Recent years have seen a number of developments in this area, including the introduction in October 2014 of the Compulsory Equal Pay Audit Regulations, requiring employment tribunals to order a compulsory equal pay audit to be published on an employer's website, where an employer has been found to be in breach of equal pay legislation.

Next month will see the coming into force of the Gender Pay Gap Regulations ("the Regulations"), requiring employers with 250 or more staff to publish a gender pay gap report within 12 months of 5 April this year.

Leaving aside the detailed requirements of the Regulations (which we will cover next month in a *QuickStudy* article), it is likely that, as major employers publish in the period prior to 5 April 2018, there will be media coverage regarding the equal pay gap disclosed, such that the issue of equal pay will be more widely discussed and debated. This increased focus could, therefore, increase the risk of equal pay claims and grievances for employers of all sizes.

Data Protection

Data protection should be an area of focus for all businesses in 2018. The EU General Data Protection Regulation (GDPR) will apply in all member states, including the UK notwithstanding Brexit. Whilst many provisions of the GDPR are similar to current UK data protection legislation, there are significant changes. Particularly:

- there is more of an obligation on a data controller, so here an employer, to audit exactly what data processing it will be carrying out and, therefore, what legal basis it has, in accordance with the GDPR, to legitimise its processing;
- there are stricter and more detailed conditions for the use of consent to legitimize data processing;
- additional information is to be given to employees regarding data processing;
- employees' rights will be widened to include rights to, "delete, freeze or correct";
- data subject access request responses will have to be provided "as soon as possible" and within a month (rather than within 40 days, as currently) and it will no longer be permissible to charge a fee for complying. It will, however, be permissible for an employer to refuse to comply if a request is, "manifestly unfounded or excessive;"
- there is a greater obligation in relation to the use of "data processors," such as payroll providers, and protections in the form of provisions which must be included within contracts with such data processers;
- there are express obligations to notify of data breaches, which will need reflecting in data protection policies.

As a first step towards getting ready for this new legislation, employers should be auditing current data processing of employee data, and reviewing the legal basis for this processing.

DATA PROTECTION SUBJECT ACCESS REQUESTS – A GREEN LIGHT FOR EMPLOYEES AND THEIR ADVISERS?

Background

A tactic which is often used by claimant lawyers, where an employee is submitting a grievance, or otherwise seeking to tee up a potential employment claim, is to put in a wide ranging subject access request (SAR) under the Data Protection Act (DPA). Often the purpose of this maybe, twofold; firstly, of course, to try and find evidence, which might support the grievance/potential claim and also often, secondly, to put the employer to cost and inconvenience in responding, in the hope that the employer might choose instead to, "throw money at the problem," and settle, rather than going through this process.

Employers and their advisers, when responding to such requests, have had a number of strategies at their disposal. On the one hand there is the issue of timing, the current requirement being that a response to a SAR need not be provided for forty days. Additionally, when responding to any request, there has always been the issue of whether the request is in fact appropriate under the DPA if clearly made for the purpose of obtaining evidence to support a claim, rather than in line with the stated purpose behind the DPA, and the underlying Data Protection Directive, of allowing a data subject to correct inaccuracies in their personal data etc. In support of a response that SRAs should not be used for wider purposes, employers and their advisers have been able to point to the leading Court of Appeal case of *Durant* where the court indicated that,

> *"the purpose of [the statutory section allowing an SRA] in entitling an individual to have access to information in the form of his personal data is to enable him to check whether the data controller's processing of it unlawfully infringes his privacy and, if so, to take such steps as the act provides….. to protect it, it is not an automatic key to any information, readily accessible or not, of matters in which he may be named or involved. Nor is it to assist him, for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties."*

Decision

In the case of *Dawson-Damer –v- Taylor Wessing*, the Court of Appeal considered whether, following on from ***Durant***, there is, in fact, a "no other purpose" rule, which has the effect that an order requiring a data controller to comply with a SAR will not be made if the applicant proposes to use the information obtained for some purpose other than verifying or correcting data held about him.

The Court of Appeal held that ***Durant*** did not establish that a request would be invalid if made for the collateral purpose of assisting in litigation. The above dicta from ***Durant*** related to the particular issue of the limited nature of "personal data" for the purposes of the DPA and, therefore, made the point that an individual could not claim something was "personal data," because it would assist in obtaining discovery, or in litigation, or complaints against third parties. There was, however, no "no other purpose rule."

Practical Implications

This decision is bad news for employers, insofar as, it effectively takes away one of the key arguments for not complying with a SAR. Following the decision, it is likely that SAR's will be even more commonly used. A further change which will, in due course, apply from May 18, when GDPR comes into effect, will be a requirement to respond, in a shorter timescale; i.e, "as soon as possible" and, in any event, within a month, rather than within 40 days as currently.

WHISTLEBLOWING

Requirements of a "qualifying disclosure"

In our 2016 Employment Law Briefings, we considered first cases on the key issue of how high a threshold is set by the requirement, added to the legislation in 2013, that a disclosure be made "in the public interest."

The decisions in both cases covered, *Chesterton Global Limited –v- Nurmohamed* and *Morgan –v- Royal Mencap Society*, served to make clear that the threshold will not be particularly high and, therefore, frequently it is likely that an employee will be able to meet this requirement where they are able to argue that the disclosure impacted on the wider interests of colleagues, as might be the case, for example, in relation to a health and safety issue.

The latest significant case on whistleblowing, *Eiger Securities –v- Korshunova*, considers a further requirement for a qualifying disclosure; that being that, the individual making the disclosure reasonably believes that the disclosure shows a failure or likely failure to comply with a legal obligation.

The Decision

The facts concerned a broker. She challenged the managing director of her employer on his using her computer screen in dealing with an external trader without identifying himself as not being her. Three of her clients were allocated to others, she was dismissed and pursued a whistleblowing claim on the basis that this amounted to a qualifying disclosure, and that she had been subject to a detriment (the reallocation of the clients) and dismissed as a result.

The employment tribunal found that the claimant had believed that there must be a legal obligation on the employer not to mislead about who was conducting a communication and, therefore, to let them know who was. Further, that it was reasonable

for her to believe that by logging onto her Bloomberg Chat system and trading in her name without identifying themselves, her colleagues were breaching some industry guidance or rules.

The EAT Judge indicated, however, that the tribunal had had to decide whether, in making the disclosure, the claimant reasonably believed that the disclosure tended to show that the managing director had failed to comply with a legal obligation to which he was subject. Further, it was not obvious that not informing a client of the identity of the person with whom they are dealing, is plainly a breach of a legal obligation. The employment tribunal should have identified the source of the legal obligation to which the claimant believed the managing director, or the employer were subject, and how they had failed to comply with it. The EAT indicated:

> *"The identification of the obligation does not have to be detailed or precise, but it must be more than a belief that certain actions are wrong. Actions, maybe considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation".*

Practical Implications

This decision is helpful for employers. Whilst the decisions referred to above made clear that the public interest requirement will not, in itself, act as a bar to many employment claims, this decision, nonetheless, makes clear that the requirements for a qualifying disclosure will not necessarily be easily met. In order to succeed in a claim, therefore, not only will an employee need to demonstrate a clear disclosure of information and that the public interest requirement is met, but also that they had a reasonable belief of a breach of a particular legal obligation, and it seems following this decision, that the particular legal obligation will need to be particularised within an employee's claim, if ultimately a claim is to succeed.

KEY CONTACT

We hope you find this briefing useful. Please contact us if you have any queries on the issues covered.

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