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Review of UK Employment Law: Key Issues to Monitor in 2017

By Caron Gosling

In a year dominated by the Brexit vote in June, 2016 also saw a number of developments that will have a significant impact on UK employment law. This alert provides a brief summary of those developments and looks at what employers in the UK may expect in the year ahead.

- The impact of Brexit on the labour market, particularly in relation to immigration
- New developments in relation to employment status and the beginning of a crackdown on the so-called "gig economy"
- The continuing pitfalls of calculating vacation pay

Impact of Brexit on Employment Law

It is difficult to estimate the significance of the result of the Brexit referendum on 23 June 2016. It gave the Government a political mandate to begin the exit process from the European Union and led to the resignation of Prime Minister David Cameron on 24 June 2016. His replacement, Theresa May, is now expected to steer the country through the choppy Brexit waters.

What to Expect in 2017:

The High Court determined, in November 2016, that Article 50 (the notice which the UK must give the EU to trigger the exit process) cannot be invoked without Parliamentary approval. The Supreme Court dismissed the Government's appeal against that decision on 24 January 2017. This means that the Government will need to get the approval of both the House of Commons and the House of Lords before invoking Article 50, which may push back the self-imposed deadline of March 2017.

There is, as yet, no clarity as to what Brexit means in any detailed or meaningful way. The Supreme Court's decision addresses no more than the constitutional mechanics of how to effect the divorce of the UK and the EU. Additional clarity on Brexit's broader impact on UK employment law, it seems, will have to wait.

That said, it is unlikely that employment law issues will be high on the agenda in determining what the post-Brexit legal landscape will look like. Indeed, the Prime Minister has already confirmed that there is no intention to dilute worker protections. But concerns about immigration dominated the referendum campaigns and will likely continue to be a key issue. Any restriction on the freedom of movement between the EU and the UK will surely affect the European businesses of U.S. corporations, potentially threatening the right of EU nationals to maintain residence in the UK and preventing UK nationals from making a home in the EU. Employers may find that recruitment in the UK becomes more challenging too, as the possibility of increased immigration hurdles may deter or prevent EU (and non-EU) nationals from coming to work in the UK even before Brexit becomes a practical reality.

One practical step which can be taken at this stage is to encourage current UK employees who are EU nationals to apply for the UK permanent residence card. EU nationals can apply for this once they have completed five years' working/studying in the UK, and once granted, this should (on current rules) be a guarantee of the future right to live and work in the UK.

When Is a Person an Employee and Why Does It Matter?

In the UK, the question of when is a person an employee is particularly important as employment status indicates not only the employment rights to which an individual worker is entitled but also how their earnings should be taxed—in simple terms, the employer pays a higher price for engaging a person as an employee, compared to engaging them as a contractor, a consultant or as a casual worker. There is no clear definition of "employee" nor "worker" in the law. Rather, the classification hinges on a number of factors, including mutuality of obligation and control.

In some cases it is possible to structure an engagement such that it is not an employment relationship but this should be treated with considerable caution, as the Uber case (*Aslam,Farrar & Others v Uber*)—heard by the UK employment tribunal in October 2016—demonstrates. Uber's argument that it simply provided a platform between the drivers and the passengers was roundly rejected by the tribunal. It was held that the drivers were "workers" under UK law, despite the lengths to which Uber had gone to provide contractual documentation establishing the drivers as independent, self-employed contractors.

The clear message from the tribunal was that employment status is based on what happens in practice and not what the contractual documentation says: just because you call something an elephant does not mean that it is an elephant. Based on how the relationship worked in practice (and given the amount of control that Uber exercised over the drivers as well as other factors), the tribunal held that the drivers were workers and immediately increased the company's labour costs by giving all Uber drivers (of whom there are some 30,000 in London alone) the right to paid vacation.

What to Expect in 2017:

Perhaps unsurprisingly, Uber has indicated its intention to appeal this decision. But the tide appears to be turning against businesses structuring their workforces so as to avoid potentially costly employment rights: the Uber case is just the first in a long line of cases to be heard. In January 2017, for example, an employment tribunal found that the bicycle couriers engaged by CitySprint were also workers and not self-employed. More such cases are expected this year.

It is estimated that 15% of the UK's labour market is now "self-employed" and working in the gig economy, carrying out jobs with little or no security and few legal protections. There are currently no less than three Government/independent reviews on the changing nature of the workplace and the issues around determining employee status, all of which are due to report back in 2017. The outcomes of these reviews,

in addition to the pending case law, are likely to affect how businesses are structured in terms of staffing going forward.

The Right to a Paid Vacation and Other Working Time Rights

The Working Time Regulations 1998 provide that employees are entitled to 28 days (5.6 weeks) of paid vacation each year. This simple concept—that for each week of leave, an employee is entitled to a week's pay—has proven to be anything but in practice. In part this has been the result of a mismatch of the domestic UK law and the implementation of the EU Working Time Directive, from which the right to paid vacation derives.

The issue of how to calculate a week's pay in relation to vacation first arose in the UK in 2013, where an employee brought a claim on the basis that his regular paid overtime should be taken into account when calculating vacation pay. This argument was extended in 2014 to include entitlement to commission payments.

At the heart of these claims was the issue of whether the UK law correctly transposed the EU Directive: the Directive refers to "normal remuneration", but under UK law the definition of a week's pay would not generally include any entitlement to commission or overtime. The Court of Justice of the European Union confirmed in 2014 that a week's pay for vacation taken under the Working Time Directive should include any payments intrinsically linked to the performance of the job in question (*Lock v British Gas*, 2014). This means that payments such as overtime, commission, bonuses, shift premia, some allowances and other payments intrinsically linked to the performance of the job should be taken into account when calculating holiday pay, so long as they are part of a "settled pattern" of work such that they could be considered "normal" remuneration.

Since that decision, the UK courts have been creative in interpreting the UK Working Time Regulations so as to comply with the Directive, unilaterally including additional wording in the Regulations so as to meet European requirements. This approach was challenged by British Gas in relation to their long-running dispute with Mr Lock and was heard by the Court of Appeal (the second highest court in England and Wales) in 2016. The Court of Appeal rejected this challenge and held that it was appropriate and permissible for the courts to apply the Regulations in this way.

What to Expect in 2017:

UK employers may face challenges from the UK employees over the calculation of vacation pay, particularly where pay is variable or commission based.

Still unclear despite the extensive case law is 1) what, in fact, constitutes a settled pattern of work, and 2) if the amount of the payment varies, over what reference period the payments should be averaged to determine normal pay. Further litigation on this is to be expected and will hopefully bring clarity to these unanswered questions. These are questions which depend heavily on the specific facts of each particular case, however, so we may see some oddities being litigated.

Is Your Company Prepared for Gender Pay Gap Reporting?

The final draft of the Gender Pay Gap Reporting Regulations was published in December 2016, and these will come into force in April 2017. Under the Regulations, private employers with 250 or more employees are required to publish gender pay gap information by April 2018 and thereafter annually.

Other Employment Law Developments to Monitor:

Discrimination on the Grounds of Religion or Belief

Two noteworthy cases currently before the Court of Justice of the European Union concern an employee's right to wear an Islamic headscarf. A preliminary opinion in each case has been issued: in July, Advocate-General Sharpston's preliminary opinion was that a dismissal for wearing an Islamic headscarf was directly discriminatory on the grounds of religion or belief in the case of *Bougnaui v Micropole*. This contrasts with the somewhat controversial opinion of Advocate-General Kokott just a month previously in the case of *Achbita v G4S*, that a dress code banning Muslim headscarves was not direct discrimination but indirect discrimination, on the basis that the employee had an element of choice as to whether she wore the headscarf or not. As such, the dress code was capable of being justified by the employer's policy of neutrality.

An opinion of the Advocate-General is not binding on the CJEU, and the stage is now set for the court to deliver its first ruling on religious discrimination. The decision will answer a fundamental question that goes to the heart of the subject: does the law protect the holding of the belief or the manifestation of it? AG Kokott's ruling reflects the former interpretation, whilst AG Sharpston's opinion maintains that the law protects both the holding of the belief and its manifestation.

Employer Liability for Employee's Actions

Under UK law, employers may be vicariously liable for the actions of their employees where these occur "in the course of employment." The High Court has recently held, in *Bellman v Northampton Recruitment Ltd*, that a company was not responsible when its managing director assaulted an employee during an impromptu drinking session that took place after the company's Christmas party. (Had it occurred during the party, the employer may well have been liable.)

Sexual Orientation Discrimination

In *Lee v McArthur and Ashers Baking Company Ltd*, the Court of Appeal in Northern Ireland held that it was direct discrimination on the grounds of sexual orientation on the part of the baker to refuse a commission for a cake which expressed support for same-sex marriage (the so-called "gay cakes" case). Same-sex marriage is not permitted in Northern Ireland, and motions to approve the ruling have this far been defeated four times before the Northern Ireland Assembly.

Employee's Entitlement to a Rest Break

Under the Working Time Regulations 1998, where the working day lasts for six hours or more, an employee is entitled to at least a 20-minute rest break. The case of *Grange v Abellio London Ltd* demonstrates that the employer has to be proactive in this respect, as it will not be a defence to any claim for this entitlement that the employee did not request the break.

Shared Parental Leave

Since 2015, working parents are entitled to "share" up to 50 weeks of parental leave (with the two weeks immediately after the birth reserved for the mother), though take up of this right has been fairly slow in practice. In one of the first cases regarding this issue (*Snell v Network Rail*), both parents worked at Network Rail and decided to share the leave. Under the maternity policy, Mrs. Snell was entitled to payments in excess of those provided by law during her maternity leave. No such enhancements were made under the shared parental leave policy, and Mr. Snell claimed that this was discriminatory on the grounds of sex. Network Rail eventually conceded the point and the tribunal awarded compensation to Mr. Snell which covered the proposed enhancements plus an award of over £6,000 for injury to feelings.

Network Rail then promptly amended its maternity leave policy to remove the entitlement to enhanced pay during maternity leave so that it would not be caught in this way in the future.

Employers who operate enhanced schemes for maternity and shared parental leave which differ in terms of entitlements may well want to keep this area under review as this is likely to be challenged and argued in full at some point in the future.

Conduct of Disciplinary Investigations

HR and legal advisers should not substitute their own decisions for those of the investigator in a disciplinary situation. The case of *Dronsfield v University of Reading* confirmed that advice from HR and legal practitioners should be limited to questions of law, procedure and process, and should not stray into culpability. A failure to adhere to this could render a dismissal unfair.

Conclusion

Although Brexit dominates the legal landscape in the UK—and is likely to continue doing so for much of 2017 and beyond—it is unlikely that withdrawal from the EU will result in the wholesale repeal of the employment protection regime in the UK. The Prime Minister has already given commitments that worker rights will not be diluted as a result of Brexit and employees will continue to benefit from mandatory protections unless and until there is a significant change in Government policy. That said, employers with employees in the United Kingdom need to be cognisant of the rules which apply to employment in the UK and monitor changes closely to ensure compliance and reduce the risks of claims.

If you would like any further information on any of the topics discussed in this alert or on any other aspect of employment law in the UK, please contact Caron Gosling in our London office – caron.gosling@pillsburylaw.com; +44 207 847 9529.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

Caron Gosling (bio)
London
+44 207 847 9529
caron.gosling@pillsburylaw.com