Employment Law Briefing

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Are You Ready to Report?
Mandatory Gender Pay Gap Reporting

By Sarah Thompson

We reported in our Employment Law Briefing 2016 Winter Edition that data from the Office for National Statistics showed that the gender pay gap was at its lowest since records began, but on average, women still earn around 19 percent less than men in the UK. Clearly, there is still work to be done, and with new legislation now in force this year, it is hoped that the gap will continue to narrow.

All public sector employers, and each private or voluntary sector employer with more than 250 employees, are required to publish prescribed calculations every year showing the pay gap between their male and female employees. The definition of employee is broad and includes not only employees in the traditional sense but also workers, apprentices and some self-employed contractors.

The following calculations must be published:

1. mean gender pay gap;
2. median gender pay gap;
3. mean bonus gender pay gap;
4. median bonus gender pay gap;
5. proportion of males and females who received a bonus payment in the last 12 months; and
6. proportion of males and females, when divided into four groups, ordered from lowest to highest pay.

For private and voluntary sector employers, the pay calculations will show a snapshot as at 5 April in the relevant year, whereas bonus calculations will cover the whole year up to April in the relevant year. The results must be published within 12 months (i.e., for calculations done this year, by 4 April 2018) on the employer's website and on a designated government website. The snapshot date for public sector employers is 31 March, and first reports must be published by 30 March 2018.

Whilst not a mandatory requirement, each employer can provide a narrative with these calculations explaining the reasons for any pay gap. This will enable employers to give a more accurate picture, justify any discrepancies and advise on actions being taken to reduce or eliminate the gap.

There are no penalties for noncompliance, although the government is keeping this under review. Nonetheless, employers will want to comply to avoid reputational damage and adverse publicity, which will likely be far more damaging than any legislative sanctions.

Employers should be collecting the required data through their payroll systems and analysing it. Employers should then identify potential risk areas and examine the rationale behind their current arrangements. Consideration should also be given to how any problem areas can be presented in the best light.

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Email Expectations and the "Right to Disconnect"

By Andrea Ward

Not long ago, coworkers could share a lighthearted chat about mobile devices and the world that existed before smartphones and tablets entered the workplace. Fast-forward 10 years or so, and the use of smartphones and tablets connecting workers to the office has really closed the gap, both in terms of hierarchy of staff and between home and work life. Such devices are essential and, like it or not, there is no going back. Companies rely on these communication tools and workers expect to be able to use them to such an extent that many prefer to use their own (the "Bring Your Own Device" phenomenon, which has its own challenges).

France drew attention at the start of the year with its new "right to disconnect" law which, by its title, suggests that all employees must have the legal right to switch off from their jobs when they leave work for the day, or are on holiday. However, closer inspection reveals that this law is actually a charter, applies only to companies with 50 or more employees, and requires them to negotiate with unions on ways to limit digital intrusions into employees' private lives. This is expected to involve training and awareness of the issues and eventual agreement on technological solutions or company policies on "disconnecting."

It is hard to find specific reference to employees' legal rights and obligations regarding responding to emails, or phone calls outside of working hours. This is likely to be a matter of contract and fall under the express term tacked on to the "normal office hours" clause under which the employee promises to "work such additional hours as necessary to meet the needs of the business," or count toward overtime, for those employees who are eligible to receive it. Alternatively, those who resent the practice and find themselves working significantly more as a result of constant emails may look to the Working Time Regulations 1998 for assistance. These regulations protect workers from being subjected to a detriment for refusing (or proposing to refuse) to work when entitled to a rest period (the standard 20 minutes' break during a six-hour day, 11 hours' uninterrupted daily rest and 24 hours' uninterrupted rest per week). However, not only are these claims uncommon, but many, especially senior employees, will find they have waived their rights under this legislation and have agreed (subject to three months' written notice) that these will not apply to their work.

An email policy might go so far as to provide that employees are not required to reply to emails outside office hours — which could have a major impact on international businesses involving French employees.

Or, it might put limits on out-of-hours emails, stipulating a time frame during which employees are not expected to respond to emails, something that car manufacturers have considered. Alternatively, emails could be forwarded to colleagues covering different shifts or time zones, although this is likely to increase email traffic and would be difficult to manage. Others have a system which reportedly allows employees to have all of their work emails automatically deleted whilst they are on holiday, which is a strict response to the problem and must entail clear backup procedures. A better approach (and one which probably serves many businesses already) is to simply have a sensible policy that permits employees to check emails periodically, but does not demand that they do so and does not oblige them to respond unless it is deemed important enough.

Whilst being constantly "connected" may be good for business and suit both parties, it can take its toll on employees' mental health and productivity. Companies have a duty of care toward staff and many recognise that employees experience high levels of stress or are simply unable to switch off from work and enjoy time with family because of the emails they receive outside of normal office hours, or whilst on holiday. These do not need to be prolific to be a source of anxiety, so the expectation, if there is one, to check devices and respond to emails or phone calls when not at work should be a topic for discussion and clear agreement. Setting the boundaries will involve consideration of the nature and seniority of the role and the demands of the business, including customer or client needs and time zones.

The Ones to Watch

By Sarah Thompson

This year is already a busy one for employment law. Here are just some of the key legislative changes and cases to watch.

Trade union balloting changes

The Trade Union Act 2016 will introduce additional strike balloting requirements. A vote for industrial action will need a 50 percent minimum turnout and a majority vote in favour of industrial action. For important public services (e.g., health, education, fire and transport), at least 40 percent of eligible voters will need to vote in favour.

Gender pay gap reporting begins

See our article *"Are you Ready to Report? Mandatory Gender Pay Gap Reporting"* for more information regarding this new reporting requirement that came into force on April 6, 2017.

Public sector exit payments

Public sector exit payments are expected to be restricted from this year. There will be a cap of £95,000 on payments to public sector employees for loss of employment, and employees who earn over £80,000 will be required to repay some or all of their exit payment if they return to a public sector role within 12 months.

Employment tribunal fees challenge

The case of *R (UNISON) v Lord Chancellor* was heard in the Supreme Court at the end of March 2017 and we are awaiting the judgment. The Court of Appeal dismissed UNISON's challenge to the introduction of tribunal fees on the basis of lack of evidence relating to the affordability of the fees.

Holiday pay and commission case appealed

The Supreme Court has refused to hear the long-running holiday pay commission case *(Lock v British Gas)*. This means the Court of Appeal's decision stands - that results-based commission should be taken into account when calculating holiday pay.

There are also a number of cases expected to be heard this year which will determine the employment status of individuals engaged as self-employed contractors. See our article *"Protection of Workers in the Economy Gig"* discussing some of these cases in more detail.

Protection of Workers and the Gig Economy

By Dan Peyton

In one respect at least, life used to be relatively simple. On the one hand, we had employees, and on the other, we had the self-employed, and HMRC and Employment Tribunals simply had to determine on which side of the line individuals fell. This has always involved its own problems, with the answer depending on a multifactor test, but as a matter of principle, the legal landscape had a logical feel to it. Then along came the broad concept of "workers," individuals who were neither employees nor truly independent contractors, enjoying some but not all statutory protections also enjoyed by employees (including rights under the Working Time Regulations and whistleblower protections).

Since the introduction into English law of the concept of a worker, we now confront a status within the labour market that lawyers, courts, tribunals and tax authorities all struggle to fit within traditional employment law concepts. The test for worker status resembles quite closely the test for employment status. It relies on familiar concepts, such as mutuality of obligation (i.e., the obligation on the party engaging the individual to provide work and the individual to perform it), control, and whether the individual is in business on his or her own account, or on behalf of the party engaging the individual, or providing services to a customer/client. These are all concepts also used in the context of determining employment status.

Recent cases have brought the issue of worker status to the fore, most notably, decisions finding that both Uber drivers and CitySprint cycle couriers were workers and not truly self-employed. At one level, the decisions do highlight a number of issues that point away from true self-employment, but on the other, it is not necessarily easy to see why these individuals were not therefore classified as employees. Although for years it has been drummed into English employers and workers that the label the parties attribute to a working relationship is not determinative of employment status, save in finely balanced cases, it is difficult not to suspect that these individuals' status as workers rather than employees may have been influenced by the starting point of the discussion. Their contracts made

it clear that they were not employees, even though a balance of what the law considers to be the relevant factors suggested that in reality they look much like employees.

There is no doubt more to come on this topic, as there are several more cases awaiting determination. In the meantime, there appears now to be a growing awareness of the tension between an orthodox legal categorisation of the working relationship and the issue of worker status. This tension arises from the imposition of an entirely legal creation in the concept of a worker and the fact that working relationships have changed in the real world to meet the demands for more flexible working arrangements from businesses, the people who provide services to them and their customers and clients.

The Department for Business Energy and Industrial Strategy has commissioned an independent review (the Taylor Review) on the subject, currently due to report in July 2017. The Office of Tax Simplification and the Work and Pensions Committee are also conducting separate reviews. We await the outcome of these reviews with interest to see whether they have an impact on the law in this area.