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EMPLOYMENT LAW:
THE YEAR IN REVIEW 2018

Introduction

Welcome to our annual review of employment law, which aims to review major statutory and case-law developments during 2018 and explore how employers can plan ahead for what's coming this year and beyond.

Although Brexit has inevitably been dominating the headlines, a variety of interesting employment law issues have regularly been in the news as well. A particular topic for debate, in the wake of the #MeToo movement, has been the extent of workplace sexual harassment and how far it is acceptable for employers to use non-disclosure agreements in that context. Another crucial development last year was the coming into force of the GDPR, which has major relevance for employers. Data protection compliance is necessarily becoming a much higher priority for most organisations, a trend that is certain to continue during 2019.

Despite Brexit hogging the political agenda, the Government did manage to enact some important legislative reforms last year. Take, for instance, the new Parental Bereavement (Pay and Leave) Act 2018 and the significant forthcoming changes to how the IR35 regime applies to contractors in the private sector. While both these reforms will not take effect until April 2020, it's not too soon for businesses to start making preparations.

Towards the end of last year, the Government also made a number of proposals for reform in its "Good Work Plan", in response to the Taylor Review of modern working practices. One particular focus is the issue of employment status which has given rise to some significant court decisions recent months, with further cases in the pipeline this year.

All of the areas mentioned above and many more are examined in the pages that follow. We hope you enjoy the read - and please get in touch if you have comments, or would like to discuss any of the areas covered and their implications in more detail.

Sexual harassment and non-disclosure agreements

The extent of sexual harassment at work and whether it is acceptable for employers to "sweep it under the carpet" using non-disclosure agreements ("NDAs") has continued to dominate legal headlines over the past year.

Aftershocks from the explosive allegations against Harvey Weinstein and the resulting #MeToo movement carried on reverberating during 2018. These included two inquiries[1] – by the Government's Women and Equalities Committee ("WEC") and the Equality and Human Rights Commission ("EHRC") – and a "warning notice"[2] from the Solicitors Regulation Authority ("SRA") about the use of NDAs. Towards the end of the year, NDAs came under renewed scrutiny when the Court of Appeal ("CA") granted an injunction preventing the Daily Telegraph from publishing details about "discreditable conduct" by an unnamed executive[3].

EHRC report and recommendations

As the #MeToo movement was gaining momentum towards the end of 2017, the EHRC began soliciting evidence about sexual harassment in the workplace and how employers deal with it. The results were set out in their report[4], published in March 2018.

The report makes for depressing reading. Almost all those who reported harassment were women and the most common perpetrator was a senior colleague. Just under 25% of incidents were committed by customers or clients, and workers reported that employers were particularly bad at dealing with these cases.

Around half the individuals said they did not report the harassment, due to fears about what would happen as a result. In many cases, employers failed to take any action, with complainants reporting that the matter was downplayed or they were treated as "trouble-makers".

The EHRC also found that this issue was often included within a wider diversity policy which made only minimal references to sexual harassment. Around two-thirds of employers responding to the survey trained managers on harassment, but only half trained other staff – and fewer than a third evaluated the effectiveness of their policies.

The EHRC made various recommendations for improving the situation:

Changing culture

A new statutory duty on employers to take reasonable steps to protect workers from harassment, and a statutory code of practice on sexual harassment which could be taken into account in Employment Tribunal ("ET") proceedings.

Promoting transparency

The Government should collect and report on data about sexual harassment at work, employers should publish their sexual harassment policy online, any NDA preventing disclosure of future acts of discrimination or harassment should be void, and the statutory

code of practice should set out the circumstances in which NDAs preventing disclosure of past acts of discrimination or harassment will be void.

Strengthening protection

The limitation period for bringing a harassment claim should be extended, and various protections that were removed from the Equality Act 2010 should be restored.

WEC urges reform

Meanwhile, the WEC had launched an inquiry[5] on sexual harassment in the workplace in February 2018, and published its own report[6] last July which supported many of the EHRC's recommendations.

The WEC's report argued that sexual harassment should be put at the top of the business agenda, on a par with anti-money laundering or data protection. It supported the EHRC's recommendations that employers should be placed under a "mandatory duty" to protect their workers from harassment and victimisation, enforceable by the EHRC and backed up by a statutory code of practice with significant financial penalties for breaching the duty. The WEC emphasised the need to protect employees from being sexually harassed by third parties, and to protect interns and volunteers who

are not currently covered. It also thought that regulatory bodies should take a more active role in policing employers.

The WEC supported the EHRC's proposal that the Government should review time limits for bringing claims, and recommended that ETs should be entitled to award punitive damages and costs. In addition, the WEC wanted the use of questionnaires and the ability of ETs to make recommendations to be reinstated, and suggested that systems similar to those available in criminal matters should be introduced in ETs to protect victims of sexual harassment. The Government should also collect data on the number of ET claims relating to sexual harassment allegations and commission surveys every three years to *"determine the prevalence and nature of sexual harassment in the workplace".*

While recognising that NDAs can be a useful tool and sometimes necessary to protect business interests, the WEC condemned their use in sexual harassment cases where the effect was to prevent the victim from being able to talk about what had happened. It recommended legislation on standard confidentiality clauses explaining the *"effect and limits of confidentiality clauses, including a clear explanation of what disclosures are protected under whistleblowing laws and cannot be prohibited or restricted".*

SRA's warning notice

Apart from the EHRC's and the WEC's criticisms of the role NDAs could play in covering up sexual harassment, there were other developments in this area. In March 2018, the SRA issued its "warning notice" saying that, while NDAs can be legitimate, they must not prevent anyone from notifying regulators or law enforcement agencies of conduct which might otherwise be reportable. The notice does not just apply to the cover-up of misconduct within law firms (which are regulated by the SRA), but also to all solicitors advising clients on the use of NDAs.

The warning notice further advises that NDAs should not be used *"as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies".*

Court of Appeal decision

Although public opinion appeared to be shifting decisively against the use of NDAs, the CA upheld their use last October in a case in which a senior executive of two group companies was accused of misconduct by five separate employees *(ABC and others v Telegraph Media Group Ltd).* The complaints were all resolved with settlement agreements, which contained NDAs. The executive and the companies applied for an injunction to prevent publication of confidential information by a journalist.

The CA granted an interim injunction preventing the Telegraph Media Group Ltd ("Telegraph") from publishing details of the allegations and the settlement agreements until the full trial of the issues. It found that there was a real prospect that publication would cause serious harm, and it was likely to be established at trial that the information was obtained through a

breach of confidentiality which the Telegraph knew about.

The CA considered it was unlikely that the Telegraph would be able to show that it was in the public interest for the duty of confidence to be breached, and there was no evidence that the settlement agreements were reached through inappropriate behaviour towards the employees. There was a public benefit to enforcing contracts which had been freely entered into in order to settle disputes, including in the field of employment. NDAs will often benefit all the parties to them and the CA noted that, in this case, two of the employees supported the application for an injunction.

The Telegraph reported this decision as *"The British #MeToo scandal which cannot be revealed"* and a politician then used Parliamentary privilege to name the alleged perpetrator. This move was, in turn, criticised as misguided and premature, as this was only an interim injunction to keep information confidential until a full trial, and there was no evidence that the NDAs were bullying or excessive.

Planning ahead

As the media frenzy around the Telegraph case shows, the issue of sexual harassment and the use of NDAs is still very newsworthy and this is likely to remain high on the workplace agenda during 2019.

Employers would be well advised to build a culture that supports employees in feeling able to come forward if they have been sexually harassed. It is not enough simply to have a harassment policy – it needs to be well publicised, monitored and effectively enforced. Employees need to feel confident that when an incident is reported, it will be taken seriously and properly investigated. Training should be given on what is and is not acceptable conduct in the workplace, and employers should not be afraid to take disciplinary action where appropriate.

It remains to be seen whether the head of steam building up around this issue will lead the Government to take action on any of the recommendations made by the EHRC and the WEC. It is not obliged to do so and it does not appear that action is imminent, but employers should keep the situation under review. Perhaps the most significant practical issue is EHRC's suggestion that confidentiality clauses relating to discrimination and harassment should not be enforceable. Reviving liability for the acts of third parties and extending time for bringing claims would also strengthen significantly the ability of workers to bring legal challenges.

In the meantime, reasonable settlement agreements containing NDAs are being upheld by the courts, but they must be drafted carefully. The CA recognised that there is public interest in the settlement of disputes and in (genuinely) consensual agreements between parties being treated as valid. Care must be taken not to bully employees, prevent them from reporting matters to regulators or the police or stop them from blowing the whistle.

Employers should also be aware that allegations might become public irrespective of court decisions, and investing time and resources in working to eliminate workplace harassment might be the better policy in the longer term.

Status update – how is the law on employment status evolving?

Several cases were fought over the vexed issue of employment status during 2018, but the prospects of legislative reform to create greater clarity and certainty appear slim for the foreseeable future.

Background

An individual's employment status is important because it governs the legal rights for which they qualify. An "employee" is entitled to the full range of rights, including unfair dismissal, maternity/paternity leave and sick pay, whereas a "worker" has a more limited set of rights such as the minimum wage and holiday pay. Genuinely self-employed contractors have few legal rights, but benefit from different tax treatment and the flexibility of working for themselves.

Adding to the confusion, a wider definition of "employment" applies for discrimination law purposes, which is essentially the same as the definition of a worker.

There are various tests for deciding into which of these categories an individual falls. This depends on the facts of the relationship in practice, and the label the parties give their relationship is not conclusive. It can therefore be difficult for businesses to be sure whether an individual has been categorised correctly.

For someone to qualify as an "employee", there must be "mutuality of obligation" - an obligation to work on one hand and an obligation to provide work (and to pay for it) on the other. There is also an obligation of "personal service" - an employee cannot generally send along a substitute to do their job instead. And the individual must be sufficiently under the "control" of the employer. These are the three most important factors pointing to employee status, but there are others which might point one way or the other - such as who takes the financial risk and how integrated the individual is into the organisation.

All employees are also "workers", but not all workers are employees. For most purposes a worker who is not also an employee, is someone working under a contract - not an employment contract - through which they undertake to perform work personally for someone who is not by virtue of that contract their client or customer. In other words, they agree to work personally and they are not running their own business.

Case law in the gig economy

Recent case-law developments on employment status have been unfolding against a novel backdrop. Facilitated by new technology, such as apps and smart phones, many people are now working in the so-called "gig" economy in which individuals are paid for individual jobs or assignments, rather than in an ongoing relationship.

While gig economy businesses generally deem these service-providers to be self-employed, there has been a spate of cases in which tribunals and courts have ruled that individuals qualified for "worker" status.

Here are some examples:

1

Uber BV v Aslam [2018] EWCA Civ 2748[7]

In December 2018, the Court of Appeal ("CA") upheld, by a 2:1 majority, the ruling of the Employment Appeal Tribunal ("EAT") that drivers engaged by Uber are "workers" rather than independent contractors. The majority CA judges rejected the argument that Uber was merely a technology platform acting as agent for drivers by putting them in touch with passengers. They also upheld the finding of the Employment Tribunal ("ET") that drivers are working when they are signed into the Uber app and ready to work. Uber was given permission to make a final appeal to the Supreme Court ("SC") and the hearing is expected to take place during 2019.

2

Dewhurst v CitySprint UK Ltd (ET 2202516/2016)[8]

An ET found that a cycle courier was a worker rather than being in business on her own account, and so upheld her claim for paid annual leave. According to the ET, the written terms did not reflect the true relationship between the parties and the reality of the situation was that Ms Dewhurst had little autonomy over how her services were performed. She had been recruited to work for Citysprint and was integrated into the business.

3

Addison Lee Ltd v Lange and others (UKEAT/0037/18)[9]

In November 2018, the EAT upheld an ET's finding that drivers working for Addison Lee were workers. This was on the basis that there was an overarching contract between the parties, or alternatively that the drivers were workers during periods when they were logged on to the company's computerised system. The ET had been entitled to conclude that the contractual documentation denoting the drivers as self-employed contractors did not reflect the true agreement between the parties.

One high-profile gig economy case this year that bucked the above trend was the decision of the Central Arbitration Committee ("CAC") that Deliveroo riders were not "workers" for the purposes of a trade union's application for collective bargaining rights (*Independent Workers Union of Great Britain and Roofoods Ltd t/a Deliveroo [2018] IRLR 84*[10]) – a case in which Lewis Silkin acted for Deliveroo.

The crucial factor in this case was that the riders had the right to use a substitute to perform deliveries both before and after accepting a particular job. The CAC held that this right was *"genuine"* and riders took advantage of it in practice. This proved *"fatal"* to the union's application as it was inherently incompatible with an obligation to work personally, as required for both "worker" and "employee" status (see above).

The High Court subsequently dismissed a judicial review challenge to the CAC's decision, ruling that the Deliveroo riders were not in an "employment relationship" for the purposes of European human rights law (*Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo [2018] EWHC 3342*[11])

The Pimlico Plumbers case

The most eagerly awaited case of the year did not directly concern the gig economy – it was the judgment of the SC in a case about whether a "self-employed" plumber should properly have been classed as a worker (*Pimlico Plumbers Ltd v Smith [2018] IRLR 872*[12]).

Mr Smith worked exclusively for Pimlico Plumbers, having signed an agreement which stated that he was *"an independent contractor of the Company, in business on your own account"*. There was also a company manual referring to a 40-hour working week, although the agreement itself said there was no obligation to provide or accept work. Mr Smith was registered as self-employed, but his contract imposed various requirements on him - including that he should drive a branded van with a tracker, wear a uniform, carry a Pimlico ID card, and follow instructions from the control room.

The ET, EAT and CA all ruled that, although Mr Smith did not fall within the definition of "employee", he was both a worker and in employment for the purposes of discrimination law, based on the facts of how he worked in practice. This meant that he was entitled to pursue claims for disability discrimination, holiday pay and arrears of pay.
The SC dismissed Pimlico's final appeal, focusing on the two main issues that had been considered below – whether Mr Smith was obliged to carry out his services personally, and whether Pimlico was a client or customer of Mr Smith's business:

- On personal service, the ET had been entitled to conclude that Mr Smith's contract involved an obligation of personal performance. There was a right to appoint a substitute, but it was limited - Mr Smith was not free to use any substitute he wished and they had to be another Pimlico operative. Various terms of the contract were also directed at performance by Mr Smith personally.

- In relation to whether Pimlico was a client or customer of a business operated by Mr Smith, the ET had correctly concluded this was not the correct analysis. On the facts, Pimlico was obliged to offer work if it was available, and Mr Smith was obliged to keep himself available to work up to 40 hours a week. Pimlico exercised tight control over Mr Smith and there were *"severe"* terms about when and how much Pimlico were obliged to pay him, as well as references to "wages", "gross misconduct" and "dismissal".

As with most employment status cases, the outcome turned on the facts of how the working relationship between the parties operated in practice. It is therefore difficult to draw general conclusions and, rather disappointingly, the SC declined to take the opportunity to clarify or change this confusing area of law.

Nonetheless, certain features of the SC's judgment which may help to guide the outcome in other cases, including:

- In relation to personal service, the SC suggested that it may be appropriate to consider whether the *"dominant feature of the contract"* was personal performance. While some factors may suggest self-employment, an individual will still be a worker if the facts overall weigh more heavily in favour of the obligation to do the work personally.

- On substitution, the SC focused on whether the other party was "uninterested" in the identity of the substitute - it was fatal to Pimlico's case that the right to substitute only applied to other Pimlico operatives. The implication is that this type of limited right of substitution will be insufficient to defeat an obligation of personal service, particularly where other wording places clear personal obligations on the individual. Only a genuine and unfettered right of substitution – such as in the Deliveroo case (above) - is likely to count towards self-employment.

- The SC was critical of Pimlico's unclear and confusing contractual arrangements. This acts as a reminder that courts and tribunals will be unimpressed by unclear contracts, and the onus is on the company to set out coherent and unambiguous terms if it wishes to rely on them as supporting genuine self-employment.

Planning ahead

The upshot of *Pimlico Plumbers* – and the other recent case-law developments summarised above - is that the position on employment status essentially remains the same. Everything depends on the reality of the relationship in practice and it continues to be difficult for parties to be sure about the correct categorisation of status in more borderline cases.

This unsatisfactory situation is likely to continue unless and until the Government acts on the recommendations of the Taylor Review[13] by carrying out a thorough review and overhaul of the relevant legislation. In its Good Work Plan[14], published shortly before Christmas, the Government said it would *"bring forward detailed proposals"* on how the employment status frameworks for the purposes of employment rights and tax should be aligned, and also introduce legislation to "*improve the clarity of the employment status tests*".

There is, however, no further information yet about what these reforms will involve or draft legislation. The Good Work Plan admits that "*defining employment status and ensuring our legislation is fit for purpose in a changing world is not straightforward*", and the Government has commissioned further independent research on those with uncertain employment status to help inform its approach. In light of this, we should not expect any detailed proposals to be published anytime soon.

In the meantime, the SC's judgment this year in *Uber v Aslam* (see above) may provide further guidance on how the status definitions and principles apply in the context of gig economy models of working.

Pay gap reporting – how effective is it in tackling inequality?

A trend has been developing in employment law towards using transparency as a method of driving change. This has been particularly evident in various moves by the Government to address inequality in the form of mandatory gender pay gap reporting, and more recent proposals for CEO pay ratio and ethnicity pay reporting.

Many organisations tend to focus their efforts on complying with legislation rather than adopting measures voluntarily, which means that in many cases one way of driving genuine change is to impose mandatory obligations. The success of this approach can be seen in relation to the recent gender pay gap regulations.[15]

Only five businesses voluntarily published their gender pay gap data before mandatory reporting was introduced in 2017, but all 10,000 or so within scope of the new law reported their pay gap within the first year of its operation. The Government will now be hoping for similar success with regard to its other recent proposals on CEO pay ratio and ethnicity pay gap reporting.

Gender pay gap reporting

Mandatory gender pay gap reporting for employers with more than 250 employees came into force on 6 April 2017, requiring publication of their first reports by 4 April 2018.

These had to include four main things:

- The overall gender pay gap figures, calculated using both the mean and median average hourly pay.
- The proportion of men and women in each of four pay bands, based on the employer's overall pay range.
- Information on the employer's gender bonus gap.
- The proportion of male and female employees who received a bonus.

Although there were a number of problematic issues for employers to grapple with in making the relevant calculations, there is no doubt that the mandatory reporting requirements pushed the issue of workplace inequality for women up the corporate agenda and prompted many employers to take action to address it.

With the first reports now published, employers will be turning their attention to the next round of gender pay gap reporting in April 2019. Guidance[16] published by Acas encourages employers to go beyond the requirements of the gender pay gap regulations and implement an "action plan", aimed at reducing the gender pay gap in their workplace. Alongside this, the Government Equalities Office and the Women's Business Council published "toolkits"[17] earlier this year to provide practical advice for organisations on closing the gender pay gap.

There will no doubt be an increasing focus the second time around on whether the published gap has narrowed since last year's reporting, and what action employers are taking in response to improve it.

CEO pay ratio reporting

A small number of high-profile failings and the hike in executive pay in recent years, at a time of stagnant wage growth for many workers, has damaged trust in big business and angered shareholders and the general public alike.

Emboldened by what it regards as the success of gender pay gap reporting, the Government now plans to shine a spotlight on "fat cat" salaries. Last year, the Government announced[18] a package of corporate governance reforms with the aim of enhancing the transparency of big business to shareholders, employees and the public. As part of this agenda, in July 2018 it published the Companies (Miscellaneous Reporting) Regulations 2018[19]. These will require directors of a UK-listed company with 250 or more employees to report annually on the difference in pay between their CEO and average workers. This is the same threshold as for gender pay gap reporting (although that applies to all companies, not just listed ones).

Reporting will be required on the ratio between the CEO's total remuneration and that of a representative employee in each of three pay percentiles: CEO to the 25th percentile; CEO to the median percentile; and CEO to the 75th percentile. The rules are quite complex, giving companies three options as to how they make these calculations, provided that the directors' remuneration report explains why the company selected the option it did. The regulations will come into effect from 1 January 2019, with the first pay ratio reports due to appear in 2020.

Companies will be compelled to "justify" their CEO's salary, as well as reporting on how their directors take employee and other stakeholder interests into account. In each year's report, companies will be required to report the same ratios for up to nine financial years immediately preceding the relevant financial year. There are also requirements for the report to explain the reasons for any changes from one year to the next. This means that, over time, there will be a ready-reference source on a company's pay gap – the implicit intention presumably being that the gap will narrow rather than widen.

Ethnicity pay reporting

In March 2017, an independent review[20] by Baroness McGregor-Smith made several recommendations for removing barriers to workplace progression faced by ethnic minorities. Ethnicity pay reporting subsequently featured in manifestos for the snap election called by Theresa May. The Conservative manifesto[21] said that, if elected, the party would *"ask large employers to publish information on the pay gap for people from different ethnic backgrounds"*. Labour's manifesto[22] also expressed concern over the *"massive pay gap"* suffered by black and Asian workers.

In October 2018 the Government announced[23] a "Race at Work" charter comprising a series of measures to tackle ethnic disparities in the workplace. At the same time, it launched a consultation[24] seeking feedback on the sort of information that employers should be required to publish. The consultation document sets out some different ways in which this could be done, including having a single pay gap figure of "white vs non-white", multiple pay gap figures for all of the different ethnicities, or publication of pay information by £20,000 pay band or by quartile (which was the approach suggested by Baroness McGregor-Smith). The Government's position is that employers with 250 or fewer employees should not be required to publish, but other views are sought.

The consultation also seeks comments on the extent to which it would be helpful to mirror the requirements of the gender pay gap reporting regime - for example, with the same definitions of "pay", "bonus" and "relevant employee", and the same reportable statistics.

There would, however, be difficulties in such a "copy and paste" approach to legislating. Many large employers will only have a small proportion of non-white employees. Ethnic minorities are exactly that – a minority – and so the size of the group for comparison will be very small. Acknowledging this issue, the consultation notes that a headline pay gap figure does not reflect overall representation - a company with a highly paid non-white CEO might have good pay gap figures, but low minority representation in the wider workforce.

The consultation paper also identifies the classification of different ethnic groups for the purposes of reporting as a potential difficulty. Firstly, unlike gender, many employers do not hold ethnicity data on all of their staff. Because ethnic origin is a special category of personal data (what used to be called sensitive personal data), employers will need to be careful about how they collect, store and process it. Secondly, the granularity of ethnicity could exacerbate the "small groups" problem mentioned above and have a big impact on the complexity of the reporting obligations.

The consultation closes on 11 January 2019, with the Government suggesting that a trial or phased approach could be used with "early adopters" testing the process before mandatory reporting is required.

Planning ahead

Gender pay reporting has prompted a wider debate not just on the gender pay gap, but also the role of transparency in tackling inequalities. This focus is set to continue over the coming year.

A Business, Energy and Industrial Strategy Committee enquiry[25], launched in March 2018, has recently made various recommendations for reform of the gender pay gap regulations. These include: pro-rating the bonus gap (the prescribed calculations currently make no provision for part-timers or those who join mid-way through the year); clarifying the legal powers of the Equality and Human Rights Commission; and forcing employers to explain their gender pay gap by way of a narrative, rather than this being optional.

The biggest proposed change to the regulations, however, is to extend their scope so that employers with over 50 employees should have to report on their gender pay gap, rather than just employers with more than 250 staff. The motivation for this is that only about 50% of UK employees work for an organisation covered by the regulations and the Committee believes that extending coverage will mean more organisations working to improve opportunities for women. While this is an admirable goal, it brings practical problems, because statistics produced by smaller organisations will be inherently more unreliable. The Committee has also recommended that the Government consult on extending pay reporting requirements to disability and ethnicity, with a view to implementation in April 2020.

While transparency and reporting can be an effective way in which to nudge behaviours, employers will need to deliver on their action plans to achieve meaningful change. Compiling the data required and driving forward plans to create more diverse and inclusive workplaces will place further burdens on already overstretched legal, HR and payroll teams.

New IR35 rules for contractors in the private sector

This year, businesses in the private sector that engage contractors need to start preparing for significant changes to how the IR35 regime applies, taking effect from April 2020.

The changes were announced[26] by the Chancellor last October in the Autumn Budget, following a consultation[27] earlier in 2018 on tackling non-compliance with the IR35 regime. The purpose is generally to align the position in the private sector with that which already applies in the public sector.

In essence, private-sector businesses which engage contractors - individuals who supply their services via their own personal service company or partnership ("Intermediary") - will become responsible for determining whether IR35 applies. If the business considers that IR35 applies, the person paying the Intermediary will be responsible for operating PAYE and NICs on the fees it pays to the Intermediary.

Changes in more detail

With effect from 6 April 2020, where an individual provides their personal service through an Intermediary to a client (whether directly or via an agency), the client - rather than the Intermediary - will be responsible for determining whether the IR35 rules apply.

In broad terms IR35 applies where an individual personally provides services to a client via an Intermediary and:

- ignoring the existence of the Intermediary, the individual would be an employee or office-holder (e.g. director) of the client; or

- the individual is an officeholder and the services he/she provides through the Intermediary relate to that office.

If the client decides that IR35 does apply, generally the person paying the Intermediary (the "Fee Payer") will be responsible for deducting income tax and employee NICs and accounting for employer NICs. Broadly, this needs to be done on the fees it pays to the Intermediary (excluding VAT). The employer NICs in respect of the fees paid to the Intermediary are also taken into account for determining the Fee Payer's liability for the Apprenticeship Levy.

Small businesses will be exempt from the new rules. No information has been released yet on which businesses will qualify as "small" for these purposes although HMRC has indicated[28] that around 1.5 million businesses will be excluded.

What are the implications?

This is a significant change for the private sector, which will require a substantial investment in terms of both cost and time. There had been widespread speculation that the change would apply from April 2019, so it is good news that the new rules will not take effect until April 2020. Nonetheless, businesses need time to prepare - both in terms of being able to assess a contractor's employment status properly, and also being able to deduct tax and NICs from consultancy fees.

Key issues include:

- It is notoriously difficult to determine an individual's employment status. Adopting a "blanket" approach of applying IR35 in all cases is open to legal challenge, and in the public sector has led to disputes with both the individuals and Fee Payers. Businesses will therefore need to have robust procedures in place to assess and decide status.

- To help determine whether IR35 applies in the public sector, HMRC launched an online tool called Check Employment Status for Tax ("CEST"). Businesses are not obliged to use the tool but many public sector clients do so as it has the advantage that - in the absence of fraud - HMRC is bound by the result pending any change in the circumstances. However, CEST has been strongly criticised as being biased towards a finding that IR35 applies, and there has been at least one case where the tax tribunal overturned its determination. Moreover, in about 15% of cases CEST does not produce an answer at all, so clients still have to determine the individual's employment status using the normal tests.

- Where IR35 applies, the Fee Payer business will face additional employer NICs (and Apprenticeship Levy costs). The Intermediaries themselves will also face additional costs. Agreement will need to be reached as to who will bear these additional costs and contracts renegotiated accordingly.

- Fee Payers will need to ensure their systems can deal on the one hand with operating PAYE and NICs on the VAT exclusive amount of the Intermediary's fees, and on the other hand ensuring that the Intermediary is paid the correct net amount plus the correct amount of VAT.

Employment considerations

Employment status is a hot topic at the moment (see the status update section above). This is largely driven by three things:

- a need for more flexibility in the workforce, driven by both employers and individuals, leading to more people (rightly or wrongly) working on the basis of being self-employed;
- a consequent reduction in tax revenue; and
- the gig economy, which has tended to categorise individuals as "self-employed" - an issue which has now been the subject of a number of appeal cases.

It should be recognised that the phrase "employment status" is used in two different ways:

Tax status

There are two types of tax status: employee and self-employed. Those who are considered to be employed must be paid through PAYE, and tax and NICs are deducted at source and paid to HMRC on their behalf.

Employment status

There are three types of employment status - employee, worker and self-employed. The category into which a person falls affects the rights and benefits that they are entitled to receive. Holiday pay, automatic enrolment into a pension scheme and the minimum wage, for example, apply to those who are employees or workers, but not to those who are self-employed. Employees have more employment rights, benefits and protections than workers, and workers have more than the self-employed.

Similar but not identical tests are used for both purposes and the results are usually similar. Importantly this new proposed change to IR35 is aimed at determining employment status for tax purposes, not for *employment* purposes. In short, while some consultants will need to be paid through the Fee Payer's PAYE payroll, this does not, in itself, mean that they also need to receive holiday pay, pension provision, and other "employment" benefits.

While clients will be involved in the assessment of tax status under the proposed new rules, the individual and any Intermediary will often presumably also have a view on their status. An individual who strongly believes they are self-employed for IR35 purposes, and is running their business in order to be compliant, is not going to simply accept the client's view on status if they disagree and will be financially disadvantaged. Professional or skilled consultants are likely to be well advised on this issue and to have strong views on their own status.

It remains the case - from both a tax and employment perspective - that regular auditing of self-employed contractors who work within a business is good practice. This is in order to avoid loose practices that treat contractors the same as employees, which risks creating an indication of employee status rather than self-employed status on both the tax and employment tests. The new regime does not change the status tests or risks, but just creates a further mechanism for HMRC to identify when IR35 is not being met.

Planning ahead

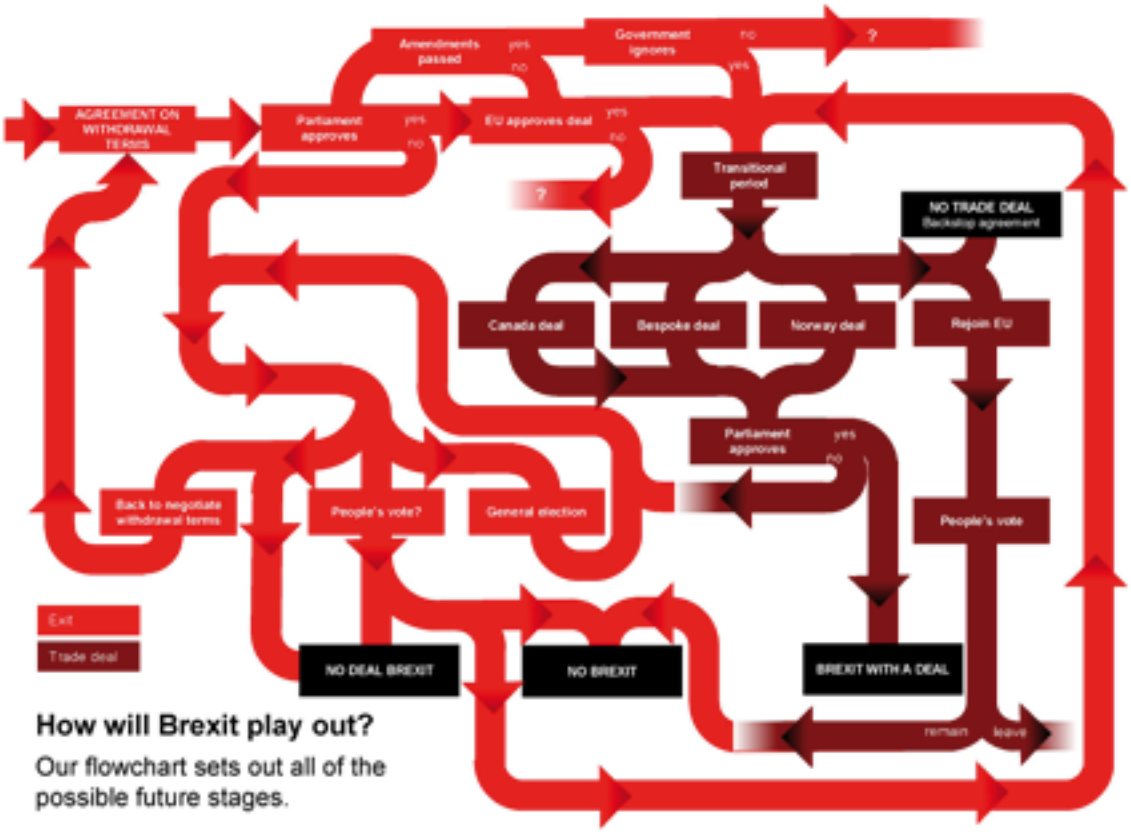
Businesses using individuals who supply their labour via an Intermediary should start preparing now for the implementation of these new rules in 2020, including:

- Deciding who within the organisation will be responsible for applying these new rules and establishing a process to help them determine whether IR35 applies.
- Identifying and reviewing existing contracts with Intermediaries (including where the Intermediary is supplied via an agency) that will still be in place in April 2020, considering whether IR35 will apply on a case-by-case basis and documenting the decisions. Where IR35 will apply, communicating that decision with the relevant Intermediary and considering who should bear the additional costs, depending on the importance of the individual to the business.
- Irrespective of whether IR35 applies, considering whether any changes are required to the relevant contracts.
- Ensuring any new contracts are compliant with IR35 and the new rules, and that payroll and accounts payable systems are able to cope with the changes.

HMRC is planning to launch a further consultation soon with a view to publishing the draft rules for the private sector in the summer.

How will the Brexit endgame play out?

Brexit and its possible outcomes and implications have been dominating the headlines ever since the EU referendum in June 2016, yet even so close to the projected date for the UK's departure on 29 March 2019 there are many imponderables and it is impossible to predict how Brexit will unfold.



Clearly, Brexit represents a huge cloud of uncertainty hanging over almost all aspects of policy and governance in the UK. This article addresses the issues from an employment law standpoint, but there are crucial concerns for businesses in many other areas. These including the immigration implications for EU migrant workers and their families, and the potential impact of Brexit on British employees working in Europe.

The political landscape

The flowchart above illustrates well the complexity of the situation in which the UK now finds itself and sets out how things might (or might not) develop from here. At the time of writing, the terms of the Withdrawal Agreement[29] between the UK and the EU and the Political Declaration[30] on their future relationship have been negotiated, but there is a huge question mark over whether it will be approved by the UK Parliament (and subsequently by the European Parliament).

If that happens, we will be into the relatively straightforward territory of a "transition" or "implementation" period until 31 December 2020, or possibly later – the Withdrawal Agreement expressly provides for the period to

be extended if the UK and the EU agree. During the transition period, the status quo would broadly be maintained, allowing businesses some time to adapt to a post-Brexit world. It is also envisaged that the UK's longer-term relationship with the EU would also be negotiated during this time.

What seems more likely at the time of writing is that Parliament will reject the deal, in which case there are various possible short-term scenarios: the Government collapses and there is a general election; a way is found towards a second referendum or "People's Vote"; the UK goes back to Brussels and renegotiates the withdrawal terms (although the EU appears adamant that will not happen); or the UK leaves on 29 March 2019 in a "no deal" Brexit.

EU Withdrawal Act

The last of those possibilities is, in fact, the current default position by virtue of the European Union (Withdrawal) Act 2018, which received Royal Assent in June 2018. It is the law of the land that the UK will leave the EU at 11pm on 29 March 2019, at which point the European Communities Act 1972 will be repealed – this is defined as "exit day", even though strictly speaking it is just a moment in time. Only fresh legislation could delay or overturn the UK's departure.

The EU Withdrawal Act essentially provides the legal basis for a "hard Brexit". Its main purpose is to ensure that UK legislation which derives from EU law (e.g. TUPE and the Working Time Regulations) continues to have effect in domestic law after exit day. The Act then goes on to set out a series of complex provisions on matters such as the extent to which the "principle of supremacy of EU law" will continue to apply to existing EU-derived legislation, and how far UK courts and tribunals should continue to have regard to decisions of the European Court of Justice ("ECJ")[31].

If – and it is a very big if – the Withdrawal Agreement is approved by Parliament and successfully concluded with the EU, the intention is that the EU Withdrawal Act will be amended to allow for the transition/implementation period, i.e. effectively pausing the clock until 31 December 2020 (or possibly later). The EU Withdrawal Act includes provision for consequential amendments to be made to the Act to cater for this.

In passing, it is worth noting that there are said to be around 900 statutory instruments that need to be drafted and passed by Parliament before the end of March to complete the job of converting EU law into domestic law.

Withdrawal Agreement

The best way to think of the Withdrawal Agreement – all 585 pages of it - is that it leaves the UK as a country with all the obligations of EU membership but with none of the rights to have a say over future direction until the end of 2020 (at least). Various provisions of the Agreement explicitly state that EU law will continue to apply to the UK throughout the transition period, and the UK will be obliged to ensure it complies (including through new legislation if necessary). The Agreement creates directly effective legal rights which individuals can sue on if they need to.

There are certain specific provisions on discrimination and workers in the Withdrawal Agreement. For example, it prohibits any discrimination on grounds of nationality against EU citizens who move to the UK before the end of the transition period and, vice versa, any UK citizens in an EU member state before this point. There are also express references to data protection in the Agreement, providing for for EU law to continue to apply to data processed before the end of the transition period (and afterwards in certain circumstances).

Controversially for Brexiteers, the Withdrawal Agreement provides that ECJ judgments in any proceedings started before the end of the transition period will be binding on the UK (even if they are handed down after the end of that period). It will also be possible for UK courts and tribunals to refer cases to the ECJ for a preliminary ruling right up to the end of the transition period.

Political Declaration

The Political Declaration - a relatively modest 26 pages - serves as a kind of "heads of terms" for negotiation of the permanent future relationship between the UK and the EU during the transition period. There are a huge number of contentious issues to resolve, from fisheries to Gibraltar, and no certainty that - even if there is a transition period – we will not still end up with a hard Brexit at its conclusion if no deal can be done.

The Political Declaration does not have much to say about employment rights, but there are a couple notable pointers – including a commitment to work together to safeguard a "high standard" of workers' rights, and an agreement that prosperity and security are enhanced by protecting workers.

Even more significant is a section of the Declaration stating that the future relationship must ensure a "level playing field for open and fair competition", which should specifically cover social and employment standards and include "*adequate enforcement mechanisms*". This is essentially a political trade-off, with the UK saying it will be prepared to accept concessions on maintaining EU employment rights and protections in return for an enhanced level of EU market access.

Also noteworthy in the Political Declaration is the allegiance sworn to human rights and fundamental freedoms and UK's commitment to the European Convention on Human Rights being incorporated within the future relationship framework.

This suggests that a UK withdrawal from the European Convention following Brexit is unlikely.

Irish Backstop

We have not so far mentioned the question of Ireland, which has bedeviled the Brexit negotiations – specifically, the vexed problem of how to avoid the re-emergence of a "hard border" between the Republic and Northern Ireland. The mechanism for this in the Withdrawal Agreement is the Irish Backstop Protocol, which complicates the picture described above further. The Protocol makes clear that it is only intended to be temporary, with the aim being for it to be superseded by the end of the transition period.

Notwithstanding this, the Protocol provides that "*until the future relationship becomes applicable*", a single customs territory comprising the EU and the UK will apply. As a condition of the EU signing up to this, so-called "*level playing field*" conditions will apply. This would basically mean that the whole of the UK in some cases, or just Northern Ireland in others, would remain subject to swathes of EU law until the permanent longer-term relationship is agreed.

How would the UK get out of the backstop? This is the measure in the Protocol that has caused so much controversy. If at any time after the end of the transition period either the EU or the UK considers the Protocol is no longer needed to achieve the objective of maintaining peace in Northern Ireland – such as the "technical solution" for the border having finally been found – it could notify the other side, setting out reasons, and within six months there would be a joint ministerial meeting to decide whether that was so. Only if the EU and the UK agreed would the UK and Northern Ireland be allowed out of the backstop (or, possibly, it could be resolved by binding arbitration).

For present purposes, the important thing about the Backstop Protocol is that it contains broad and strong commitments from the UK on employment law matters. After the end of the transition period, the UK would be obliged to ensure non-regression of labour and social standards – i.e. no reduction in the level of protection "*and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring*". In essence, until the backstop is dissolved, the UK would be prevented from introducing changes to any EU-derived employment laws.

Planning ahead

The analysis above seeks to explain the current state of play and where we might be heading. In a situation of such complexity and serious uncertainty, it will come as no surprise that some businesses operating in the UK have Brexit contingency plans in place that involve relocating all or some part of their operations

outside the country. In many cases, certainty that there is going to be a hard Brexit – with no transition period - is being viewed as a "trigger" for those plans. So let's finish with a couple of practical points for employers contemplating such action.

The first is a reminder about collective redundancy consultation. When an employer is planning 20 or more redundancies at one establishment within a period of 90 days or less, it is under a duty to inform and consult with appropriate representatives of affected employees in good time. This must be at least 30 days before the first dismissal takes effect if there are 20-99 redundancies, and at least 45 days before the first dismissal takes effect if there are 100 or more redundancies. To avoid exposure to a 90-day protective award, it is vital not to start consultation too late.

The key point here is that if a business has decided that a hard Brexit will trigger contingency plans involving a collective redundancy, it is strongly arguable that it should start to consult straight away rather than waiting to see how the politics play out. In a 2007 case about closure of a mine (*UK Coal Mining Ltd v NUM* [2008] IRLR 4), the Employment Appeal Tribunal ruled that if a decision to close an operation will inevitably lead to a collective redundancy, the employer ought to consult on the business case for closure before the decision is taken.

While a cleverly worded management statement will always say that any decision is "subject to consultation", "subject to legal requirements" and so on, some businesses will have overseas parents involved in the decision-making who might not be familiar with such nuances. In Brexit-related redundancy situations, it is important to avoid slipping up and finding you are consulting too late - and employees themselves may welcome transparency from management about its intentions.

The second point concerns alternative employment and whether employees should be given the opportunity to relocate abroad if their role is moving to an overseas location. The safest answer is that they should. There may be circumstances in which this is not necessary because, for example, the role is changing and there will henceforth be a language requirement or a requirement for a regulatory qualification that the individual does not meet. But in the ordinary course where it is simply the role that is relocating, it is prudent to offer the opportunity. The employee does not have to accept, of course, and in many cases will not do so - in which event, they will be entitled to leave with a redundancy package.

The new law on parental bereavement

This year will see the completion of new legislation entitling employed parents who have lost a child to take paid leave to allow them to grieve, with these rights expected to come into force in 2020.

Background

It has been estimated [32] that one in ten employees are likely to be affected by bereavement at any one time. The death of a child can have a devastating effect on parents' physical and emotional wellbeing. Carefully managed, sensitive support from an employer can make a huge difference to the affected employee's experience and their successful return to work.

A survey [33] commissioned in 2016 by the charity Child Bereavement UK revealed that less than a third of British adults who were working at the time of their bereavement said they had felt very supported by their employer, indicating that there is evidently scope for improvement in management practice in this area.

There is currently no legal requirement in the UK for employers to provide paid leave for grieving parents. Employees have a "day one" right, under section 57(A) of the Employment Rights Act 1996, to take a reasonable amount of *unpaid* time off work to deal with an emergency. This would include the death of a dependant, but there is no definition of "reasonable" for these purposes and it will depend on the individual circumstances. Disagreements between the employee and employer regarding the appropriate length of leave may potentially arise.

The new legislation

The Parental Bereavement (Pay and Leave) Bill started off as a private member's bill, but was supported by the Government. It received royal assent last September, becoming the Parental Bereavement (Leave and Pay) Act 2018.

Regulations under the Act will be required to flesh out the detail of these new rights, but several points were clarified last November when the Department for Business, Energy and Industrial Strategy ("BEIS") published the response to its consultation on parental bereavement leave and pay which had been launched in March 2018. From what we now know, the legislation will operate as follows:
A bereaved parent will be entitled to take at least two weeks' paid leave, either as two separate blocks of one week or a single block of two weeks.

The Act provides for the leave and pay to be taken within a period of at least eight weeks (beginning with the date of the child's death), but BEIS says the forthcoming Regulations will provide for an extended period of 56 weeks. This will mean parents can take the leave when they feel they need it most, for example around the first anniversary of their child's death.

Where the death of more than one child is involved, leave can be taken in respect of each child. A child for these purposes is a person under the age of 18 (and includes a stillborn child after 24 weeks of pregnancy).

The definition of a qualifying parent will be set out in the Regulations and based on the notion of a "primary carer", whose relationship with the child is parental in nature. This will include, for example, legal parents (biological or adoptive), step-parents, legal guardians and foster parents, subject to eligibility.

The Regulations will provide for employees to give notice of parental bereavement leave in some circumstances. No notice will need to be given for leave taken in the immediate aftermath of a child's death, but where leave is taken after an initial period (yet to be determined), employees will be required to give one week's notice of their intention to take leave.

The Regulations will also deal with evidential requirements. An employee who needs to take time off to grieve in the initial period will not need to provide any written declaration of their eligibility to bereavement leave. In relation to statutory bereavement pay, however, a written declaration will be required confirming that the employee meets the eligibility requirements (regardless of whether the employer asks for this).

The rules about rights during maternity leave (and other types of family leave) will also apply during bereavement leave - including the right to the same terms and conditions (other than in respect of pay) and the right to return to broadly the same role.

The rates of pay will be determined by the Regulations, but in order to receive pay (as opposed to taking leave), a parent must have at least 26 weeks' service and received pay above the lower earnings limit for the last eight weeks.

Planning ahead

The Government will now be preparing the Regulations setting out the full details of the new statutory rights, which are expected to come into force in 2020. Once those Regulations have been finalised, employers can start in earnest to put in place the necessary processes and procedures and policy documents as appropriate.

In the meantime, it may be instructive and useful to consider guidance[34] produced by Acas on managing bereavement in the workplace, which includes good practice suggestions for dealing with an affected employee's absence and return to work. The guidance makes the point that advance planning and training will ensure managers are better prepared to deal with what can be a difficult issue to negotiate.

Further helpful recommendations include:

- Employers should consider having a written bereavement policy in place, as this can provide certainty and security at a difficult time.

- Details of the death are private under data protection legislation. The employer should always ask the employee how much information they wish to give their colleagues and whether a more public announcement is appropriate. If the death was covered in the media, employers may need to deal with further queries to the company and manage other employees who might be approached by journalists etc.

- Employers should be aware of the risk of race or religious discrimination claims that may arise from refusing requests for time off for religious observances on death. Certain religions require a set time for mourning – for example, observant Jews might need to mourn a close relative at home for seven days ("sit shiva"), while observant Muslims have certain set mourning periods depending on their relation to the deceased relative.

- The effects of grief may manifest themselves physically and mentally, potentially even resulting in a long-term condition or illness. Employers should be mindful of this should there be a change in an employee's performance, behaviour or absence. Requests for time off or increased sickness leave should be treated carefully, in the knowledge that a long-term condition could give rise to a disability discrimination claim.

- Employers should remember that mothers who lose a child after 24 weeks of pregnancy, or during maternity leave, will not lose their entitlement to maternity leave and pay. Rights to paternity leave and shared parental leave (where notice of leave has been given) will generally also be maintained in these circumstances.

While businesses will be required to put suitable measures in place to comply with the new legislation outlined above, it is likely to provide a catalyst for many employers to reassess more broadly their approach towards supporting employers through the trauma of bereavement.

Processing the General Data Protection Regulation

2018 was the year when the General Data Protection Regulation ("GDPR") came into force in the UK. It aims to ensure that organisations using and processing personal data do so fairly and lawfully and gives a number of rights to individuals in terms of how they can access their data and influence its use.

The GDPR took effect in all EU countries on 25 May 2018 and has been implemented in the UK via the Data Protection Act 2018[35] ("DPA"), which replaced the DPA 1998. This new data regime is similar in structure to the previous data protection laws, but is more stringent and can result in much higher penalties for failure to comply with the rules - including fines of up to £17 million or 4% of global turnover. The rules in the UK are enforced by the Information Commissioner's Office[36] ("ICO").

The GDPR is highly relevant for employers, all of whom process data on their staff. Data protection compliance is necessarily becoming a high priority for many organisations, as there is a potential for significant fines and reputational damage if they fail to comply.

Basic concepts

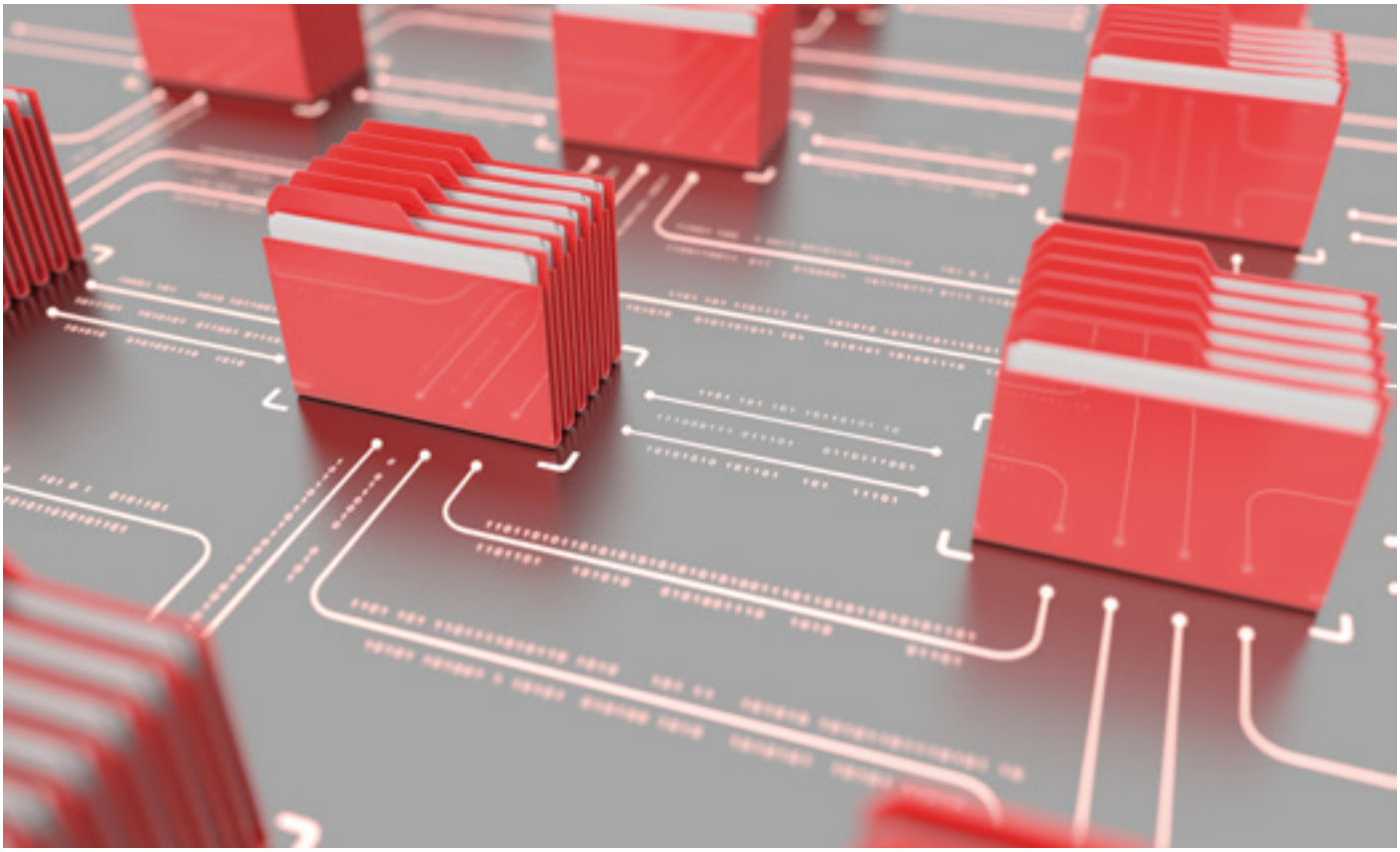
A number of the basic concepts under the GDPR are very similar to the concepts used under the 1998 legislation:

The *"data controller"* is the person who has control of the purposes and ways in which personal data are processed. Employers will be data controllers in respect of the data they process about their staff.

"Personal data" is data relating to an identifiable natural person (the "*data subject*"). Personal data can be information processed on a computer (including e-mails and documents) as well as information held within structured paper filing systems (such as a set of employee files organised by name).

"Processing" personal data includes obtaining, holding and using data, as well as changing and deleting it. Essentially, everything an organisation might do to employee data.

"Special personal data" is a category of sensitive data to which more stringent conditions apply. This includes data revealing ethnic origin, religious or philosophical beliefs, trade union membership and political opinions, genetic and biometric data and data concerning health, sex life, and sexuality. These are all areas where employers may hold information about their staff.



Data protection principles and conditions

Data protection principles and conditions
All data controllers must comply with the data protection principles. In summary, these are designed to ensure that data is processed fairly and lawfully, obtained and used only for specified purposes, kept accurate and up to date, retained for no longer than necessary, and processed securely.

These principles mean that data controllers must ensure that they have a valid legal basis for processing data. At least one of several conditions for processing must be satisfied, which include:

- Where the processing is necessary for the performance of a contract to which the data subject is party - for example, processing an employee's bank account details for the purposes of paying them.
- Where the processing is necessary to comply with a legal obligation to which the controller is subject - for example, processing an employee's NI number for tax purposes.
- Where the processing is necessary for the purposes of "legitimate interests" pursued by the controller or by a third party - for example, processing information about an employee's performance.
- Where the data subject has given consent.

Consent is more difficult for employers to use under the GDPR than under the old DPA rules. Historically, employers have often relied on consent to process employee data, often in the form of very general wording in the employment contract. Under the GDPR, consent must be actively and freely given to be valid. Where consent is given in a wider document, the request for consent must be clearly distinguishable from those other matters. It must be as easy to withdraw consent as it is

to give it. Crucially, if there is a clear imbalance between the parties - such as in an employment relationship - consent is presumed not to be freely given at all.

It is clear from all these factors that signing an employment contract with a general consent clause is no longer going to be effective. Even where a valid consent can be shown, subjects have the right to withdraw this at any time. The GDPR therefore requires employers to move away from consent and focus on other legal bases for processing employee data.

Where special personal data (see above) is processed, there are additional conditions which must be satisfied. These include where the data subject has given explicit consent, and where processing is necessary for the purpose of rights or obligations conferred by law on an employer or employee in relation to employment. (This could include, for example, the employer processing sick notes for statutory sick pay purposes.)

Other key rules under the GDPR

Data minimisation. Data must be limited to what is necessary in relation to the purposes for which it is processed. Employers must ensure that they do not process more data than they need to – for example, by collecting too much extraneous information during recruitment or background checks.

Data retention. Employers should have a policy setting out the maximum periods for which different categories of data should be stored, and should ensure this is followed. In the employment sphere it will often be necessary to retain data for the purpose of defending against legal claims and many retention periods can be based on the limitation periods for such claims – for example, this could mean keeping employee contracts for six years after the employment relationship ends.

Privacy notices. Data subjects are entitled to receive significant information about their data and how it is handled – including information about what data is processed, why, the legal basis for the processing, who has access to the data and how long it will be held for. Controllers also have to spell out the rights of the data subject, such as the right to withdraw consent to data processing. The notice should go into sufficient detail for each category of data. For example, an employer may need to inform employees that their bank details will be processed for the purposes of paying them, and that the legal basis is that it is necessary for performance of the employment contract.

The accountability principle. A data controller must be able to demonstrate compliance with the GDPR, usually by means of appropriate policies and practices. This should involve undertaking internal audits of what data they process, implementing clear policies and procedures, training staff, and keeping a record of processing activities carried out. A Data Protection Officer should be appointed where a controller's core activities require systematic monitoring or the processing of sensitive data on a large scale.

Data security and data breaches.

Under the GDPR, data controllers are responsible for ensuring the security of the personal data they hold. Organising targeted training and guidance for the workforce about their responsibilities when handling personal data is a pre-requisite. Third-party processors also need to be vetted and certain contractual obligations imposed on them.

Where a data breach occurs, the controller must document the facts relating to the breach, its effects and the remedial action taken. If the breach is likely to lead to a risk to the rights and freedoms of individuals - this could include theft or fraud, reputational damage, loss of confidentiality or other disadvantages - the controller must notify the ICO within 72 hours. Because of the tight timeframe, controllers should have a taskforce trained and ready to respond to breaches and a clear and well-publicised policy informing staff what to do.

Privacy impact assessments. The GDPR imposes a new obligation on data controllers to carry out a privacy impact assessment ("PIA") where a processing activity is 'high risk'. An activity will always be considered high risk in the case of large-scale monitoring of a publically accessible area, large-scale processing of sensitive data, and some types of automated decision-making. Guidance suggests, however, that other factors will also point to activities being high risk, including where the processing involves:

- evaluation or scoring (this would include evaluation of an employee's performance at work);
- systematic monitoring (which could include routinely monitoring employees' emails or computer use); or
- processing special data (such as sickness records) or the data of vulnerable data subjects (which, notably, includes employees).

The upshot is that employers will most likely need to carry out a number of PIAs in respect of the processing activities they undertake. A PIA should describe the processing activity and its purpose, explain why it is necessary, and consider the risks posed in respect of affected data subjects.

Transfers of data outside the European Economic Area ("EEA"). Data must not be transferred outside the EEA unless there is adequate protection in the receiving state. Transferring for this purpose includes the hosting of data on servers outside the EEA. Since very few countries outside the EEA have adequate protection (not even the USA), there are certain exceptions that permit disclosure. The transfer of data outside of the EEA can also be legitimised by implementation of particular legal safeguards, such as putting into place EU-approved contracts between the person sending the data and the person receiving it.

Data subject rights

The GDPR has expanded on the rights data subjects have in relation to their data. These now include (subject to certain exemptions):

- a right to access personal data and be given certain information about the processing;
- a right to have inaccurate data restricted;
- a right of erasure of personal data in certain circumstances, such as where there is no longer a purpose for the processing, or where consent is withdrawn and there is no other valid legal basis;
- a right to restrict (freeze) processing in certain circumstances, such as where the subject has contested accuracy or objected;
- a right to receive data in a machine-readable format; and
- a right to object to an act of processing based on the controller's legitimate interest (unless the controller can show compelling legitimate grounds for the processing).

Employers are already used to handling data subject access requests ("DSARs") from employees, but the information which must now be provided in response to such requests is more extensive under the GDPR. The time limit to comply with a DSAR is one month from the request. This time period may be extended by two months in complex cases or if there are a number of requests from the same source, and in certain circumstances the data controller can refuse to comply.

Where DSARs are manifestly unfounded or excessive, data controllers may either charge a reasonable fee based on their administrative costs, or refuse to act on the request. There are also various exemptions from disclosure – including complex rules where third-party data would be revealed by providing the requested information.

Planning ahead

Although Brexit will result in the UK no longer being a member of the EU, UK-based employers will still need to comply with the GDPR. Even if the terms of Brexit mean that the UK is longer bound by EU law, the new DPA is based squarely on the GDPR and will continue to apply. In addition, any employer that deals with group companies or other organisations in the EU will need to show it adequately protects data in order for to be transferred to or from EU countries.

The full effect of Brexit on data processing will depend on what deal is reached. The current versions of the Withdrawal Agreement and Future Relationship documents [37] provide that EU law will continue to apply for the two-year transition period, and anticipate that the UK will obtain a decision from the European Commission that it has adequate data protection measures in place. If this happens, nothing will need to change. If not, there may be problems with transferring employee data between group companies based in the EU and the UK. It is advisable to review your EU-UK data flows now and to give some thought as to how you might put EU-UK data sharing mechanisms in place if needed, such as by expanding existing intra-group data sharing mechanisms or creating new ones.

The GDPR is still relatively new, so there may well be further guidance from the ICO as the new rules bed in, including on treatment of employee data.

Meanwhile, the ICO has been showing increasing willingness to impose large fineon organisations

that are responsible for data breaches – the most high-profile example[38]
being the £500,000 fine of Facebook for breaches in the context of the Cambridge Analytica scandal. (This was the maximum fine under the old DPA, and could have been much higher if the GDPR had applied at the time.) Employers should pay particular attention to data security, as it is the area where the largest penalties are likely to apply.

Employment Tribunals – the post-fees landscape

2018 was a busy year for the Employment Tribunal ("ET") system. The abolition of fees has resulted in a large increase in claims, and the ETs are struggling to cope with the workload. Employers are also having to adjust to facing more legal challenges to their decisions.

Fees for ET claims

The ramifications of the landmark judgment by the Supreme Court ("SC") on fees for ET claims in July 2017 are continuing to be felt by the ET system and its users. The SC declared that ET and Employment Appeal Tribunal ("EAT") fees - introduced in July 2013 – were unlawful on the basis that they prevented access to justice, and were also indirectly discriminatory against women (*R (on the application of Unison)* v *Lord Chancellor*[39]).

The effect of this ruling was that fees were immediately no longer payable, and all fees paid since the introduction had to be reimbursed. The Government implemented a refund scheme and it was anticipated that up to £33 million would need to be refunded, although in the event uptake has not been as high as expected.

All ET claimants whose claims were rejected or dismissed for non-payment of a fee have also been sent a letter asking them if they wish for their claim to be reinstated. Claims brought by individuals who were previously deterred altogether by the fees system have been considered on a case-by-case basis, in accordance with the usual rules on time limits. Contrary to speculation at the time, however, there does not appear to have been a flood of out-of-time claims brought on this basis.

Since the abolition of fees, the number of ET claims has risen dramatically. The latest statistics[40] (for April to June 2018) show that the number of single claims had increased by 165% as compared to the same period the previous year. Unfortunately, this has led to the ET system becoming overloaded, as there has been no increase in either ET judiciary or support staff since fees were abolished. Although the situation varies by region, parties are now facing a significant wait to get their cases heard – often in excess of a year after the claim was issued. There are also significant delays in ETs responding to correspondence from the parties.

The SC's judgment does not prevent the introduction of a new fees system, but clearly any such regime would need to be compatible with access to justice. In November 2018, the Ministry of Justice ("MoJ") announced[41] that ET fees might be reintroduced, although there were no firm plans to do so at the present time. Speaking to the House of Commons Justice Committee, permanent secretary for the MoJ Richard Heaton suggested that a balance could be reached between increasing ET funding and ensuring that access to justice was not infringed, and said that any new scheme would need to allow people to avoid paying fees where they could not afford them. He indicated that a new fee regime was in development, without giving any further details about what this might involve.

Online ET judgments

Since February 2017, all new ET judgments have been publically available online. This includes short judgments which simply confirm the result in a case, and also full written reasons for decisions which have been requested by the parties or where the decision was reserved to be sent out in writing.

Judgments from 2013 onwards have also now been uploaded to the database. Earlier ET decisions currently continue to be available in Bury St Edmunds and Glasgow, although there are apparently plans to move them to the National Archive.

Now that the database is filling up with judgments, some claimants may think twice before bringing a claim and some employers may be more hesitant about going the full distance, due to the public nature of this information. The search function not only searches against the title of the case, but also the text within the judgment itself – so any names mentioned within a judgment may also be picked up. It is also possible to find judgments using a general Google search, meaning that the visibility of the facts of the claim to a wide audience is significantly increased.

Reform of the ET system

In December 2016, the Department for Business, Energy and Industrial Strategy[42] and the MoJ launched a joint consultation setting out proposals for reform of ETs and the EAT. These proposed changes are intended to simplify the process and accelerate resolution of disputes. Following conclusion of the consultation, the Government confirmed its commitment to:

- Digitise the entire claims process, so that users can digitally start a claim, track progress, provide evidence and information and participate in "*innovative resolution methods*" if they choose to do so. As a result, the ET may not need to hold a physical hearing for some claims.

- Delegate some functions to legally "trained and qualified" case workers.

In October 2018, the Courts and Tribunals Service published a progress report[43] on its reform programme. This included some details of a new ET service which will enable some cases to be resolved online and by video. Work is expected to start on this project in 2020.

In September 2018, the Law Commission launched a consultation[44] about the relationship

between ETs and the civil courts. This includes, for example, questions about whether ETs should be able to hear non-employment discrimination claims, and whether the current £25,000 limit on breach of contract claims in the ET should be increased. The consultation closed on 11 January 2019.

Planning ahead

Unless and until more judicial and administrative resources are recruited for the ET system, parties to proceedings should plan ahead with their case preparation. In particular, they should avoid leaving any applications to the last moment – which the ET is unlikely to consider quickly – and be prepared to chase the ET for a response if a matter is urgent. Due to the long wait before a complex case may be heard, it may also be advisable to collect witness evidence as soon as a claim is received to avoid memories of events fading too much.

With no new fees system expected in the near future, employers should also expect to continue to receive more ET claims than when the former was in place. Individuals are more willing to bring lower-value claims, such as for deductions from wages or basic unfair dismissal, now that fees are no longer operating as a financial deterrent.

Employment law reform and the Taylor review – what's on the horizon?

It is a year and a half since Matthew Taylor completed an extensive review of modern employment practices and published his report and recommendations. Just before Christmas the Government finally published details of its "Good Work Plan", setting out proposals for reforming employment law in various areas.

Background

In November 2016, the Government launched[45] the Independent Review of Employment Practices in the Modern Economy. Its purpose was to consider the implications of new models of working, including those used in the "gig economy", for the rights and responsibilities of companies and individuals. Matthew Taylor's report - *Good Work: the Taylor Review of Modern Working Practices*[46] - was published in July 2017.

Many of the proposals in the Taylor report could have a significant impact on many employers, including for "nuts and bolts" matters such as worker status, holiday pay, zero-hours contracts, the minimum wage and working time. When the Government published its initial response[47] in February last year, it promised action on nearly all of the Taylor Review's 53 recommendations.

Four consultation documents were published alongside the Government's response, dealing with: employment status; increasing transparency in the labour market; agency workers; and enforcement of employment rights. These largely focused on seeking views on the detail and the impact of potential changes, rather than committing to any specific changes to the law.

The Good Work Plan[48] has now been published, which sets out the Government's considered position on Taylor's recommendations, and is described as the Government's "*vision for the future of the UK labour market*". This remains, however, largely just a list of proposals, accompanied by some (but not all) draft legislation. As yet, there are no firm dates for when many of the reforms will come into effect or what much of the important legislative detail will look like.

Proposals for reform

The following is a summary of the main proposals:

Employment status clarification.

The Government says it will "*bring forward detailed proposals*" on how the employment status frameworks for the purposes of employment rights and tax should be aligned, and there will also be legislation to "*improve the clarity of the employment status tests*". This has the potential to be significant, but there is no further information yet about what this will involve or draft legislation. This is a key area which both employers and employees find difficult at the moment, but finding a solution is far from easy as the tests have been developed through case law and tend to be very fact specific (as shown by the Supreme Court's decision in the Pimlico Plumbers case[49]). As noted in the plan, "*defining employment status and ensuring our legislation is fit for purpose in a changing world is not straightforward*". The Government has commissioned further independent research on those with uncertain employment status to help with this task, so it would appear that detailed proposals are not imminent.

A new right for workers to request a more predictable and stable contract.

This would allow workers who work variable hours to ask for a fixed working pattern after 26 weeks of service, such as minimum hours or fixed days of work. There would simply be a right to make the request, and the plan does not suggest there will be any obligation on employers to agree. The new right may be subject to specific rules similar to those which currently apply to the right to request flexible working. The UK was likely to be required to adopt such a law anyway under the EU's proposed Transparent and Predictable Working Conditions Directive (subject of course to Brexit developments).

Extending the relevant break in service for the calculation of the continuous service qualifying period from one week to four weeks.

This is designed to help those who work intermittently for the same employer and so find it difficult to build up employment rights.

Removal of the "Swedish derogation" in the Agency Workers Regulations 2010, and banning this type of contract from being used to withhold agency workers' equal pay rights.

The Swedish derogation currently allows temporary work agencies to avoid matching pay by engaging agency workers in a way that allows for pay between assignments. Draft Regulations[50] will remove this provision from 6 April 2020, including an obligation on agencies that have previously used the opt-out to provide a written statement to all affected agency workers explaining the change. There will also be protection from unfair dismissal or detrimental treatment for enforcing these new rights.

A ban on employers making deductions from staff tips.

This is to ensure that workers receive all of the tips that that customers leave for them. Presumably this will be done by amending the rules on unauthorised deductions from wages.

Extending the right to a statement of employment particulars to all employees and workers from day one.

This right currently only applies to employees, and the statement can be provided up to two months into employment. The information to be given in this statement is also to be expanded, covering matters such as probationary periods and family leave. Two sets of Draft Regulations[51] have been published, which indicate that the new rights will apply to employees and workers who begin employment on or after 6 April 2020[52]. There is a related proposal for a "Key Facts page for all agency workers", providing basic information about the contract, pay rates and pay arrangements.

Increasing the reference period for holiday pay from 12 weeks to 52 weeks.

Currently, workers without normal working hours have their holiday pay calculated based on the previous 12 weeks. The Government is concerned that this can result in workers losing out if they take holiday at certain times of year, e.g. seasonal workers. The relevant calculation of a "week's pay" is used for various different purposes and is taken from the Employment Rights Act 1996. Under Draft Regulations[53], due to come into force on 6 April 2020, the Government proposes to amend the Working Time Regulations to replace the relevant references to 12 weeks with 52 weeks in holiday pay cases. The Government also plans an awareness campaign and new guidance to ensure workers understand their rights to holiday. In addition, there will be a new state enforcement system for holiday pay – although the body responsible for this has not yet been identified.

Introducing a "name and shame" scheme for employers who fail to pay Employment Tribunal awards.

The Department for Business, Energy and Industrial Strategy ("BEIS") has published details of this scheme[54]. It will be linked to the existing BEIS penalty scheme[55], which allows individuals to ask for enforcement of unpaid awards through payment of an additional penalty. If individuals register with the penalty scheme they will also be able to register with the naming scheme. This means the effects may be limited as employers who are not being pursued under the penalty scheme will not be subject to the naming scheme either. A naming round will take place every quarter, showing the name of the employer and the amount of the unpaid award. There will also be a review of guidance on how to enforce awards, with a "vision" to build a seamless end-to-end digital system for the entire lifecycle of an Employment Tribunal claim.

Implementing stronger sanctions for employers who have previously lost similar cases and greater use of aggravated breach penalties and costs orders.

The current limit on financial penalties for aggravated breaches by employers will be increased from £5,000 to £20,000 for breaches of rights beginning on or after 6 April 2019, under Draft Regulations[56]. There will also be new guidance on how the use of these powers can be encouraged. To date, very few penalties have been imposed, so it is not clear how increasing the limit will make a difference if parties are unwilling to ask for this and/or judges are reluctant to impose a penalty that goes to the Government rather than the employee. There are also plans for new sanctions in respect of repeated breaches by the same employer, with an obligation on judges to consider the use of these sanctions. No further detail is provided as there will be further consultation with "interested parties".

Lowering the threshold required for a request to set up information and consultation arrangements from 10% to 2% of employees (while keeping the 15-employee minimum threshold).

This is to make the right to information and consultation more accessible, as part of a recognition of the benefits of giving employees a voice. Draft Regulations[57] indicate that this will come into effect from 6 April 2020.

Planning ahead

The Good Work Plan addresses all the Taylor Review recommendations but is very short on detail as to how or when the most major reforms will be implemented. There is also little discussion of the outcome of the four related consultation exercises. The full set of responses to three of the four consultations have been published online[58] but, although the relevant pages say the plan draws on this feedback, there is no explanation of how it has been taken into account.

While the plan gives useful information on what is likely to happen, it is too early for employers to take many steps to prepare. The draft regulations that have been published so far are relatively straightforward, and most changes will not come into effect until April 2020 at the earliest. Draft legislation and firm timings are needed for the more significant changes in relation to employment status and the right to request a more predictable contract. With the ongoing Brexit negotiations, we should probably not hold our breath…

Taxing times – the new rules on taxation of termination payments

Last April, new rules took effect ensuring that all payments in lieu of notice are subject to income tax and national insurance contributions in full. The changes stemmed from a consultation on "simplifying" tax treatment but, in fact, the new rules are complex and often more expensive than the previous regime.

Background

If an employee's employment terminated before 6 April 2018, the tax treatment of any payment in lieu of notice ("PILON") varied depending primarily on whether the employer had a contractual right to terminate immediately by paying a PILON rather than serving notice.

In broad terms, if the employment contract gave the employer the right to terminate the employee's employment by paying a PILON, the latter was generally subject to income tax and national insurance contributions ("NICs") in full. The position was different in circumstances where the employment contract did not allow the employer to terminate the employment by paying a PILON, but the employer still did so. In these situations, the PILON generally benefitted from the £30,000 income tax exemption for payments made as compensation for termination of employment and could be paid NIC free, on the basis that it was damages for breach of contract.

Tax position with effect from April 2018

Since 6 April 2018, all PILONs have been subject to income tax and NICs in full, irrespective of the contractual position. The situation now is that if an employee's employment terminates and the employer pays a "relevant termination award", the employer must calculate how much of that payment is "post-employment notice pay" ("PENP").

The PENP is subject to income tax and employee and employer NICs in full. The balance of the relevant termination award and any statutory redundancy payment ("SRP") is eligible for the £30,000 tax exemption and full NICs exemption. (Note, however, that for payments made on or after 6 April 2020 - delayed from April 2019 - the employer NICs exemption will be limited to the first £30,000 but the employee NICs exemption will still apply in full.)

A relevant termination award is any payment or benefit which compensates the individual for the termination of their employment (i.e. those payments and benefits which prior to 6 April 2018 would have qualified for the £30,000 tax exemption), excluding any SRP.

PENP is, broadly, the basic salary the employee would have received during any unworked period of notice, minus any contractual or deemed PILON. It is calculated using the following formula:

((BP x D)/P) – T

Where generally:

BP = "basic pay" in the pay period which ends prior to the date on which notice is given, or, if no notice is given, the termination date ("relevant pay period"). Basic pay excludes benefits, bonuses, commission, some allowances and share options/awards. But if the employee participates in a salary sacrifice scheme, pre-sacrifice salary must be used.

D = the number of calendar days in the "post-employment notice period", being the period beginning at the end of the date on which the employee's employment terminates and ending on the earliest date on which the employer could lawfully terminate the employee's employment by notice.

P = the number of calendar days in the relevant pay period.

T = the contractual or deemed contractual PILON.

However, where: (i) the employee is paid monthly; (ii) under the employment contract the minimum notice is a number of whole months; and (iii) the unworked period of notice is a number of whole months:

D = the number of whole months in the post-employment notice period.

P = 1.

In either case, if the formula results in a negative number, the PENP is zero.

What is the impact of the rules if there is a contractual PILON?

In some circumstances the PENP may be greater than the employee's PILON and in others it may be equal to or less than the employee's PILON. Where the PENP is greater than the employee's PILON, this will have implications for the tax and/or NICs treatment of any relevant termination award:

- If the employee's relevant termination award (and any SRP) is less than £30,000, the amount to which the £30,000 tax exemption and NICs exemption applies is reduced.
- If the employee's relevant termination award (and any SRP) is more than £30,000, the amount to which the NICs exemption applies is reduced.

Where the PENP is equal to or less than the employee's PILON, the £30,000 tax exemption and NICs exemption will apply in accordance with the normal rules.

Planning ahead

The new rules on taxing PENP have a number of implications. The most obvious is that there is now no tax disadvantage in having a PILON clause for basic salary in the contract of employment. But where there is a contractual PILON, employers will still need to calculate the PENP for the employee whose employment is terminating.

If the employer and employee are entering into a settlement agreement, the agreement should be clear that the employer will deduct income tax and employee NICs from PENP.

If the employee serves their full notice - either working or on garden leave for the duration - the new rules will not apply.

Finally, don't forget the upcoming change to employer NICs from April 2020, mentioned above. For termination payments made on or after 6 April 2020 which qualify for the £30,000 tax exemption, any amount in excess of £30,000 will be subject to employer NICs as well as income tax.

Important cases coming up in 2019

We have summarised the most significant appellate employment law cases that are awaiting hearing or judgment during the course of this year.

Supreme Court

In the **employee competition** case *Tillman v Egon Zehnder Ltd*[59], the Court of Appeal ("CA") set aside an injunction upholding a six-month non-compete restrictive covenant. The restriction sought to prevent Mr Tillman from being concerned or interested in any competing business for a period of six months from termination, but did not contain an express limitation allowing the employee to hold a minor shareholding in a competing business for investment purposes.

The CA ruled that, given that the phrase "*interested in*" included holding one share in a publicly quoted company, this meant the restriction was impermissibly wide and so void. The Supreme Court ("SC") heard this case on 22 and 23 January 2019.

Royal Mail Group Ltd v Jhuti[60] is a **whistleblowing** case in which the CA ruled that an employee was not automatically unfairly dismissed for making protected disclosures to her line manager, because the person who took the decision to dismiss her was unaware of those

disclosures. According to the CA, a decision made by one person in ignorance of true facts, which is manipulated by someone else who is responsible for the employee and does know the true facts, cannot be attributed to their employer. Ms Jhuti was given leave to appeal to the SC in March 2018 and a hearing date is awaited.

The case of Royal Mencap Society v Tomlinson-Blake[61] (and another case), concerning the **national minimum wage**, is of huge significance for employers in the care sector. The CA decided in July 2018 that care workers carrying out "sleep-in" shifts were not entitled to the minimum wage for the whole shift, but only when they were required to be awake and working. The trade union Unison, which supported the claimants' case, has lodged an application for permission to appeal to the SC and the outcome is awaited.

In October 2018, in *WM Morrison Supermarkets plc v Various claimants*[62], the CA dismissed an appeal by the supermarket Morrisons against a High Court ruling that it was **vicariously liable** for a rogue employee's deliberate disclosure of co-workers' personal data on the internet. The CA ruled that the common law remedy of vicarious liability for misuse of private information and breach of confidence was not expressly or impliedly excluded by the Data Protection Act. It went on to hold that this was in the course of employment - the employee's actions at work and the disclosure on the internet was a seamless and continuous sequence of events.

This is the first group litigation data breach case to come before the courts and compensation payable to the claimants collectively (there are over 5,000) could be substantial. Morrisons has said that it will be seeking leave to appeal to the SC.

Court of Appeal

In *Chief Constable of Norfolk v Coffey*[63], the Employment Appeal Tribunal ("EAT") upheld a claim for direct discrimination based on **perceived disability** - the first case directly to address this issue under the Equality Act 2010. According to the EAT's judgment, perceived disability discrimination claims are permissible and, in such cases, it is necessary to decide whether the putative discriminator perceived the individual to have an impairment with the features set out in the Equality Act (e.g. whether they perceived the adverse effects as long-term). This case is due to be heard by the CA on 19 or 20 February 2019.

There were two EAT judgments last year on **shared parental leave** ("SPL") and whether enhancing maternity pay but not doing the same for shared parental pay might amount to sex discrimination against men. In *Capita Customer Management Ltd v Ali*[64], the EAT decided that it was not directly discriminatory to fail to pay full salary to a father taking SPL, in circumstances where a mother taking maternity leave during the same period would have received full pay. The EAT said that the correct comparator was a female employee who was taking SPL in order to care for her child – who would have been treated in exactly the same way as the claimant. A woman on maternity leave and a man taking SPL were not in comparable circumstances, because the purposes of the leave are different.

However, in *Hextall v Chief Constable of Leicester Police*[65], the EAT indicated that enhancing maternity pay, but not pay for taking SPL, may give rise to an *indirect* sex discrimination claim by fathers. The EAT held that the Employment Tribunal ("ET") in this case had not properly considered the test for indirect discrimination, the purpose of which was to address whether men might be disadvantaged in circumstances where men and women appeared to be treated the same (in this case by receiving only statutory pay during SPL). The EAT remitted the case to a different ET to consider whether men were in fact disadvantaged by the relevant provision, criterion or practice.

The appeals to the CA in *Capita and Hextall* have been joined. There is no hearing date yet, and it is not expected to be before autumn 2019.

In *X v Y Ltd [2018]*[66], the EAT held that an email from an in-house lawyer was not covered by **legal advice privilege** because there was a strong prima facie case of an iniquity. The email gave advice that a genuine redundancy exercise could be used as a "cloak" to dismiss an employee in order to avoid his continuing complaints about disability discrimination. The EAT set aside an employment judge's decision to strike out paragraphs of the employee's claim relying on the email on the ground that it was covered by legal advice privilege. Y Ltd is appealing to the CA and a hearing date is expected sometime in 2019.

European Court of Human Rights

Lopez Ribalda and others v Spain[67] is an important Spanish case about covert **employee surveillance** and the right to privacy. In January 2018, the European Court of Human Rights ("ECtHR") ruled that a supermarket breached a number
of its employees' rights to privacy under Article 8 of the European Convention on Human Rights by installing hidden video cameras to monitor suspected thefts.

The ECtHR held that, although the employer's suspicions of theft were correct, it had failed to strike a fair balance between its interest in protecting its property and the employee's right to respect for their private life. The employer's rights could have been safeguarded by alternative means and the employees could have been informed in advanced of the installation of the surveillance system. The case has been referred to the Grand Chamber of the ECtHR and was heard on 28 November 2018. Judgment is now awaited.

REFERENCES

1 Women and Equalities Committee and Equality and Human Rights Commission (2018). Sexual harassment in the workplace. Available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2017/sexual-harassment-workplace-17-19/ and https://www.equalityhumanrights.com/en/sexual-harassment-workplace

2 Solicitors Regulation Authority (2018). Warning note: use of non-disclosure agreements. Available at: http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page

3 ABC and others v Telegraph Media Group Limited [2018] EWCA Civ 2329. Available at: https://www.judiciary.uk/judgments/abc-and-others-v-telegraph-media-group-limited-23-october-2018/

4 Equality and Human Rights Commission (2018). Turning the tables: ending sexual harassment at work. Available here: https://www.equalityhumanrights.com/en/publication-download/turning-tables-ending-sexual-harassment-work

5 See 1 above

6 Women and Equalities Committee (2018). Sexual harassment in the workplace. Available at: https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/725/72502.htm

7 Lewis Silkin LLP (2018). Court of Appeal rejects Uber's worker status appeal. Available at: http://www.lewissilkin.com/en/Insights/Court-of-Appeal-rejects-Ubers-worker-status-appeal

8 Dewhurst v CitySprint UK Ltd (ET 2202516/2016). Available at: https://www.clydeco.com/uploads/Blogs/employment/Dewhurst_and_CitySprint_1.pdf

9 Addison Lee Ltd v Lange and others (UKEAT/0037/18). Available at: https://assets.publishing.service.gov.uk/media/59d4cdd9ed915d2b82ee34e0/Mr_M_Lange_and_Others_v_Addison_Lee_Ltd_2208029-2016___Others__Final_and_Reasons.pdf

10 IWGB and Roofoods Ltd t/a Deliveroo TUR1/985 (2016). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf

11 Independent Workers Union of Great Britain v Central Arbitration Committee and Roofoods Ltd t/a Deliveroo [2018] EWHC 3342. Available at: http://www.lewissilkin.com/Insights/Trade-unions-Deliveroo-judicial-review-challenge-fails

12 Pimlico Plumbers Ltd v Smith [2018] IRLR 872. Available at: https://www.supremecourt.uk/cases/uksc-2017-0053.html

13 Department for Business, Energy & Industrial Strategy. Good work: the Taylor review of modern working practices. Available at: https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices

14 Lewis Silkin LLP (2018). The Good Work Plan – any good? Available at: http://www.lewissilkin.com/en/Insights/The-Good-Work-Plan-any-good

15 The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. Available at: https://www.legislation.gov.uk/uksi/2017/172/contents/made

16 Acas (2017). Managing gender pay gap reporting. Available at: http://www.acas.org.uk/index.aspx?articleid=5768

17 Government Equalities Office (2018). Reducing the gender pay gap and improving gender equality in organisations. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731288/Gender-Pay-Gap-actions_.pdf

18 Department for Business, Energy & Strategy (2017). World-leading package of corporate governance reforms announced to increase boardroom accountability and enhance trust in business Available at: https://www.gov.uk/government/news/world-leading-package-of-corporate-governance-reforms-announced-to-increase-boardroom-accountability-and-enhance-trust-in-business

19 The Companies (Miscellaneous Reporting) Regulations 2018. Available at: https://www.legislation.gov.uk/uksi/2018/860/contents/made

20 Department for Business, Energy & Industrial Strategy (2017). Race in the workplace: The McGregor-Smith Review. Available at: https://www.gov.uk/government/publications/race-in-the-workplace-the-mcgregor-smith-review

21 The Conservative Party (2017). Forward together: The Conservative Manifesto. Available at: https://www.conservatives.com/manifesto

22 The Labour Party (2017). For the many not the few: Labour Manifesto. Available at: https://labour.org.uk/wp-content/uploads/2017/10/labour-manifesto-2017.pdf

23 Prime Minister's Office, 10 Downing Street. Press release: PM launches series of measures to tackle barriers facing ethnic minorities in the workplace. Available at: https://www.gov.uk/government/news/pm-launches-series-of-measures-to-tackle-barriers-facing-ethnic-minorities-in-the-workplace

24 Department for Business, Energy & Industrial Strategy (2018). Consultation: Ethnicity pay reporting. Available at: https://www.gov.uk/government/consultations/ethnicity-pay-reporting

25 The Business, Energy and Industrial Strategy Committee (2018). Gender pay gap and executive pay examined by Committee. Available at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2017/corporate-governance-pay-launch-17-19/

26 BBC News (2018). Budget 2018: Self-employed face higher tax and NI payments. Available at: https://www.bbc.co.uk/news/business-46021558

27 HM Revenue & Customs (2018). Off-payroll working in the private sector. Available at: https://www.gov.uk/government/consultations/off-payroll-working-in-the-private-sector

28 See 26 above

29 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (2018). Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756374/14_November_Draft_Agreement_on_the_Withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union.pdf

30 Political declaration setting out the framework for the future relationship between the EU and the UK (2018). Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf

31 Lewis Silkin LLP (2018). The EU (Withdrawal) Act – what does it mean for employment law? Available at: http://www.lewissilkin.com/Insights/The-EU-Withdrawal-Act-what-does-it-mean-for-employment-law

32 Breffni McGuiness MA (2009). Grief in the workplace. Available at: https://www.tandfonline.com/doi/abs/10.1080/02682620902746037

33 Child Bereavement UK (2016). Impact report. Available at: https://childbereavementuk.org/wp-content/uploads/2016/05/Child-Bereavement-UK-Impact-Report-2016.pdf

34 Acas (2018). Managing bereavement in the workplace – a good practice guide. Available at: http://www.acas.org.uk/media/pdf/n/b/Managing-bereavement-in-the-workplace-a-good-practice-guide.pdf

35 The Data Protection Act 2018. Available at: http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted

36 The Information Commissioner's Office. Available at: https://ico.org.uk/

37 Department for Exiting the European Union (2018). Policy paper: Withdrawal Agreement and Political Declaration. Available at: https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration

38 The Information Commissioner's Office (2018). ICO issues maximum £500,000 fine to Facebook for failing to protect users' personal information. Available at: https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/facebook-issued-with-maximum-500-000-fine/

39 R (on the application of Unison) v Lord Chancellor [2017] IRLR 911. Available at: https://www.supremecourt.uk/cases/docs/uksc-2015-0233-judgment.pdf

40 Ministry of Justice (2018). Tribunal and gender recognition certificate statistics quarterly: April to June 2018. Available here: https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018

41 Personnel Today (2018). Employment tribunal fees back on the agenda. Available here: https://www.personneltoday.com/hr/employment-tribunal-fees-back-on-the-agenda/

42 Ministry of Justice (2016). Reforming the Employment Tribunal system. Available at: https://www.gov.uk/government/consultations/reforming-the-employment-tribunal-system

43 HM Courts & Tribunals Service (2018). The HMCTS reform programme. Available here: https://www.gov.uk/guidance/the-hmcts-reform-programme

44 The Law Commission (2018). Consultation: Employment Law Hearing Structures. Available here: https://www.lawcom.gov.uk/project/employment-law-hearing-structures/

45 Gov.uk. Employment Practices in the Modern Economy. Available here: https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy

46 See 13 above

47 Department for Business, Energy & Industrial Strategy. Government response to the Taylor review of modern working practices. Available at: https://www.gov.uk/government/publications/government-response-to-the-taylor-review-of-modern-working-practices

48 HM Government (2018). Good Work Plan. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765128/good-work-plan.pdf

49 Lewis Silkin LLP (2018). Supreme Court says Pimlico Plumbers are workers. Available at: http://www.lewissilkin.com/Insights/Supreme-Court-says-Pimlico-Plumbers-are-workers

50 Legislation.gov.uk. The Agency Workers (Amendment) Regulations 2019. Available at: https://www.legislation.gov.uk/ukdsi/2019/9780111177297/regulation/4

51 Legilsation.gov.uk (2018). The Employment Rights (Miscellaneous Amendments) Regulations 2019. Available at: https://www.legislation.gov.uk/ukdsi/2019/9780111177457/pdfs/ukdsi_9780111177457_en.pdf

52 Legislation.gov.uk (2018). The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018. Available at: https://www.legislation.gov.uk/uksi/2018/1378/introduction/made

53 See 51 above

54 Department for Business, Energy & Industrial Strategy (2018). Naming scheme for unpaid employment tribunal awards. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764756/Naming_guidance_final_.pdf

55 Department for Business, Energy & Industrial Strategy (2018). Employment tribunal: penalty enforcement and naming scheme. Available at: https://www.gov.uk/government/publications/employment-tribunal-penalty-enforcement

56 See 50 above

57 See 50 above

58 See 47 above

59 Tillman v Egon Zehnder Ltd [2017] IRLR 906. Available at: http://www.bailii.org/ew/cases/EWCA/Civ/2017/1054.html

60 Royal Mail Group Ltd v Jhuti [2018] IRLR 251. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2017/1632.html

61 Royal Mencap Society v Tomlinson-Blake (and another case) [2018] IRLR 932. Available at: https://www.bailii.org/ew/cases/EWCA/Civ/2018/1641.html

62 WM Morrison Supermarkets plc v Various claimants [2018] EWCA Civ 2339. Available here: https://www.bailii.org/ew/cases/EWCA/Civ/2018/2339.html

63 Chief Constable of Norfolk v Coffey [2018] IRLR 193. Available at: https://www.bailii.org/uk/cases/UKEAT/2017/0260_16_1912.html

64 Capita Customer Management Ltd v Ali [2018] IRLR 586. Available at: https://www.bailii.org/uk/cases/UKEAT/2018/0161_17_1104.html

65 Hextall v Chief Constable of Leicester Police [2018] IRLR 605. Available at: https://assets.publishing.service.gov.uk/media/5ae84c97ed915d42f7c6bc9d/Mr_A_Hextall_v_1__Chief_Constable_of_Leicestershire_Police_2__Working_Families__Intervenor__UKEAT_0139_17_DA.pdf

66 X v Y Ltd [2018] UKEAT 0261/17. Available at: https://assets.publishing.service.gov.uk/media/5b6c232740f0b640c3b1cf61/X_v_Y_Ltd_UKEAT_0261_17_JOJ.pdf

67 Lopez Ribalda and others v Spain [2018] IRLR 318. Available at: https://www.droit-technologie.org/wp-content/uploads/2018/02/LOPEZ-RIBALDA.pdf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