



Legal update — January 2019

Employment What to expect in 2019

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What does 2019 have in store for employment law?

Brexit continues to dominate the headlines, but there is continuing uncertainty as to what form it will take, and what it will mean for employment. As the situation evolves we will be able to give you more concrete advice, but in the meantime there are plenty of other things to look out for.

Legislation coming into force on 6th April

Under the Employment Rights (Miscellaneous Amendments) Regulations 2019, increased financial penalties for employers will come into force which will quadruple the maximum penalty for an aggravated breach of employment law from £5,000 to £20,000.

There are no reported cases to illustrate what a tribunal has determined to be aggravating features. The explanatory notes to the Enterprise and Regulatory Reform Act 2013 provide for a "non-exhaustive list of factors" a tribunal may take into account, including the size of the employer, the duration of the breach of the employment right and the behaviour of the employer and of the employee. The explanatory notes state that a tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where the action was committed deliberately, or with malice, the employer has a dedicated human resources team, and/or the employer had repeatedly breached the employment right concerned.

Meanwhile all workers will have the right to be provided with an itemised pay statement and the ability to enforce this right at an employment tribunal under the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018. Employers will have to state the hours being paid for on the payslips of all workers paid by the hour. Where a member of staff's pay varies according to time worked, the employer will have to include on the itemised pay statement the total number of hours worked for which variable pay is received. This can be done as an aggregate figure, or

as separate figures for different types of work or different rates of pay.

Consultations and responses in the pipeline

The consultation into mandatory ethnicity pay gap reporting (following the very low take up of voluntary ethnicity pay reporting) closed on 11 January. It sought employers' views on issues such as reporting methods. The government has suggested that a trial or phased approach could be used to test the process before mandatory reporting is required.



Source: Shutterstock

We are still waiting to hear whether there will be any reforms to employment status. Last year the government launched a consultation as part of its response to the Taylor Review on employment status. Although the responses to the other three consultations launched at the same time (on enforcement of employment rights, agency workers, and measures to increase transparency in the UK labour market) have been published, there has been nothing as yet on this one. However, the government's Good Work Plan, published towards the end of last year has committed to improving the clarity of the employment status tests, as well as possibly harmonising the position under employment and tax law. Employment status looks like it will be remaining firmly on the agenda for 2019.

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At the end of last year the government issued a consultation (which closes on 1 March) on whether national minimum wage (NMW) legislation should be amended to make it easier for employers to rely on the provisions for salaried hours work.

Some of the conditions required to satisfy the definition of salaried hours work are complex and make compliance with the legislation difficult. Employers in the hospitality and retail sector have reported that the two permissible pay cycles (weekly or monthly) do not reflect common business practice as staff are often paid fortnightly, or four-weekly in these sectors. In addition the definition of a "calculation year" is complex, and the exclusion of overtime pay and other premia can make it difficult for employers to offer attractive pay packages to workers.

As a result the government is asking for views on whether the payment cycles should be changed, whether it would be helpful to introduce a single calculation year for all workers of the same employer, and whether the rules should be amended to include overtime and other premia in remuneration for basic hours.

The consultation also asks employers to give their views on the benefits and risks of offering salary sacrifice schemes. Some employers have been withdrawing salary sacrifice schemes to avoid non-compliance with the NMW, and the consultation asks them to state whether they have withdrawn any such schemes in the past 12 months in light of NMW compliance fears.

Finally the Law Society's consultation on employment tribunal reform closed on 11 January. The consultation sought views on a number of different issues such as whether the limitation periods in employment tribunals should be extended (mostly to six months), and whether to raise or remove the £25,000 limit for breach of contract claims.

Sexual harassment

Sexual harassment continues to garner attention with the response to the inquiry launched by the Women and Equalities Committee (WEC) into the use of non-disclosure agreements in harassment and discrimination cases expected this year.

Towards the end of last year the government responded to the WEC's report on sexual harassment in the workplace. Amongst other things the government announced that it would be asking the Equality and Human Rights Commission (EHRC) to develop a statutory code of practice on sexual harassment, and the Government Equalities Office (GEO) would be working with Acas and the EHRC to raise employer awareness on how to deal with and prevent sexual

harassment at work. Other measures include the issuing of consultation on non-disclosure agreements, how best to tackle third-party harassment, whether further legal protections are required for interns and volunteers, and exploring the evidence for extending employment tribunal time limits for Equality Act 2010 cases.

Other things on the cards

As already mentioned, the Law Society's consultation on employment tribunal reform has recently closed. It is likely that later this year some recommendations will be issued and that various reforms will be implemented. In addition, it's worth noting that there is currently an ongoing HM Courts & Tribunals Service reform programme which is looking into the possibility of a new employment tribunal service which would enable some cases to be resolved online and by video. However, work on this is not expected to begin until 2020.

Will 2019 be the year that sees the reintroduction of tribunal fees? According to comments made by Richard Heaton, Permanent Secretary at the Ministry of Justice, to the House of Commons Justice Committee back in November, the Ministry of Justice is looking at how employment tribunal fees might potentially be reintroduced. There is no detail as yet on the terms of such a revised fee scheme, or any time frame as to when such a scheme would commence.

Ever since 2015 the government has been considering introducing an obligation to repay public sector exit payments in certain circumstances, as well as capping such payments. There have been consultations and draft regulations have been issued, but no definite time frame has been announced. Could 2019 be the year these come into force?

The plans for extending shared parental leave and pay to working grandparents are in a similar state of limbo. A consultation was initially proposed for May 2016, but was then delayed until after the referendum on leaving the EU. There has been no consultation paper to date and plans have been temporarily put to one side while the government carries out an evaluation of the shared parental leave policy in general. The findings of this evaluation are expected to be published in early 2019

And looking into 2020...

Meanwhile, there are a few things in the pipeline for 2020 which it's useful to be aware of.

In April 2020 all termination payments which fall above the £30,000 threshold will become subject to employer NICs.

There will also be a tranche of new legislation coming in as a result of the Good Work Plan. In April 2020 we are due to have regulations coming into force which repeal

the "Swedish derogation" for agency workers, ensuring that all agency workers will have the right to pay parity with their directly recruited counterparts. There will also be regulations to lower the threshold for a request to set up information and consultation arrangements from 10% to 2% of employees, subject to the existing minimum of 15 employees. All workers will have the right to a written statement of terms (currently this is only available to employees) from the first day of their employment, and there will be new legislation to prevent employers from keeping tips and service charges intended for workers.

Since 6 April 2017 responsibility for operating off-payroll working rules, and deducting income tax, has been the responsibility of the relevant public sector body, or agency or third party supplying workers to public authorities. In order to bring private sector organisations in line with public sector bodies and agencies, the government is due to reform the off-payroll working rules (IR35) in the private sector. This follows consultation, and IR35 will begin to apply to the private sector from April 2020 and will only apply to large and medium-sized businesses.

Finally, the government has confirmed that it intends to introduce a right for bereaved parents to take paid time off work. Currently it is proposed that bereaved parents will be able to take leave as a single two-week period, as two separate period of one week each, or as a single week. They will have 56 weeks from their child's death to take leave. The new right is expected to come into force in April 2020.

How about case law?

As ever, there are a number of interesting cases to look out for. For the first time in over a hundred years the Supreme Court will be considering a case involving an employment restrictive covenant (in *Tillman v Egon Zehnder Ltd*). The Court of Appeal in *Tillman* held that a provision in a restrictive covenant, which stated that a former employee's "interest" in any competing business could include holding one share in a publicly quoted company, rendered the six-month non-compete prohibition invalid.

On the discrimination front the Court of Appeal is due to hear the appeal in the case of *Chief Constable of Norfolk v Coffey*. In *Coffey* it was held that it will be direct discrimination if a non-disabled job applicant is rejected because of a perception that a condition could become a disability in the future. It remains to be seen if the Court of Appeal will agree.

The suspension case of *Agoreyo v London Borough of Lambeth* is also due to be heard by the Court of Appeal. This is an appeal against a decision of the High Court that the suspension of a teacher, who was accused of having used unreasonable force against children, in

order to allow a fair investigation to take place, constituted a breach of contract.

We are due to hear whether the Supreme Court is going to grant Unison leave to appeal in the Mencap case (*Focus Care Agency Ltd v Roberts, Frudd and another v The Partington Group Ltd, and Royal Mencap Society v Tomlinson-Blake*) where the Court of Appeal held that employees carrying out sleep-ins are only entitled to the NMW when they are awake and carrying out duties.

Finally it seems that the Uber litigation remains with us for another year. The Court of Appeal held last month that Uber drivers are workers, but has given Uber permission to appeal.

Dates for your diary

TUPE breakfast briefing

- London office – 6 February 2019
- London VC links to Our Birmingham, Manchester and Exeter offices – 12 February 2019

Upcoming Spring seminars

Brexit and employment update

- Keep a look out for the dates on our website

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