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Legal update ——— January 2017

Employment
What's happening in 2017?

Pioneering Bahrain Construction Public sector Energy Real estate London Tax IT Dubai Manchester
Knowledge **Pragmatic** Malaysia Exeter Thought leadership Housing Agile Creative Connecting
Local government Manchester Environment Focused Islamic finance Projects Abu Dhabi Corporate finance Passionate
Employment Regulation Procurement Expertise Specialist Planning Investment Committed Delivery IT
IP Corporate Infrastructure Value Development Private wealth Oman Governance Birmingham Corporate finance
Dynamic **Pensions** Dispute resolution Insight Banking and finance Arbitration Diverse Regeneration Care

While Brexit will inevitably be taking a large chunk out of the government's agenda, particularly in view of the Supreme Court's recent decision that an Act of Parliament is needed to trigger article 50, 2017 will also bring a number of changes on the employment law front.

Key legislation

Gender pay gap reporting

The Equality Act 2010 (Gender Pay Gap Reporting) Regulations 2017 come into force on 6 April and will apply to private or voluntary sector employers with at least 250 employees on the "snapshot date". The "snapshot date" is the 5th of April each year so the first gender pay gap reports will have to be produced by 4 April 2018.

Employers will be required to:

- Publish overall gender pay figures calculated using both the mean and the median.
- Report on the number of men and women in each of four salary quartiles, based on the employer's overall pay range.
- Publish separate information on the gender pay gap relating to bonuses. The regulations only require the mean bonus payments to be analysed separately, not the median.

Employers will have the option to include a narrative explaining any pay gaps and setting out what action they plan to take.

A failure to comply with the Regulations will constitute an "unlawful act" within the meaning of section 34 of the Equality Act 2006, empowering the Equality and Human Rights Commission to take enforcement action.

Meanwhile, the government has just published the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 which extend the duty to publish annual gender pay gap reports to public sector employers with over 250 employees. Although currently in draft form, these are due to come into force on the 31st of March. The Regulations are broadly similar to those covering private or voluntary sector employers, but the "snapshot date" for public sector employers is 31 March rather than 5 April.

Source: Fotolia

The apprenticeship levy

The apprenticeship levy is being introduced on 6 April (although funds will not appear in an employer's digital account until just before the end of May for levy paid on their April payroll). It requires all employers operating in the UK, with a pay bill over £3 million each year, to invest in apprenticeships.

These employers will need to spend 0.5% of their total pay bill on the apprenticeship levy. A "levy allowance" of £15,000 per year is being introduced, meaning that the total amount that an employer needs to spend is 0.5% of their pay bill, minus £15,000.

The government has produced guidance, 'Apprenticeship funding: how it will work' which provides information on the apprenticeship levy. This makes it clear that some employers will be required to contribute to a new apprenticeship levy, and there will be changes to the funding for apprenticeship training for all employers.

The start date for the new apprenticeship funding system is 1 May 2017. Any apprenticeships starting from this date will be funded according to the new rules.

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This will apply to all employers, both those paying the levy and those who do not.

IR35 and public sector bodies

From 6 April, where workers are engaged through their own limited company, often known as a personal service company (PSC), to work in the public sector, they will no longer be responsible for deciding whether the intermediaries legislation (often referred to as IR35) applies. This responsibility will move instead to the public sector employer, agency or the third party that pays the worker's intermediary.

Where a public sector organisation employs a worker indirectly through an agency or third party, the agency or third party will be responsible for operating the new rules and collecting and paying the relevant tax and NICs. The public sector body will be required to check that the agency/third party operates the rules correctly.

The Trade Union Act 2016

Parts of the Trade Union Act 2016 are expected to come into force this year. The Act is being introduced following disruption to public services in recent years and the changes will, essentially, make it even more difficult for unions to bring industrial action.

The main provisions are as follows:

- A simple majority of those voting must be in favour of action and at least 50% of those who were entitled to vote in the ballot must have done so; and

- Where the ballot relates to "the provision of important public services", at least 40% of those entitled to vote must vote "yes" to the proposed action.

"Important public services" will be defined in Regulations, but they are limited to health services, education of those under 17, fire and transport services, decommissioning of nuclear installations, and border security.

Other measures that could have significant impacts include the requirement for a ballot paper to include a summary of the matter or matters in dispute. The notice must set out the date of the ballot and list the total number of employees concerned, the categories in which they belong, the workplaces at which they work and the numbers in such categories and workplaces. In addition there is due to be a repeal of the prohibition on using agency workers to cover striking workers' duties. All these measures are designed to minimise the disruption to the business.

Key case law

There is never any shortage of employment case law, so we've just picked out a few forthcoming cases of interest.

Headscarves and discrimination

The European Court of Justice (ECJ) heard the conjoined cases of *Achbita v G4S Secure Solutions NV* and *Bougnaoui and anor v Micropole SA* towards the end of the last year. The cases were the subject of conflicting Advocate General Opinions so it remains to be seen how the ECJ irons out the discrepancies between *Bougnaoui*, where a company policy requiring an employee to remove her Islamic headscarf when in contact with clients, constituted unlawful direct discrimination, and *Achbita*, where a ban on wearing Islamic headscarves was held to be a genuine and determining occupational requirement.

Disability discrimination

The Court of Appeal is due to consider whether an employer had constructive knowledge of an employee's disability in *Donelien v Liberata UK Ltd*. The Employment Appeal Tribunal (EAT) agreed with the tribunal that it did not on the basis that the employer had taken reasonable steps to ascertain the nature of the employee's illness and could not reasonably be expected to know that she was disabled. As a result the duty to make reasonable adjustments did not arise.

Source: Fotolia

Carreras v United First Partnerships Research is another reasonable adjustments case where the Court will be considering whether an employer's expectation, initially communicated as a request that a disabled employee work long hours, then based on an assumption that he would do so, was sufficient to constitute a provision, criterion or practice.

Human rights

The Court of Appeal will be hearing *Garamukanwa v Solent NHS Trust*, an appeal against a decision that Article 8 (the right to respect for private and family life) was not engaged when an employer used material which had been seized by the police in the course of a criminal investigation for disciplinary purposes. The

EAT held that the employee could not have a reasonable expectation of privacy in relation to material about a personal relationship with a colleague which had been turned into a workplace issue by the employee's conduct.

The eternal holiday pay dispute

If you thought you'd seen the back of *Lock v British Gas Trading Ltd* then you were, quite possibly, wrong! The Court of Appeal held last year that the Working Time Regulations 1998 should be interpreted in line with the Working Time Directive in order to include commission payments in the calculation of holiday pay. British Gas has now lodged an application with the Supreme Court for permission to appeal so watch this space…

Sleep-ins and the national minimum wage

Following the EAT's decision in *Shannon v Rampersad* (t/a Clifton House Residential Home) it seems that there will be times when on-call time will only be paid when an individual is awake for the purposes of working. Here a night care assistant in a residential care home was not "working" for the purpose of calculating the NMW simply by being "on-call" in his flat on the premises. He was required to be in a staff flat known as the studio from 10pm until 7am and to respond to any request for assistance by the night care worker on duty at the home, but could sleep if he was not required. The EAT held that only those hours when he was "awake for the purpose of working" counted towards the NMW. The Court of Appeal will be reconsidering the issue later this year.

Whistleblowing

Since 25 June 2013 a worker must have a reasonable belief that his or her disclosure was made in the public interest if it is to qualify for statutory protection. The "public interest" test (which is not defined) was introduced to close the loophole which enabled workers to blow the whistle about matters of purely private, rather than public, interest. Following the EAT's decision in *Chesterton Global Ltd t/a Chestertons and anor v Nurmohamed* it seems that complaints about breaches of an employment contract could still get whistleblowing protection. Here the EAT found that the claimant's complaints that his employer had manipulated its accounts in a way which potentially adversely affected the bonuses of 100 senior managers (including himself) was in the public interest and amounted to a protected disclosure. The Court of Appeal will reconsider the case in June.

Are tribunal fees lawful?

This is a question which the Supreme Court will be considering in March. *In R (on the application of Unison) v Lord Chancellor* the Court of Appeal agreed with the EAT that Unison had not provided sufficient evidence to establish that the fees regime breached the EU law principle of effectiveness, and held that they were not indirectly discriminatory under the Equality Act 2010. It remains to be seen if the Supreme Court agrees.

Review of modern employment practices

The Prime Minister has asked Mathew Taylor, chief executive of the Royal Society for the Encouragement of Arts, Manufactures and Commerce, to lead an independent review of modern employment practices. The review will consider the implications of new forms of work on worker rights and responsibilities, as well as on employer freedoms and obligations, and will take six months to complete. In the meantime, the Department for Business, Energy and Industrial Strategy (BEIS) will be launching a research project into the scale of the gig economy which will also look at the motivations of people engaging in "gig" work.

Following recent decisions in which Uber drivers and bicycle couriers have been found to be workers despite their self-employed contractor label, it's clear that the "gig" economy will continue to throw up challenges in the months to come.

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