UK Employment Law Round-up

June 2017 | Issue 15

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Welcome to the June edition of our UK Employment Law Round-up. In this issue, we look at a decision by the Employment Appeal Tribunal (EAT) regarding alleged discrimination against an employee due to the application of a "leavers policy" while she was on maternity leave. We also examine a case which confirms the importance of acting reasonably at every stage of the redundancy process.

In addition, continuing the theme of reasonableness, we look at the EAT decision in relation to the deployment of a "mobility clause" against employees, with the decision highlighting that acting reasonably when doing so is key.

Topically, we report on the importance of a strong and clear social media policy in the workplace, after the dismissal of a long-serving employee with a clean record because of derogatory comments about her employer on Facebook.

Finally, we consider a landmark decision of the EAT and subsequent Tribunals regarding the calculation of holiday pay, since payments such as commissions and certain overtime should now be included in holiday pay calculations. This decision confirms that the "series of deductions" is broken by a three-month gap, proving to be good news for employers.

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Tribunal applies wrong legal test in case of maternity discrimination

In *Interserve FM Ltd v. Tuleikyte*, the Employment Appeal Tribunal (EAT) held that the Employment Tribunal (ET) had applied the wrong test in a case involving alleged discrimination against an employee because she was on maternity leave. In the circumstances, the ET should have applied the "reason why" test, and considered the conscious or subconscious thought processes of the alleged discriminator, but failed to do so.

Facts

Interserve operated a policy whereby employees who had not received any payments for three months were treated as leavers. Ms. Tuleikyte commenced her maternity leave in June 2013. She did not meet the earnings threshold for statutory maternity pay (SMP) and, as a result, received no pay from her employer once she had started maternity leave. After she had received no payment for three months, the leavers policy kicked in and in November 2013 she was issued with a P45 with a leaving date of June 2013. At the same time, six other employees were also treated as leavers, although it was not clear what the reason was for their lack of pay.

Ms Tuleikyte then told her manager that she was on maternity leave and it was agreed that she would complete a backdated new joiner form when she returned. However, she did not return from maternity leave and her leaving date was not amended, even though her actual termination date was May 2014.

This resulted in Ms Tuleikyte losing her government benefits, including her accommodation.

The decision

Ms Tuleikyte issued proceedings in the ET, claiming pregnancy and maternity discrimination. The ET upheld her claim concluding that an automatic consequence of applying the policy was that she was treated unfavourably because she was on maternity leave. Interserve appealed to the EAT, which then held that this was not the correct approach.

Courts and tribunals have identified two types of maternity discrimination cases. The first are those where the facts are inherently discriminatory – "criterion" cases". The second are other cases where the reason for the discriminatory treatment is not immediately apparent and it is necessary to look at the employer's conscious or subconscious thought processes to see if the maternity leave was a significant influence – "reason why" cases. The EAT decided this was a "reason why" case. The policy was, on the face of it, neutral and was not targeted at women generally, whether or not on maternity leave. Women on maternity leave with sufficient earnings to qualify for SMP would be unaffected; on the other hand, employees on long-term sick leave, who did not qualify for statutory or contractual sick pay, would be caught by the policy. The ET should have considered the thought processes involved in the decision to have the blanket policy; the case was therefore sent back to the ET for this to be done.

What is the practical impact of this for employers?

The case illustrates that, even if being on maternity leave is the context for unfavourable treatment, this

does not inevitably mean the treatment is "because of" maternity, hence amounting to unlawful discrimination. Unless a policy is inherently discriminatory, the courts must enquire as to the mental processes of the alleged discriminator. Notwithstanding this decision, employers should always tread cautiously when seeking to apply policies or practices that could potentially result in unfavourable treatment for women on maternity leave or other protected groups. Interestingly, Ms Tuleikyte did not claim indirect discrimination. The EAT acknowledged that an indirect sex discrimination claim may have been successful in this case. The application of the blanket policy may have had a disparate adverse impact on women because they take maternity leave and may not qualify for statutory maternity pay. Therefore, women may be more likely to be disadvantaged by such a policy than their male colleagues.

A key message for employers arising from this case is to ensure that policies and practices are kept under review so that they do not unlawfully discriminate against certain groups.

Redundancy exercises: A useful reminder to act reasonably

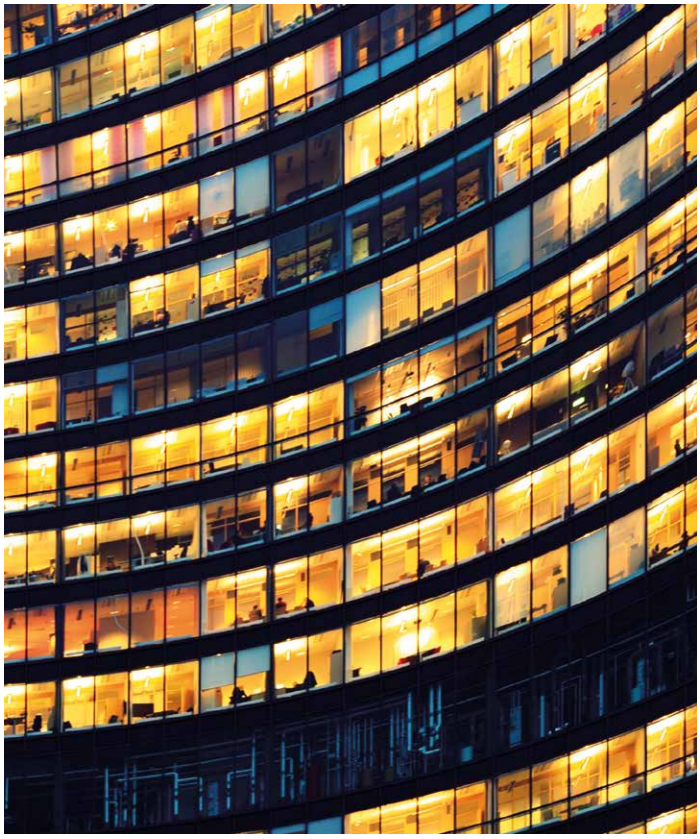
The Employment Appeal Tribunal's (EAT) decision in *Green v London Borough of Barking and Dagenham* serves as a useful reminder for employers to act reasonably at every stage of the redundancy process. This includes throughout any interview process, where employees in the redundancy pool are competing for a reduced number of new roles within the same organisation.

Facts

Ms Green was employed by the London Borough of Barking and Dagenham as a Senior Regeneration Professional. At the time, Ms Green was one of three employees performing broadly similar roles. In October 2012, there was a restructure of Ms Green's team that included the removal of the three similar posts and creation of two new roles. Ms Green and her two colleagues were then invited to compete for the new roles by completing a written test and attending an interview. Ms Green emerged with the lowest score at the end of the process and was made redundant.

Ms Green issued a claim against her employer for unfair dismissal on the basis that the recruitment process was unfair because one of the candidates had prior knowledge of the subject matter of the written test. She also claimed the following procedural failings:

- there had been a failure to consult meaningfully with her regarding the proposed redundancies;



- the redundancy selection pool was not wide enough;
- she was not considered for assimilation into another, more junior role that was available; and
- she was not offered the right to appeal the employer's decision to dismiss her.

Employment Tribunal decision

The Employment Tribunal (ET) considered that, because this was a case where candidates were applying for new roles following a reorganisation, it was akin to the facts of a previous similar case. This meant that the ET was prevented from addressing many of the usual questions of fairness that would ordinarily be considered in a redundancy situation.

As a result, the ET focused largely on whether the employer had acted reasonably during the interview process and did not consider why Ms Green had been selected for redundancy in the first place. The ET concluded that the employer had acted reasonably at the interview stage and Ms Green lost her claim.

EAT decision

Ms Green appealed to the EAT, which concluded that the ET had misunderstood the previous case law and therefore incorrectly failed to consider Ms Green's arguments in relation to the procedural fairness of the redundancy process as a whole. It held that, in a redundancy situation, the entire process followed should be reviewed by the ET in order to determine whether the employer acted reasonably at each stage, regardless of the method used to select the redundant employees.

What is the practical impact of this for employers?

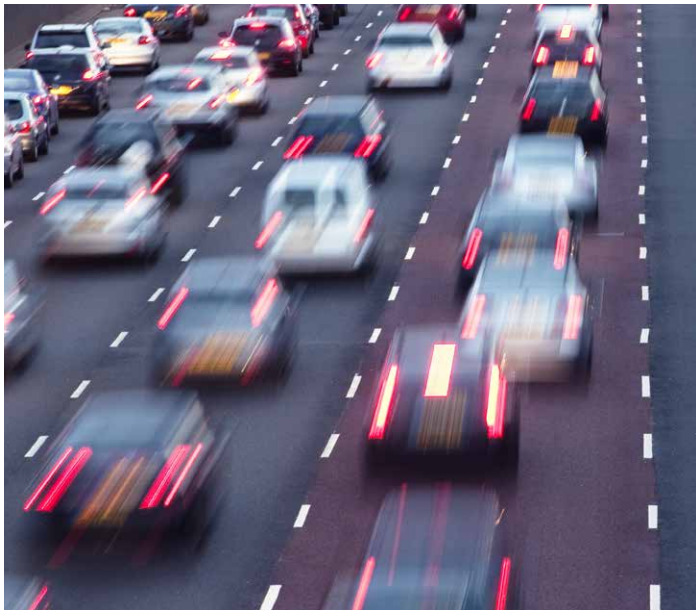
This case acts as a reminder to employers that Tribunals will review the overall fairness of the process and will not just focus on an individual stage. In view of this judgment, employers should remember that following a fair redundancy process generally involves identifying an appropriate pool for selection; ensuring selection criteria are objective and non-discriminatory; carrying out a meaningful consultation process with potentially redundant employees; adopting an objective and fair basis for selection; considering whether alternative employment is available; and allowing the employee the right to appeal any decision that is made. Therefore, employers must act fairly and reasonably throughout all stages of any redundancy process, applying the principles set out in the ACAS Code.

Mobility clauses in employment contracts: Reasonableness is key

The Employment Appeal Tribunal (EAT), in the case of *Kellogg Brown & Root (UK) Ltd. v (1) Fitton and (2) Ewer*, examined in detail reliance by an employer on a "mobility clause" in an employment contract in circumstances where two employees were instructed to move to another site, after the closure of the site at which they worked.

What is a mobility clause?

All employees are entitled to receive a written statement of their terms and conditions of employment. One of the terms that an employer must provide is the employee's normal place of work. However, in order to maintain a degree of flexibility to allow for circumstances whereby it may be necessary to require employees to move from one location to another, relocation or mobility clauses are typically incorporated into employment contracts. Generally, these clauses specify that the employer reserves the right to change the place of work and that an employee may be required to work from any office or location of the employer, as the need arises.



The facts

Mr Fitton and Mr Ewer were employed by Kellogg Brown & Root (UK) Ltd (Kellogg) and worked at its site in Greenford, Middlesex. Kellogg decided to close this site and instructed Mr Fitton and Mr Ewer to transfer to its site in Leatherhead, Surrey, in accordance with the mobility clause in their contracts of employment. Both Mr Fitton and Mr Ewer refused to do so on the basis that such a change in location would significantly increase their commute times by some 20 to 30 hours per week.

Kellogg believed that it could rely on the mobility clause because it was a reasonable instruction to require the employees to work at the new location. Kellogg considered that the availability of work at the new site meant that redundancy was not available and that the refusal to work at the new site was a breach of contract.

Both Mr Fitton and Mr Ewer were invited to disciplinary hearings for alleged unacceptable conduct for refusing to relocate and were summarily dismissed. Their appeals were unsuccessful and they both issued proceedings for unfair dismissal and a statutory redundancy payment.

The decision

The Employment Tribunal (ET) held that the dismissals were unfair and were by reason of redundancy. Kellogg appealed to the EAT, which upheld the ET's decision that the dismissals were unfair but assessed that the employees had been unfairly dismissed by reason of misconduct, as opposed to redundancy. This was because Kellogg had chosen to rely on the mobility clause and not pursued a redundancy route. For such a misconduct dismissal to be fair, the EAT considered that:

1. the instruction to relocate had to be lawful (i.e. was Kellogg entitled to rely on the mobility clause?);
2. Kellogg had to have acted reasonably in giving that instruction; and
3. the employees had to have acted unreasonably in refusing to comply with the relocation instruction.

The EAT found that it was indeed unfair because:

1. the instruction to relocate was not lawful as the mobility clause was drafted too widely in that it suggested that the employee was agreeing to work "anywhere in the UK or overseas";
2. the instruction to relocate was unreasonable in light of the considerably extended commute (i.e. an additional 20 to 30 hours per week); and
3. it was reasonable for both employees to refuse to comply with the relocation instruction.

What is the practical impact of this for employers?

Mobility clauses or the lack thereof are routinely examined by Employment Tribunals in deciding claims brought for unfair dismissal and redundancy payments. The key question to be decided is whether it is reasonable for an employer to rely on such a clause, or conversely whether it is reasonable for an employee to refuse the relocation or the alternative employment on offer. While this decision does not alter the law, it usefully illustrates that reasonableness is key. If the mobility clause can in principle be relied upon, then an employer still has to act reasonably when invoking that clause and mobility clauses cannot be exercised in an unfettered fashion. Regardless of whether or not a contract contains a mobility clause, it is important that employees are consulted on any proposals in terms of relocation. Providing sufficiently long notice of the relocation and possibly providing some sort of transitional financial assistance may also be helpful. Proximity of the new workplace is also a relevant factor. It will be difficult to argue that a request to transfer is unreasonable when the new work location is in close proximity to the old.

Note that the test for reasonableness is subjective and not objective. Therefore, the Tribunal will consider the employee's subjective view as opposed to what the employer deemed to be reasonable.

This case also illustrates the confusion that can arise when an employer seeks to exercise a contractual mobility clause against the backdrop of a redundancy situation. Using a mobility clause may enable an employer to avoid dismissing employees for redundancy. However, the terms of the mobility clause and the manner in which the employer operates the clause may themselves be subject to scrutiny. In particular the following points should be noted:

- when embarking upon a redundancy exercise, consideration should be given to whether a mobility clause can be relied upon to avoid making employees redundant;
- in particular, mobility clauses must not be too widely drafted; and
- just because there is a mobility clause in the contract it does not mean that it is automatically fair to dismiss an employee who refuses to comply with an instruction to relocate.

Therefore, employers should be aware of the pitfalls and risks when seeking to invoke mobility clauses and always act reasonably in doing so.

Social media-related dismissal held by an Employment Tribunal to be fair

In *Plant v. API Microelectronics Ltd*, the Employment Tribunal (ET) has held that the dismissal of a long-serving employee was fair, after she had made derogatory comments over social media about her employer. This decision was reached on the basis that Mrs Plant "was aware of" the company's social media policy and so her dismissal was within the band of reasonable responses open to the employer.

The facts

Mrs Plant had been employed for 17 years with a clean disciplinary record. The employer had introduced a social media policy, which provided a non-exhaustive list of unacceptable social media activity, including publishing comments that could damage the reputation of the company. The policy also reminded employees that conversations between friends on Facebook can be copied and forwarded on to others without permission, meaning that conversations on Facebook are not truly private. The policy provided that breaches could lead to disciplinary action and that serious breaches would be regarded as gross misconduct, leading to dismissal.

Following the company's announcement of a possible move of premises, the employer was made aware that Mrs Plant had posted inappropriate comments on Facebook. Mrs Plant's Facebook profile, on which she had posted her job title description as "general dogsbody", was in fact linked to API Technology and she posted a further comment following API's announcement about a possible move of premises: "PMSL [pissing myself laughing] bloody place I need to hurry up and sue them PMSL". Following an investigation, API called Mrs Plant in for a disciplinary hearing.

At the hearing, Mrs Plant did not dispute that the comments were aimed at API, stating instead that she had not realised that her Facebook profile was linked to the employer. Mrs Plant was dismissed for a breach of policy, based on the offensive nature of her comments.

The decision

Mrs Plant's dismissal was found to be fair by the ET. She admitted that she was aware of the social media policy and what it entailed. In addition, she admitted that she had made the insulting comments that resulted in a breakdown in trust with API.

Although the decision may be seen as harsh when dealing with a long-serving employee with a clean record, the ET concluded that the employer had reasonable grounds for dismissal, after an investigation and disciplinary hearing. It will be interesting to see whether Ms Plant appeals the decision.

What is the practical impact of this for employers?

The case demonstrates the importance of ensuring employers put in place clear social media policies which set out the employer's position, guidance and sanctions for breach. Employers should ensure that employees fully understand the policy by offering social media training or by ensuring wide circulation, whereby employees are required to confirm that they have read and understood the policy.

A strongly drafted social media policy can aid in mitigating risk for the employer and employee and it can provide clarity around the values and culture of an organisation, setting expectations and guidelines for communication and responsibility in the workplace.

Tribunals will take into account many factors in assessing whether a social media-related dismissal is fair. Such factors include:

- the nature and severity of the comments made by an employee;
- the subject matter of those comments;
- the extent of the damage caused to an employer's reputation;
- whether there has been a breach of confidentiality;
- whether the employer has a social media policy and whether employees have been given training in that policy;
- whether the comments made by an employee were made during working hours and/or using the employer's equipment; and
- whether there are any other mitigating factors.

Employers need to be aware that any decision to dismiss an employee for alleged social media misconduct should be based on a fair and unbiased consideration and assessment of these factors, in order to minimise the chances of being found guilty of an unfair dismissal.

Holiday pay: Series of deduction broken by a three-month gap

Calculating holiday pay has become more complex over the past few years. Key cases include *Bear Scotland Ltd v. Fulton* and *Lock v. British Gas*, which focus on the issue of whether payments such as certain overtime, commission and bonuses should be included in holiday pay – and the courts determined that certain payments should. *Bear Scotland* has spent much time in the courts where the complexities of calculating holiday pay have been considered. This recent appeal is good news for employers: it deals specifically with the three-month gap between payments which breaks the series of deductions, hence preventing an unlawful deductions claim.

Facts and background

In 2012 and 2013, David Fulton and Douglas Baxter brought unlawful deductions from wages claims against Bear Scotland. They claimed that overtime and other supplemental payments were excluded from the calculation of their holiday pay and therefore they were underpaid. Fulton and Baxter asserted that this was contrary to the Working Time Regulations 1998.

An important and welcome aspect of the Employment Appeal Tribunal's (EAT) earlier decision in *Bear Scotland Ltd v. Fulton* was that an interval of more than three months between underpayments will "break the chain" of the series and prevent a Tribunal claim for underpayment of wages/holiday pay from reaching back prior to that break. However, this aspect of the EAT's decision on "breaking the chain" was challenged, leading to the most recent appeal.

The decision

The EAT has confirmed its previous position that an interval of more than three months between underpayments will "break the chain" of the series and prevent a Tribunal claim for underpayment of wages from reaching back prior to that break.

The decision states that a period of more than three months is generally to be regarded as too long a time to wait before making a claim. The focus on the word "generally" must be understood in the context of it being a clear rule, albeit with an equitable discretion to extend time, rather than a presumption rebuttable in undefined and open-ended circumstances.

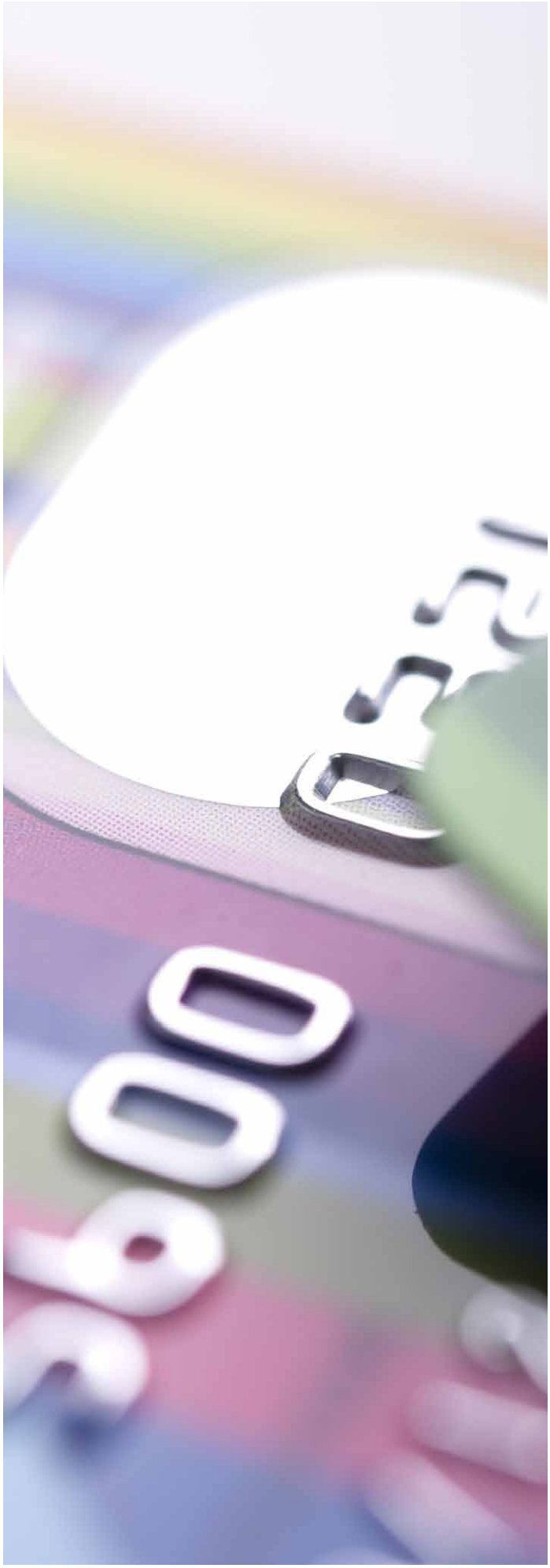
What is the practical impact on employers?

This is very good news for employers. Recent holiday pay decisions require the inclusion of commissions and overtime in the calculation of holiday pay only in respect of the basic EU Working Time Directive four-week minimum holidays, and not to the additional 1.6 weeks added by the UK Working Time Regulations, or any further holiday provided for by the employment contract.

For example, if one assumes a holiday year to be the same as the calendar year, an employee gets their new holiday entitlement from 1 January. Three months prior to that is 30 September. Therefore, if the employee had taken four weeks' holiday (including bank holidays) by or before the end of September, there is a relevant gap. It will not matter that the employee then took all or any of the remaining 1.6 weeks or any additional contractual entitlement between 1 October and 31 December.

Practically, the decision limits employers' exposure to unlawful deduction from wages claims. Employers should analyse the potential impact of the *Bear Scotland* decision by looking at pay structures, holiday pay records and general workforce awareness of the issue. A central monitoring process will also ensure that any claims for holiday pay (or claims which involve a holiday pay element) are logged, to enable employers to perform an effective assessment of liability. By way of reminder, from July 2015, a two-year limit on backdated claims for holiday pay was introduced.

While this decision does not get round the administrative burden of calculating holiday pay, it is welcome news.



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Brand-3797-UKEmploymentLawRoundUpNewsletter_June-2017_v2–21/06/2017