大成 DENTONS

UK Employment Law Round-up

APRIL 2018 | ISSUE 23

In this issue we look at some of the key employment law, pensions and immigration developments that have been taking place over the past month. In particular, we take a look at how employers can work to improve their gender pay gap, your "need to know" guide to engaging Agency Workers, whether or not a "Pensions Superfund" is the answer to dealing with the rundown of our formerly world-leading defined benefit sector and finally we highlight some of the key immigration changes that you may have missed amongst the Brexit headlines.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice, reward issues and global mobility at our UK Employment Hub.

IN THIS ISSUE

Gender pay gap reporting – how employers can action change

As a refresher, the "gender pay gap" is a measure of the difference between men and women's average earnings across an organisation, expressed as a percentage of male earnings.

If you are a business that has completed this analysis, published your findings and discovered that a gender pay gap exists at your organisation, we have set out a number of steps for you to consider in order to reduce this gap going forward.

1. Consider the reason behind your gender pay gap.

It is important to remember that equal pay and the gender pay gap are two different things. Equal pay is the concept of looking at employees who carry out the same jobs, similar jobs or work of equal value and assessing whether those employees are paid the same. The gender pay gap looks at the average pay disparity between men and woman employed at the same organisation.

There could be many reasons for a difference in average pay between men and women. For example, you may employ more men than women in high-paying or senior roles, or you may employ more women than men on part-time working arrangements.

Whatever the reason(s) behind your gender pay gap, it is important to understand each reason fully in order to action change.

2. Implement policies which enable change.

As explained above, because the gender pay gap is different from equal pay, the solution is not as simple as increasing pay for women in certain roles and seeing your statistics change overnight. Although pay may be a contributing factor and may be something to review across the organisation, there are policies and initiatives that could create an environment where men and women have an equal opportunity to progress in your organisation. The right policy and initiative will depend on the reason(s) you have identified for your gender pay gap.

For example, if you have identified that there are more men employed at senior levels in your business, or in higher-paying roles, then you should explore the reasons behind this. Review your internal workplace attitudes: are women discouraged from applying for senior positions due to internal attitudes or the required working style? If so, can you change this? It would also be worth reviewing your historical data regarding the application and interview process for these roles: do women apply for senior positions but not get the role, or do you have very few women applying for these positions at all? You should consider reviewing your recruitment process in its entirety.

There is also a wider question to be asked here too: do women consider themselves as able to achieve as much as their male counterparts in your organisation?

Policies which may instigate change in these areas include transparency as to job requirements at every level, internal succession planning and developing talent from within, implementing an internal mentoring system, ensuring you have role models for both sexes at every level and mandatory leadership courses for all employees who are at a certain level of seniority in the business.

3. Can there be more widespread flexible working?

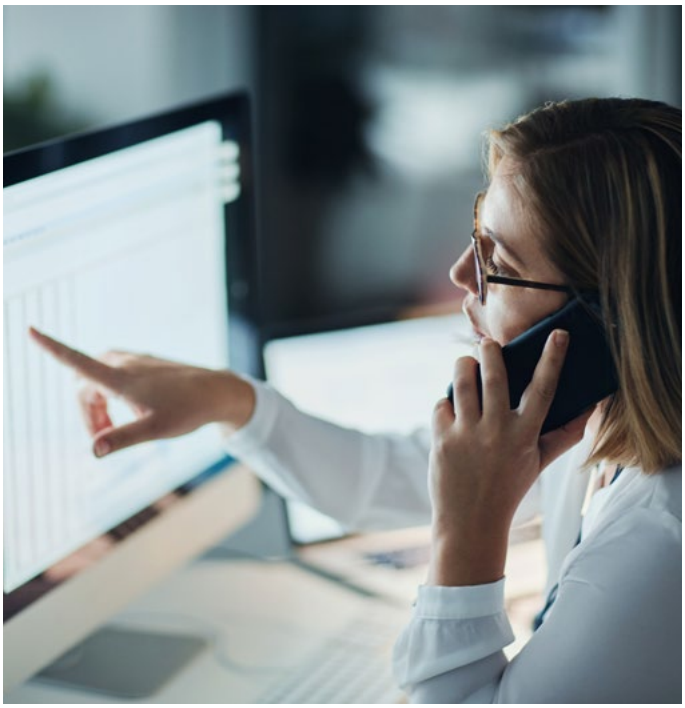
If you have identified that one of the reasons behind your organisation's gender pay gap is that more women are employed on part-time working arrangements in comparison to men, then it may be an apt time to review your working policies and consider implementing policies and job descriptions that do not punish those who need or want more flexibility. This disparity is not only due to the fact that more women are working part time per se, but also that there are few senior roles available for those who wish to work part time. You may wish to consider whether you make clear that more senior roles can be carried out on a flexible basis too.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- The Telegraph – Michael Bronstein comments on possible ways of improving the number of father's taking shared parental leave.
- Personnel Today – Jessica Pattinson's comments on the MAC's interim report on the current and likely future patterns of migration from the EEA to the UK and the likely economic and social impact of Brexit.

If you have an idea of a topic you'd like us to cover in a future Round-up or seminar, please provide your comments here.



There is a society-wide perception that the woman is the primary child carer and this may lead women to make what could be considered as career-limiting choices in certain careers, such as needing to work from home, or asking to leave work early, or choosing to work part time. You can eradicate this perception in your workplace by adapting your working policies to suit the modern-day family and promote the sharing of responsibilities between men and women. Consider implementing an agile working policy, or encourage employees to place less emphasis on face time, allowing them to leave earlier and work from home in the evening or work from home one day a week.

4. Provide for equality in your policies

Similarly, it may be a good time to review your maternity and paternity policies. There has not been much male take-up of Shared Parental Leave (SPL), which enables eligible mothers, fathers, partners and adopters to share up to 50 weeks of leave and 37 weeks of pay after a baby is born. It is argued that this is due to employers having differing maternity and paternity policies, whereby the mother receives enhanced maternity pay that goes beyond the minimum pay for SPL but the father does not. This can make it unaffordable for some families to opt in to SPL. So, if you are an employer who can offer beyond the minimum pay, and have men and women in your workforce who may wish to take up shared parental leave but cannot afford to, then increasing pay under your paternity pay policy may be worth considering.

5. Review your recruitment process.

If one of the reasons for your gender pay gap is the higher ratio of male to female employees at your business, it may be a good time to review your recruitment policy and collect data of interview and offer statistics. Do you attract, and invite to interview, an equal number of male and female candidates for every role? Do you have transparent internal recruitment processes, gender-balanced interview panels and unconscious bias training for everyone involved in your organisation, or at least everyone involved in appointing candidates?

Bias should be completely removed from any hiring, or promotion process. Decisions regarding who to interview, who to make offers to, who to promote and who to award bonuses to should be made as objectively as possible.

Whatever the reasons behind your gender pay gap, all organisations should make a concerted effort to understand why this has occurred and how the gap can be closed and should take steps to close it. There is currently no action plan from the government to close the gender pay gap within businesses via statutory means, but we expect that, in time, this will be introduced.

Agency workers summary

In the UK, agency workers' rights are protected under the Agency Workers Regulations 2010 (AWR). These regulations aim to prevent the exploitation of agency workers. Some employers may be inclined to afford agency workers less rights than full-time employees and instead treat them as a second tier worker. The AWR introduced a variety of protections for agency workers to combat this tendency, which apply either from the start of the agency worker's engagement or after 12 weeks.

The AWR are relevant to employers who engage agency workers through an agency but take on the "supervision and direction" of the agency workers themselves. The AWR are not triggered if the individual is genuinely self-employed (typically providing his/her services through a company of which he/she is a director and who is entitled to provide a substitute) or genuinely autonomous and, therefore, not working under the employer's supervision and direction.

Day 1 rights

From the first day of being engaged by an employer, agency workers have the right to access all collective facilities and amenities in the same way as people carrying out broadly similar work to the agency worker under the direction of the same employer at the same location (or, if there are no such people, people working at another location owned by the employer), (Comparable Workers). These facilities include canteens, childcare facilities, car parking and transport services.

Less favourable treatment of agency workers in this respect can be objectively justified in limited circumstances, although cost alone is not usually a sufficient reason. Agency workers also have the Day 1 right to be informed about job vacancies with the employer during their engagement in order to give them the same opportunity as Comparable Workers in finding permanent employment.

Employers are solely responsible for any breach of these rights and thus have full liability.

Rights after 12 weeks

After 12 weeks of engagement, agency workers have the right to the same basic working and employment conditions as those directly recruited by the employer. This includes key elements of pay. The right to the same working conditions also applies to duration of working time, night working, rest periods, rest breaks, annual leave and paid time-off for antenatal appointments. The agency worker again needs to be able to demonstrate that there is a Comparable Worker who enjoys the working conditions that they claim they should be given. Agencies can prevent these rights applying by entering into special types of contractual arrangements with their agency workers but these are rarely used in practice.

Liability for any breach of these rights after 12 weeks is apportioned between the employer and the agency to the extent that either is at fault. However, the agency will have a defence if it acted on information received from the employer concerning the pay or the working conditions of comparable employees, even if that information was not correct. It is therefore important that employers provide agencies with accurate and current data.

Continuous rights

Employers and the agency must not structure engagements to prevent agency workers acquiring 12 weeks' service and thus deny them their further rights. This would be in breach of the anti-avoidance

provisions. The employer and/or agency can be liable for such breaches, depending who is responsible for the structuring of the engagement.

Agency workers' remedies

For breaches of any entitlements arising from day 1, the agency worker should approach the employer directly with a written request for information before making a claim. The employer has 28 days from receipt of the request to respond in writing. The employer should then provide a written statement with the relevant information relating to the rights of a Comparable Worker or employee and its reasons for the treatment of the agency worker.

For breaches of agency workers' rights acquired after 12 weeks, the agency worker can request a written statement from the agency about any aspect of the treatment they are questioning before making a claim. The agency has 28 days from receipt of the request to respond in writing. There is no statutory obligation for the employer to provide the agency with relevant information about the terms and conditions of Comparable Workers. However, the employer will be held responsible for any breach to the extent that it is responsible for the infringement. Therefore, employers should provide such information on an ongoing

basis. For example, the employer should provide the agency with copies of standard terms and conditions of employment, pay scales and annual leave entitlements of Comparable Workers.

The future of AWR

Whilst the future of employment law in the UK remains a little uncertain, it seems the general public appears to be in favour of keeping the protections afforded to agency workers as they are. Initially the AWR were very unpopular with businesses, who considered the regulations to be too complex and discouraged them from engaging agency workers. Indeed, even the 2011 Beecroft report of employment law, commissioned after the EU directive dictating such rights was issued, recommended a non-statutory code of practice and asked the government to explore the consequences of not implementing the Agency Workers Directive. However, research published at the end of February 2012 by the Institute of Public Policy Research highlighted the public's desire to maintain these regulations – just under half of the people questioned said they felt that the AWR should remain as they are, with only 12% expressing a desire for them to be loosened or removed altogether. In light of the above public perception and the number of agency workers in the UK employment sector, employers should ensure they are fully aware of their obligations.

Pensions Superfund

As some readers may be aware pension schemes offering a guaranteed income in retirement are not a popular sell and haven't been for fifteen years or more. In fact a fair proportion of the collective intelligence of the pensions industry is devoted to the conundrum of how to deal with the run down of our formerly world leading defined benefit sector.

One option getting a lot of thought at the moment is consolidation. Small funds, the argument goes, have less resources to devote to regulatory compliance, they have little negotiating power with their providers and they do not have the bulk that the most interesting investment options offer.

A big fund (one made up of dozens of these smaller, less efficient funds) would be able to leverage its size into greater efficiency. Greater efficiency would mean lower costs per member, meaning less money is required to get to those end-result guaranteed benefits. That should be an easy sell to employers struggling with deficit contributions into defined benefit schemes that disappear into a black hole over the funding cycle so that more are always needed.

There is also the sheer amount of effort and risk associated with legacy defined benefit schemes. No one likes a visit to meet Frank Field if something goes wrong.

The government finds the idea attractive. Its white paper on the future of defined benefits in the UK included a future consultation on proposed regulatory framework consolidator schemes this year.

So all is well? Not entirely. Although there are a few consolidator style schemes already out there, the proposed launch of a new superfund and the government consultation appear to have engaged the interest of the insurance industry.

A word on funding here. Occupational pension schemes (OPS) are regulated by the UK Pensions Regulator, and are generally funded on a "scheme-specific" basis. This requires employers to pay in enough money to make sure that funds are available to pay benefits as they fall due. Funding takes into account things like investment returns over time which means less money is needed upfront.

Of course, if an OPS terminates or the employer decides they have had enough of their scheme and wants to get rid of it (legally), you move over to a far more expensive "buy-out" basis, which is based on the cost to buy benefits with an insurer right now.

And insurers do not fund benefits they are required to pay under the scheme-specific funding regime. They have to fund under the more stringent Solvency II capital rules.

Two things appear to concern the insurers.

First, if, rather than 5,600 potentially fragile schemes, there are 100 or 200 superfunds, each with the expected efficiency savings and investment options, buy-outs would become much less frequent, or disappear entirely.

Secondly, why would anyone choose to close down their scheme and pay an insurer a big upfront cost to buy out the benefits when they can hand over the keys to a cheap as chips consolidator that will just send them a bill once in a while?

So we are getting into regulatory arbitrage arguments and competition issues. The press war has already begun. This issue has history too. The IORP II Directive took forever to negotiate due to fundamental disagreements between those member states with big occupational pension sectors and those with insurance-based schemes under the Solvency II regime as to how OPS benefits should be funded.

In our view this is not an open-and-shut case. Funding is central to everything defined benefit. The UK's current scheme funding regime was not set up with this form of big consolidator scheme in mind (hence the DWP's consultation), but there are clear theoretical benefits that are hard to ignore to the bigger is better approach.

But there are also big risks. The Pension Protection Fund acts as a lifeboat for the defined benefit sector – if your employer goes under, the PPF gets the assets of your scheme and provides you with compensation.

Your average defined benefit pension scheme is not a huge strain to the PPF – although some of the bigger schemes would be hard to digest. If something went wrong with a superfund, the PPF would face a nightmare with either bigger industry levies or a cutback of PPF compensation until it was back on an even keel.

If the superfunds funded like insurers, this would be a very minor risk. It would also kill the superfund idea stone dead, as the point of the product is to combine the less stringent ongoing funding basis applicable to occupational pension schemes with administration, governance and investment quality available to an insurer-sized operation.

After some more thought, we will be commenting on the DWP's consultation when it is released.

Immigration update – what you may have missed

Whilst this article does not have a main focus on Brexit, it seems it would fall short if it completely glossed over looming Brexit Day. Brexit Day is set for 29 March 2019. Please read our article on our blog (https://www.dentons.com/en/insights/alerts/2018/march/20/brexit-immigration-update-agreement-reached-on-the-transition-period) to get an update on the latest position for EU citizens in the UK.

MAC interim report

Thank you to those of you who completed our questionnaire to input into the MAC (Migration Advisory Committee) report last year. The MAC's full report on the current and likely future patterns of migration from the EEA to the UK and the likely economic and social impact of the UK's exit from the EU is due to be released in September 2018. In the meantime it has published an interim report based on the 417 responses it received. The report acknowledges that EU workers are employed because they are the best and are available. Therefore, there is a concern about the prospect of restrictions on the ability to recruit EEA migrants and that EEA migrants may be subject to the Tier 2 points based system application process. Those currently using the Tier 2 process to recruit non-EEA migrants complain that the system is time consuming, costly and overly complex. There is also a fear that low-skilled migrants will not meet the criteria to apply under Tier 2.

Unfortunately the report does not give any suggestions for tackling the issues employers face. Further, it does not give any indication of what a future immigration regime will look like post Brexit. Any new regime is likely to be implemented in 2021. To assist our clients in navigating the complexities of Brexit, we have published a comprehensive guide: *Immigration and Brexit: Guide for UK-based EU nationals*. The guide includes information on how EU nationals will be affected by Brexit and what can be done now in preparation. If you would like to discuss how Dentons can help you prepare for Brexit, and receive a copy of the guide, please email: immigration@dentons.com

Increase in fees

Fees for immigration and nationality applications have been increased with effect from 6 April 2018. For some applications the increase is as much as 4 per cent – which is a moderate increase compared to previous years.

As a reminder to employers, in addition to government visa application fees, the immigration health surcharge applies to most limited leave to remain (temporary residence) applications, and for Tier 2 applications there is also the immigration skills charge. There are also optional priority / premium service fees to expedite processing, and in certain situations fees will also be incurred for English language assessment and tuberculosis testing.

Regarding the immigration health surcharge, this is currently £200 per year per applicant, however at a point to be determined in 2018, this will increase to £400 per year per applicant.

With the escalating costs of applying for UK visas it is important for employers to have a policy which clearly describes the financial support provided to employees, and any measures to recover costs where employment ends prematurely. Please get in touch if you would like to discuss this further.

Croatian nationals

EU member states were able to restrict Croatian citizens' access to labour markets when the country joined the EU in 2013. The UK chose to apply this measure. This meant that Croatians needed permission from the Home Office to work in the UK.

The restriction will be lifted from 30 June 2018 meaning that Croatian workers' rights will be in line with other EU citizens working in the UK. This decision was made on the basis that unemployment was at near record lows and the eurozone and Croatia are forecast to grow strongly over the next two years. Further, there are estimated to be fewer than 10,000 Croatians in the UK. When the same controls were lifted from Romanians and Bulgarians there were around 57,000 Romanians and 35,000 Bulgarians living in the UK.

Whilst this will be welcome news for Croatians and their employers, they will of course remain concerned about the impact of Brexit on their right to continue working in the UK.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Mergers and acquisitions post-completion immigration actions – http://www.ukemploymenthub.com/mergers-and-acquisitions-post-completion-immigration-actions
- Vento bands increase announced – http://www.ukemploymenthub.com/vento-bands-increase-announced
- The gender pay gap reporting deadline has now passed – so what have we learned? – http://www.ukemploymenthub.com/the-gender-pay-gap-reporting-deadline-has-now-passed-so-what-have-we-learned
- GDPR: subject access requests – what's new? – http://www.ukemploymenthub.com/gdpr-subject-access-requests-whats-new
- Pensions Regulator consults on master trust authorisation regime – http://www.ukemploymenthub.com/pensions-regulator-consults-on-master-trust-authorisation-regime

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK Employment Hub – www.ukemploymenthub.com

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.

www.dentons.com

Contacts

Virginia Allen
Head of People, Reward and Mobility UK
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner
D +44 20 7320 4096
sarah.beeby@dentons.com

Michael Bronstein
Partner
D +44 20 7320 6131
michael.bronstein@dentons.com

Ryan Carthew
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

Mark Hamilton
Partner
D +44 14 1271 5721
mark.hamilton@dentons.com

Gilla Harris
Partner
D +44 20 7320 6960
gilla.harris@dentons.com

Amanda Jones
Partner
D +44 13 1228 7134
amanda.jones@dentons.com

Roger Tynan
Partner
D +44 20 7634 8811
roger.tynan@dentons.com

Brand-8732-UK Employment Law Round up - April 2018-02 – 25/04/2018