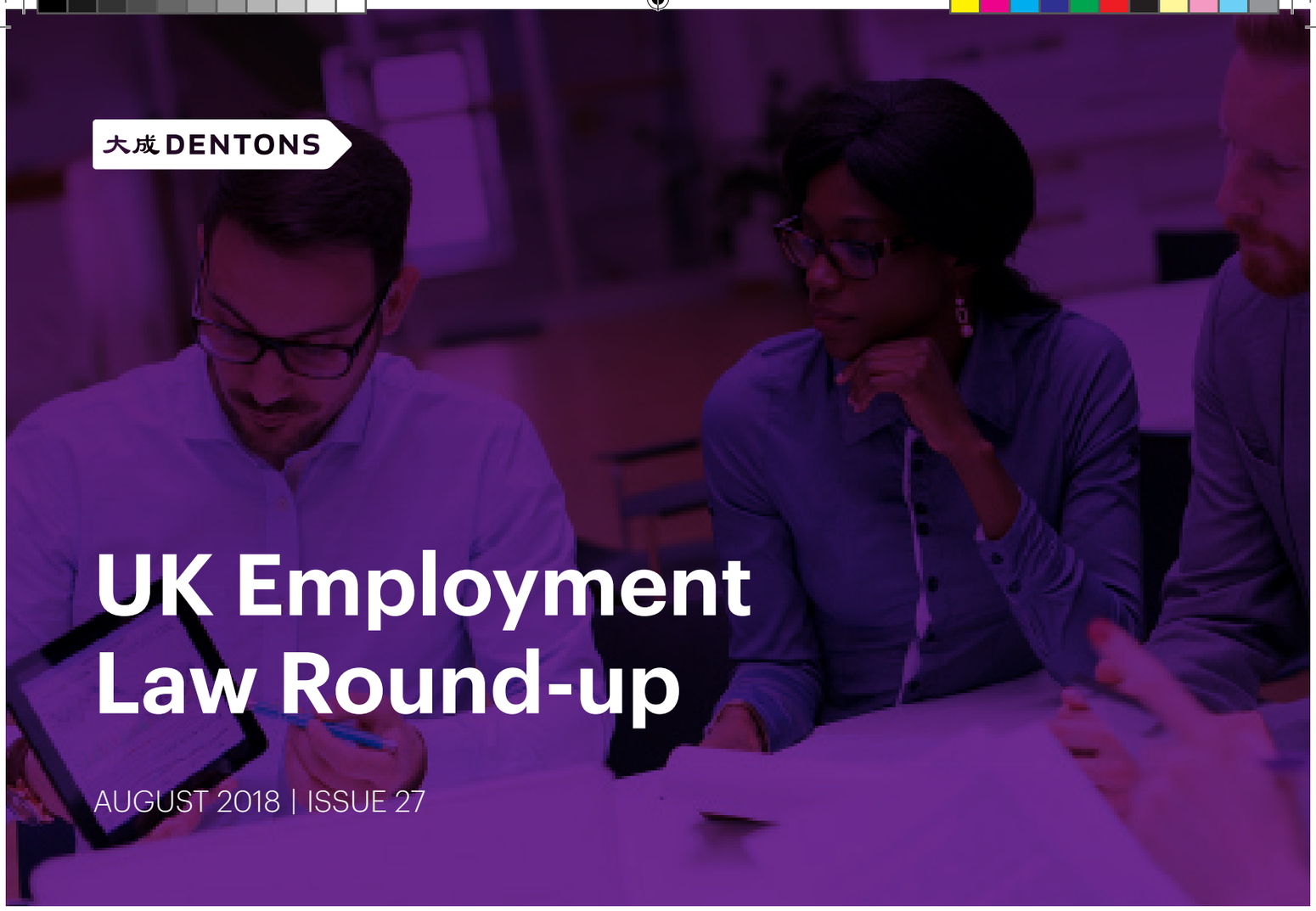

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UK Employment Law Round-up

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In this issue we look at some of the key employment and immigration law developments that have been taking place over the past month. We provide an update on the UK settled status scheme, review the use of "gagging clauses" in settlement agreements, analyse a recent case on employer vicarious liability and provide advice on how to deal with sickness absence in the workplace.

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.

IN THIS ISSUE

Applying for settled status - an update on the process

Three easy steps to settled status

Since we last addressed the plight of EU citizens in the UK, the government has published further details of its settlement scheme. The Home Office has announced that EU citizens will be able to apply for settled status in three easy steps, and the cost will be less than that of a British passport.

The Immigration Minister, Caroline Nokes, confirmed those applying would need to:

- **prove their identity:** the government expects this to be by passport, national identity card, biometric residence card, permit, digital scan or hard copy documents. It will also include a requirement to enrol a facial image;
- **show they live in the UK:** see further information below; and
- **declare that they have no serious criminal convictions:** the government will undertake checks against UK criminality and security databases, and conduct overseas criminal record checks.

For EU citizens who already have valid permanent residence or indefinite leave to remain documentation, they will be able to exchange it for settled status. They will incur no fee.

One significant change to the immigration system is the proposal that the Home Office will work with other UK government departments to obtain the required supporting information and documents to show that the applicant lives in the UK. Anyone who has previously dealt with the Home Office will have been used to compiling full and numerous supporting documents. In deciding on settled status applications, the Home Office will check the employment and benefits records held by HM Revenue and Customs and, in due course, the Department for Work and Pensions, to automatically prove residence. The government also expects to roll out this initiative to other immigration applications in the future. Of course, if it is not applicable or appropriate to revert to HMRC or the DWP for the checks, the Home Office will accept documentary evidence from a prescribed list.

Application deadlines

The deadline for applications to the scheme for those who, by 31 December 2020, have been continuously resident in the UK for five years, will be 30 June 2021. "Continuously resident" retains its current meaning in that an applicant must not have been absent from the UK for more than six months in total in any 12-month period.

The government will grant pre-settled status to those who have arrived in the UK by 31 December 2020, but have not yet lived in the UK for five years. They will be able to apply for settled status once they reach the five-year point. The government will not charge for the subsequent settled status application.

The new online application will be accessible through smartphones, tablets and computers, albeit android phones, not Apple. Of course, there will be a minority who will not have access to technology and there will be a focus by the government on finding those people and providing special help so they can apply.

Starting on 28 August 2018, the government will run a beta trial of the online settled status application, using NHS trusts and universities in the North West as guinea pigs. From there, the government will phase in the scheme. It is expected to be fully open by 30 March 2019, the day after the UK leaves the EU. The deadline for applications will be 30 June 2021. The status of applicants will be protected, pending the outcome of the application.

What can employers be doing?

Managing the people aspects of Brexit is more about talent retention than immigration compliance. With more EEA nationals leaving the UK, and fewer arriving, it is important to consider reliance on labour and skills from Europe, and how employers will replace this pipeline after Brexit. Employee retention, especially in those areas with a reliance on skills and labour from Europe, will be critical. One way to increase retention is to see Brexit as a way to show your employees how much you value them. Employers could proactively engage with employees on Brexit matters, keep them informed on what they will need to do to apply for residence documentation and provide a level of support (for example, through seminars).

We do not have clarity on what will happen in the event of a no-deal Brexit. One of the potential risks is that there would be no official transition period. This could accelerate the timeline for the end of free movement, meaning that anyone arriving in the UK after 29 March 2019 would need to satisfy requirements for a visa, as with non-EEA nationals. There is clearly still much work for the government to do to iron out all the people mobility issues that arise with Brexit. We will continue to keep you updated as news develops.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Should the UK follow New Zealand's example and add paid leave for domestic violence victims to the Domestic Abuse Bill?
  http://www.ukemploymenthub.com/should-the-uk-follow-new-zealands-example-and-add-paid-leave-for-domestic-violence-victims-to-the-domestic-abuse-bill
- Testing the limits of religious and philosophical belief discrimination
  http://www.ukemploymenthub.com/testing-the-limits-of-religious-and-philosophical-belief-discrimination
- MPs call for smaller companies to report gender pay gap
  http://www.ukemploymenthub.com/mps-call-for-smaller-companies-to-report-gender-pay-gap
- Women and Equalities Committee report calls for a more proactive approach to dealing with sexual harassment in the workplace
  http://www.ukemploymenthub.com/women-and-equalities-committee-report-calls-for-a-more-proactive-approach-to-dealing-with-sexual-harassment-in-the-workplace

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Confidentiality concerns

"Gagging clauses" have come in for some bad press over recent times, especially where matters of wider social and public concern have been involved. Nowhere is this more true than in the context of the #metoo movement, where the use of non-disclosure agreements has been widely criticised. Legitimate concerns have been raised as to the ability of perpetrators to squash adverse publicity, silence their victims and avoid detection. The clauses themselves may perhaps not have been that unusual in terms of their drafting. We will likely never know. But their context and effect on keeping women's voices out of the public arena for so long has succeeded in attracting high levels of criticism.

These concerns have fostered wider unease. Recently the House of Commons came under fire for spending almost £2.5 million on non-disclosure agreements entered into with employees over the last five years (data which was only released in response to a request under the Freedom of Information Act). Calls then followed for such clauses to be made "a thing of the past".

But is there a case for confidentiality clauses in some circumstances? Those involved in the daily tussle of HR and ER disputes will recognise the use of confidentiality clauses within settlement agreements as a common occurrence. Rather than having a malign motive, in these contexts they are seen as an important step in drawing a line under any potential dispute, for the benefit of all concerned. Indeed, confidentiality obligations of some form are often imposed on the employer as well as the employee.

In a snapshot, what is the current legal position and where might we be headed?

- Whistleblowing: Under the Employment Rights Act 1996, any clause is void in so far as it purports to prevent employees from making protected disclosures. However, the general view is that failing to include a specific carve-out for protected disclosures will not render the confidentiality clause void in its entirety. In other words, "in so far as" can be read along the lines of "to the extent that". Blanket confidentiality provisions often remain the preference on this basis.

- Regulated firms and whistleblowing: Large banks and certain other regulated firms are required under FCA and PRA rules to ensure that employment contracts and settlement agreements do not deter staff from whistleblowing. In contrast to the general position, blanket provisions without carve-outs or statements confirming the employee's ability to make a protected disclosure are likely to fall foul of these rules.
- Turning the tables: Ending Sexual Harassment at Work was published by the Equality and Human Rights Commission earlier this year and recommended a number of changes, including:
  - a legislative ban on the use of clauses seeking to prevent disclosure of future acts of harassment, discrimination or victimisation; and
  - a statutory code of practice dealing with the circumstances in which clauses in a settlement agreement may (or may not) validly prevent the disclosure of allegations of past acts.
- The Solicitors Regulation Authority: The SRA has issued a notice reminding practitioners not to use non-disclosure agreements inappropriately.

Pressure continues to mount. But, for the time being at least, these types of clause remain commonplace within negotiated employment settlements (potential adverse publicity notwithstanding).

Employers can focus on their own interests in defending vicarious liability proceedings unimpeded by reputational and economic concerns of employees

In James-Bowen v. Commissioner of Police of the Metropolis, the Supreme Court held that an employer does not owe a duty to its employees to protect them from economic or reputational harm as to the manner in which vicarious liability proceedings are conducted.

Vicarious liability involves an employer being liable for the wrongs committed by its employees where there is a sufficient connection between those wrongs and the employment.

In this case, an individual made a claim against the Commissioner alleging vicarious liability for the acts of her officers during the course of an arrest.

The claim settled at trial with the Commissioner admitting liability and issuing an apology for "gratuitous violence" on the part of her officers. The relevant officers claimed, among other things, breach of duty in contract and tort as to the manner in which the Commissioner had defended the individual's claim.

Although police officers are not employees with a contract of employment, the Court considered the analogous position of employees in these circumstances and held that the implied term of trust and confidence does not include a duty on the employer to conduct litigation in a manner which protects its employees from economic or reputational harm.

The Court then considered whether such a duty arose in tort and whether it would be fair, just and reasonable to impose such a duty.

The Court recognised that, in cases involving vicarious liability, the employer's interests may be fundamentally different from those of the employee. It is the employer who will bear the cost and effort of defending proceedings. On the other hand, the predominant interest of an employee will be that his reputation should be vindicated. The Court considered that it should be open to an employer to take its own view as to the reliability of the employee and how it considers the employee would perform as a witness.

Further, the Court found that other public policy considerations relating to the conduct of litigation weighed heavily against imposing such a duty. Parties in dispute should be free to conduct litigation without fear of incurring liability to third parties. Imposing such a duty could impede settlement and lead to additional delay, disruption and expense in defending such proceedings.

So, the upshot is that employers can clearly focus on their own interests in the stance they take in defending a claim based on vicarious liability, without being concerned that what they consider they should say or concede, in that litigation, about the conduct of their employees, will give rise to a claim by those employees.

Are declining sickness absence levels unhealthy for your business?

Recent figures published by the Office for National Statistics (ONS) have revealed that the average number of sick days taken by employees in the UK in 2017 was 4.1. This figure is almost half the average for 1993 (7.1), and has been declining every year since 1999. The sickness absence rate is lowest in the private sector and particularly low for professional occupations (1.7%).

But what are the reasons for this decline? It has been optimistically suggested that the decline in sickness absence could be explained by improvements in health and life expectancy. However, this suggestion has been dismissed by HR experts. Cary Cooper, President of the Chartered Institute of Personnel and Development (CIPD), has commented that, if this were the case, there would be a corresponding rise in productivity at work. Yet we have seen no such improvement in productivity in the UK. Instead, Cary Cooper and many others are attributing this decrease in sickness absence to a phenomenon known as "presenteeism".

What is presenteeism?

Presenteeism is the term used to describe employees who continue to show up for work, despite being potentially unfit to do so. According to the 2018 CIPD/ Simplyhealth "Health and Wellbeing at Work" survey, 86% of those surveyed admitted to having witnessed presenteeism in their workplace within the last 12 months, compared to 72% in 2016 and a mere 26% in the 2010 survey. Presenteeism has become more commonplace across UK workplaces for various reasons. In particular, the global financial downturn and our impending withdrawal from the European Union have created a more uncertain and competitive job market, resulting in employees continuing to work even when they are not fully fit, out of concern that they will be looked on unfavourably if they take sick leave. In addition, the rise of the "gig" economy, flexible working and zero hours contracts means that many groups of employees simply do not have the luxury of paid sick leave.

Another interesting factor is the role that technology has played in the decrease in sickness absence. Remote access is viewed increasingly positively – it can allow employees to work from home and manage their working day with greater control. However, this ease of access can also encourage sick employees to continue to work whilst ill, as they may feel as though the flexibility to work from the comfort of their own home leaves them with no excuse for not logging on. Another finding in the CIPD/ Simplyhealth survey supports this reasoning – nine in 10 respondents identified their employees' inability to switch off outside working hours as the most common negative effect of technology on wellbeing, linking technology to rising stress levels and increased risks to the psychological health of employees. Stress-related absence is one of the most common causes of long-term sickness absence, capturing the almost paradoxical connection between presenteeism and absence.

What should employers do about this?

What seems clear is that presenteeism is a catalyst for stalled or even reduced productivity. In which case, employers should look to address any such culture in their workplace. But in addition to looking at presenteeism from a productivity perspective, employers should also remember that they have a duty of care in respect of their employees – they must take reasonable steps to ensure their employees' health,

safety and wellbeing. The potential connection between presenteeism and long-term sickness absence puts employers at risk in this regard.

However, employers can take action to protect themselves and their employees from the dangers of presenteeism. Rachel Suff, Senior Employment Relations Adviser at the CIPD, advises employers to "look beyond sickness absence rates alone and develop a solid, evidence-based understanding of the underlying causes of work-related stress and unhealthy behaviour like presenteeism". Employers should therefore keep an eye out for unexpected decreases in productivity or behaviour that is out of character. Performance appraisals and private discussions should be used to explore the underlying causes of such behaviour. Employees that appear to be sick or stressed should be encouraged to see an occupational health provider, and employers should consider providing counselling services and subsidised gym memberships to promote general employee wellbeing in and out of the workplace.

IN THE PRESS

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

- People Management – Elise Turner provides guidance to employers on when employees should be allowed time off to deal with emergencies involving their dependants.
- Scottish Grocer – Victoria Albon looks at an employer's obligations to its zero-hour workers.

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