UK Employment Law Round-up

February 2018 | Issue 21

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In this issue we look at some of the key employment law developments that have been taking place over the past month. In particular, we take a look at the outcome of Matthew Taylor's review of modern employment practices and the Fawcett Society's report on potential gaps in current sex discrimination legislation in the UK. The second of these is particularly significant in light of the growing movement to raise awareness of sexual harassment in the workplace. We also give you our top tips for getting your organisation ready for the implementation of the GDPR, which is now only three months away(!), and the first hike in the "minimum" requirements for auto-enrolment compliance.

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.

Sex discrimination law review final report

2018 is a momentous year, in that it marks 100 years since British women were given the right to vote. Things have moved on a bit since 1918, and we can safely say that there have been many positive developments since then aimed at addressing the issue of gender inequality in the workplace.

Yet here we are, in this historic centenary year, reading daily accounts of high-profile cases of sex discrimination and harassment. Take, for example, the BBC "not doing equal pay" and the sexual harassment allegations arising from the notorious Presidents Club dinner. Inequality in the workplace remains a real issue, and against that backdrop one key question needs to be considered: are the UK's sex discrimination laws still fit for purpose?

This was the question that the Fawcett Society (the UK's leading charity campaigning for gender equality and women's rights), together with a panel of legal and policy experts, was recently tasked with answering. Following a nine-month review, the Society has now made a number of recommendations on the following topics.

Brexit

The Society recommended that the use of ministerial powers conferred by the European Union (Withdrawal) Bill should be limited so that they cannot be used to substantively amend employment law in the UK. Unlimited ministerial powers would allow scope for amendments that would have a disproportionate impact on female workers, such as curtailing rights protected by the Working Time Directive, the Parental Leave Directive, and part-time and agency workers' rights. In particular, the Society recommended that the equality legislation be enacted as primary legislation, as was the approach with the European Convention on Human Rights through the enactment of the Human Rights Act 1998.

Gender pay gap

The gender pay gap between men and women (which was 9.1 per cent in 2017) was noted as being "stubbornly slow in closing". The new reporting requirements show that important policy progress is being made on this issue, but the Society recommended that civil penalties for non-compliance should be introduced and the threshold for reporting obligations lowered.

Family-friendly rights

The Society also highlighted another problem area, namely that an estimated 54,000 pregnant women and working mothers are made redundant or pressured to leave their jobs each year across the UK. The Society attributes this to the fact that, as it stands, the additional protection from dismissal linked to maternity discrimination ends on the last day of an employee's maternity leave. As such, the Society has recommended extending the protection to cover the six-month period immediately following a mother's return to work.

In the Press

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

- People Management – Emma Carter reports on how to be transparent about your gender pay gap reporting.
- People Management – Verity Buckingham and Julianna Khudoliei look at how companies are coping with the apprenticeship levy.
- People Management – see Jessica Pattinson's insight on how employers are braced for the "perfect storm" as UK reaches non-EU migration cap for second consecutive month.

Work place harassment

The report noted that research has revealed that 52 per cent of women have experienced sexual harassment in the workplace in some form, and that 80 per cent did not report it to their employer. It was recommended that, as one of the steps to address this issue, Section 40 of the Equality Act 2010 (which can make an employer liable for the harassment of its staff by a third party in certain situations) should be reintroduced. Section 40 was previously repealed in 2013. However, the Society also suggested an amendment, so that only a single prior incident of harassment would be necessary to trigger the application of the provision. It was also recommended that pregnancy and maternity, in addition to marriage and civil partnership status, be included as protected characteristics when it comes to prohibiting harassment.

Government's response to Taylor Review

Seven months ago, we reported on the Taylor Review of modern working practices, with its focus on "good work" for all that is "fair and decent". In short, the review recommended extra protection for the UK workforce, ranging from clarity over employment status to extra rights on zero-hours contracts. This month the government has published its eagerly anticipated response to Matthew Taylor's 53 recommendations.

In summary, the government's response is threefold, in that it seeks to ensure: that vulnerable workers know about their rights; that workers receive the benefits and protections that they are entitled to; and that employers who breach workers' rights are penalised. Certain proposals actually go further than Taylor's recommendations, including:

- enforcing holiday and sick pay entitlements;
- day one rights – for example, guaranteeing a payslip for all workers including casual and zero-hours workers;
- naming and shaming employers who do not pay tribunal awards; and
- increasing employment tribunal fines (from £5,000 to £20,000) for employers showing malice, spite or gross oversight and increasing penalties for "repeat offender" employers.

Nevertheless, some of the proposals, such as introducing "a more predictable contract" clearly need further clarification. Hopefully, this will emerge from the four consultations the government has since launched, which will consider:

- employment status;
- increasing transparency in the labour market;
- agency and atypical workers; and
- enforcement of employment rights.

These consultations close in May/June 2018 and it is widely thought that it will be the responses to these that will reveal the real response to Taylor. We will keep you updated.

The government's full response can be accessed here.

Pensions – auto-enrolment contributions edge upwards

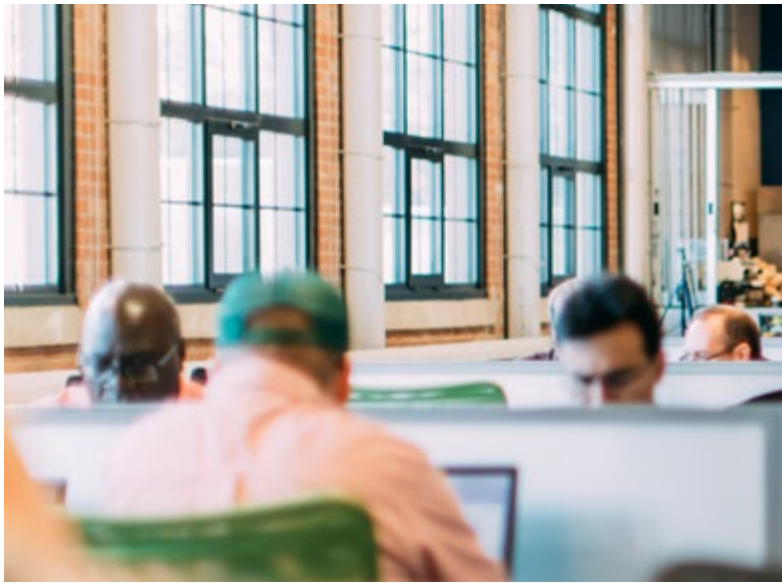
We are now seven weeks from the first hike in the "minimum" requirements for auto-enrolment compliance (6 April 2018). In practical terms, for employers currently applying those statutory minimums this means that your employees will see an increase in their pension contributions from one per cent of their annual earnings between £6,032 and £46,350 (based on the 2018 figures) to three per cent.

This could come as something of a shock for employees who didn't read the fine print on their auto-enrolment announcements as it will mean less money in their April pay packet (though more going into their pension savings).

There'll also be an increase in the amount you have to pay in as an employer from one per cent of those banded earnings to two per cent.

Again, in practical terms, where staff are affected by this change in contributions it might be sensible to highlight this before the changes take effect noting that this is a statutory requirement. And of course we have a similar issue to look forward to in April 2019, when three per cent for employees and two per cent for employers become five per cent and three per cent respectively.

Just as a reminder, the Pensions Regulator has the ability to fine employers who don't meet their auto-enrolment obligations and has recently announced a mix of fines and backdated contributions accruing to a bus company in excess of £32,000. Given that the employer had 35 staff it shows that it pays to be compliant with these legal obligations and it's never a bad time for a review.



Surveillance of employees in the workplace and the Article 8 right to privacy

Advances in technology have made monitoring employees easier than ever before. With the increased use of email, smartphones, laptops, trackers and SmartWare, almost every mode of communication has gone digital. As such, it is now possible to monitor your employees' every movement and communication, to find out not just where they are but also how productive they are being.

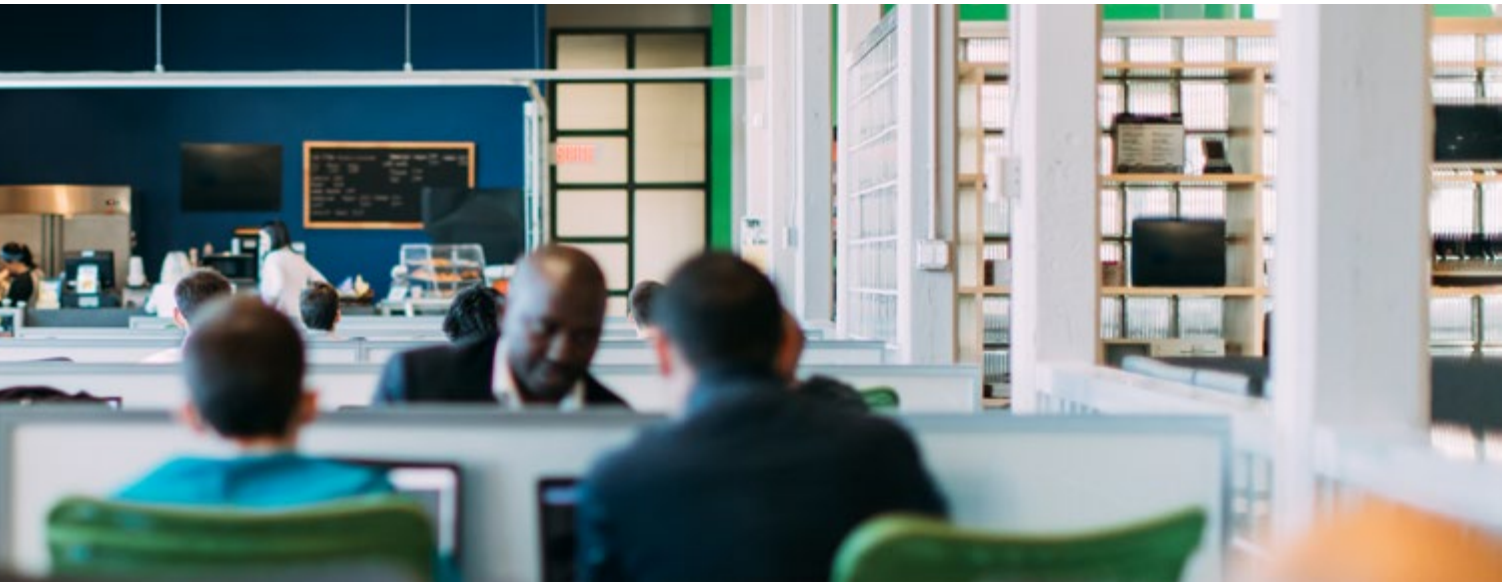
However, many employees try to argue that this monitoring is an intrusion on their right to a private life (under Article 8 of the Human Rights Act) and is therefore unlawful.

This important issue has been the focus of two recent decisions by the European Court of Human Rights (ECHR). In each case, the judges considered the limits on what is and isn't permissible when it comes to the surveillance of employees.

Summary

In *Bărbulescu v. Romania,* Mr Bărbulescu was dismissed for using his professional Yahoo Messenger account to send personal messages whilst at work. The employer knew this because it had monitored and accessed his messages to check on his usage of the account.

Mr. Bărbulescu successfully argued that his right to private life and correspondence had been breached



by his employer's monitoring. In reaching its decision, the ECHR emphasised the need to strike a fair balance between Article 8 and an employer's right to take measures to ensure the smooth running of the company. It said that every case would be different, but consideration should always be given to:

- whether the employee has been notified of the possibility of monitoring;
- the extent of any monitoring and the degree of intrusion into the employee's privacy;
- whether the employer has legitimate reasons to justify monitoring;
- whether more proportionate methods could be used;
- the consequences of monitoring for the employee; and
- whether the employee was provided with sufficient safeguards to ensure that the employer cannot access the content of communications unless the employee has been notified in advance.

In another case on this issue, *López Ribalda v. Spain*, an employer installed covert video surveillance to monitor its employees due to suspicions of workplace theft. Five employees were subsequently dismissed after they were caught on video stealing the employer's property.

The facts of this case were somewhat surprising as, even though the employees had committed theft (as suspected by the employer), the ECHR still found that their right to privacy under Article 8 had been breached. Further, each employee was awarded €4,000 damages, plus costs and expenses.

Similar themes to that in *Bărbulescu* emerged from this decision. The ECHR emphasised that its decision was influenced by the fact that:

- all staff were subject to the surveillance, rather than only those employees who were most likely to be responsible for the thefts;
- the surveillance took place over an unnecessarily prolonged period;
- the surveillance had not been carried out in accordance with the data protection principles; and
- less intrusive means were available – the aim of preventing further thefts could still have been achieved if the employer had informed the employees in advance of the installation of cameras.

What does this mean for employers?

These decisions do not ban employers from monitoring employees, or even from using covert surveillance in the workplace. However, employers should always ensure that any monitoring undertaken is proportionate and for legitimate reasons. Save in exceptional circumstances, employees should also be notified of the monitoring.

With the introduction of the General Data Protection Regulation (GDPR) fast approaching in May 2018, these issues are particularly relevant. Employers will no longer be able to rely on blanket contractual consents to the processing of personal data. It is time to start thinking about other grounds, including the legitimate interest of the business, to justify the processing of such data.

Three months to go until GDPR comes into force: are you ready?

Has getting to grips with GDPR been lingering on your to-do list for the past year? With only three months to go until GDPR comes into force on 25 May, now is the time to push it to the top of your list.

Don't panic if you have not yet started to prepare. Here are our top tips for getting your organisation ready:

- Start with an audit of what data you hold and what you do with it. You can then consider what legal basis you have for processing the data. With the advent of GDPR, you should be moving away from the use of consent, which individuals are entitled to withdraw, to one of the other permitted bases for processing data. In the employment context, most data processing will be permitted as being required for performance of the employment contract or complying with a legal obligation. There is also a basis for processing where an organisation has "legitimate interests" to do so.
- A new privacy notice will be needed to comply with GDPR. Consider having separate privacy notices for existing employees and for recruitment purposes. GDPR requires privacy notices to be concise, easily accessible and easy to understand. There is a significant list of mandatory information which needs to be included in a compliant notice.
- If, like most employers, you have a data protection consent clause in your template employment contract, this should be removed from any new contracts being issued. You don't need to issue fresh contracts to existing employees but you should let them know that you are no longer relying on consent and refer them to your new privacy notice.
- Put in place a procedure for dealing with subject access requests – GDPR requires requests to be dealt with faster (within a month in all but exceptional cases) and without charging a £10 fee (except where a request is "manifestly unfounded or excessive", in which case you can charge a "reasonable" fee). You should also have a procedure in place for dealing with any data breach and the new requirement to notify the Information Commissioner's Office of such a breach.
- Start training employees so that everyone is aware of their responsibilities.

Whilst GDPR brings with it the threats of significantly increased penalties for non-compliance, starting preparations now (if you have not already done so) will stand your organisation in good stead for the new regime. If you need support in tackling your preparations, please get in touch with a member of the team.

Our expanded immigration offering

Immigration continues to be an area of focus for our clients as they adjust to the changing landscape brought on by Brexit and the challenges this brings. To ensure that we are best placed to assist our clients in navigating what will be an unprecedented amount of change over the next three to five years, we are pleased to announce that Jessica Pattinson has joined our team in London as our new Head of Immigration. Jessica brings with her 17 years' immigration experience gained in London, New York and Sydney, working with corporate clients on immigration matters ranging from straightforward work permission matters under Tiers 2 and 5 to complex immigration compliance and Brexit-related projects. Jessica will lead an established team of immigration lawyers in London, Milton Keynes, Glasgow and Edinburgh.

If you would like to learn more about our immigration services, or you would like to subscribe to our immigration news alerts, please do get in touch.

Editor's top pick of the news this month

- Less than half of businesses prepared for GDPR – http://www.ukemploymenthub.com/less-than-half-of-businesses-prepared-for-gdpr
- Non-renewal of fixed-term contracts – be careful! – http://www.ukemploymenthub.com/non-renewal-of-fixed-term-contracts-be-careful
- Presidents Club Scandal – http://www.ukemploymenthub.com/presidents-club-scandal
- How to be transparent about your gender pay gap reporting – http://www.ukemploymenthub.com/how-to-be-transparent-about-your-gender-pay-gap-reporting
- Watch out for "post employment notice pay" – http://www.ukemploymenthub.com/watch-out-for-post-employment-notice-pay

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