UK Employment Law Round-up

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In this issue:

In this issue we look at the main employment and immigration changes coming into effect in 2018 of which employers should be aware. We also consider the issues that have been raised in recent case law dealing with data protection, which will be particularly pertinent given the upcoming introduction of the General Data Protection Regulations. We also give our view on recent decisions dealing with collective bargaining arrangements and occupational requirements.

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

Employment and immigration changes for 2018

Many key employment developments are geared up to take effect in 2018. Here, we set out the main employment and immigration changes all employers should be aware of as the new year sets in:

EU General Data Protection Regulation

The introduction of the General Data Protection Regulation (GDPR), coming into effect on 25 May 2018, is set to be one of the most significant changes in employment law this year. The aim of the data protection overhaul is to have a consistent set of rules throughout the EU dealing with data protection. Though the UK is approaching Brexit, we will have a Data Protection Bill (to replace the current Data Protection Act 1998) which will preserve the GDPR in the UK once we have left the EU. If you have not got your head around the new rules yet, now is the time to do so as all employers will be expected to comply with various new obligations, including those relating to the processing of personal data and consent. See below for more details about the GDPR sessions we are holding to help you get ready for this change.

Gender pay gap reporting

This is something that is already in full swing and all employers (with 250 or more employees) should be aware of. However, the first reports for large public

sector employers are due to be published by 30 March 2018, and those for large private and voluntary sector employers are due by 4 April 2018, less than three months away! At the time of writing, just over 600 out of an estimated 8,000 employers who must undertake the analysis have published their results so far. This means that more than 90 per cent of employers are yet to report. We can already hear the number crunching as the remaining employers race to meet the deadline.

Senior managers and certification regime (SM&CR)

The SM&CR rules currently apply to banks, PRA investment firms and some insurers. However, this is due to be extended to all regulated firms in the summer of 2018. This will mean that all firms authorised under the Financial Services & Markets Act 2000 will have to comply with the regime. The intention behind this is to encourage individuals working in the financial services sector to take greater responsibility for their actions, increase the ability to hold them to account and increase the transparency of those working at relevant firms by bringing them into the regulated sphere. Employers working within this sector need to be aware of the main changes that will apply to their business, so get in contact with a member of our team if you need further advice on this.

Termination payments

From April, all payments in lieu of notice will be subject to income tax and National Insurance. This will be followed in April 2019 with any settlement sums over £30,000 being subject to employer National Insurance contributions, potentially making settlements with employees more expensive for employers.

National Minimum Wage (NMW) and National Living Wage (NLW) increases

In April 2018, the NMW and NLW rates will increase as follows. The NLW for workers over the age of 25 will rise from £7.50 to £7.83. The NMW for workers between the ages of 21 and 24 will increase from £7.05 to £7.38, for workers between 18 and 20 it will increase from £5.60 to £5.90, for workers between 16 and 17 years old it will increase from £4.05 to £4.20 and, for apprentices under the age of 19, it will increase from £3.50 to £3.70. Employers should be ready to increase wages of those on the national limits in April. Failure to pay the minimum wage may result in employers facing penalties of £20,000 per worker in addition to a potential ban on the employer's directors from acting in such a capacity for up to 15 years.

In the Press

In addition to this month's news, take a look at the publications we have contributed to over the last month:

- The Scotsman – *Harassment at Work*. An article addressing the steps employers should take to address workplace harassment and promote dignity at work (Amanda Jones).
- Reward Magazine – *Employee bonuses – claw-back in anger?*
  A discussion of the methods available to employers who wish to claw back employee bonus payments (Tom Fancett).

We would love to hear from you if you have an idea for a topic you would like us to cover in future editions of our Round-up, or if you have any comments on this edition. Please provide your comments here.

Tier 2 (General)

From 11 January 2018, students who hold a Tier 4 (General) visa no longer have to wait for their final results to be released by their academic institution before switching to the Tier 2 (General) category. Instead, students can now make the application as soon as they have finished their course. This will not, however, apply to individuals on PHD courses.

Family members of points-based system migrants

Dependent partners of applicants in the UK under the points-based system (including Tier 1 and Tier 2) will now also be brought under the same requirements whereby they are not permitted to be out of the country for more than 180 days in any 12-month period during the qualifying period in order to qualify for indefinite leave to remain. This change will apply to partners who are granted new periods of leave after 11 January 2018. Therefore, even those partners who have already been granted leave before this date will be subject to the new rules following any grant or extension of leave post 11 January 2018. A further requirement is that dependent family members will have to prove that their relationship to the applicant is "genuine" as part of any applications after 11 January 2018.

Tier 1 (Exceptional Talent)

There are two main changes coming into effect in 2018. First, the number of visas available from this category will increase from 1,000 to 2,000 per year for the 12 months from 6 April 2018. The additional 1,000 visas will

be held separately, in an unallocated pool, which will be distributed on a first come first served basis. Second, "world leaders" in their field of expertise may be able to qualify for accelerated indefinite leave to remain after three years, rather than the usual five years. This will not apply to those holding an exceptional promise visa.

Electronic entry clearance:

From 2018, a new electronic entry clearance system is being rolled out. Now, individuals with electronic clearance will only have to present their passport or other identity document at the UK border to an immigration officer to check electronically for entry clearance. This new form of entry clearance will initially be tested with a pilot group, before being fully implemented on a wider scale.

Tier 2 visa holders

Under new rules, Tier 2 visa holders who have more than 60 days' gap between holding Tier 2 jobs will no longer be prevented from applying for indefinite leave to remain when they have accrued five years' employment in the UK. This means that applicants will no longer have to be employed continuously throughout the five-year qualifying period to be eligible for settlement.

For more updates, and insights into the upcoming changes, keep an eye on our UK Employment Hub.

Circumvention of collective bargaining arrangements – a costly mistake ...

The Employment Tribunal and the Employment Appeal Tribunal have both confirmed that attempting to negotiate directly with employees during pay negotiations with a recognised trade union amounts to an unlawful inducement under section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

In 2015, Kostal UK Limited entered into a recognition agreement where it agreed that formal annual pay negotiations would take place with Unite and that it would negotiate with Unite regarding any proposed changes to terms and conditions. In 2016, Kostal's pay deal and proposed changes to terms and conditions were rejected both by Unite and the employees following a ballot. In an effort to resolve matters, Kostal wrote to all employees directly on two separate occasions. In the first letter (immediately after the unsuccessful ballot) they urged employees to agree to the changes or forfeit their Christmas bonus and in the second letter they told employees that, if they did not reach agreement, the company may serve them with notice under their contract of employment. A subsequent deal was reached between Unite and Kostal in relation to the pay and contract changes. However, claims were brought in the Employment Tribunal by a large group of employees alleging that their rights under section 145B of TULRA had been infringed because Kostal had tried to circumvent Unite in its negotiations.

The Employment Appeal Tribunal agreed with the earlier decision of the Employment Tribunal that each of the letters sent by Kostal to employees amounted to a prohibited inducement under section 145B. The letters were sent with the intention of circumventing collective negotiations with Unite. Each employee was awarded the mandatory award (£3,800 at the time) for each letter they had been sent. Kostal unsuccessfully argued that it would only be a prohibited inducement if the direct offer was intended to bring collective bargaining to an end completely. That argument was rejected by both the Tribunal and on appeal. If direct offers are made to employees during the course of collective bargaining, this may result in one or more terms of employment being agreed directly and not through the collective bargaining arrangements with the recognised union. This is sufficient to amount to a prohibited result under section 145B.

This leaves the very tricky question of what can an employer do if negotiations with a recognised trade union reach stalemate and there remains a need to introduce contractual changes? There is little guidance either in the

legislation or in case law as to what an employer might safely do. On the basis of the Kostal decision, it looks like negotiations will need to have reached an absolute impasse before an employer may consider a direct approach. An employer who acts too hastily in abandoning the collective process (or by dropping in and out to suit its purposes) and engaging with employees directly without being able to demonstrate a pressing business aim, is likely to be much more vulnerable to challenge under section 145B. According to the EAT, an employer who has (a) engaged in lengthy and meaningful consultation with a recognised union and reached an impasse, (b) demonstrated a strong history of operating collective bargaining arrangements, and (c) shown genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective arrangements, will be in a much stronger position to defend a claim under section 145B. Kostal were perhaps a little hasty in their attempts to negotiate directly with the employees as an immediate reaction to the 'no' vote in the ballot. Their reasons for doing so (relating to the Christmas bonus) were found not to be a pressing business reason. They were also still at stage 4 of the dispute resolution procedure (referral to ACAS) when the letters were sent to employees directly.

This is the first appellate authority on this statutory provision and is a timely reminder of the sanctions for circumventing collective bargaining – a costly mistake.

GDPR and the Morrisons case: why data security is the hot topic every employer should be concerned about

The GDPR, described as the biggest ever overhaul of data protection regulations, is arriving on 25 May 2018. With Morrisons Supermarkets recently having been found vicariously liable for an employee's deliberate leak of personal data in respect of thousands of his colleagues, it is now more important than ever to check that your organisation is taking appropriate steps to protect the data it controls and whether you would be equipped to respond to a data breach.

In 2013, Andrew Skelton, a senior IT internal auditor working for WM Morrisons Supermarkets plc was the subject of disciplinary proceedings after a package containing a white powder found in Morrisons' mail room (causing alarm and requiring police involvement), turned out to be a slimming drug Mr Skelton was posting to a customer in connection with an eBay business he was running. He received a disciplinary warning for his conduct. Thereafter, with the clear intention to cause harm to the supermarket and in retaliation for receiving the disciplinary warning, Mr Skelton deliberately published personal details of nearly 100,000 of his colleagues on the internet. In his trusted position within the company, he had access to and published sensitive employee personal data including bank details, salary, National Insurance information, addresses and phone numbers.

Unsurprisingly, Mr Skelton was found guilty of criminal fraud offences under the Data Protection Act 1998 and the Misuse of Computers Act 1990. He received an eight-year jail sentence, which he is still serving.

Separately, a class action lawsuit was brought against Morrisons by 5,518 of its affected employees, seeking compensation from the supermarket for breach of statutory duty under the Data Protection Act, as well as the misuse of private information and breach of confidence. The High Court was required to consider whether Morrisons had primary liability for the breach, and/or vicarious liability for Mr Skelton's actions.

In considering primary liability, the court assessed whether Morrisons had breached the data protection principles enshrined in the DPA. All claims that Morrisons breached these principles were dismissed on the basis that Morrisons had not been the "data controller" when the breach occurred, since it was Mr Skelton who determined how the data on his laptop was processed. There was one exception to this finding. The seventh data protection principle states that data controllers must take "appropriate technical and organisational measures ... against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, and damage to, personal data." Morrisons was the data controller when the information was downloaded by Mr Skelton, initially for a legitimate purpose. The court accepted that there had been no reason for Morrisons not to trust Mr Skelton with the data and that it had taken precautions to ensure the safety of the data by limiting those who had access to it. However, the court noted that there was no organised system in place for the deletion of the data, which had remained locally on Mr Skelton's computer allowing him to later download it onto a personal USB stick, and so the supermarket fell short

of its legal requirements. In making this finding, the court concluded that, even if Morrisons had taken additional measures to minimise the risk of disclosure, this could not have prevented Mr Skelton's actions.

The court also found that Morrisons was vicariously liable for Mr Skelton's actions because it considered he was carrying out his actions during the course of his employment. This test was set out in a different case against the same employer in 2016, *Mohamud v. WM Morrisons Supermarkets plc*, where the supermarket was found liable for the actions of an employee who assaulted a customer on one of its petrol station forecourts. In essence, in this case (as in *Mohamud*), the wrongdoing was sufficiently closely connected to the individual's authorised duties to meet the "course of employment" test. He received the data when he was acting as an employee, he was entrusted with the data and there was a continuous sequence of events linking his employment to the disclosure. The level of compensation to be awarded will be determined at a future hearing. However, the financial implications could be huge (on top of the reported costs of £2 million that Morrisons has already incurred in relation to the case thus far), particularly if the remaining 94,000+ affected employees also decide to bring claims.

This is a troubling conclusion for employers. It is very hard to see what Morrisons could have done differently. Indeed, the court agreed that there was no foolproof system to prevent a rogue employee disclosing data they have been entrusted with. The court also voiced its own discomfort at the outcome, with Justice Langstaff making clear that he recognised his finding against Morrisons served to further Mr Skelton's criminal aims (i.e. Mr Skelton had set out to harm Morrisons and the outcome of the proceedings only added to that harm). He has therefore already granted leave to appeal, meaning it is unlikely to be the end of the story.

The case is the first class action of its kind in the UK. However, the extensive media coverage of the case may make this type of claim more popular due to the raised awareness of would-be claimants and the increased confidence arising from the favourable judgment. In the context of the GDPR, however, such class actions could become far more complex, and costly. Extended rights to take action against "data processors" as well as "data controllers" means that such cases may involve multiple defendants, fighting among themselves over who bears liability, and in what proportion.

If your organisation is busy preparing for the introduction of the GDPR, then now is a good time to take the opportunity to carry out a full and detailed review of your data security measures to ensure that your organisation is in as robust a position as possible. Even though you cannot fully extinguish the risk of a rogue employee taking steps to harm your business, there are ways in which you can set up your security processes in order to minimise this risk and to prevent further damage on discovery of any breach. In the meantime, please watch this space for further legal updates on this topic.

If you would like advice on how to prepare for the GDPR more generally, then you are in luck. Dentons is hosting a

full session on "tackling GDPR in the employment context" across our London, Milton Keynes, Glasgow, Edinburgh and Aberdeen offices (between 30 January and 7 February 2018). The sessions will focus on how you can ensure compliance with the new rules, which will radically change how employers view and deal with employee personal data. For example, a key change is that employers will effectively no longer be able to rely upon "consent" from employees to process their data and will need to have tools in place to meet requests to be forgotten. We will discuss the new obligations under the rules, including the need to provide much more detailed information to employees, as well as the eye-watering fines (of up to 4 per cent of annual global turnover or €20 million, whichever is greater) for non-compliance.

Please click here for more details on how to book a space at one of these sessions. If you are unable to attend one of these sessions, but would like further advice on GDPR compliance, please do not hesitate to contact one of our team.

Occupational requirements: a helpful reminder

In the case of *Ms Z De Groen v. Gan Menachem Hendon Ltd*, an employment tribunal made finding ofreligious and sex discrimination against a faith-based nursery after it dismissed a teacher for the way she was living her personal life.

Ms De Groen was cohabiting with her boyfriend, something which was not seen to be in-keeping with the principles and practices of the ultra-orthodox Jewish ethos of the school. After parents complained to the school, Ms De Groen was summoned to a meeting, in which she was probed about her personal life. Following a second meeting and a disciplinary hearing in Ms De Groen's absence, she was dismissed for "some other substantial reason" for acting in contravention of the nursery's beliefs and damaging its reputation.

The approach taken by the school was criticised by the employment tribunal, finding that their behaviour in the first meeting was "rather like an overbearing mother" and that a man would not have been subjected to the same sort of questioning. The tribunal found that Ms De Groen had been subjected to direct and indirect religious discrimination, direct sex discrimination and harassment. Remedy will be determined at a future hearing.

One of the defences put forward by the school was that their action in dismissing the claimant was justified because she did not meet necessary "occupational requirements" in respect of her role. The tribunal helpfully set out a detailed analysis of the law in this area, explaining that relevant legal test:

"It is for the respondent to prove that:

1. It had an ethos based on religion or belief.
2. It applied a genuine occupational requirement.
3. Having regard to that ethos and to the nature and context of the claimant's work:

a. The requirement was an occupational requirement. Such a requirement must be legitimate and justified – an objective assessment for the tribunal. The requirement must be necessary (or at least crucial) for the claimant's personal employment. This exception should be construed narrowly. The occupational requirement must be connected directly to the claimant's work. Lifestyles and personal beliefs are almost always excluded for the scope of an occupational requirement ... the greater the interference with the claimant's human rights, the more stringent the test should be.

b. The application of the requirement must be in pursuit of achieving a legitimate aim.

c. The application of the requirement must be a proportionate means to achieving that aim. There should not be a blanket policy and the tribunal should ask itself whether all of the duties need to be performed by someone with that particular characteristic or whether others could "fill the gaps".

d. The respondent reasonably believed that the claimant did not meet the requirement."

In this case, the tribunal was satisfied that the school had a religious ethos, and so the first part of the test was met. However, the school fell down at the second stage of the test. The tribunal found there had been no general requirement not to cohabit. Indeed, it found that the school did not actually care whether the claimant cohabited, rather that she kept quiet about it. A requirement to conceal her co-habitation could not be capable of protection since it was not a requirement that she have "a particular protected characteristic".

The case is a helpful reminder to employers of the strict legal test which applies if seeking to rely on an occupational requirement to justify discrimination. Employers should bear in mind that:

1. any occupational requirement should be made clear in advertising the post and in other related documentation;
2. the requirement should be reassessed periodically to ensure that it is still justifiable;
3. the requirement must be essential to the post, not simply one of several important factors; and
4. the requirement must relate to the specific job in question, not the nature of the employing organisation.

Editor's top pick of the news this month

Take a look at our top picks of the news from January on our UK Employment Hub:

1. World Braille Day 2018: http://www.ukemploymenthub.com/world-braille-day-2018
2. Employment law dates for your diary: http://www.ukemploymenthub.com/employment-law-dates-for-your-diary.
3. Time's up: http://www.ukemploymenthub.com/times-up
4. Changes to immigration rules on continuous residence: http://www.ukemploymenthub.com/changes-to-immigration-rules-on-continuous-residence.

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