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IN THIS ISSUE

02
Statutory illegality did not bar an illegal worker from pursuing her claims

04
Annual leave entitlement for atypical workers

08
Impact of #MeToo on settlement agreements – update

10
So much to do and so little time

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: an employee pursuing a claim despite an illegal employment contract, part-time workers' holiday entitlements, #MeToo's impact on settlement agreements and recent employment consultations.

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Statutory illegality did not bar an illegal worker from pursuing her claims

This article explores whether an illegal employment contract means that both the employee and employer are unable to enforce their rights under the contract.

If an employment contract is illegal for some reason both the employer and employee may be prevented from enforcing their rights under it. However much depends on who is involved in the illegality and what makes it illegal in the first place.

There are two distinct bases on which a contractual claim may be defeated on grounds of illegality. These were set out in the case *Hall v. Woolston Hall Leisure Ltd*. They were held to be:

- statutory illegality, i.e. where statute provides that the making of a contract itself is prohibited or that it is unenforceable; and
- common law illegality, i.e. where the formation, purpose or performance of a contract involves conduct that is illegal or contrary to public policy.

However, neither was engaged in the case of *Okedina v. Chikale* ([2019] EWCA Civ 1393) which recently came before the Court of Appeal. Ms Chikale claimed unfair dismissal and breach of contract but the argument focussed on her illegal employment status. Ms Chikale was a Malawian national whose leave to remain (and right to work) in the UK had expired.

The issue in the case was whether sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006 meant that an employee, who unknowingly worked when they had no right to work in the UK, was barred from bringing contractual claims by virtue of the doctrine of statutory illegality. Section 15 imposes civil penalties on employers that employ illegal workers, although employers have a statutory excuse against liabilities for civil penalties if they carry out satisfactory right to work checks. Section 21 makes it a criminal offence to employ a person knowing that they are disqualified from employment because of their immigration status.

Factual background

Both parties were Malawian nationals. The employer, Mrs Okedina, brought the employee, Ms Chikale, to the UK in July 2013 to work for her as a live-in domestic worker. Mrs Okedina obtained a six-month domestic worker visa by giving a good deal of false information.

Following the expiry of the visa in November 2013, Ms Chikale remained in the UK and continued to work for Mrs Okedina. Mrs Okedina kept Ms Chikale's passport and applied for a visa extension on the false basis that Ms Chikale was a family member. The visa application and subsequent appeal were refused. Mrs Okedina told Ms Chikale that the necessary steps were being taken to extend her visa and Ms Chikale was unaware that she no longer had the right to remain or work in the UK. Ms Chikale continued to work for Mrs Okedina until June 2015. Ms Chikale was required to work seven days a week, for very long hours and low pay. She was summarily dismissed when she asked for more money.

Following her dismissal, Ms Chikale brought claims in the employment tribunal for unfair and wrongful dismissal, unlawful deductions from wages (both by reference to the terms of her contract and for breach of the national minimum wage), unpaid holiday pay, breach of the Working Time Regulations 1998, failure to provide written particulars and itemised payslips, and race discrimination.

Mrs Okedina said the contract was illegal and had been illegally performed. She therefore argued that the contract was unenforceable and could not be relied on to bring contract-based claims. The employment tribunal did not agree. Ms Chikale succeeded in her claims apart from her claims relating to discrimination. The successful claims fell to be categorised as "contractual", in that they arose out of the contract of employment.

Employment tribunal and Employment Appeal Tribunal (EAT) decision

One of the issues raised in the employment tribunal was whether Mrs Okedina could rely on the defence of illegality in respect of the period of Ms Chikale's employment after November 2013. This was on the basis that from November 2013 the employment contract was illegal, or illegally performed, because Ms Chikale no longer had leave to live or work in the UK.

This statutory illegality defence was rejected by the employment tribunal. As for common law illegality, the tribunal found as a fact that Ms Chikale did not knowingly participate in any illegal performance of her contract. Applying *Hall*, the employment tribunal held that the contract was not rendered unenforceable by Ms Chikale at common law.

The EAT upheld the tribunal's decision but permission was granted for Mrs Okedina to appeal to the Court of Appeal on the limited ground of whether the effect of sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006 precluded an employee from pursuing contractual claims where those claims arose at a time when the employee's leave to remain had expired.

Court of Appeal decision

The Court of Appeal considered the two bases on which a contractual claim may be defeated on grounds of illegality.

Statutory illegality

Lord Justice Underhill considered whether the Immigration, Asylum and Nationality Act 2006 expressly prohibits employment. The court considered it significant that sections 15 and 21 do not, in terms, prohibit a person from employing someone in breach of immigration restrictions.

The court also had to consider whether Parliament intended that someone who did not have permission to work in the UK was to have no remedy to enforce their contract of employment if they were, in fact, employed. It held there was no clear implication that this had been Parliament's intention.

The judge went on to hold that there is not always culpability on the part of the employee and public policy did not require the relevant statutory provisions to be construed in a way which had the effect of depriving innocent employees of all contractual remedies. He found the employment tribunal had

been entitled to hold that the defence of statutory illegality did not prevail. To do otherwise would allow employers to get around claims by using the statutory illegality defence based on their own illegal actions.

Common law illegality

Lord Justice Underhill found that Ms Chikale had not been aware that her leave to remain in the UK had expired or that she had no right to work. She had been misled by her employer. On those facts, the doctrine of common law illegality could not apply as there was no "knowledge plus participation" from the employee. The court found that the contract had not been rendered unenforceable at common law.

Take-away points

The Court of Appeal has confirmed that the Immigration, Asylum and Nationality Act 2006 was not directed at those working illegally, but instead imposed civil and criminal penalties on those who employed people who were. Further, as the employment tribunal had found that Ms Chikale had not knowingly participated in any illegality, there was no reason to deny her a remedy.

This is an unusual case on the facts – the employee was wholly unaware that she had no leave to remain in the UK. While this may be a common scenario for the most vulnerable workers in our society, in most cases an individual employee will be aware that they have overstayed their leave to remain or do not have that leave in the first place. In such cases it is more likely that an employee would find that they are not able to rely on the contract for the purposes of pursuing an employment tribunal claim.

Clients should remain aware of the penalties that can be imposed if they know any employees are working illegally. It is also important to ensure that right to work checks are carried out at the outset of employment and are repeated as appropriate if temporary leave to remain is granted. In right to work cases, a proper dismissal process is also important. Employers should follow a fair process which includes investigating concerns about the employee's immigration status, determining if the right to work in the UK could be retained and obtaining evidence to justify a decision to terminate.

Annual leave entitlement for atypical workers

Calculating holidays should be simple - but for workers with irregular hours this has always been problematic. Employers often simply pro rate holidays but, while simple, this may not be compliant for those who work only part of the year. Following the case of *The Harpur Trust v. Brazel* [2019] EWCA Civ 1402, companies may find their employees more willing to crunch some numbers and challenge their holiday calculation.

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Holiday calculations

The statutory minimum holiday entitlement is currently 5.6 weeks per year under the Working Time Regulations 1998. A part-time worker is generally entitled to this amount reduced pro rata.

The holiday calculation becomes more challenging if it is not known in advance how long a temporary or casual worker will be employed and/or they do not have regular hours or working patterns.

Many employers calculate the statutory holiday entitlement of a part-time employee by calculating 12.07% of hours worked. This method is not prescribed by the Working Time Regulations (WTR) but is useful to make calculating holidays easier for those who work reduced hours throughout the year. It is crucial to note this is for the calculation of holiday entitlement and not holiday pay. Employers can also use the government's holiday entitlement calculator [https://www.gov.uk/calculate-your-holiday-entitlement] to help assist in adjusting holiday entitlements of individuals who work fewer days, hours, casual or irregular hours, annualised hours, compressed hours or shifts.

However the Court of Appeal has now made it clear that this simple approach does not comply with the WTR for those who have no work for large parts of the year (such as school holidays).

Case summary

Mrs Brazel was a "visiting music teacher" employed by Harpur Trust (the Trust). She was paid monthly at an agreed hourly rate, applied to the hours worked in the previous month, on a zero hours permanent contract. The length of school terms varied and she gave no lessons in school holidays.

She and the Trust agreed that she would receive three equal payments for her leave (April, August and December) as school holidays were longer than her 5.6 week entitlement. The Trust calculated her entitlement at the end of each term, and paid her one third of 12.07% of this figure.

Brazel brought claims in the employment tribunal of unlawful deductions from wages and less favourable treatment based on part-time status. At first instance Brazel's arguments were not successful – the tribunal preferred the 12.07% calculation applied by her employer. However, Brazel had more success

when the matter was appealed to the Employment Appeal Tribunal (EAT). The EAT found that there is no requirement in the WTR to prorate holiday for part-time employees. It found the tribunal had overlooked the fact that part-time workers were not to be treated any less favourably than full-time workers, and that there was no equivalent requirement to protect full time workers.

At the Court of Appeal, the Trust made arguments about unjust results if the calculation applied was not 12.07%. However, the Court of Appeal (taking account of Article 15 of the Working Time Directive) upheld the judgment of the EAT. It concluded that there was no requirement to prorate leave entitlement for part-year workers. Member states were free to adopt more favourable arrangements for such workers. Further, the Court did not believe that omitting prorating was unfair to full-year workers, as Brazel was under a permanent contract. It also noted the attraction of having the same entitlement for all permanent employees.

The appeal was dismissed. The court held a simple understanding should be taken of what is required by the WTR, and there was no provision for prorating. Attempting to build a system of accrual into this would be the exercise of an entirely different scheme.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Is ethnic pay gap reporting on the horizon?
- Tribunal issues different decisions for different contracts in IR35 ruling
- Magistrate who said same-sex adoption not in best interests of a child loses discrimination claims
- Consultation on the establishment of a new single labour market enforcement body in the UK

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How would the position differ where there was a casual worker engaged under an umbrella contract?

In some instances, workers who only work part of the year may be engaged under an umbrella contract (i.e. they work under a series of individual contracts but there is an overarching contract which can operate to preserve their continuity of employment, even where there are gaps between the individual contracts). On a literal interpretation of the WTR, a casual worker in this situation will accrue holiday even whilst not actually working.

In the case of *Heimann and another v. Kaiser GmbH* (cases C-229/11 and C-230/11) [2013] IRLR 48, the workers were working under contracts which might be considered to be akin to umbrella arrangements with lay-off periods between assignments. In that case the European Court of Justice (ECJ) held that the Working Time Directive does not preclude a national law under which a worker's accrual of paid annual leave is prorated. However, whilst the ECJ said that no such national law was precluded by the Directive, arguably it is not implied in the wording of the WTR.

If employers wish to avoid holiday accruing between assignments, they should be explicit about breaks in continuity between assignments and not enter into any umbrella arrangement.

What is the position in respect of an individual who is paid by assignment?

An individual working under a contract paid by assignment might also only work for a defined spell before a break, but they will typically be engaged on a series of discrete contracts. Calculating holiday for these individuals can be challenging as it is not so obvious how to apply a prorated calculation. The key is to either work out an average/approximate figure for the hours worked per assignment, or to treat an assignment as a shift and calculate the holiday entitlement in shifts. In some instances, this may be challenging to calculate without some rounding-up of the worker's statutory entitlement, or bespoke payment arrangements.

Amendments to the WTR

The WTR will be amended from 6 April 2020 by the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations 2018. The regulations change the reference period used to calculate pay due where a worker has a variable remuneration. For example this will apply if remuneration depends on the amount of work done, or if the worker does not have normal working hours. Where a worker has been employed for at least 52 weeks, the reference period will be extended from 12 weeks to 52 weeks. Where they have been employed for fewer than 52 weeks, the reference period is the period that they have been employed.

However, none of the amendments have an impact on this issue at hand.

Take-away points

Whilst it may be arguable that to build in the requirement to prorate or accrue leave goes beyond an exercise in interpretation or construction of the WTR, it is nonetheless a method which has been used by employers for some time to manage the adjustment of annual leave entitlements to reflect part-time working arrangements.

Employers are recommended to take stock of the range of part-time working arrangements that they currently have in place. Where employers have a large body of workers who do not work part of the year, it may be worth calculating the differential. They may find that, with the reporting of this decision, such employees start to make unlawful deductions arguments. Where employees receive an enhancement on their statutory leave entitlement, it may be that they receive more than the statutory entitlement whichever calculation method is applied. However, employers should check the position and be ready to answer the question about their calculation methods (and employees' entitlements) where they are challenged.

Although the Court of Appeal was clear that its findings applied in respect of individuals on permanent contracts, there may be instances of employees with more casual working arrangements making similar challenges.

Impact of #MeToo on settlement agreements – update

Since #MeToo brought non-disclosure agreements (NDAs) into the spotlight, there has been a flurry of activity from government committees and regulatory bodies seeking to implement change. In this article, we look at what this means in the context of confidentiality clauses in settlement agreements and how the desire for change has expanded to more than cases of sexual harassment.

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Timeline of government response following #MeToo

July 2018: Women and Equalities Select Committee (WESC) publish a report on workplace sexual harassment and make recommendations on potential new legislation governing the acceptable use of confidentiality clauses.

December 2018: Government responds to WESC report and commits to consult on NDA regulation.

March 2019: BEIS launches a consultation on possible measures to prevent the misuse of confidentiality clauses (NDAs).

June 2019: WESC publishes second report containing recommendations on the use of confidentiality clauses in cases of discrimination and not limited to sexual harassment.

11 July 2019: Government Equality Office launches consultation on sexual harassment in the workplace.

29 July 2019: Government publishes a response to its March 2019 consultation on possible measures to prevent misuse of confidentiality clauses (NDAs).

Indirect effect of #MeToo on settlement agreements

Many of the headlines surrounding NDAs and the various reports, consultations and responses outlined in the timeline above consider their use in respect of sexual harassment. However, NDAs are also used in settling other types of contentious employment matters, such as unfair dismissal and discrimination claims. As employment lawyers, we most often see NDAs featured in settlement agreements, in the form of *confidentiality* clauses. Some of the concerns expressed about NDAs in cases of sexual misconduct and in the reports above also extend to the use of confidentiality clauses in settlement agreements for other employment-related matters, not only sexual harassment.

The most recent government response on proposals to prevent the misuse of confidentiality clauses was published at the end of last month. The government reiterated in its response that confidentiality clauses are useful in both employment contracts and settlement agreements and condemned their misuse, especially when used to cover up workplace harassment or as an intimidation tactic. As a result, the government has committed to introducing appropriate legislation "when parliamentary time allows". The proposed legislation would:

- ensure that settlement agreements cannot prevent someone from making a disclosure to the police, regulated health and care professionals, or legal professionals;
- require confidentiality clauses in settlement agreements to clearly set out their limitations;
- ensure that the independent legal advice that an individual must obtain before entering a settlement agreement to ensure the validity of the agreement will include advice on the confidentiality clause itself; and
- introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.

As parliamentary time is not likely to free up in the near future, the introduction of the appropriate legislation the government refers to seems a long way off. However, this does not mean that there will not be, and has not been, change. One of the effects of the push for change regarding NDAs is to the drafting of confidentiality clauses in settlement agreements, which the SRA (the body that regulates solicitors) has recently commented on. The SRA has indicated that clauses that now cause concern include those which:

- permit disclosures only where they are "required" by law (rather than where a party **chooses** to make a disclosure to an appropriate law enforcement or regulatory body); or
- seek to impose restrictions on a party's ability to participate in criminal or other proceedings, or deter them from taking part in those proceedings.

The clearest approach, and the one recommended by the SRA, is for the agreement itself to identify specifically what disclosures are not prohibited by the confidentiality clause. These exceptions will usually include disclosures to a court, regulator or other competent authority.

What does this mean for employers?

Although the change highlighted above is a drafting point and something primarily for lawyers, not employers, to worry about, it is important that employers understand the settlement agreements they sign and what can and cannot be covered in the confidentiality clauses.

Those seeking further regulation in this area are not trying to completely eradicate the use of NDAs. Most appreciate that it is understandable and fair for employers to want to keep the terms of their settlement with an employee confidential. However, times are changing and more care must be taken in drafting confidentiality clauses. Employers should review their settlement agreements to ensure that these changes are reflected.

IN THE PRESS

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

- People Management - Alison Weatherhead advises on how to deal with tricky TUPE issues
- Scottish Grocer – Laura Morrison comments on using social media to keep up appearances

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

So much to do and so little time

The article looks at recent government consultations, including in relation to the Good Work Plan, the Government response to extending redundancy protection for women and new parents, the use of NDAs/ confidentiality clauses in the workplace, sexual harassment and whistleblowing.

Parliament will have a busy few months ahead. However, to the extent parliamentary time allows, Theresa May's administration has left the current government plenty of areas for change to pursue. Those keeping an eye on our employment law blog will have seen our posts on the recent consultations. Below is a consolidated round-up of what is, or may be, on the horizon ... at some point soon.

Good Work Plan: proposals to address one-sided flexibility and proposals for families

Background

In July 2017, the Taylor review identified that some employers have been abusing employee flexibility and transferring excessive amounts of risk to employees with no corresponding benefits. Such workers have to sustain unpredictable hours, a lack of income security and often feel exposed and unable to assert their basic employment rights. The Taylor review recommended a higher minimum wage rate for non-guaranteed hours, or hours not agreed at least one week in advance, as a way of addressing the issue. Having taken account of the Low Pay Commission's recommendation, the government has decided not to take the National Minimum Wage proposal forward. However, it has committed to introduce rights for workers to request a more predictable pattern of work and stable contract after 26 weeks' service.

Consultation in a nutshell

The consultation explores the proposal that workers would have new rights to be given reasonable notice of their working hours and compensation where shifts are cancelled or curtailed without reasonable notice. Points for consultation include:

- what amounts to reasonable notice;
- should there be a baseline notice requirement introduced, which employers could enhance;

- what working hours are in scope and how would reasonable notice be recorded;
- the level of competition to deter poor practice;
- the cut-off dates for compensation to be payable;
- whether this should only apply if individuals are being paid rates which are at, or close to, National Minimum Wage;
- should these be "day-one" rights; and
- should there be variances or exceptions for different industries.

It is clear that the government wants to facilitate employers sharing best practice.

Key dates: consultation closes 11 October 2019.

Proposals for families

These proposals also arise from the Taylor review and the government's stated aims to further rights and flexibility for working families. The proposals consist of three consultations. They explore family-related leave and pay (particularly reforming parental leave and pay), introducing statutory leave for parents of babies who go into neonatal care, and greater transparency around flexible working and parental leave and pay.

Consultation in a nutshell

Points for consultation include:

- options for reforming existing entitlements which could help parents to balance the gender division of parental leave;
- proposals for new leave and pay entitlement for parents of babies that require neonatal care;
- a potential duty to consider if a job can be done flexibly; and
- options for large employers (with more than 250 employees) to publish their family-related leave and pay, and flexible working policies.

Key dates: consultation closes Chapter 1 (parental leave and pay) – 29 November 2019. Chapter 2 (neonatal leave and pay) and Chapter 3 (transparency) – 11 October 2019.

Government response on consultation on extending redundancy protection for women and new parents

Background

Under existing legislation, before making a woman on maternity leave redundant, an employer must offer her a suitable alternative vacancy where one is available within the employer's group. It is recognised that this may not go far enough to protect those individuals. As long ago as 2016, BEIS published some research that demonstrated pregnancy and maternity discrimination is still far too prevalent in the workplace. There have been calls since this time, including from the Women and Equalities Committee, to make changes. The government ran consultation from 25 January 2019 to 5 April 2019 which focused on:

- whether redundancy protection should be extended into the period when women return to work;
- whether similar protection should be given to other groups who take adoption leave, shared parental leave, or other extended periods of leave; and
- whether there is more the government could do to tackle the issue by increasing employer awareness.

In a nutshell

The government proposes to:

- extend the redundancy protection period for six months once a new mother has returned to work;
- afford equivalent protection to individuals taking adoption leave; and
- extend redundancy protection for those returning from shared parental leave, but recognise in designing the new protection that these rights operate slightly differently than the above rights.

The government is clear that the protections are aimed at those returning to work after a prolonged period of absence, so paternity leave will not justify equal treatment to maternity leave when contemplating redundancy protection.

Key dates: proposals to be implemented when parliamentary time allows.

Government response on consultation on the use of non-disclosure agreements/confidentiality clauses in the workplace

Background

Following publication of this consultation, on 11 June 2019, the Women and Equalities Committee produced its recommendations on use of confidentiality clauses in situations of harassment and discrimination. On 25 July 2019, the Women and Equalities Committee published a further report on workplace sexual harassment (see below) which included recommendations that new legislation be introduced governing the use of confidentiality clauses. A full response to that report is expected to follow. However, the government's response to the consultation published in July 2019 goes some way to addressing the points raised.

In a nutshell

The government proposes:

- to introduce new legislation to prevent individuals being barred by confidentiality clauses from making disclosures to police, regulated health and care professionals, or legal professionals;
- new obligations to ensure that confidentiality clauses which go into settlement agreements are clear to the individuals who are entering into them (there will be mandatory legal advice on a settlement agreement);
- new guidance which will be produced by the Equality and Human Rights Commission (EHRC), Solicitors Regulation Authority and Acas to clarify the law and good practice; and
- to make non-conforming confidentiality provisions void.

The government has decided not to introduce standard confidentiality wording, or any reporting duty.

Key dates: proposals to be implemented when parliamentary time allows.

Government consultation on sexual harassment

Background

In July 2019 (following the 2017 #MeToo movement), the Women and Equalities Committee published a report on sexual harassment in the workplace. That report called on government, regulators and employers to take a more proactive role regarding sexual harassment and called for changes in the law in some areas. The government responded to that report in December 2018. In its response the government set out 12 action points, including a commitment to consult on key points outlined below.

On 3 July 2019, the government also launched a gender equality roadmap outlining its aims that everyone can balance caring responsibilities and a rewarding career. That document focused on eight key drivers of inequality and gave a government commitment to act on those issues. One of those eight issues was ensuring that we sustain strong foundations for the future. This included reference to a consultation to help ensure that sexual harassment legislation is fit for purpose.

The government is of the view that the fact that there is a clear issue means that employers need to do more. It is applying a mix of change in legislation and the issue of guidance to try to engineer those changes. We are anticipating a new statutory code of practice and technical guidance from the EHRC, which was a commitment in the government's December 2018 response.

In a nutshell

The consultation is in two parts – one part is a simple question format directed at individuals who have suffered harassment, and the second is a "technical consultation" with more of a focus on the legal position and how it may be reformed.

The consultation explores:

- a new mandatory duty on employers to protect workers from harassment. The government has been clear that it will only introduce this if there is "compelling evidence" that this will be effective;
- external reporting on prevention and resolution policies and board buy-in through the sign-off of those policies;

- re-introduction of legislative protections in respect of third party harassment and whether the "reasonable steps" defence, which employers rely on in respect of their duties under the Equality Act 2010, should apply in the same way in respect of third party harassment;
- new and additional protections for interns and volunteers;
- whether the three-month time period to file harassment and discrimination claims should be extended to six months or another period; and
- enforcement powers of the EHRC.

Key dates: consultation closes 2 October 2019.

In addition ...

There is also a cross-party parliamentary group recommending an overhaul of the UK's whistleblowing regime. The group, referring to itself as the All Party Parliamentary Group for Whistleblowing (APPGW) which launched in July, has the aim of putting whistleblowers at the top of the agenda and proposes "world class gold standard legislation that protects whistleblowers". In its first report (The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring It) the APPGW looks at the experience, concerns and proposals of whistleblowers. In producing its 10-point plan the APPGW says that many whistleblowers cannot understand the current framework or afford to pursue claims under it. Recommendations include expanding whistleblowing protection to all members of the public and an urgent review of barriers to justice for whistleblowers. Whilst approaching the issue from a different angle, some of the APPGW's recommendations accord with the Women and Equalities Committee findings on discrimination and harassment, with the APPGW recognising that 28.4% of the individuals who responded to its survey said that they had blown the whistle about bullying and harassment.

Comment

The general theme we can draw from the above is that the government has identified that certain categories of casual worker, women and working families require further protection than they are currently afforded. In due course we can expect to see legislative changes and best practice guidance issued to engineer those changes. The Women and Equalities Committee has been making its voice heard on several of the key issues. However, the open consultations allow an opportunity for individuals and businesses to have their own say on what is desirable and workable.

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