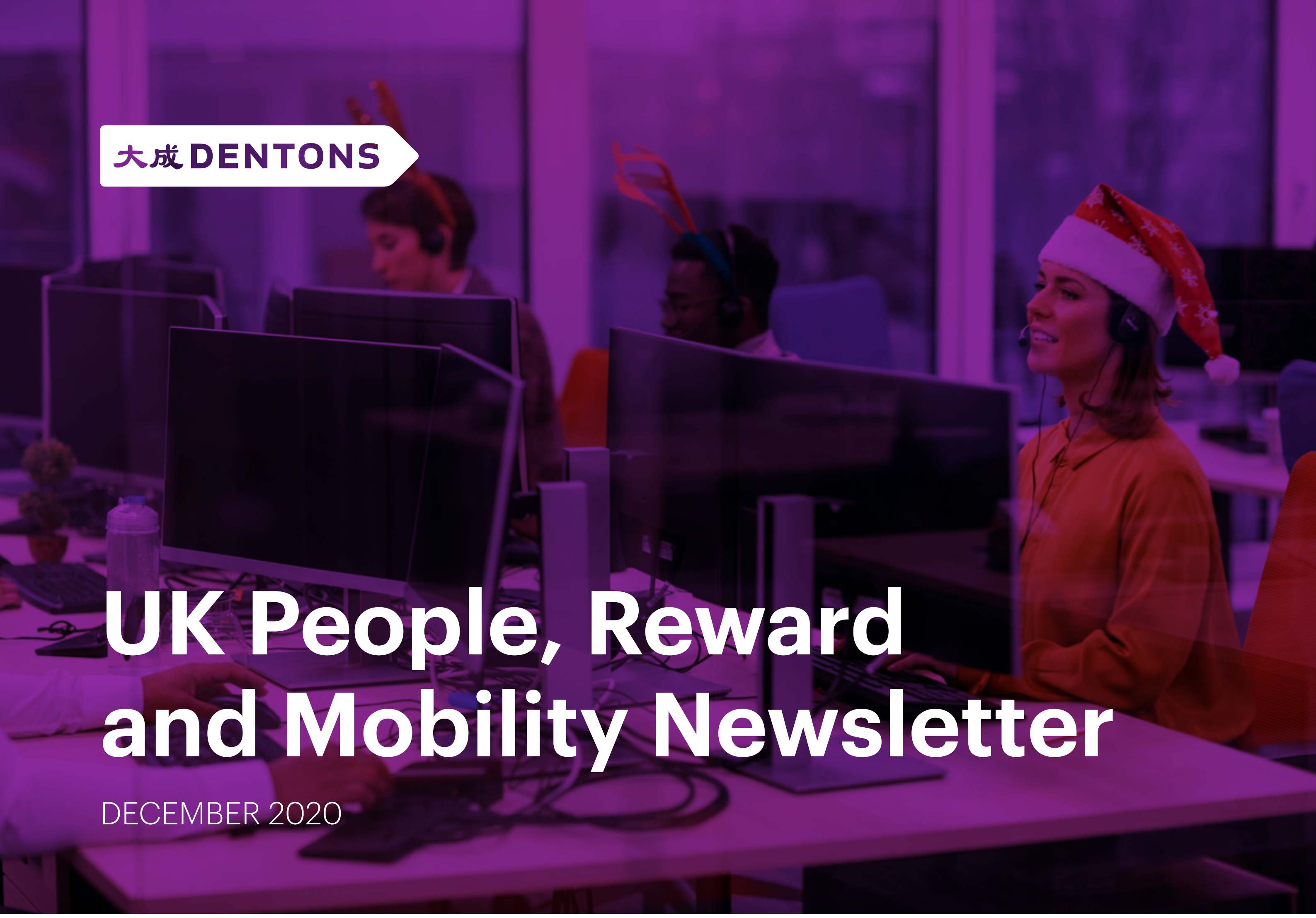

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UK People, Reward and Mobility Newsletter

DECEMBER 2020

IN THIS ISSUE

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: what themes 2021 is likely to bring in the world of pensions, when cost considerations might justify discrimination, the post-Brexit outlook for employment law and a recent European Court of Justice decision on the reference period for triggering collective consultation periods.

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 People Reward and Mobility Hub.

Key issues in pensions for employers in 2021

Brexit has meant Brexit

We are under one month away from the end of the transition period, which will see the UK no longer bound by EC rules and regulations, and no longer a member of the customs union and single market. However, there remains uncertainty surrounding whether or not the government will reach an agreement regulating the UK's relationship with the EU. Deal or no deal, what does this mean from a pensions perspective?

It remains likely that, at least in the short term, the UK's departure from the EU will not have a significant impact on the legislation and rules governing pension schemes in the UK. We consider that the anti-discrimination legislation will continue to apply in the same form (age, sex and part-time workers' access are important for pensions). There will be some exceptions to this general rule, with some minor technical amendments and the cessation of the cross-border pensions regime in the event of a "no deal" withdrawal which, according to the Pensions Regulator (TPR), would affect around 40 schemes in the UK. However, any longer term impact on the legal framework for pensions will depend on how pensions policy develops and on any agreement on the UK's future relationship with the EU.

For employers and HR professionals, we think that TPR will, of course, continue to be active in its policing of contract-based and trust-based pension schemes. TPR has recently issued guidance to pension scheme trustees on preparing their schemes for a future EU relationship, but we would not expect there to be many implications from this for HR teams.

Pensions Schemes Bill

In the previous newsletter, we discussed the important changes which the new Bill will introduce when passed, which is likely to be at the end of the year. Many relate to companies and their financial dealings, and so you may not come across related questions in your general duties.

However, we think that it would be useful for you to be aware of the new "**pensions dashboards**", offering users an online system to view information about their pension on one platform. The aim is for the dashboards to give members easy access to their data and a more user-friendly way of being able to engage with their retirement savings.

As employers and HR professionals, it may fall to you to provide information on your company's arrangements for storing on the dashboards, or you may have to work with your pension scheme's trustees or provider on this. There is not much information on this at present beyond the rough timeline of a three to four year period for schemes to provide data, so watch this space for further updates in the future. You may also receive requests for details from employees who may wish to understand how the dashboards work, so it will be helpful that you are at least aware of this new venture.

Also, a point to highlight to you is the framework set out under the Bill for the operation and regulation of "**collective defined contribution**" (CDC) pension schemes. Under CDC schemes, employers and employees would contribute to a collective fund from which the employee (the scheme member) would draw an income at retirement. The inherent financial risks would not lie entirely with the members (employees) but would be shared between them collectively. This contrasts with "defined benefit" (DB) schemes, where the employer bears the funding risks, and "defined contribution" (DC) schemes, where the risks (associated with investment returns and decisions made at retirement) fall on the members.

CDC schemes may be an interesting option for employers to explore. You may, therefore, find that there may be a move to look at this as part of an audit of benefit provision for employees or if your organisation decides to look at different options for pensions.

Environmental, Social and Governance (ESG)

ESG is increasingly becoming a buzzword in pensions as it is elsewhere, with the coronavirus having thrown an even greater spotlight onto ESG investments. Regulations have required trustees of DB occupational pension schemes to update their "statement of investment principles" (SIP) to take account of financially material considerations, stewardship and any policy on non-financial matters. Trustees of DC occupational schemes must also publish their SIP.

The feeling in the industry is that pension schemes, with their huge underlying funds, could be a significant driver of climate change and all that is green investment and ESG. We consider that employees will start to engage with this and, for those with contract-based schemes, may actively look into the default fund option and compare this with exposure to different "greener" funds. You may be asked for information on the different options offered by your scheme provider or how the employees may access information on greener funds. It will probably be useful for you to familiarise yourself with the insurer's literature and where in the portal to look.

Indeed, for a DC scheme, ESG objectives are perhaps relatively subtle and may be best thought of as having two main elements: (i) to establish a default fund appropriate to the needs and any indicated view of the membership, keeping this under review and updating it as necessary, and (ii) to ensure an appropriate choice of investment (including ESG friendly) arrangements for those members who do not wish to invest in the default arrangement.

Large DC providers (in particular for auto-enrolment schemes, see below), such as *the People's Pension,* have expressly declared that their investment policies will follow ethical principles, with a push to "screen out" investment companies which "do not meet certain minimum ethical criteria".

Employees who are members of trust-based schemes may start to challenge trustees more with requests for information on their strategy on green investments. As their HR contact, you may be the first port of call for this and having a direct number or email for the trustees' administrator could well prove helpful here.

Auto-enrolment (AE) update

As you know, the auto-enrolment regime requires a minimum 8% contribution on a range of earnings, with the employer paying at least 3% and the employee making up the difference. For the 2020/21 tax year, this range is between £6,240 and £50,000 a year. The government reviews these figures each year, so we advise you to keep an eye out for the notification for the next tax year of 2021/22.

The government review of AE of December 2017 set out reforms to increase the amount being saved (in particular, by removing the lower earnings limit). A ministerial announcement followed, confirming the government's ambition to implement this change by the mid-2020s. Given that the mid-2020s are not far away, a current Work and Pensions' inquiry will look at what should be done now and we shall report any developments in future newsletters.

Employers should ensure that they have accurate records on any employees who had opted out of AE and for whom the re-enrolment date is approaching and/or confirm this with their scheme administrators. Employers will need to ensure that they re-enrol those employees at the right date.

Master trusts

Continuing the trend of recent years, we predict that the prevalence of master trusts will continue to increase, with more employers seeking to modernise their DC pension provision and outsource delivery and governance to reduce the costs and risks. Master trusts are a form of occupational pension scheme, set up under a trust as their name suggests. However, they are available for non-associated employers who may join to take advantage of economies of scale for administration, as well as wider options and reach for investments.

As the continuing COVID-19 crisis prompts employers to look more closely at efficiency savings, we think that there is likely to be increased streamlining of trust-based processes. There are many factors for employers to consider when approaching this issue, including investment options (see above for thoughts on ESG) and pension flexibility offered; quality of governance; quality of communication; administration provision and costs; and charges for members.

Indirect discrimination – when can discrimination be justified by cost?

Indirect discrimination

Under the Equality Act 2010, a person is indirectly discriminated against if a provision, criterion or practice (PCP) is applied to them, which does or would put that person at a disadvantage compared to others. However, where the application of the PCP is justified as a proportionate means of achieving a legitimate aim, it will not constitute indirect discrimination.

It has been a long-established principle of case law that an employer cannot justify a discriminatory PCP solely on the ground that to avoid the discrimination would be costly. This was considered further by the Employment Appeal Tribunal (EAT) in 2015, which decided that cost considerations may be taken into account but only along with other factors. This led to the approach being labelled "cost-plus".

The cost-plus approach was recently considered by the Court of Appeal in *Heskett v. Secretary of State for Justice*.

Heskett v. Secretary of State for Justice

Mr Heskett was employed as a probation officer. A new pay progression policy was introduced. Under the new policy, Mr Heskett would progress one pay point per year, as opposed to three pay points by which he could expect to progress under the old policy. Mr Heskett brought a claim for indirect age discrimination. He argued that the policy put those aged under 50 at a significant disadvantage to those aged over 50, as older employees at the top, or nearing the top, of the band would earn significantly more in salary and accrue greater pension benefits than those lower down the band.

At first instance, an employment tribunal agreed with the employer's objective justification for the policy – the need to cut costs and "live within its means". The tribunal also took into account that the policy was temporary. On appeal, the EAT upheld the tribunal's decision.

The Court of Appeal dismissed Mr Heskett's further appeal that his employer was relying on costs alone to justify the discrimination, and that there was no evidence that the policy was temporary. The Court of Appeal considered the distinction between applying a PCP because it would simply be more expensive otherwise, and applying a PCP because it would be unaffordable otherwise. The court held that an employer's need to reduce its expenditure, and specifically its staff costs, in order to "balance its books" could constitute a legitimate aim. It then needed to consider whether the actions taken were a proportionate means of meeting that aim, or whether there was a less discriminatory way to achieve it.

In this case, the court acknowledged that the employer's short-term means of responding to the problem was proportionate.

What does this mean for employers?

Whilst employers will still need to search for the "plus factor" to their costs argument for imposing potentially discriminatory measures, it is now helpful to know that the need to balance the books can be a legitimate aim. Since all organisations will find they are being driven by a need to balance the books and nearly all decisions made by employers will in some way relate to cost, this case is important in lowering the bar to establishing a legitimate aim.

The courts appear to accept that a pragmatic view needs to be taken, but are also clear that attempts to find the plus factor should not be artificial. The establishment of a legitimate aim by the employer will be dependent on how the aim can be most fairly characterised when looked at in totality. In any event, it remains important for employers to consider whether there is a less discriminatory way of balancing the books, with a focus remaining on proportionality.

IN THE PRESS

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

- GDPR: Employee personal data – handle with care – Employment Law Journal, by Rhodri Thomas and Marianne Hessey

Post-Brexit employment law outlook

The UK left the EU on 31 January 2020 with a withdrawal agreement in place, a transition period and a framework for negotiations on the future relationship between the EU and the UK. The UK has since been in the transition period during which, for all practical intents and purposes, the UK has remained an EU member. This period will end on 31 December 2020 and, regardless of a deal or no-deal situation, most EU laws will be converted into UK law indefinitely, unless and until they are adapted. This ensures that the UK has a functioning statutory framework post-Brexit.

The vast majority of EU laws and case law will become "retained law" in the UK so it is difficult to predict just how much the UK employment law landscape will change. However, there are a number of areas that may be impacted and subject to change sooner than others. Much will depend on the government in charge in the UK from time to time as to whether employee rights are extended or restricted.

In this note we have outlined the key day-to-day areas that could change in the post-Brexit era.

Working Time Regulations - holiday pay and working time

There are several aspects of the Working Time Regulations 1998 (WTR) that the government may decide to amend post-Brexit. The origin of the WTR is an EU Directive and so the government has not been able to change the provisions while the UK was a member state. Some UK employers may be frustrated with case law developments in this area, particularly those that allow employees to accrue holiday whilst on sick leave and, in certain circumstances, carry over any unused holiday into the next year. If the government of the day decides to take an employer-friendly stance, this may change.

Holiday pay is another area where employers would welcome change. The current calculation for holiday pay is not simply based on basic pay; the European Court of Justice has held it must correspond to "normal pay". This has led to a series of domestic judgments on what holiday pay should or should not

include. Employers must include elements such as commission and overtime. A UK government could decide to change this so that basic pay alone would become the benchmark again.

A further potential change under the WTR is in relation to the 48-hour weekly limit. As employers may be aware, a worker's average weekly hours calculated over their reference period (usually 17 weeks) must not exceed 48 hours, unless the worker has opted out. It may no longer be necessary to obtain this opt-out from workers if the government removes this requirement.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) are not universally popular amongst employers. It is likely that the government will keep the provisions for the most part to protect employees, and provide certainty to businesses used to factoring TUPE into their transactions, but it may amend certain aspects to make it more employer-friendly. For example, it may allow transferee employers to harmonise terms and conditions following a transfer more easily. At present employees' terms are protected on transfer and TUPE does not permit changes, other than in certain limited circumstances.

Agency workers

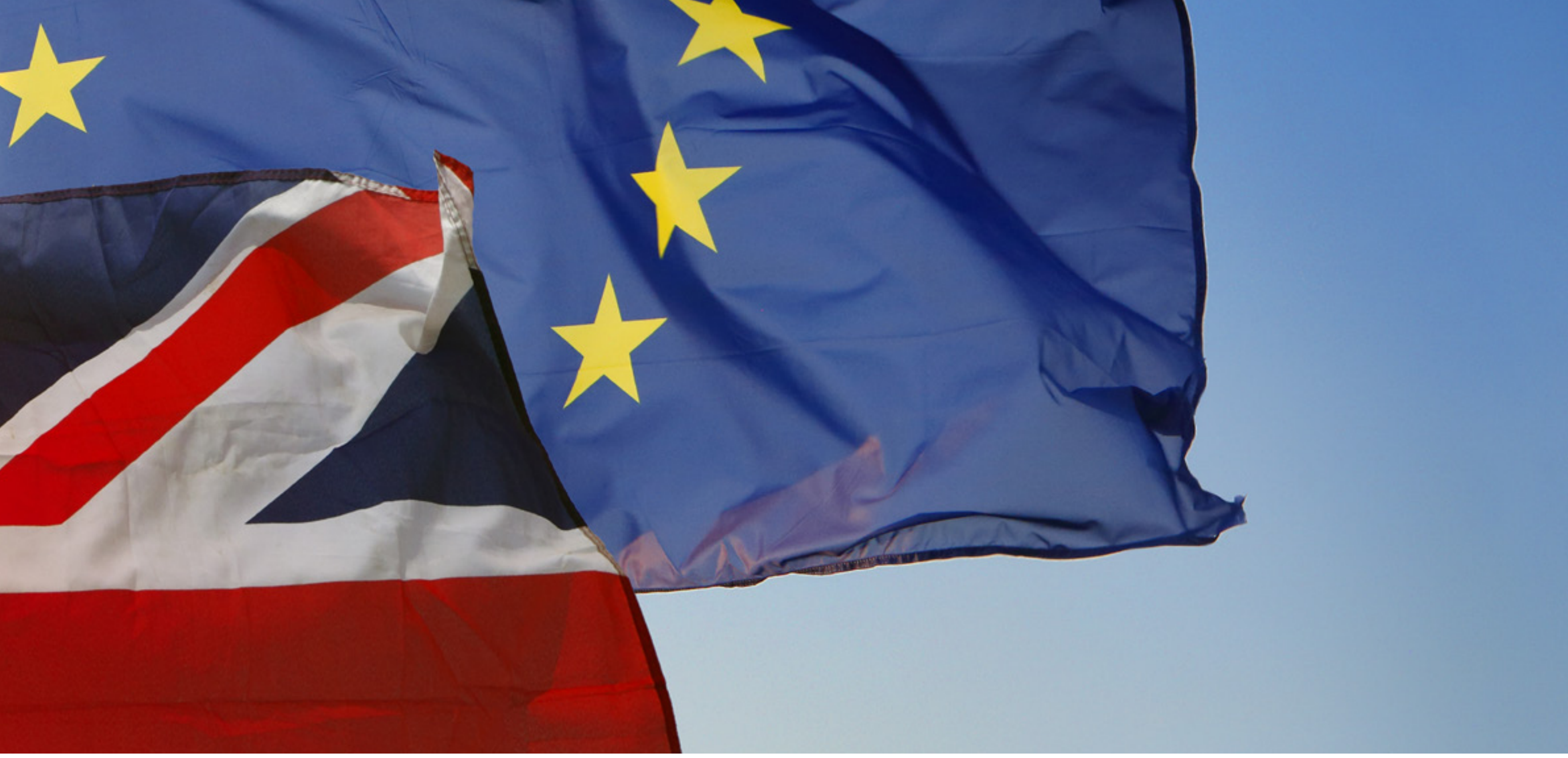
The Agency Workers Regulations 2010 (AWR) have never been popular amongst employers. They also have not become so fixed in employment law that they are now unmovable. Therefore, at first glance, the AWR are a prime candidate to be completely revoked. However, following the recent employment law updates that took effect in April 2020, it would appear that the government does not intend to make any changes to these regulations. The changes made in April have afforded greater rights and protections to agency workers (for example, removing a significant exemption to the right to equality of pay).

Discrimination

We do not expect to see significant change in discrimination law. The UK had legislated to protect against certain types of discrimination (such as sex, equal pay and race) before the EU introduced similar legislation. In some areas EU law has improved and extended rights and it has also introduced protection for other characteristics, including age and sexual orientation. The principle of protecting employees from discrimination is now very much entrenched in employers' practices and it is almost unthinkable that a government would seek to roll these protections back. There have, however, been suggestions that the government might bring in a cap on compensation in discrimination claims (as there is for unfair dismissal claims). It is also possible that the government would legislate to permit positive discrimination in a wider range of circumstances than EU law allows.

Family-related leave and pay

The legislation covering family-related leave and pay derives from a combination of UK law (for example, maternity leave and pay) and EU law. In some



respects, UK law is more generous than the minimum requirements set by the EU. It is therefore unlikely that the government will make changes in this area simply because of Brexit.

Redundancy consultation periods

Some commentators believe the minimum duration of collective redundancy consultations could be reduced. However, trade unions would likely oppose any plan, and employees and employers may not feel particularly strongly about making any change to the process which is now well-established in the UK and in itself is not overly onerous.

Areas of imminent change

European Works Councils: this is one area that will certainly see change in a no-deal Brexit scenario. From 1 January 2021, no new requests to set up European works councils in the UK will be permitted. The government has committed to preserving the rights and protections for employees in the councils. However, co-operation from other member states will be required. Where central management of an EWC is in the UK, the employer will need to transfer this to another member state or it will default to the member state with the most employees.

Immigration law: the new immigration system came into force on 1 December 2020 and, from 1 January 2021, EU and non-EU nationals will be treated equally. Employers recruiting EU nationals to arrive and start in the UK from 1 January 2021 will need to ensure that the correct visas are in place.

Conclusion

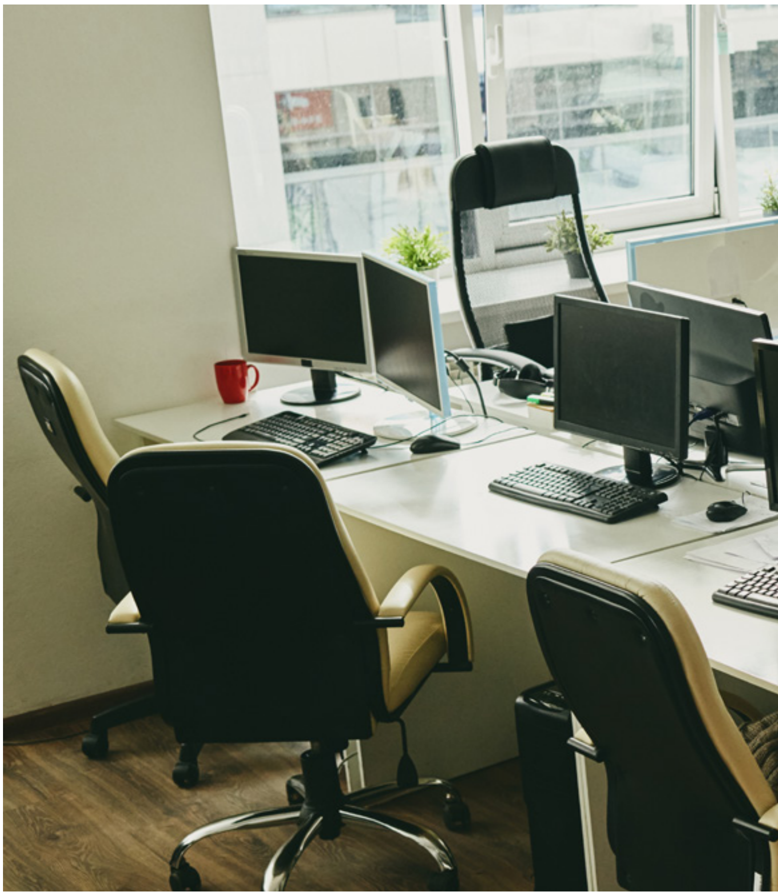
It is unlikely that there will be any significant and immediate change to UK employment legislation post-Brexit, although, if change does occur, it is most likely to be in the areas highlighted above. Future government policy will dictate whether any changes are made and those changes will depend on whether that government is more employer or employee-friendly. Changes will also be dependent on parliamentary time. Other, more pressing matters may take precedence given that the employment legislation framework does not require any immediate attention in the event of either a deal or no-deal scenario.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- ICO publishes guidance to simplify data subject access requests
- Investment Association and executives' pensions
- Health and safety protections extended to gig economy workers

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 People Reward and Mobility Hub – www.ukemploymenthub.com.

Collective Redundancies Directive – ECJ rules on the aggregation period for redundancies in UQ v. Marclean Technologies SLU



Legal background

The EU Collective Redundancies Directive (No.98/59) (the **Directive**) requires communication between employers and employees in relation to collective redundancies. Under the Directive, a collective redundancy is triggered when a certain number of redundancies are proposed within a set period (here the "aggregation period"). The Directive allows member states to adopt one of two slightly different formulas, so the aggregation period can be either 30 or 90 days. The UK's collective redundancy law deriving from the Directive was implemented by the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) which adopts the 90 day formula.

Under section 188 of TULRCA, the duty to consult collectively arises when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days. The minimum consultation period is 30 days for between 20 and 99 redundancies and 45 days for 100 or more redundancies. Failure to consult collectively can lead to protective awards of up to 90 days' gross pay in favour of each affected employee as well as potentially making any subsequent dismissals unfair.

The ECJ decision*

The decision of the ECJ in *UQ v. Marclean Technologies SLU* arose from a referral by a Spanish court. The employee (UQ) brought a claim for unfair dismissal under Spanish law. She argued that her redundancy was unfair because her employer had failed in its obligation to consult collectively.

UQ was dismissed on 31 May 2018. She argued that, between 31 May and 15 August 2018, a further 36 employees were dismissed and, as such, her dismissal formed part of a series of redundancies which, taken together, triggered the obligation to consult collectively. The Spanish court referred the question to the ECJ, seeking clarification on whether dismissals which took place after UQ's dismissal could be taken into account for the purposes of collective consultation.

The ECJ held that the relevant aggregation period covers any 30 or 90 consecutive days which includes the date of the dismissal in question, whether those consecutive days are before, after or both before and after that dismissal. The ECJ rejected the alternative proposition whereby the relevant reference period would be the period specifically either before or after the dismissal in question.

The result of this is that, in any particular case, the actual aggregation period will be those 30 or 90 consecutive days which include (i) the dismissal in question and (ii) the highest number of other redundancy dismissals.

In the UK, this could be any 90 days within the period starting 90 days before the relevant dismissal and ending 90 days after it. You have to pick the 90 days in that 180-day period which has the most redundancies. It does not matter that later

redundancies were not proposed at the date of the dismissal in question.

Impact on employers – practical problems

The ECJ decision is likely to cause significant practical problems. It would essentially mean that redundancies which did not trigger the collective consultation obligation when made, may retrospectively have required such consultation if further redundancies are made in the next 90 days. For example on 1 June, an employer makes 15 redundancies and has no proposals for any more so does not consult collectively. However, business doesn't improve and on 1 August it makes a further 10 redundancies. Under the Marclean decision, the employer would be in breach of s.188 because it did not consult collectively about the first group of 15 redundancies, even if it does consult about the second group of 10.

If the first redundancies are still in process, the employer may be able to start consultation though it may be argued this is a sham if the process was at all well advanced. It will not be able to do anything about this "breach" if the first redundancies have already happened as in the example above.

The impact of the decision on UK law may be limited by section 188(3) of TULRCA which states that, when determining the number of dismissals proposed, no account is taken of employees in respect of whose dismissal consultation has already begun. So, if the first group had been 20 redundancies and the employer started collective consultation, it would not need to consult collectively about a second group of 10.

However, section 188(3) doesn't help the employer in our first example as it would not have started collective consultation when making only 10 redundancies.

Time will tell what impact, if any, the ECJ decision will have on UK law given Brexit and the end of the transition period on 31 December.

**Please note the judgment has not yet been published in English.*

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