UK People, Reward and Mobility Newsletter

FEBRUARY 2021

IN THIS ISSUE

In this month's issue we turn our attention to the gender pay gap and some of the insights from the Government Equalities Office report into employer's understanding of the gender pay gap regulations. We also examine some practical ways employers should protect themselves and their confidential information when employees move on to join competitors in the industry as well as what happens when employees fail to follow instructions that aim to deter them from taking part in trade union activities. We also delve into pensions dashboards and ESG and, finally, look at the government report on how employers can support victims of domestic abuse at the workplace.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub.

Annual Gender Pay Gap Report 2019/20: employer understanding and underlying issues

In April 2017, the government introduced gender pay gap (GPG) transparency regulations[1] which were designed to encourage large employers (those with 250 or more employees) to take informed action to close their GPG. Most recently, on 22 December 2020, the Government Equalities Office (GEO) published its annual report on large employers' understanding of the GPG and their experiences in complying with these regulations.

The basis of the report consisted of a survey of 900 large employers conducted shortly after the GPG deadline in 2019, as well as qualitative interviews to analyse the key issues in more detail. Unsurprisingly, enforcement of the GPG reporting deadline for the 2019/2020 year was suspended due to the COVID-19 pandemic. However, with the 2020/21 reporting deadline rapidly approaching (30 March 2021 for public sector bodies and 4 April 2021 for all other eligible companies) (the snapshot date), a nuanced understanding of the GPG obligations and the government guidance serves as an important reminder for employers to gather the relevant information beforehand.

Understanding the GPG obligations

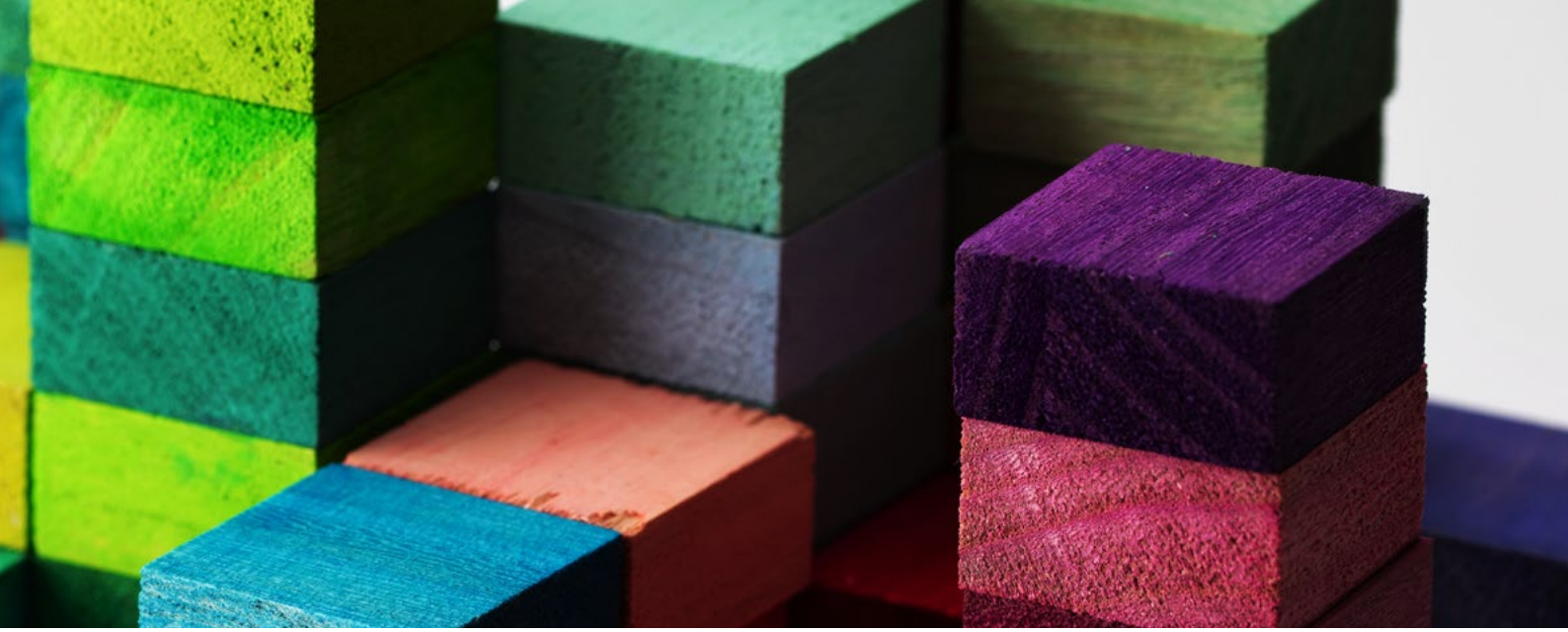
The scope of the reporting obligations essentially requires employers (and their subsidiaries within a group structure) with a headcount of 250 or more employees to report their GPG using data from the snapshot date. This must be submitted online, where employers can choose a supporting narrative and an employer action plan along with their GPG. This information is available for access to the general public via the government website here.

The report suggests that employers' understanding of the GPG has continued to rise and, crucially, amongst senior staff members. Overall, 89% of the respondents felt they had a "good understanding" of what the GPG is and how it is calculated, a figure that has risen from 47% in 2017 (i.e. when large employers had to report their GPG data for the first time). More than half of the respondents (56%) also judged the ease of complying with the reporting regulations as "very or fairly straightforward", with only 15% finding the process difficult. The survey provides strong evidence that employers have found the compliance process easier second time around.

Employer GPG engagement

Around two-thirds of senior staff agreed that GPG reporting had increased awareness of gender issues at board level and prompted a discussion about GPG with a view to address and bridge the gap as quickly as possible. Furthermore, the majority (57%) believed that GPG reporting had provided a platform for an increased focus on wider quality and diversity issues within their companies.

1 "The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017" for the private/voluntary sector and "The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017" for the public sector.



The report suggests that, in most cases, employers felt indirectly impacted by the regulations due to the heightened publicity around reporting the GPG results. A minority also described a more direct influence in which the need to report a GPG figure and subsequently consider amending the gap had led to board-level discussions of equality and diversity policies.

Despite senior level engagement with GPG being commonplace in 2019/20, most organisations reported little response to their latest GPG result amongst their employees. This could be attributed to the lack of communication of results by employers to their staff, as only 15% seemed to have adopted a comprehensive staff-engagement strategy.

Increasing priority to reduce GPG

Since the regulations came into force, employer attitudes to reducing the GPG varied widely and there has been little change to this, with the results almost identical to those seen in the 2017 baseline survey. Within the qualitative sample in this survey, the introduction of the regulations was said to have increased the priority afforded to closing the GPG. However, most reported a small change in priority in the period since enforcement, primarily because the underlying factors (including the importance of being a fair and ethical employer, size of their GPG, cost associated with closing their GPG, and perceived ability to close their GPG) affecting this had not changed, or because their initial plans to reduce GPG were long term in nature and required a consistent level of commitment.

Interestingly, those treating their GPG as a high priority were typically driven by "a desire to do the right thing" and be fair/non-discriminatory. Only a paltry 23% were of the opinion that diversity was good for their business in terms of profitability and productivity, and the same proportion highlighted the potential impact on their reputation as a motivating factor. Of the employers who viewed GPG as a medium priority, 15% referenced other more important priorities and claimed that GPG was a long-term issue that would take time to solve. Among those who saw GPG as a low priority, their most common reason was that they believed they could do nothing about it, or had little desire to address GPG. Many of the interviewees expressed an inability to identify anything which would spur them to increase priority in addressing their GPG. Often, this was because they either felt that enough was being done in this area or because they attributed their GPG to wider societal or cultural factors outside their control.

Additionally, employers were reluctant to report a direct link between diagnosis of the reasons for their GPG and the development of specific actions to close any gap. Some felt it was more important for the government to take action at a broader level to address its underlying causes, rather than attempting to encourage or facilitate individual employers to do more.

A call to action

Several GPG actions taken by employers focus on staff working practices, with 44% offering or promoting flexible working (e.g. part time, home working, job sharing) and 36% promoting shared parental leave policies. Others reported to have concentrated on the organisation's HR practices, such as reviewing their existing policies and improving or altering their recruitment and promotion processes. Training was also an important feature as 30% introduced or continued mandatory unconscious bias training and 37% claimed to have introduced and/or improved other equality and diversity training, which emphasises its significance.

However, notably, the qualitative interviews revealed that these actions were not necessarily implemented exclusively to address the GPG within some organisations. The report noted that the development of dedicated actions to close any GPG remains relatively uncommon. Rather, most employers admitted that these actions had been introduced prior to the regulations and described that they had been implemented to provide a fair and equitable working environment. For "passively engaged" employers (most employers), tackling the GPG was seen as important or beneficial, but not urgent.

Although employers described the GEO guidance as clear and well laid out, the perceptions were typically negative when it came to the content as most found it to be lacking specific details about concrete actions they could take to address GPG. In most cases, employers also considered this as less critical than other priorities, such as overcoming skills shortages, dealing with commercial pressures, and addressing other equality and diversity issues.

Conclusions

Undoubtedly, the impact of the regulations has led to a greater and continued understanding of the GPG in general and almost all those responsible for reporting claimed to have good knowledge. This has made compliance with the regulations a lot easier and less burdensome for employers as they are increasingly familiar with the requirements and have established processes in place.

Despite this, many employers believe that the government should focus on addressing the wider societal and cultural drivers of the GPG, rather than encouraging or facilitating employers to do more. There is a persistent feeling that employers have already placed an appropriate level of priority on GPG and are doing all they can to address it.

However, evidence suggests that not all employers understand what they could or should be doing to address their GPG, so there is still a role for appropriate guidance and room for improvement. In any case, the overall feeling seems to be that instructions from the government in the form of guidance should be as specific as possible and include concrete examples of how employers can make a difference.

Given the requirement to report was suspended last year, the regulations serve as a useful reminder of the upcoming snapshot date for employers. Employers should ensure that they are taking the necessary steps to remain compliant with the reporting regulations in good time for the deadline. For further information, please follow the link to the annual report here.

IN THE PRESS

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

- After Brexit: the employment law outlook – Law Society of Scotland Journal, by **Laura Morrison**
- Pensions changes to be aware of in 2021 – People Management, by **Verity Cruse**
- New guidance on gender pay gap – Scottish Grocer, by **Emily Shaw**

Non-competes & protecting confidential information

It is not uncommon – employee moves to a competitor and a dispute arises between the ex-employer and the ex-employee about confidential information. In such a scenario, the ex-employer will often also threaten legal action against the new employer. This can be an effective tactic because generally no business wants to be embroiled in what is expensive litigation. Furthermore, the new employer will usually have deeper pockets than the former employee if the ex-employer can establish loss. In the case of *Trailfinders Ltd v Travel Counsellors Ltd & others,* Trailfinders alleged that its former employees took confidential information and gave it to their new employer, Travel Counsellors Ltd (TCL). It also alleged breach of confidence against TCL for allegedly receiving that confidential information and allowing the employees to use that confidential information for their and TCL's benefit.

The decision from the Court of Appeal should serve as a warning to businesses that they cannot 'turn a blind eye' to the possibility that information brought by its new employees could be too good to be true and may be confidential to the ex-employer. If the new employer fails to make enquiries about information that it receives and uses, in circumstances where a reasonable person may conclude that the information, or some of it, may be confidential, it may find itself on the receiving end of an expensive claim for breach of confidence.

The chronology of events in this case:

a. The ex-employees had a list of clients with whom they dealt and did business at Trailfinders;

b. In joining TCL new recruits were expected and encouraged to bring their own customer contacts;

c. TCL did not warn new recruits about the risk of breach of confidence in doing so;

d. The ex-employees duly took details of customers from their soon to be ex-employer's data bases and brought their customer lists to TCL;

e. These contacts were added to TCL's database without any questions or enquiries.

The ex-employees were found to be in breach of their implied duty of confidence to Trailfinders. TCL was also found to be in breach of a duty of confidence owed to Trailfinders. The key finding was that where a reasonable person would have reason to believe that information it receives may have been provided in breach of an obligation of confidentiality, it should generally make further enquiries before using that information. If instead it turns a blind eye and fails to enquire (as was the case here), it risks being liable for breaching that confidentiality.

The concern for employers is that this decision places them under a greater burden, when they receive information, to make enquiries as to the nature and origin of that information. What practical points can we take from this decision?

Some practical tips for the current employer

a. Do a risk assessment and identify your key players who could damage the business if they left tomorrow.

b. Make sure your key players have robust and enforceable restrictions in place relating to confidential information, customers, employees and in some cases suppliers.

c. Include an obligation to provide a copy of the restrictions to any new employer.

d. Remind exiting employees of their contractual obligations when notice is served by either party.

e. Make use of garden leave to protect the business during notice.

f. If the individual has to work all or part of their notice period, monitor their use of your systems to ensure confidential information, customer and employee relationships are protected.

g. Act quickly if you suspect any breach of confidential information or post termination restrictions.

h. Consider whether any appropriate action should extend to the new employer.

Some practical tips for the new employer:

a. As an employer, do not turn a blind eye. Make enquiries with the new recruit.

b. If you expect employees to generate their own business, where do their contacts and business come from?

c. If circumstances were reversed, would you regard the information you receive as confidential? If the answer to that question is yes, then it is likely to be confidential to the other business and therefore put your business at potentially significant risk if you use it.

d. Ask your newcomers if they have any post-termination restrictions, if the answer is yes, get a copy so that you can do risk assessment.

e. Consider including a contractual warranty that the individual is not in breach of any restrictions or duties of confidentiality in accepting the position with you and will continue to comply with any such ongoing obligations.

f. If the new employee is providing the business with information and insights, does it go beyond skills and knowhow built up over the course of their career? Would you expect someone to be able to carry this information in their heads? If not, it is possible, indeed likely, that the individual has copied and/or taken at least some of the information – make enquiries.

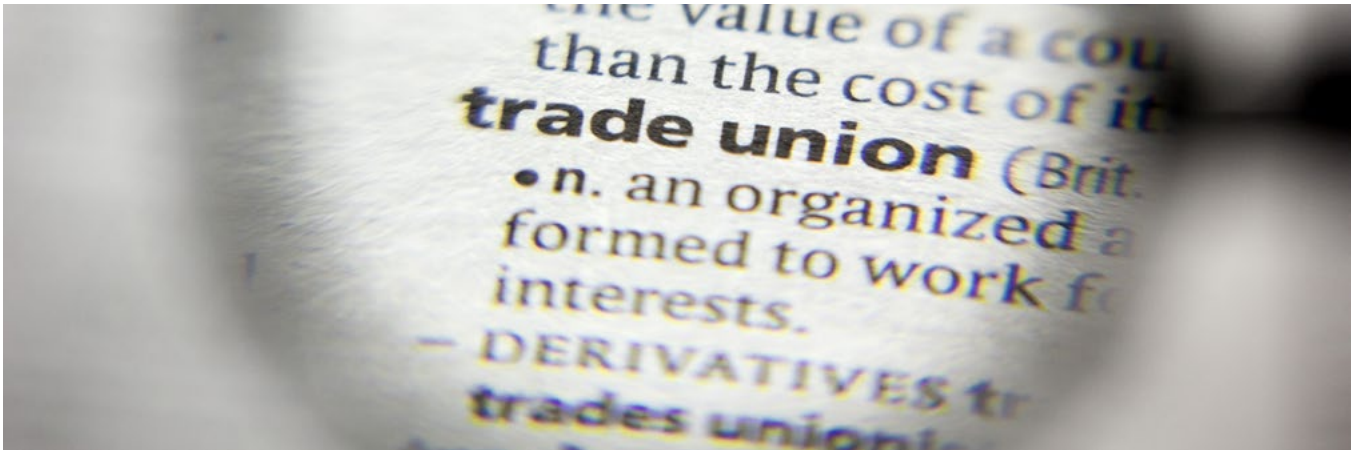
g. Remind new employees that they may owe a duty of confidentiality to their ex-employer and tell them not to pass on or use any such confidential information in their role with you.

h. Educate your management team as to the potential risk to the business of breach of such obligations to past employers.

The government has opened a consultation on potential reform for non-compete clauses. They are seeking views on the following options:

- Mandatory compensation for the duration of the non-compete provision;
- requiring the employer to disclose the terms of non-competes before employment begins; and
- A ban on non-competes.

It will be interesting to see the progress in this area, particularly in the wake of the pandemic. Whilst a ban is highly unlikely, non-competes remain the hardest restriction to enforce, so it is important that employers do not rely solely on them to protect their businesses. Enforcement of confidentiality may therefore become ever more crucial.



Insubordination vs trade union activity

In *UCL v. Brown* UKEAT/0084/19, it was held that an employee, who was disciplined for failing to follow a reasonable management instruction, was subjected to a detriment on grounds relating to trade union membership or activities.

Under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the Act), workers have the right not to be subjected to any detriment by any act of their employer if the act takes place for the sole or main purpose of preventing or deterring them from taking part in trade union activities.

Facts

Mr Brown works as an IT Systems Administrator for UCL and is an elected trade union representative for the UCU. He is part of the ISD team which had a mailing list (ISD-All Mailing List). This enabled any ISD staff (including the UCU) to send unmoderated emails to all ISD staff.

It was used to send all sorts of emails, including matters of legitimate concern to all staff such as pay, pensions, working conditions and disputes with management relating to workplace arrangements.

Following the arrival of a new director and a request from a member of staff to be taken off the mailing list, changes were proposed to the mailing list. Essentially, the ISD-All Mailing List would be replaced by two other mailing lists: one which would be moderated; and one which would not be moderated, but which people had to actively opt into to be copied in.

The UCU objected and Mr Brown set up a new mailing list, effectively re-creating the ISD-All list (New Mailing List). He added all ISD staff to it.

When the new director asked Mr Brown to delete the New Mailing List, Mr Brown refused. He sent an email to the director in his capacity as UCU representative, explaining that the decision to create the New Mailing List had been taken by a meeting of the UCU. Therefore, in creating that New Mailing List, he was acting in his capacity as trade union representative.

Mr Brown was invited to a disciplinary meeting and ultimately issued with a formal verbal warning for failing to follow a reasonable management instruction.

Mr Brown brought a claim of detriment on grounds related to union membership or activities under section 146 of the Act. Mr Brown was successful in the tribunal and UCL appealed to the EAT. Both tribunals agreed that Mr Brown's actions in setting up the New Mailing List and refusing to take it down constituted taking part in the activities of an independent trade union (which was protected by section 146 of the Act). By issuing him with a verbal warning, UCL had subjected him to a detriment contrary to section 146. This was because the matters that were sent on the ISD-All Mailing List and New Mailing List could reasonably and objectively be described as core trade union activities.

In the closing statements, UCL tried to argue that Mr Brown had breached data protection legislation in setting up and then failing to delete the New Mailing List. This had not been previously raised and there was no evidence on the matter that had been put before the tribunal. UCL was therefore not successful in its argument.

Conclusion

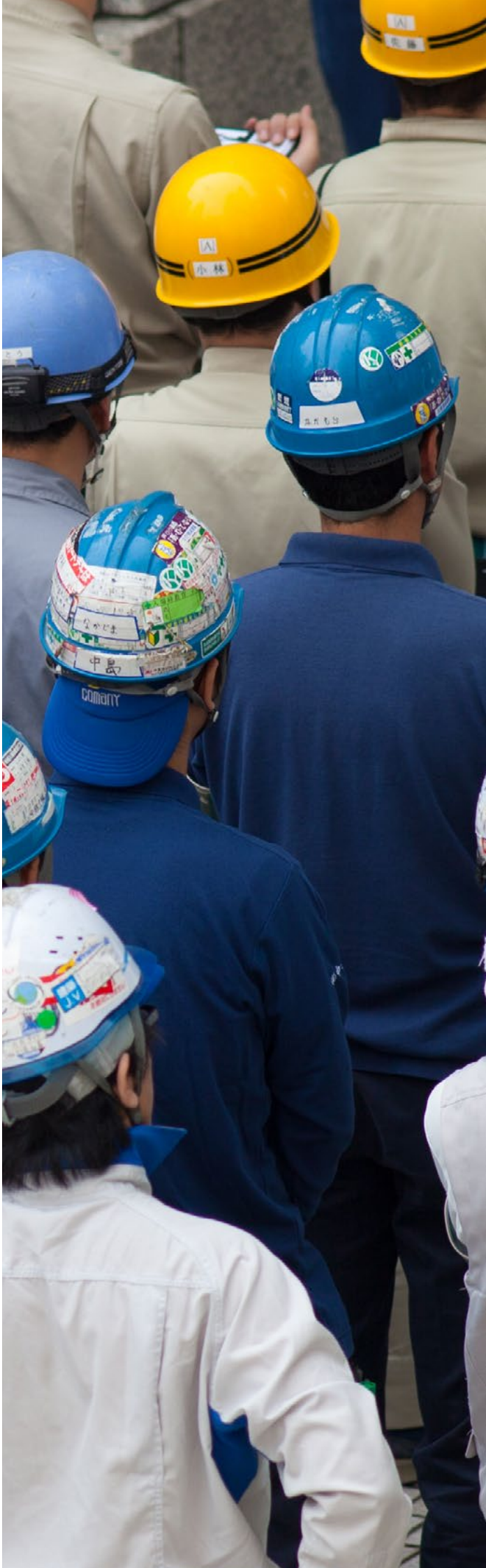
When a tribunal has cause to look at whether a worker has been subjected to a detriment with the sole or main purpose of preventing or deterring them from, or penalising them for, taking part in the activities of an independent trade union under section 146 of the Act, it will focus subjectively on what was in the mind of the employer at the time. However, in a case like this where facts are inextricably bound together, that will not necessarily make it easy for an employer to put forward a clear indisputable position. Incidentally, as the EAT reminded us, the assessment required to determine if a worker gains protection under section 146 of the Act is largely objective (including analysis of (i) whether there was an "independent trade union", and (ii) phrases such as "at an appropriate time", "making use of trade union services" and "taking part in activities of an independent trade union" used in the Act). When taking action against trade union officers, employers should fully consider the implications. To say that a request is a reasonable management instruction will not necessarily be sufficient to avoid a detriment claim under section 146 of the Act.

We do not know whether the arguments around data protection legislation would have had more success if they had been incorporated earlier. In any similar situation, employers are recommended to consider data protection risks at the earliest stages.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- UK job retention scheme: government publishes detailed rules for extension to 30 April 2021
- Modern slavery: call to action in the financial services industry
- ECJ rules on aggregating dismissals in collective redundancies

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.



Growing areas of interest in pensions for employees – dashboards and investments

Pensions dashboards

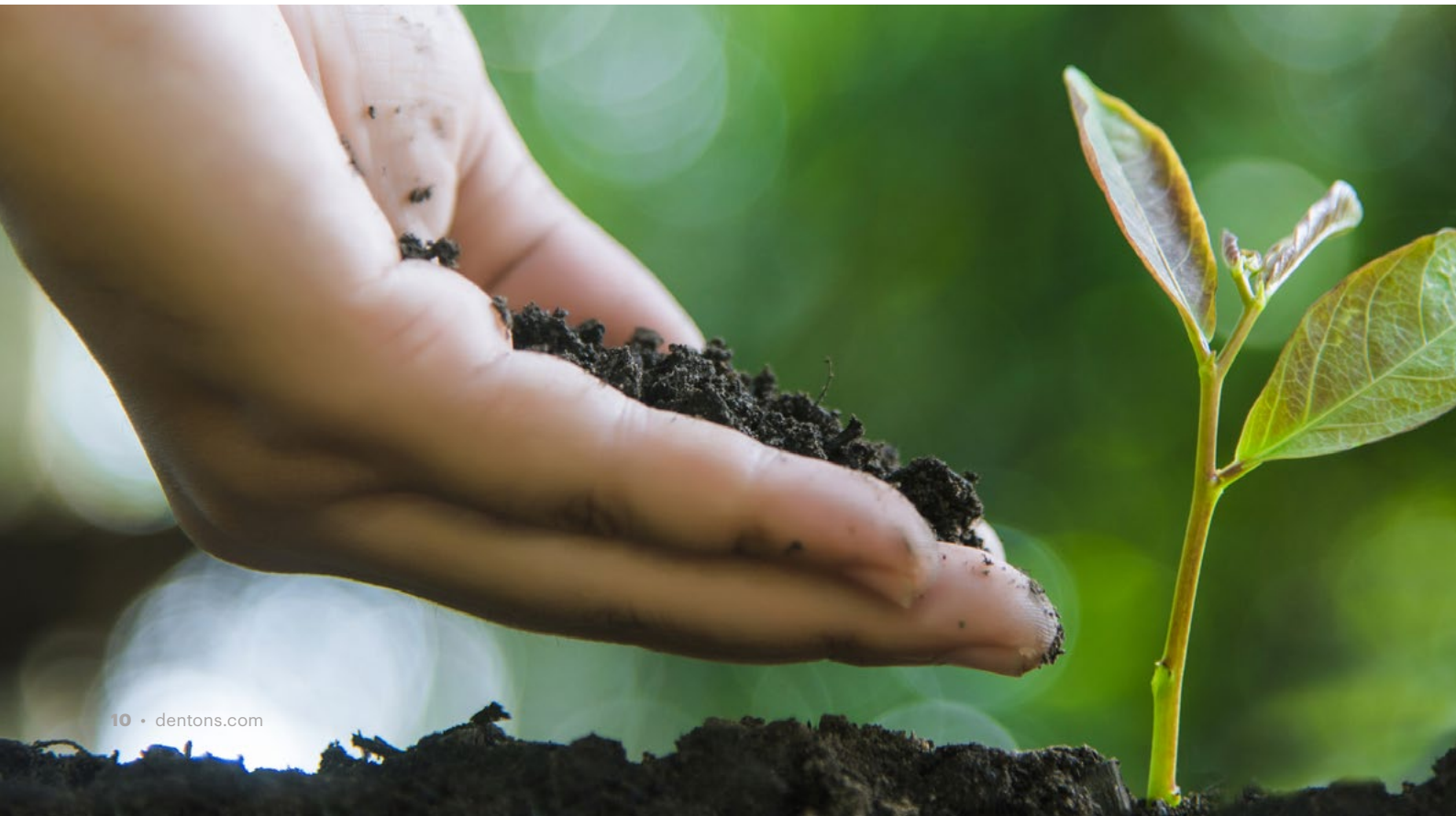
Most of us are now accustomed to instant online access to information about our bank accounts and savings, individual pension "pots" and flexible healthcare benefits. So it makes sense that we shall soon be able to view all our pensions information in one place, on a *pensions dashboard*. Whilst it will not be employers providing information (this will be for the trustees of the scheme or the applicable insurance provider), we think that employees may well have questions about dashboards. It will be useful for employers to understand what dashboards are and the likely timeframe for their introduction.

Currently, employees receive an annual benefit statement from their scheme's provider or trustees. However, the PSB creates a legislative framework for new information platforms and, from 2023, there will be a requirement for pension providers and occupational pension scheme trustees to supply adequate data with which the dashboards will be populated.

The hope is for improved member engagement and for the pensions industry to emulate the banking sector in its promotion of financial technology. The government's aim is for dashboards to provide clear and simple information about an individual's pension savings, including their state pension. This will be especially useful for individuals who have changed jobs and, therefore, pension arrangements, without consolidating those arrangements through transfers.

Should employees ask about the regulation of dashboards, we note that the government has made a commitment to make the provision of pensions dashboards a "regulated activity" under the remit of the Financial Conduct Authority (FCA). Organisations wishing to become pensions dashboard providers will have to apply for FCA authorisation and, as would be expected, there is a significant role for the Pensions Regulator in regulating compliance of providers and trustees in their provision of data.

As a final comment, if employees voice concerns over the protection of their individual data in its flow from scheme provider/trustee, the ICO has published applicable guidance on "design and default" and "accountability and governance", and has confirmed its approval of the prominence given to this area by the government and relevant parties.



ESG and "climate-friendly" investments

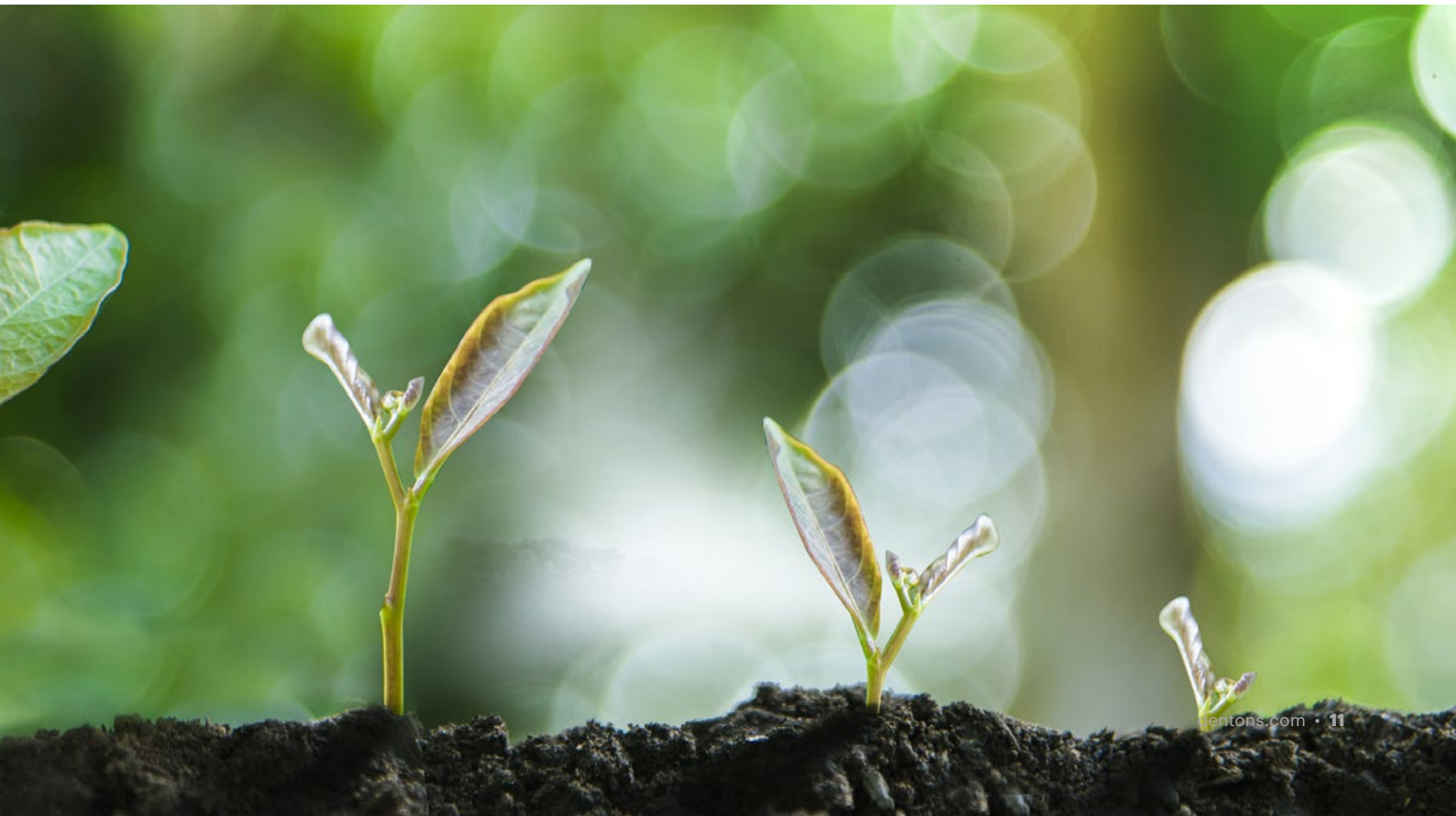
We are all aware that environmental, social and governance (ESG) considerations received substantial political interest in 2020, with collaborative action in the face of the pandemic showing that a global response to a global crisis is possible. This trend is likely to continue and, for pensions, the PSB introduces a requirement on pension schemes to adopt and report against the recommendations of the Task Force on "Climate-Related Financial Disclosures" (TCFD). Indeed, pensions minister, Guy Opperman, has said that pensions play a vital role in shaping the UK's commitment to be "net zero" by 2050 and that the measures included in the PSB are intended to create a greener pensions system.

The TCFD obligations largely focus on trustees assessing and understanding climate-related risks and, in particular, the climate-friendly opportunities available for pension scheme assets, liabilities and investments. From October 2021, trustees of occupational pension schemes with assets worth more than £5 billion and authorised master trusts will need to have in place effective governance, strategy, risk management and accompanying metrics and targets for the assessment and management of climate risks and opportunities. This will likely apply to trustees of smaller schemes from late 2023.

However, with many sections of the PSB unlikely to come into force until the autumn or later, and with much of the detail to be included in secondary legislation yet to be published, there may be a lag before climate initiatives become mainstream for pensions. However, we think that employees, and especially younger recruits, will increasingly start to consider "green" investment options. Green bank Triodos found (in October 2020, and not just in relation to pensions) that 78% of those aged 18 to 24 take into account climate-friendly options when considering investments.

You may receive questions from employees about providers' approach to climate change, their portfolios and, in particular and in relation to "defined contribution" personal pension schemes, default investment options and how employees may switch options. It will be useful for you to know in which direction to point employees on providers' platforms and as to when a window becomes available for changing investment funds.

Watch this space for further confirmation on pensions catching up with climate-focused initiatives.



UK workplace support for victims of domestic abuse: Department for Business, Energy & Industrial Strategy report

Since March last year, millions of employees now consider their home to be their workplace. This unprecedented shift to homeworking, caused directly by the COVID-19 pandemic, has sparked many conversations about the challenges this creates in terms of employees' welfare and wellbeing. One of the most serious and alarming challenges faced by millions of people in the UK has been the increased prevalence of domestic abuse.

For many sufferers of domestic abuse, having a job and going into work can offer a degree of independence and separation from the abuser. Unfortunately, as a result of the COVID-19 restrictions, the ability to spend time away from perpetrators of domestic abuse has been significantly impacted – many individuals are no longer able to leave home and go into the workplace.

In response, the Department of Business, Energy & Industrial Strategy (BEIS) undertook a review to examine how victims of domestic abuse can be supported in the workplace.

Overview

The BEIS report is divided into three chapters:

1. Building an awareness and understanding of domestic abuse amongst employers.
2. Extending support in the workplace.
3. Employment rights in light of domestic abuse.

We summarise a few key practical points from each chapter below.

Awareness and understanding

The report highlights the importance of raising awareness and understanding in the workplace of domestic abuse. It can be difficult for employers and colleagues to spot the signs of domestic abuse – it is often described as a "hidden crime". For example, some controlling behaviours, such as someone's partner driving them to and from work every day, may not raise alarm bells as it could be perceived by colleagues as loving and caring behaviour.

In addition, individuals may not realise that what they are experiencing is domestic abuse or may not feel able to speak about it. The review found that one of the most prevalent forms of domestic abuse is sabotaging the victim's employment and career, which means that domestic abuse often extends to work itself. As mentioned above, the independence that a job provides can be vitally important to sufferers of abuse.

The report highlights the key role that businesses and representative organisations, such as trade unions, can play in working together with charities with expertise in identifying, understanding and responding to domestic abuse.

Support

The report also found that, even though a growing number of employers are offering support initiatives, there are still significant barriers to accessing this support. This can be because individuals are not aware of the existing support or they may simply not feel comfortable disclosing that they are being abused.

It was noted that there is a lack of recognition of diversity in the victims themselves, and how a person may have multiple characteristics that make coming forward all the more difficult. In addition, stereotypical representations of domestic abuse victims can make it more difficult for individuals to identify themselves as victims.

The clear response in the report was that organisations should, wherever possible, have a policy on domestic abuse that is visible across the organisation and which is embedded in the wider organisational culture and practices.

The report notes there is value in employers working closely with trade unions and specialist organisations in shaping the policy and that a comprehensive policy should set out:

- signs of abuse;
- roles and responsibilities;
- education and training;
- safety in the workplace; and
- practical support.

Practical support includes paying salaries into separate accounts; additional financial assistance; access to counselling or other health-related services; access to time and space within work to make calls and other arrangements, as well as flexibility and time out of work. Safety in the workplace could cover measures such as informing security, providing safe parking spaces, accompanying employees to public transport and ensuring that information about the employees' whereabouts is not accessible.

Employment rights

The report concluded that there are unmet needs within the current employment rights framework, particularly in relation to flexibility and time out of work, for individuals dealing with domestic abuse. For example, it is acknowledged that victims can face challenges in balancing work and dealing with the consequences of abuse. During certain periods, they might use their annual leave entitlement to engage with a range of services such as the police, courts, banks, schools and social services, as well as moving home or finding refuge accommodation. The report highlights that victims may need more ad hoc flexibility given to them by their employer to help manage these appointments.

The report also scrutinises the existing right to request flexible working, which requires an employee to have worked with their employer for 26 weeks and allows an employer up to three months to respond. In addition, it highlights an employer's duty of care which may, in certain circumstances, extend to protecting employees from the wrongful acts of third parties. The report also considers that this duty may go further than an employer's legal obligations and there are ethical and moral considerations for employers who become aware that one of their employees is suffering from domestic abuse.

Key contacts

Virginia Allen
Head of People, Reward and Mobility UK, London
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner, Milton Keynes
D +44 20 7320 4096
sarah.beeby@dentons.com

Alison Weatherhead
Partner, Glasgow
D +44 141 271 5725
alison.weatherhead@dentons.com

Purvis Ghani
Partner, London
D +44 20 7320 6133
purvis.ghani@dentons.com

Mark Hamilton
Partner, Glasgow
D +44 141 271 5721
mark.hamilton@dentons.com

Michelle Lamb
Partner, Milton Keynes
D +44 207 320 3954
michelle.lamb@dentons.com

Eleanor Hart
Head of Reward, London
D +44 20 7246 7166
eleanor.hart@dentons.com

Jessica Pattinson
Head of Immigration, London
D +44 20 7246 7518
jessica.pattinson@dentons.com

ABOUT DENTONS

Dentons is the world's largest law firm, connecting talent to the world's challenges and opportunities in more than 75 countries. Dentons' legal and business solutions benefit from deep roots in our communities and award-winning advancements in client service, including Nextlaw, Dentons' innovation and strategic advisory services. Dentons' polycentric and purpose-driven approach, commitment to inclusion and diversity, and world-class talent challenge the status quo to advance client and community interests in the New Dynamic.

dentons.com

CSBrand-49927-PRM February Newsletter-03 — 23/02/2021