Steptoe

A New Year Update

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It's a New Year! In this update, we look forward to what 2019 may have in store and summarise some developments from the very end of 2018. But first we consider some 2018 highlights.

2018 Highlights

Some highlights from 2018 have been:

1. The first deadline under the new gender pay reporting obligations, and an increasing awareness of the lack of pay equality in many workplaces;
2. The coming into force of the General Data Protection Regulation, met with a lack of enthusiasm by some but also with one eye open to the resulting training needs;
3. The introduction of new rules regarding the taxation of termination awards, which were arguably overcomplicated and raised as many questions as they answered.

There were also a number of interesting cases and developments from the very end of 2018, which we summarise below.

Developments From the End of 2018

Government publishes Good Work Plan

Some of you may remember the Taylor Report, and its emphasis on so-called "good work". A link to our commentary on that report is here. The report was lengthy, but generally viewed as a missed opportunity to comment meaningfully on the current state of work in the UK (and to make some consequential proposals).

In any case, the Government has now confirmed that it intends to introduce a number of changes to provide additional protection for agency workers, zero-hours workers and other atypical workers. These changes are set out in the Government's Good Work Plan. Perhaps tellingly, however, no draft legislation is provided and there is little commitment to firm implementation dates.

The key proposals are:

- A streamlining of the employment status tests, so the same tests apply for employment and tax purposes as far as possible.
- A change to the rules regarding continuity of employment, so that a break of four weeks between contracts will not break continuity.
- An extension to the right to a written statement of terms and conditions, so that workers (not only employees) are entitled to a written statement. The proposal is that employers will now have to provide this written statement on the first day of work.
- An abolition of the Swedish Derogation, which enables employers to pay agency workers less than their own workers if the agency workers have an employment contract with the relevant agency giving them a right to pay between assignments.
- An increase to the penalty for aggravating conduct by an employer (where they

show malice, spite or gross oversight in breaching employment rights) from £5,000 to at least £20,000. In practice, however, this penalty is imposed infrequently.

- A bringing forward of proposals, in early 2019, for a single enforcement body to ensure better protection of vulnerable workers and new penalties for employers who breach employment agency legislation.
- Naming and shaming of employers who fail to pay tribunal awards. This was launched on 18 December 2018, and is triggered by filling in a penalty enforcement form.
- Generally, greater transparency regarding the entitlements of workers. For example, it is proposed that agency workers should be provided with clear information about their rates of pay and those responsible for paying them and that holiday pay entitlements should be promoted more widely. Eligibility for sick leave and pay, and other types of paid leave, will also be addressed.

Comment

As detailed above, the general lack of commitment to specific timeframes does not suggest that any meaningful legislative reform will happen imminently. In addition, the report slips into use of the word 'expectations' (e.g. an 'expectation' that companies will make public their model of employment and use of agency services). This does not suggest that any future measures will necessarily have teeth. Time will tell whether all, or some, of the above proposals will be implemented in practice and supported by meaningful legislation.

A link to the Good Work Plan is here.

Uber drivers are workers

The Court of Appeal has upheld an employment tribunal's decision that Uber drivers are workers. It has also upheld the decision that drivers are working during any period when they are within their territory, have their Uber app switched on and are ready and willing to accept trips.

As a result of the Court of Appeal's decision, Uber drivers are entitled to be paid the national minimum wage and to paid annual leave. A link to our previous commentary on this case can be found here.

The Court of Appeal, as with the tribunal and Employment Appeal Tribunal before it, considered that the contractual documentation created by Uber did not reflect the practical reality of the relationship between Uber and its drivers. This contractual documentation could, therefore, be disregarded. Uber was a transportation business which relied on the skilled labour of its drivers to provide a service to its customers and earn profits. Any elaborate or innovative contractual documentation that tried to suggest otherwise, and to create a relationship of self-employment, did not reflect the reality of the working relationship.

Uber has been granted permission to appeal to the Supreme Court.

Comment

As with other cases addressing so-called self-employment, the legal position remains clear. No amount of creative drafting will stop a tribunal from examining the reality of the working relationship. An employer can call a working relationship what it wants, but its assertions will come unstuck if the reality of the relationship is something different and is tested before a tribunal. Tribunals have demonstrated, time and time again, that they will look behind the contractual documentation placed before them when determining whether an individual is a 'worker' or not.

Pensions and disability discrimination

In the case of *Williams v Trustees of Swansea University Pension*, the claimant was disabled and working part time as a result of his disability. He applied for ill health early retirement. This was granted when he was aged 38. Under the applicable scheme, he was entitled to a lump sum and annuity, payable immediately, in addition to an enhancement based on his salary at the time of retirement.

The enhancement was calculated based on his part-time salary – the salary he had been earning immediately before his retirement. He claimed that this amounted to unfavourable treatment on the basis that he was working part time only because he was disabled.

Whilst the tribunal initially agreed with the claimant's analysis, the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court did not.

In its judgment, the Supreme Court considered that the treatment the claimant relied on was the immediate award of a pension. If the claimant had not been disabled, he would not have received any pension at all aged 38. As a result, the treatment was not intrinsically unfavourable or disadvantageous. Any non-disabled employee would have had to wait until the age of 67 to receive a pension.

Comment

In many respects, the Supreme Court's decision is a logical and pragmatic one. The claimant was only entitled to an early pension at all because of his disability. If he had not been disabled, and able to work full time, he would have had no immediate right to any pension (and would have had to wait until reaching the normal retirement date).

Employers should, however, tread carefully when dealing with disabled employees and the termination of employment. In particular, employers should consider any entitlements an employee may have (e.g. early retirement under any applicable pension scheme, or any entitlements under a permanent health insurance scheme) before deciding to dismiss. The costs of not doing so could be very significant.

Pensions and age discrimination

In the case of *The Lord Chancellor v McCloud*, there were two sets of claimants – judges and firefighters. Both groups were affected by government pension reforms and, in both cases, older members were entitled to remain members of their old pension schemes whilst younger members were required to transfer to a new, less generous scheme.

The Court of Appeal held that any "visceral instinct" that it "felt right" to protect older members was not enough to justify age discrimination. Without real evidence of financial difficulties for older members as a result of having a shorter period of time to prepare for the impact of the changes, there was not a legitimate aim to justify discrimination against younger workers.

Comment

Whilst it can be possible to justify age discrimination, a mere "feeling" is not sufficient to demonstrate an objective justification. Whilst the outcome of this case is unsurprising given the somewhat half-hearted attempt to provide a justification, it confirms that employers would be well-advised to obtain significant evidence in support of any objective justification they may intend to rely on when treating employees differently. The case is also particularly pertinent at a time when some employers continue to look at scaling back benefits that were available to older sections of their workforce, meaning that younger workers will not benefit in the same way.

Employee entitled to a statement of employment particulars when employed for six weeks

The case of *Stefanko & others v Maritime Hotel Ltd* has confirmed that employees are entitled to a written statement of employment particulars when they have worked for one month or more, but less than two months.

Whilst the Employment Rights Act 1996 states that employees are entitled to a written statement of employment particulars not later than two months after the start of their employment, it also states that the right exists even if an individual's employment ends before two months (but continues for one month or more).

Failure to provide a written statement of employment particulars may result in an award to an employee of two or four weeks' pay.

Comment

From April 2020, it is expected that every employee will have the right to a written statement of employment particulars from day one of their employment. The Good Work Plan (see comments here) also proposes to extend this right to workers. Regardless of the statutory position, it is good practice for employees and workers to receive a written statement of particulars before they start work and, in any event, on the first day of work.

Choice of law in employment contract relevant to territorial scope of employment rights

The protections afforded to individuals under the Employment Rights Act 1996 are not subject to any express limitation on their territorial scope. However, individuals must show a sufficiently strong connection to Great Britain and British employment law.

In *British Council v Jeffery and another case*, the Court of Appeal confirmed that whether an individual's connection to Great Britain is sufficiently strong to afford him or her protection under the Employment Rights Act 1996 is determined by an evaluation of the facts. This evaluation is a matter of law. Whilst an appellate court can, therefore, overturn a tribunal's initial decision, the tribunal's evaluation of the facts should only be interfered with if it took into account the wrong matters or made some other error. The choice of law in an individual's employment contract will be a relevant, although not decisive, factor in determining whether there is a sufficiently strong connection.

Comment

It is important to distinguish between the territorial scope of employment rights and the jurisdiction of tribunals to hear claims for a breach of those rights – they are different things.

Whilst employers should think carefully about the governing law and jurisdiction clauses in employment contracts, the wording of the contract will be only one factor in any subsequent dispute. For example, employees ordinarily working in or based in Great Britain will benefit from the protections under the Employment Rights Act 1996 even if their employment contract states that their employment contract is governed by some other law. They will then be able to enforce these rights if a tribunal is able to accept jurisdiction.

The Year to Come

It is, perhaps, inevitable that 2019 will be dominated by Brexit. There still remains tremendous uncertainty, and talk of a 'no deal' Brexit is now widespread amongst politicians and commentators. How and if Brexit will come to pass is anyone's guess!

However, there are a number of salient points in the context of employment law:

- Whilst the Government has committed to protecting existing employment law rights, it seems very likely that some changes will be made post-Brexit. After all, one of the arguments put forward for Brexit by Brexiteers was a removal of 'red tape' and regulation. The saving grace for workers is that a widespread reform of employment law is likely to be very low down the Government's list of priorities in the event of a 'no deal'.
- Following the abolition of tribunal fees, the increase in the number of employment tribunal claims continues. The tribunals' inability to cope with the increased number of claims also continues. There is currently talk of reintroducing fees at a lower level. However, it is unclear when this may happen. In the meantime, employers making rash decisions about their staffing needs in the context of a 'bad' or 'no deal' Brexit may face claims from employees with 'nothing to lose'. In order to defend claims, employers should ensure that fair processes are followed before making decisions to dismiss. Employers should also ensure that these processes are documented properly.
- If employers are considering relocating all or part of their workforces as a result of Brexit, they must comply with the applicable consultation obligations. When 20 or more redundancies are proposed at one establishment within 90 days or less, collective consultation must take place with appropriate representatives of affected employees. This number is surprisingly easy to reach. The applicable strict legislative timeframes must also be complied with.
- Finally, employers should remember that 'redundancy', for the purposes of collective consultation legislation, includes changes to terms and conditions of employment when dismissal and re-engagement on new terms of employment is proposed. When changes to rates of pay or shift patterns are proposed (rather than redundancy dismissals under the Employment Rights Act 1996), there may still be a duty to consult on a collective basis.

We wish you all a very happy 2019, albeit one that may pose a few challenges along the way. Please do not hesitate to contact Nic Hart at nhart@steptoe.com, or on +44 75 8429 0605, if you have any questions or would like to discuss any employment law issue.

Employment Team London

Nic Hart

Partner, Head of Employment
+44(0)20 7367 8049
+44(0)7584 290605
nhart@steptoe.com

Nic is a solicitor advocate with higher rights of audience. Nic provides Board level HR support. He has wide experience in ER including Talent Management, Executive dismissal, high value compromise agreements, complex team moves as well as injunctions, competition issues, tribunal litigation and TUPE He has specific experience of managing organised labour and trade disputes and business issues arising from Trade Union recognition. He has lectured on advocacy, evidence and trial strategy in the UK and USA.

Nic is currently ranked in the latest legal directories for Employment.

Katya Gevargiz

Associate
+44(0)20 7367 8097
kgevargiz@steptoe.com

Katya advises on both contentious and non-contentious employment law issues. She works primarily with employers providing support and guidance on a range of issues from day-to-day HR matters including disciplinary, grievance and performance management processes) to more complex restructuring arrangements, negotiated exits and discrimination issues. In addition to her advisory work, Katya has experience of developing and delivering training on a range of topics and providing practical commentary on the latest employment law developments.

Alice Head

Associate
+44(0)20 7367 8065
ahead@steptoe.com

Alice advises on both contentious and non-contentious employment law. Her work with employers involves providing support and guidance on a full range of issues, from day-to-day HR advice including grievances, performance management, disputes and dismissals; to strategic matters, such as redundancies, restructurings, business protection and policy advice, as well as contentious issues in the Employment Tribunals, Appellate and High Courts. She also delivers training and seminars to clients on various employment law topics.