MILLS & REEVE

briefing

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Employment review of the year 2017/2018

We select our top 10 employment law themes of 2017 and make our related predictions for the year ahead.

Brexit: defining the terms of withdrawal

After months of negotiations, in December 2017 broad agreement was finally reached on the terms of the UK's withdrawal from the EU. The UK Government's next target will be agreement on a transitional period to bridge the gap between its exit from the EU and at least political agreement on a new trade deal. By March 2018 it hopes to have reached a provisional transitional agreement, which will probably run from March 2019 until the end of 2020.

The outline withdrawal agreement is set out in a joint report from the negotiating teams, published on 8 December. As it makes clear, it is an agreement in principle on the package as a whole, which will need to be reflected in full detail in the formal withdrawal agreement. According to the EU's timetable, this will need to be concluded by October 2018 to allow ratification by the EU Parliament.

The report sets out the understanding reached on the three key elements of the withdrawal agreement: the rights of EU citizens currently living in the UK, the position of Northern Ireland and the financial settlement:

- On EU citizens, the UK Government has now in effect agreed to replicate, in post-Brexit UK law, the rights currently enjoyed by EU nationals who are established in the UK (more details below).

- On Northern Ireland, the Government has committed to avoiding a hard border with the Republic of Ireland and has also promised that Northern Ireland will not be treated separately from the rest of the UK, unless the NI Executive and Assembly agree to separate arrangements.

- On the financial settlement, a method of calculating the withdrawal bill has now been agreed, which involves the UK not only promising to meet its commitments under the current budget but also its share of the EU's contingent liabilities.

Meanwhile, on the domestic front, the Government has been piloting the EU Withdrawal Bill through Parliament. Although a number of other Brexit Bills will be required, the Withdrawal Bill is the key to establishing a new domestic legal framework, following the repeal of the European Communities Act, which took the UK into what was then the EEC. The essential idea behind the Bill is that the entire body of EU-derived law applying at the point of Brexit will be converted into UK law. In the years that follow, the Government will decide how much of this law to retain. Its room for manoeuvre will be defined not only by domestic politics, but also by the terms of its new relationship with Europe.

The Withdrawal Bill has now completed its committee stage in the House of Commons, during which the Government was forced to make a number of concessions. It also suffered a defeat on an amendment which will require approval of the withdrawal agrement by an Act of Parliament. However, attempts by the opposition to secure an amendment which would have entrenched EU-derived employment rights into UK law were defeated.

As 2017 ended the shape of the UK/EU divorce has certainly come into sharper focus, but there is still little clarity on what the future relationship between the UK and the EU is going to look like and when it can be implemented. That will be the Government's major task for the first few months of 2018. At the beginning of 2018, businesses are still not a lot clearer about what will be happening once the UK's article 50 notice expires on 29 March 2019.

Brexit: implications for immigration

One of the key components of the political agreement reached in December 2017 concerned the rights of EU citizens living in the UK, and the corresponding rights of British nationals living in the EU at the point of Brexit.

As had been signalled since the Prime Minister's speech in Florence in September 2017, the UK has now agreed to the following:

- A new settled status in UK law will be created for EU citizens who have been resident in the UK before a specified date. This will be the date the UK leaves the EU, which is scheduled to be 29 March 2019.

- EU citizens (and their family members) who have resided in the UK for five years on the specified date will be eligible to apply for settled status.

- EU citizens (and their family members) resident in the UK before the specified date, but who have not been resident for five years on the specified date, will be able to apply for a temporary residence status to cover the period until they have accumulated five years' continuous residence. They will then be eligible to apply for settled status.

- EU nationals will have around two years from the date of the UK's exit from the EU to lodge applications and will have protected status during this transitional period.

Similar arrangements are likely to apply to EEA nationals (ie nationals of Norway, Iceland. Lichtenstein and Switzerland). Irish Nationals will not be affected by these new arrangements. As part of the withdrawal

agreement, the UK Government has agreed to preserve the Common Travel Area established under the Ireland Act 1949.

The Government has not decided what immigration arrangements will apply to EU nationals arriving after Brexit. In practice freedom of movement is likely to continue during any transitional period, though as things stand it is not clear whether that those arriving in the UK after the specified date but before the end of the transitional period will be eligible to apply for the new settled status.

Like its EU counterparts, the Government has agreed that, when administering applications for the new settled status, it will avoid "unnecessary administrative burdens" and that application forms will be "short, simple [and] user friendly". However, it is still likely to be advantageous for EU nationals currently living in the UK to apply for permanent residence prior to Brexit, since the procedure for switching from this to the new settled status is likely to be simpler than applying from scratch. Employers in the UK will need to decide how best to support their EU workers while negotiations on the transitional period continue.

Corporate governance: introducing ratios for top executive pay

In response to growing concerns about rising executive pay, the Government announced over the Summer that it would be introducing new legislation to require the publication of executive pay ratios. This was part of a wider package of reforms announced in its response to the Corporate Governance Green Paper, which was published back in November 2016.

New legislation, which is due to be introduced in mid-2018, will require quoted companies to report annually in their remuneration report on the ratio of CEO pay to the average pay of their UK workforce. They will also need to publish a narrative explaining changes to that ratio from year to year and how the ratio relates to pay and conditions across the wider workforce.

Further details will be revealed when the draft statutory instrument is published, probably early in 2018. However it is likely to reflect the approach adopted in the gender pay reporting legislation, which came into effect in April 2017 for businesses with 250 or more employees and which will require figures to be published by early April 2018. That means that the primary focus will be on using increased transparency to encourage best practice, rather than seeking to lay down any particular ratio as appropriate.

These proposals will apply only to public listed companies. It is no coincidence that similar proposals are being considered in the HE sector. The Committee for University Chairs is developing a fair remuneration code, which will be launched for consultation in January 2018. This is likely to include a requirement to publish the ratio that the value of the head of the institution's total pay package bears to the median earnings of the institution's entire workforce.

Both groups of provisions sit alongside broader, principles-based guidance to the setting of remuneration for higher paid staff, which will still give private and HE sector employers considerably more latitude in the setting of salaries than prevails in the public sector. However, the added impetus that the introduction of gender pay reporting requirements seems to have given the equal pay agenda, has given the Government more confidence to push for the adoption of these additional reporting metrics. They will make it easier to compare pay structures across different organisations, albeit on a relatively crude basis. It may well be that this approach will be extended to cover a wider range of organisations in future years.

Employment status and the gig economy

A number of big names in the Gig economy have been involved in employment litigation over 2017, including Uber, Deliveroo and Addison Lee.

The stand-out case has been the Employment Appeal Tribunal's ruling in the Uber litigation in November. This upheld the employment tribunal's decision that a test group of drivers should be treated as workers, not self-employed contactors as Uber had argued. This ligation has provided a fascinating insight into the detailed network of legal agreements behind the apparently simple app, which around 2 million Londoners have been using.

Although Uber lost the appeal, the EAT made it clear that this was the outcome of an extremely detailed analysis of the precise relationship between the drivers and Uber, and fell short of suggesting that all individuals engaged in the gig economy should be classified as workers.

We already know that the Supreme Court is due to hear an appeal in the Pimlico Plumbers case next month, in which the plumbing business concerned will be challenging a ruling that the individuals it engages are not self-employed. It is also possible that the Court of Appeal will hear Uber's appeal from the EAT decision by the end of 2018.

Both these cases are examples of the employment tribunal adopting a painstaking analysis of the details of the terms of engagement and coming up with a decision that has been upheld on appeal to the EAT, although arguably in each case the decision could have gone the other way.

As the law stands at present, therefore, there is no simple test to distinguish a worker (who is entitled to basic rights like paid holiday and the National Minimum Wage) from an individual who is self-employed and entitled to no employment-related rights at all. Instead the courts look at a range of factors including the degree to which the individuals are integrated into the business which engages them and the degree of "true independence" in the delivery of the service.

If the opportunity arises, it will be interesting to see whether the Supreme Court confirms – as is widely expected – that this approach remains correct in the context of the gig economy. If so that would create added pressure on the Government to create some guidelines to make it clearer which side of the line individuals engaged in the gig economy should fall. Alternatively, it could consider adjusting the tax regime to remove some of the advantages that self-employed status confers on individuals and the businesses engaging them.

These issues were explored in some detail in the Taylor Review, which was commissioned in Autumn 2016 and reported in July 2017. No action has yet been take to implement any of its recommendations, but the Government announced in November 2017 that it would be publishing a discussion paper "exploring the case and options for longer-term reform to make the employment status tests for both employment rights and tax clearer". It is currently unclear when this will be published, but it will be certainly interesting to see what emerges during the course of 2018.

Employment tribunals: no fees and rising awards

One of the most surprising legal developments of 2017 was the Supreme Court's ruling that the secondary legislation which had introduced tribunal fees four years previously was unlawful. That left the Government with no option but to stop charging fees immediately and to agree to refund all litigants who had paid fees in the employment tribunal or Employment Appeal Tribunal over that period.

Following completion of a pilot, the full refund scheme was launched in mid-November 2017. It enables litigants in the employment tribunal and Employment Appeal Tribunal to reclaim fees paid since their introduction in July 2013. For employers the key point is that they will able to apply for a refund of employment tribunal fees in their own right if they were ordered by the tribunal to reimburse claimants' fees. In addition any fees they paid direct – for example judicial mediation fees, and in relation to appeals to the EAT – can be claimed back with interest.

Last month the official tribunal statistics for the quarter to the end of September 2017 revealed just how dramatic the effect of the abolition of fees has been on the volume of claims being lodged in the employment tribunal. The number of single claims lodged in August and September averaged just over 2800 per month. That is approximately double the monthly average number of single claims lodged during the first seven months of 2017, before the Supreme Court's decision was announced.

In 2018 employers will not only face the pressure of an increased volume of claims, but also the impact of a number of other developments which are likely to increase the level of compensation awards. These include:

o The Court of Appeal's confirmation that awards in the employment tribunal for injury to feelings or personal injury should be subject to a one-off increase of 10%. That decision, when combined with the effect of inflation, means that the guideline upper limit on compensation for injury to feelings in the most serious cases of discrimination has been increased to £42,000. Back in 2002, when the Court of Appeal first established these guidelines in the Vento case, the equivalent figure was £25,000.

o The reduction in the discount rate from 2.5% to minus 0.5%. This will mean a significant increase in awards for career loss and pensions losses. In effect, employers will be expected to compensate successful claimants for the negative real returns on safe fixed-rate investments when compensating for future loss.

o A decision from the Employment Appeal Tribunal that the calculation of a week's pay (used to calculate redundancy payments and protective awards among other things) should include an amount to reflect employers' pension contributions.

Equality law: continuing the process of clarification

Discrimination law continues to be one of the most dynamic areas of employment law, with many significant cases decided in 2017. Two cases however stand out from the rest: a Supreme Court ruling on indirect discrimination and a decision from the Employment Appeal tribunal about comparators in the Asda equal pay litigation.

Supreme Court clarifies scope of indirect discrimination

Indirect discrimination is one of the most complex areas of discrimination law, and the Supreme Court had to address two commonly encountered difficulties. Firstly, what happens if there is evidence that a given policy disadvantages a particular protected group, but it is not possible to establish why this should be the case? The Supreme Court said it should be no surprise that this should happen, given that indirect discrimination normally happens because of a number or inter-related factors. When group disadvantage is shown, the absence of an explanation does not relieve the employer of the responsibility for justifying the policy in question. So in this case the Home Office was called upon to justify its policy of requiring applicants for promotion to pass an exam, even though candidates of BAME ethnicity were significantly less likely to pass.

The second and related question the Supreme Court addressed was whether the policy under scrutiny had to have a direct connection with the protected characteristic. The answer was no. That meant that a Home Office service-related pay scheme was capable of being indirectly discriminatory against Muslim prison chaplains, even though Muslim and Christian chaplains who started work at the same point would be paid the same.

The lesson for employers is clear. As Baroness Hale, who gave the leading judgment in the Supreme Court, put it: "a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

EAT in landmark equal pay ruling

The Asda case is another example of the increasingly wide reach of our equality law. This time it concerns the circumstances in which a female worker can mount an equal pay claim by comparing her pay with that of a male comparator in a different part of the same business. Despite the fact that our equal pay legislation is now over 40 years old, this issue has not so far been conclusively determined.

Asda had argued that its female store workers could not compare their pay with male workers in distribution depots, because different arrangements applied for setting their pay. The retail workers' pay was not set by collective bargaining, while in contrast the pay and conditions of the depot workers were covered by a national collective agreement with the GMB.

When it heard Asda's appeal in September 2017, the EAT endorsed the employment tribunal's reasoning that the responsibility for setting the pay of both groups of workers could be traced back to a "single source". This source - ie Asda's Executive Board - bore ultimate responsibility for setting pay levels, even though in practice the conduct and implementation of pay negotiations was delegated. However that decision is not the end of the story because the employers have appealed. The Court of Appeal is due to hear the appeal in October 2018, and a further appeal to the Supreme Court is a possibility. Employers, particularly those in the private sector with similar pay structures, will be following this litigation with interest.

GDPR: getting ready for implementation

The General Data Protection Regulation – an EU-wide upgrade of the current data protection regime which dates from the mid- 90s – will come into force in the UK on 25 May 2018. While the UK remains a member of the EU this will have "direct effect". Once the UK leaves the EU its operative provisions will be translated into UK law via a new Data Protection Act, which is currently progressing through the House of Lords as the Data Protection Bill 2017-19.

Many of the key data protection principles remain the same, but it has been felt necessary to increase the level of protection for individuals and strengthen penalties for non-compliance in the light of the vastly greater amounts of personal data now being processed in the social media age.

Significant changes from the current regime include:

- A greater emphasis on transparency by data controllers;
- Tightening the restrictions on processing sensitive personal data (now to be called "special categories of personal data");
- A strengthened "right to be forgotten";
- A new right to "data portability";
- Wider obligations to report data protection breaches;
- Abolition of the subject access fee in most circumstances plus reduced time for compliance; and
- Scope for imposing much greater fines for non-compliance.

Key challenges for HR departments include:

- **Sensitive/special category data:** Currently many employers rely on consent at least as a fall-back for lawful processing. In the future an increasingly restrictive interpretation of consent is going to mean that

employers will need to rely on other fair processing conditions in most circumstances. The Data Protection Bill will preserve the specific exemption for processing which is "necessary for the purposes of exercising or performing any right or obligation" imposed by law on the data controller "in connection with employment". However enhanced record keeping obligations will now be applied to employers relying on this condition.

- **Fair processing notices:** Not only will these need to reflect the wider range of rights conferred on data subjects under the new regime, but will also have to include a more comprehensive account of how and why the employer processes employee data.

- **Subject access requests:** Employers will need to ensure that they are able to cope with subject access requests within the new time frame (a month instead of 40 days) as well as having the capacity to respond to any upsurge in the volume of requests due to the abolition of fees. They will also need comply with the new "portability" requirement when providing the data.

The Information Commissioner substantially revised her guidance on the GDPR in December 2017 and further updates are expected early in the New Year. Employers will be particularly interested to see the consent guidance, which will be finalised once consultation at an EU-wide level has been concluded later this month.

Pensions: equality and auto-enrolment

There were a number of significant equality-related decisions in the pensions field in 2017. The year ended with a significant announcement about extending the scope of the auto-enrolment provisions, on top of the increase in contribution levels planned for 2018 and 2019.

Noteworthy decisions of 2017 included:

- A Supreme Court decision in March 2017 which declared that a rule in a public sector pension scheme which imposed an absolute requirement of nomination on unmarried partners as a condition of eligibility constituted unlawful discrimination contrary to the European Human Rights Convention. Private sector defined benefit schemes that contain similar provisions will need amending to remove the requirement.

- A Supreme Court ruling in July 2017 that the restriction in UK legislation allowing a surviving civil partner's/same sex spouse's pension rights to be based on their partner's pension rights earned after 5 December 2005 only is unlawful. Instead, survivors' benefits for such individuals should be calculated in the same way as benefits for opposite sex spouses - i.e. by reference to the entire period of pensionable service completed by the member, and not limited to periods after the Civil Partnership Act came into force. Action may be required to amend defined benefit schemes that restricted rights to 5 December 2005.

- Also in July 2017, a decision was made by the Supreme Court to make a reference to the European Court of Justice in relation to pension rights for part-time workers. The issue is whether a part-time worker's pension must be calculated on the basis of the whole period of service or merely the period since 7 April 2000, when the deadline for transposing the Part-tine Workers Directive expired. The advocate general's opinion is expected in 2018.

In December 2017 the Government announced the outcome of its review of the current pensions auto-enrolment regime Significant policy changes include reducing the lower age threshold for auto-enrolment from 22 to 18 and the removing the lower earnings limit as the base line for calculating contributions. The Government proposes to introduce these changes from the "mid 2020s".

In the meantime some employers will need to grapple with prepare for the increases to statutory minimum contribution levels to auto-enrolment qualifying schemes. The total contributions required will rise from 2% to 5% in April 2018 (including a minimum 2% employer contribution) and to 8% in April 2019 (including a minimum 3% employer contribution). Many employers will take the step-ups in their stride because their DC contribution rates are already above the minimum required rates. Other employers will need to increase their contributions, or may wish to increase workers' contributions, or both, from 6 April 2018, and perhaps again from 6 April 2019. In some cases implementing these changes may require contractual changes to be implemented, along with consultation with employees or their representatives.

Whistleblowing: two key cases

Among the many 2017 whistleblowing decisions to choose from, the two that stand out concern the meaning of "public interest" and a case which exposed the potential liability of non-executive directors for victimisation of a whistleblower.

Court of Appeal declines to define public interest

Since June 2013, a disclosure has not qualified for protection unless the claimant reasonably believes that making it is "in the public interest". The first case in which the Court of Appeal was called upon to interpret this expression concerned a complaint made by Mr Nurmohamed about the way Chestertons' management accounts were prepared. He claimed that irregularities in the accounts meant that around 100 senior managers (including him) were receiving reduced commission payments. The key question was whether he reasonably believed that the disclosure was being made "in the public interest".

The Court of Appeal ruled that the employment tribunal had been entitled to conclude that this was a case where the claimant had reasonably believed that the disclosure was made in the public interest. It was not merely a question of the number of people who were affected, though this was a relevant factor. The tribunal was also entitled to take into account the nature of the alleged irregularities (which were not trivial) and the size and prominence of the organisation involved. However the Court of Appeal stopped short of providing a definition of the public interest for these purposes, saying that as Parliament did not provide a definition in the legislation, it was not for the courts to supply one.

EAT lands non-executive directors with £1.7 million bill

A month later came a decision from the Employment Appeal Tribunal which upheld an employment tribunal ruling that two non-executive directors were jointly and severally liable with the claimant's employer for a whistleblowing award of over £1.7 million.

The vast majority of this award related to the financial impact of the claimant's dismissal, which the tribunal found had been planned by one of the NEDs and implemented by the other, in response to protected disclosures. They argued that this liability should fall exclusively on the company, since only it could be liable for automatically unfair dismissal.

As the EAT explained, prior to the changes introduced in 2013 no liability would have attached to the NEDs. Then changes were made to align the whistleblowing regime more closely with long-standing principles of discrimination law. These not only make an employer vicariously liable for the discriminatory actions of its workers and agents, but also expose such people to personal liability.

Some aspects of this decision are being appealed, and the hearing before the Court of Appeal will take place in July 2018. One of the issues that it is likely to explore is the extent to which company employees and other workers (such as NEDs) can be liable for dismissal-related losses, which in normal circumstances would fall on the employing company. Whatever happens in the Court of Appeal, this case, more than many others in recent years,

has highlighted the wide reach of whistleblowing legislation, as well as the potential for very significant awards of compensation.

Working time: more developments on holiday pay

Lock litigation ends

Litigation about the calculation of statutory holiday pay has been going on for many years, but the Supreme Court's decision early in 2017 to refuse permission to appeal in *Lock v British Gas* marked something of a turning point. From that point it has been clear the following payments should be included in the four weeks' paid holiday guaranteed by the Working Time Directive:

- Shift allowances;
- Guaranteed overtime payments;
- Pay for overtime that a worker is obliged to work if offered; and
- Results-based commission.

In short, any payments that are normally received during a typical working week should be included. There is however still a lack of clarity about how commission should be calculated for these purposes. There is also uncertainty about the extent to which more irregular payments should be included.

Voluntary overtime

By the middle of 2017 we had a decision from the Employment Appeal Tribunal which addressed one of the remaining gaps in our understanding – how purely voluntary overtime should be calculated. The case involved a group of 56 employees of Dudley Council responsible for repairs to its social housing stock.

The EAT said that "where the pattern of work, though voluntary, extends for a sufficient period of time on a regular and/or recurring basis" then it should be included in "normal remuneration". However there are no hard and fast rules about where to draw the line. It is for the employment tribunal to determine whether overtime worked "is sufficiently regular and settled" for the payments made in respect of it to amount to normal remuneration.

So, while the EAT has established a general framework to help employers assess the status of voluntary overtime for these purposes, it has left it to employment tribunals to work out what is "normal" in each particular case. That is perhaps as well, given the almost infinite variety of working arrangements across the UK.

A holiday day bombshell

2017 ended with a decision from the European Court of Justice in *King v Sash Windows* about claiming backdated holiday pay. Although it followed an advocate general's opinion that was published earlier in 2017, the radical nature of the decision still took many people by surprise. It ruled that workers denied the opportunity to take paid holiday because they were wrongly categorised as self-employed should be able to back-date claims for holiday pay to the start of their engagement.

The ECJ said that any legislation which prevented the worker from carrying over and accumulating such rights in these circumstances would be incompatible with the Directive. In Mr King's case, since his rights as a worker had not at any time been recognised, that meant that he should be able to carry forward accrued holiday pay until the termination of his engagement with Sash Windows.

The case will now return to the Court of Appeal so that it can consider whether the Working Time Regulations can be interpreted to conform with what the ECJ has now said about the requirements of the Directive. Its decision is expected early in 2018.

Although the full implications of this decision will take a while to filter through, it considerably increases the risks to which businesses are exposed if they miscategorise the individuals they engage as self-employed when they are in reality workers

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