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Briefing Note – October 2018

UK: EMPLOYMENT UPDATE

Welcome to this month's Briefing in which we consider another medley of topics: a change of approach by HMRC in pursuing transferees for pre TUPE transfer national minimum wage failures, various government proposals to support parents and carers, developments in relation to ethnicity and gender pay gap reporting, new guidance on processing criminal offence data and the potential claims that can arise out of the mishandling of a harassment grievance.

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TUPE: HMRC will pursue transferee for national minimum wage liabilities

TUPE provides that the rights and liabilities arising under or in connection with the contracts of employment of transferring employees will transfer to the transferee's employer. Until the beginning of July 2018, HMRC charged the former employer (i.e. the transferor) all or part of the penalties where they were triggered by national minimum wage (NMW) arrears that accrued prior to the transfer.

HMRC has now indicated that going forward, where there has been a TUPE transfer of employees, all NMW liabilities including the full penalty amount, will now be enforced against the transferee's employer.

In many cases, transferor and transferee will have a contractual agreement providing reciprocal indemnities in relation to liabilities arising from actions or inactions either side of the transfer. However, this is not always the case particularly in situations where there has been a service provision change where there is not usually a contractual relationship between an incoming and outgoing service provider. Given this new stance by HMRC, incoming service providers will be vulnerable to financial penalties where the outgoing service provider has failed to pay the NMW for whatever reason. Such a failure may arise for many reasons including the misclassification of the employment status of the workforce or the failure to calculate holiday pay appropriately. Transferees should therefore consider what steps they can take to address this vulnerability.

New measures to support parents and carers in the pipeline

The Business Secretary has announced that the Government is to consider whether a new duty should be imposed on employers to consider whether a job can be done flexibly and to make it clear when advertising for roles.

The Government also proposes to consult on a new requirement for employers with more than 250 'staff' to publish their parental leave and pay policies. The intention is that the provision of this information would put job applicants in a position to make an informed decision "about

whether they can combine the role with caring for their family". As ever the devil will be in the detail; it is unclear whether the reference to 'staff' is to employees alone or the broader workforce whether employee, worker or self-employed contractor.

No indication of the proposed timeframe for consultation has been provided, however, some companies have pre-empted any new legal obligations by taking the initiative to publish their parental leave and pay policies.

Ethnicity and gender pay gap reporting – latest developments

The Government has today launched a consultation seeking views on ethnicity pay reporting by employers. It seeks views on a broad range of questions, the responses to which will inform future policy. Key issues include:

- What ethnicity pay information should be reported? Possibilities include a single pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees or several pay gap figures comparing average hourly earnings of different groups of ethnic minority employees as a percentage of white employees.
- Whether reporting should be by £20,000 band or pay quartiles.
- Whether employers that have an ethnicity pay gap should be obliged to publish an action plan to address the disparities.
- What approach to ethnicity classification should be adopted.
- What size of employer should be in scope of the reporting obligations.

While the Government is exploring how to introduce ethnicity pay reporting, it has confirmed that the gender pay gap legislation will not be amended to bring to all employers with 50 or more employees and LLP's in scope. Instead, it will be reviewed in 5 years to provide a sufficient period to properly evaluate its impact.

The Consultation closes on 11 January 2019. It can be found here.

Parental Bereavement Leave

The legislation Parental Bereavement Leave and Pay Act 2018 has received royal assent which means that the Government is in a position to implement the new Parental Bereavement Leave regime that will provide for two weeks' paid leave for bereavement caused by the death of a child under 18. It is understood that the Government's aim is to bring it into force in 2020.

New guidance on processing criminal data in recruitment

In conjunction with the Information Commissioner's Office, Unlock (the charity for people with criminal convictions) has produced guidance to help employers ensure that their policies and practices on collecting criminal records data during recruitment are compliant with the EU General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA). As the full legal implications of the GDPR are not yet known, this is not intended to be definitive guidance; the document will be update periodically to reflect developments.

The guidance clarifies:

- the need for employers to have a clearly identified purpose for processing criminal records data at any stage of the application process;
- the obligation to identify the *lawful basis* for processing (e.g. legitimate interest of the employer) and to meet a *condition of processing* (e.g. it is necessary for the purposes of performing or exercising rights or obligations that are imposed or conferred by law in connection with employment (the 'Employment Processing Condition'). An example of this would be the requirement on an FCA and/or PRA regulated firm to carry out criminal records checks in relation to an individual to be appointed to a senior manager role);
- the need for the company's data privacy policy to expressly state the purpose of processing criminal records data, the retention period and who it will be shared with; and the policy must be made available to applicants at the time the information is collected.

The guidance stresses that the collection of criminal records data must be *necessary* to fulfil the purpose for which it is collected and if the processing is not necessary, the processing will

not be lawful. In the past it has been (and in some cases continues to be), the practice of employers to ask about unspent criminal convictions on the application form rather than at the stage that an offer (conditional or otherwise) is made. The guidance suggests that collecting criminal records at the application stage is unlikely to be necessary and will therefore be in breach of the GDPR and the DPA.

The DPA sets out the lawful conditions for processing criminal convictions data. In addition to the specific Employment Processing Condition, it also provides that such data may be processed in other circumstances which include broadly speaking: where the processing is necessary to prevent or detect crime, and where the processing is necessary for the purpose of complying with a regulatory requirement (either legislation or generally accepted principles of good practice relating to a type of body or an activity) which involves taking steps to establish whether an individual has committed an unlawful act or been involved in dishonesty, malpractice or other seriously improper conduct. Unfortunately, the guidance does not address these processing conditions; this is a missed opportunity as many employers will seek to rely on these processing conditions and would welcome guidance on their application.

The Guidance can be found here.

Mishandling allegations of harassment can give rise to claims by the alleged harasser

A case before the High Court illustrates that employers owe a duty of care to both the employee who brings a harassment complaint and the individual who is the subject of the complaint; mishandling a complaint can expose the employer to claims of vicarious liability for harassment and damages for breach of the duty of care.

C was employed by LSE as was D as C's teaching assistant. It was alleged that D had become infatuated with C and when D accompanied him on a work trip she allegedly made an overt sexual advance. C then made a number of attempts to talk to her about the inappropriateness of her behaviour; this included a conversation in the early hours of the morning, attended by another colleague during which C advised D that she could no longer work with him.

C's attempts to handle the situation with D upset her considerably, prompting her to lodge a series of complaints with the LSE about C. She also shared her complaints with LSE staff and students and the Economist. C was unware of this but perceived that he was being shunned by students and colleagues alike. Eventually almost 3 weeks later D instigated a formal harassment complaint against him. The day after being advised of this, C fell ill with an acute stress reaction and never returned to work.

C brought a claim for damages for psychiatric injury on the basis that the LSE was vicariously liable for D's actions which he asserted amount to harassment of C under the Protection from Harassment Act 1997 (the PHA). In addition, C claimed that LSE's handling of D's harassment complaint was negligent.

For conduct to amount to harassment under the PHA the individual has to act in a malicious, oppressive or unacceptable manner. The court concluded that D genuinely believed that she had a legitimate complaint about C; although she should not have shared her complaint with staff, colleagues etc, she had felt strongly about the way in which she had been treated by C and was concerned that other young women could be subjected to the same treatment. She had been putting others on notice of C's conduct, one reason being to prevent a reoccurrence. Given those facts, the court concluded that D's conduct had not been oppressive and unacceptable, and such conduct would not amount to harassment for which the LSE could be liable under the PHA.

C also complained that the LSE had been negligent in handling D's complaint and that it had been reasonably foreseeable that this would result in C suffering from a depressive illness.

The court held that the LSE had been in breach of its duty of care to C in the way in which it had managed D's complaints because the process was unnecessarily protracted and the delay was compounded by D disseminating her complaints to staff and students at LSE at a time when C was unaware of them, and, the LSE failing to take any steps to stop her from doing so. Once the LSE had received D's initial complaint the court

considered that it should have attempted to ascertain whether she wished to pursue a formal complaint. However, the court did not consider that it had breached its duty of care by not showing C the original (informal) complaint.

Was the LSE liable for C's psychiatric injury (i.e. the depressive illness)? The question the court had to consider was whether LSE's actions/inactions created a foreseeable risk of injury against which it should have protected him. The court considered that knowing of the stress and anxiety that a complaint such as D's could cause, the LSE should have proceeded as expeditiously as possible in investigating it and it was foreseeable that a delay when C was becoming aware that others knew something that he did not was likely to cause stress and anxiety. However, foreseeability of stress is not in itself enough to give rise to liability. On the facts, it was the court's opinion that there was nothing to put the LSE on notice of any vulnerability on C's part that would make him susceptible to mental illness. It had no relevant information as to C's personality or past medical history that would have rendered his depressive illness reasonably foreseeable.

In this era of #MeToo, employers must take all complaints of harassment seriously and act promptly to investigate them. Mishandling of the process can expose an employer to a range of common law and statutory employment claims including: victimisation, discrimination, constructive dismissal and breach of contract. An employer can mitigate the risk of such claims crystallising in several ways:

- Maintaining confidentiality in relation to both the complainant and the individual that is the subject of the allegation and emphasising the need to do so to all parties and staff involved in the process.
- Following the ACAS Code of Practice on disciplinary and grievance procedures unless there are exceptional reasons for not doing so.
- Adhering to internal procedures in relation to grievances and harassment complaints.
- Acting promptly and keeping all parties informed where there are unavoidable delays.
- Not prejudging the situation.
- Reviewing whether complainant and /or the accused may have any particular vulnerabilities that could make them susceptible to psychiatric harm as a result of the way in which the investigation process is deployed.
- Checking that neither complainant nor the accused suffer from any disabilities that may require some aspect of the grievance, investigation or disciplinary process to be adjusted to remove or reduce any particular disadvantage.

[Piepenbrock v London School of Economics]

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