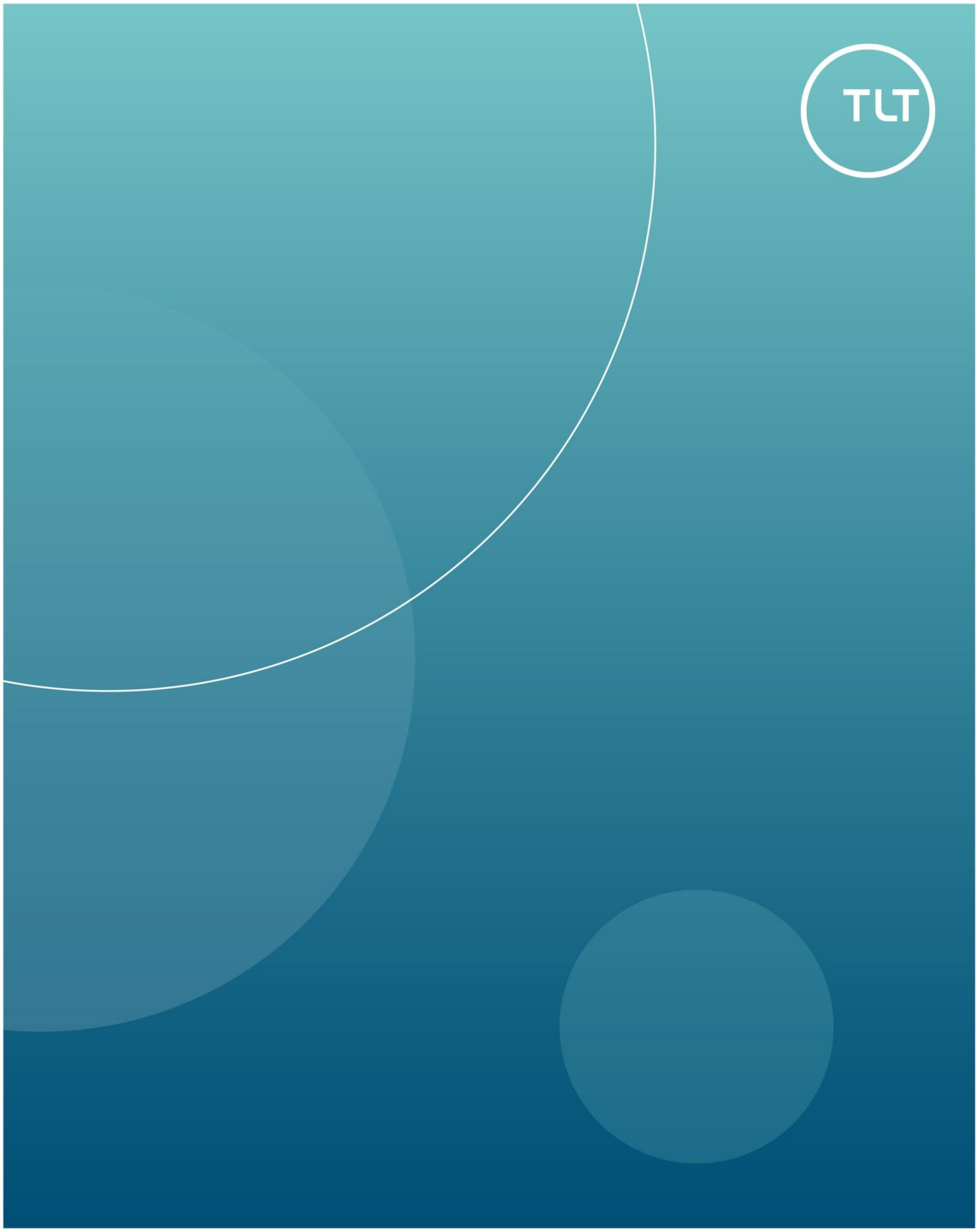

A-Z of Employment Law

November 2018

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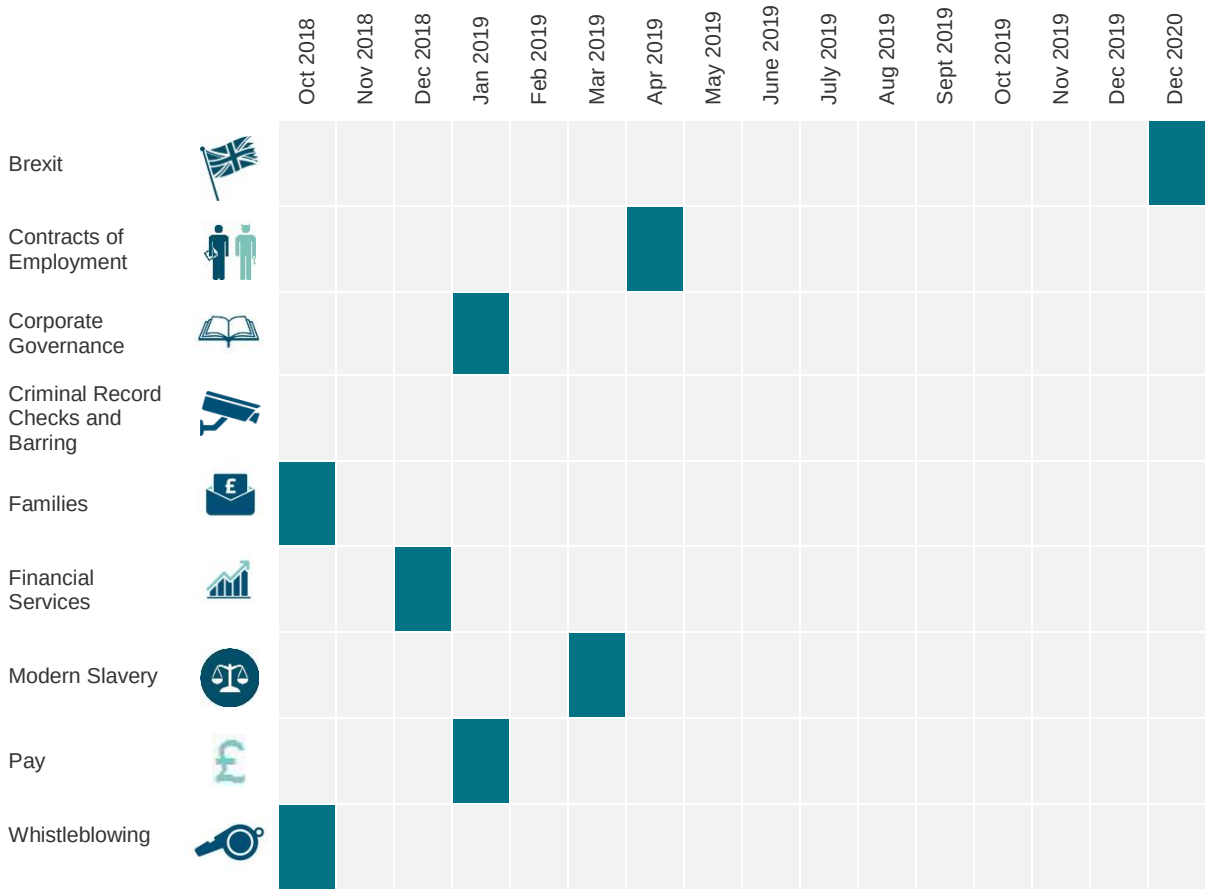
November 2018

Employment Timeline 2018-2019



Brexit

December 2020

EU Settlement Scheme

In summer of this year the UK Government published a Statement of Intent containing details of the EU Settlement Scheme that it is envisaged will apply to EU nationals in the UK post-Brexit.

Under the Scheme, EU Nationals will need to make an application to the Home Office for a residence document in order to continue to live and work in the UK. This contrasts with the current position where no registration and/or visa documentation is required.

The key date in the context of the Scheme is 31 December 2020. Any EU nationals who are present in the UK at that point and wish to remain will need to make a formal application (and will no longer be able to rely on EU free movement principles) as follows:

- EU nationals and their family members who have been continuously resident in the UK for 5 years as at 31 December 2020 can apply for "settled status", effectively giving them indefinite leave to remain in the UK on essentially the same terms as before.
- EU nationals and their family members who have arrived in the UK on or before 31 December 2020 - but have not been continuously resident in the UK for 5 years - can apply for "pre-settled status". Once these individuals reach 5 years' continuous residence, an application can be made to secure fully settled status.

Applications must be made by 30 June 2021 and it is envisaged that the application process will be user-friendly and straight-forward. The Government's proposals simply require the applicant(s) to prove their identity, residence and criminal history.

The position regarding future immigration rules for EU nationals arriving after 31 December 2020 is unclear and will in all likelihood depend on the terms of any Brexit deal reached between the UK and the EU.

Workplace rights and a "no-deal" Brexit

In August of this year the UK government published a series of "technical notices" giving guidance and information about their preparations for a "no-deal" Brexit. One notice was entitled "Workplace rights if there's no Brexit deal".

The notice advised that workers in the UK will continue to receive rights they have under UK law derived from EU law and that any changes would only be "linguistic". However, it also identified that protections for UK workers in other EU countries if their employer becomes insolvent could change. It also identified that the right of UK workers to request that their employer establishes a European Works Council could be affected.

Our insight

There is no immediate rush for businesses that employ either EU nationals or family members of EU nationals to take action. Brexit talks have stalled of late due to disagreements regarding the post-Brexit treatment of the Irish border.

In the meantime, it would be prudent for businesses to carry out an audit of their workforce to determine the extent of any reliance on EU workers. Although the proposed Scheme does not ask much of employers, they may nevertheless want to inform their EU staff of the Scheme so they can start taking the necessary steps to remain.

Contracts of Employment

April 2019

Case: *Tyne and Wear Passenger Transport Executive v Anderson and others*

Early this year the EAT considered to what degree employment tribunals were permitted to carry out analysis of contractual terms when determining unlawful deduction of wages claims.

Unlawful deduction of wages claims involve the Tribunal considering whether sums are "properly payable" under the employment contract. The EAT confirmed that, to determine such a question, it was necessary for Tribunals to consider the construction of the contract and carry out interpretation of its terms.

Itemised payslips

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No.2) Order 2018 has been made and will take effect on 6 April 2019.

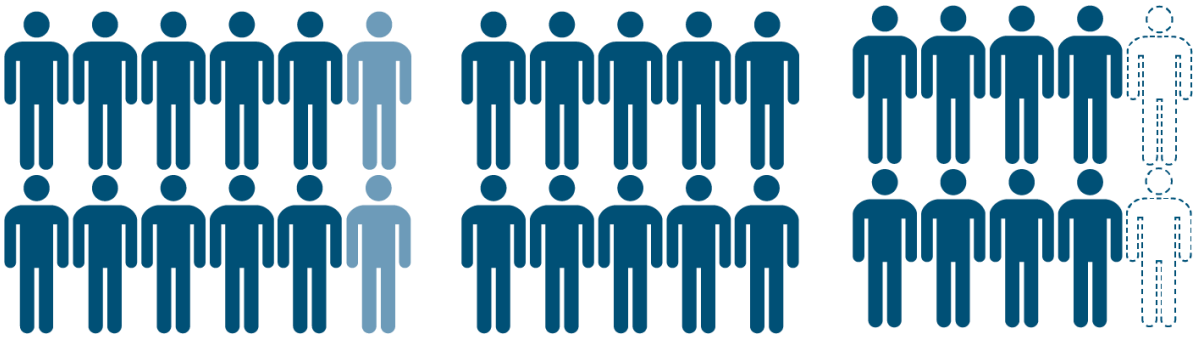
The Order requires employers to provide itemised payslips to all workers, not just employees. For workers paid by the hour, the payslip must state what hours the worker is being paid for. This is designed to help low paid workers check they are being paid correctly.

Our insight

The *Tyne and Wear* case has addressed a question mark raised by a previous EAT decision. The previous decision suggested the EAT did not have jurisdiction to consider questions of contractual construction since this was the domain of the High Court. Many commentators questioned that decision and the *Tyne and Wear* judgment has hopefully settled the issue once and for all.

As for the legislation regarding itemised payslips, employers now have time to ensure payroll systems are prepared to comply with these requirements. Employers may wish to start providing payslips to all workers as soon as they are ready to, rather than waiting for the April 2019 deadline.

'Employers may wish to start providing payslips to all workers as soon as they are ready to, rather than waiting for the April 2019 deadline.'



Corporate Governance

January 2019

A new version of the UK Corporate Governance Code was published by the Financial Conduct Authority (FCA) on 16 July 2018. This Code is the key source of corporate governance recommendations for many listed companies (those with a premium listing).

The new Code tightened up the requirement for companies to adopt certain types of workforce engagement. It states that companies must either have a director appointed from the workforce, a formal workforce advisory panel or a non-executive director designated to workforce engagement. Boards that do not adopt one of the above methods must justify this to the FCA.

Further changes to the 2016 Code include greater promotion of external board evaluations (the FCA suggests FTSE 350 companies should have these every three years) and a broadening of the scope of remuneration committees to include workforce remuneration, related policies and alignment of benefits with organisational culture.

The new Code applies to accounting periods beginning on or after 1 January 2019.

BEIS consultation on governance of firms approaching insolvency

In March of this year BEIS published a consultation paper on reform of corporate governance of firms that are approaching or in insolvency.

The government provided its response to this consultation in August seeking further consultation but indicating it would look to take action in relation to strengthening transparency requirements in respect of group structures, strengthening shareholder stewardship and strengthening the dividend payment framework.

Our insight

Corporate governance reform is an area the government has taken some interest in. Reforms connected to executive pay and governance of large privately-held businesses have previously been mooted, amongst others. For this reason it is worth keeping an eye on the regulatory environment surrounding corporate governance to identify the direction of travel.

The government suggested a number of actions in its response to the BEIS consultation and BEIS confirmed that further details will be provided this autumn. It will be interesting to see what actions are to be implemented without further consultation and when implementation will occur.

'The new Code… states that companies must either have a director appointed from the workforce, a formal workforce advisory panel or a non-executive director designated to workforce engagement.'

Criminal Record Checks and Barring

2018/2019

R (on the application of P) v The Secretary of State for the Home Department

Claims brought by four individuals against the government were heard by the Supreme Court in June of this year. All the claimants have disclosable records for the purposes of the UK's scheme for disclosure of criminal records.

These individuals claim that the provisions for disclosure contained in a number of Acts of Parliament violate their right to a private life under Article 8 of the European Convention on Human Rights (ECHR). This is due to the negative impact disclosure has on their ability to obtain work.

The appeals all involve circumstances in the grey area of ethical questions surrounding whether criminal records should be disclosed to potential employers. They involve cautions for arguably minor criminal acts, historic offences, offences committed by minors and/or offences committed by individuals suffering from mental illness.

If the appeals succeed the government will be forced to change the offences that show up when organisations carry out background checks under the UK's criminal records disclosure scheme.

Jeff v United Kingdom

An application has been lodged with the European Court of Human Rights to consider the Safeguarding and Vulnerable Groups Act 2006. The 2006 Act provides for lists of barred individuals to be maintained to prevent these individuals from obtaining jobs that put them in positions of responsibility in respect of vulnerable adults.

Individuals may be included on barred lists because they have, for example, been convicted of or cautioned in relation to sexual offences against children.

Seven appellants argue that inclusion of their names on these lists breaches their Article 6 right to a fair trial and their Article 8 right to a private life under the ECHR.

Our insight

The *R v Secretary of State* case is an interesting 'one to watch'. Even if the Supreme Court finds for the individuals there will be no immediate change to the law. However, employers will be interested to see whether the court's decision leads to a narrowing of the background information caught by the disclosure and enhanced disclosure schemes. Society at large will be interested to see how the court weighs the balance between the rights of individuals to seek gainful employment and the right of the public to be protected from harm.

The European Court of Human Rights has not yet confirmed whether it will hear the case of *Jeff v UK*. The barring regime provides for some individuals to be automatically added to the barred list without being afforded any opportunity to object. Such blanket provisions can be problematic from a human rights law perspective. However, the regime does provide for periodic reviews of the names included and for appeals against inclusion. These provisions should help shore up the government's position if this case makes it before the court.

Families

October 2018

Childcare voucher scheme

The government's childcare voucher scheme allows employees to receive favourable tax treatment where they exchange salary for childcare by way of their employer's salary sacrifice arrangements.

However, on 29 March 2018 the government changed the rules to bring an end to the scheme. 4 October 2018 was set as the final date for employees to join the scheme. New entrants must have sacrificed salary and received their vouchers by that date to be eligible.

The previous scheme has been replaced by a new "tax-free" childcare scheme which was fully rolled out on 14 February 2018. Parents sign up to this scheme via an online portal, the government will then top up £2 for every £8 that parents pay into their child-care account. The government maintains that the tax benefits under this scheme are substantively the same as those provided under the previous scheme.

The Parental Bereavement (Pay and Leave) Bill 2018

The Parental Bereavement (Pay and Leave) Bill 2018 received Royal Assent in September.

The Bill requires that two weeks' leave be given to employed parents who have lost a child. The aim of the Bill is to ensure parents experiencing this harrowing situation are afforded an opportunity to grieve away from their workplace.

Where the parents have at least 26 weeks' service they will be entitled to be paid in line with the "prescribed rate" set by the government or 90% of their average earnings, whichever is lower.

Our insight

The latest developments regarding tax free childcare are only relevant to employers in so far as they want to keep their employees updated about childcare schemes.

Interested employees should now know that the childcare voucher scheme has closed. Although the new scheme involves an arrangement between the government and parents (i.e. without the involvement of employers) you may want to let employees know that it is available.

It is not common for private members' bills to become law. However, the Parental Bereavement Bill 2018 received support from all corners of the political spectrum including from the government.

'The government maintains that the tax benefits under the new scheme are substantively the same as those provided under the previous (childcare vouchers) scheme.'

Financial Services

December 2019

Senior managers and certification regime

In March 2016 the senior managers and certification regime (SM&CR) came in to replace the "approved persons" regime for individuals working in "relevant firms". "Relevant firms" included banks, building societies, credit unions, investment firms regulated by the Prudential Regulation Authority, and foreign banks operating in the UK.

On 9 December 2019, the SM&CR is due to be extended to all firms authorised under the Financial Services and Markets Act 2000. It will be extended to all regulated insurers on 10 December 2018.

The SM&CR has three parts: (1) the 'senior managers' regime' which lays out the approvals required for and responsibilities of the most senior people working for firms subject to the regime (2) the 'certification regime' under which firms are responsible for annually certifying the fitness and propriety of their staff (3) the 'conduct rules' laying out the standards of behaviour expected of most individuals working in firms subject to the regime.

Our insight

Firms affected by the extension of the regime should ensure that they are familiar with its requirements and how it will apply to them. Sensible steps will include reviewing your governance structure, briefing affected senior managers and certified persons, and ensuring the readiness of your HR and Compliance function.

'Firms affected by extension of the regime should ensure that they are familiar with its requirements and how it will apply to them.'

Modern Slavery

March 2019

Modern Slavery Act 2015

The Modern Slavery Act 2015 requires commercial organisations with total global turnover exceeding £36 million to publish a slavery and human trafficking statement for each financial year.

Modern slavery remains a significant problem in the UK with the National Crime Agency reporting in 2017 that there were tens of thousands of victims and that it was occurring "in every large town and city in the country".

On 30 July 2018 the Home Office announced an independent review of the 2015 Act. The review aims to report on the effectiveness of the Act and identify any areas for improvement. It is expected to report back to the Home Secretary before the end of March 2019.

The House of Lords has also passed a Modern Slavery (Victim Support) Bill which is now being considered by the Commons. The Bill aims to help identify and support victims of modern slavery.

Our insight

There is not yet any indication of what recommendations may come out of the review of the 2015 Act. The current requirement for businesses to publish a statement is not too onerous. It will be worth watching this space to see if the government comes up with new ways to enlist employers in the fight against modern slavery.

£ Pay

January 2019

CEO and ethnicity pay-gap reporting

Following the introduction of gender pay gap reporting requirements, two new pay reporting requirements are on the horizon.

The Companies (Miscellaneous Reporting) Regulations 2018 come in to force on 1 January 2019. They require that quoted companies with more than 250 UK employees report the ratio of their CEO's total remuneration to the median, 25th and 75th percentile full-time equivalent remuneration of their UK employees. These figures have to be accompanied by an explanatory narrative. The Regulations apply to financial years beginning on or after 1 January 2019.

In October 2018, the government launched a consultation on ethnicity pay gap reporting. The consultation runs until 11 January 2019 and seeks views on the most appropriate method of reporting, what size of employers should be subject to the rules and how best to collect and analyse the data that results.

Case: *Mencap v Tomlinson-Blake*

In July 2018, the Court of Appeal held that national minimum wage legislation does not require care providers to pay their staff NMW during sleep-in shifts.

Sleep-in shifts involve carers staying the night at or near their place of work so that they can provide support if needed. The Court of Appeal held that during that time they were available for work rather than actually working. This meant they were not entitled to be paid the national minimum wage for the whole of the sleep-in shift, but only for the time when they were required to be awake for the purpose of working.

Our insight

Although it is too early to say whether it will result in long-term change, the government considers the introduction of gender pay gap reporting a success. The ethnicity pay gap proposals are at an early stage and employers should take this opportunity to have their say on them.

The CEO pay gap reporting provisions have some interesting elements. For example, the government has provided three different calculations that can be used to generate the ratios that have to be published. You would of course expect employers to choose the calculation that leads to the most favourable result. However, the legislation requires that employers provide a justification for the calculation they choose to use.

The Mencap decision came as an enormous relief for care providers who are extremely short on funds and could have been facing a huge bill for back-pay. The claimant in that case was supported by Unison who have now confirmed that they intend to appeal the decision to the Supreme Court. This unfortunately means that care providers are not yet out of the woods.

'The Mencap decision comes as an enormous relief for care providers who are extremely short on funds and could have been facing a huge bill for back-pay.'

Whistleblowing

October 2018

Timis, Sage v Osipov

A recent Court of Appeal judgment has confirmed that personal liability for whistleblowing detriment extends to dismissals and the losses that result.

The decision means that colleagues of a dismissed worker could be on the hook for the potentially significant losses that flow from the dismissal. In this case, Mr Timis and Mr Sage (the senior executives that sacked Mr Osipov because of his whistleblowing) are now joint and severally liable to pay just over £2 million of compensation.

The decision also provides a route for employees to use a whistleblowing detriment claim to recover losses for dismissal against their employer. It was previously thought that their only recourse against their employer was an unfair dismissal claim.

Our insight

This decision ensures that employees now have the same right as workers to bring whistleblowing detriment claims against co-workers in respect of dismissals.

However, the decision leads to some anomalous outcomes including that, although Parliament specifically excluded employees from bringing dismissal detriment claims, employees are now able to circumvent this intention by relying on the Employment Rights Act's vicarious liability provisions. Such outcomes raise the prospect of Mr Timis and Mr Sage continuing their fight to the Supreme Court.

Get in touch

As the year progresses, we will be keeping you up to date with developments as and when they happen.

If you would like direct updates on a particular area of the law, please contact our senior business development executive, Kay Bhatti, or another member of the employment team.

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