EVERSHEDS SUTHERLAND

Back in focus

UK employment law agenda

January 2022

Prepare for more proactive enforcement of various statutory rights 01

A vital component of the Government's proposals to reform workers' rights in the UK, through its 2018 Good Work Plan, was enhanced enforcement. During 2021 the Government published proposals for a new Single Enforcement Body which, once operational in the coming months, will co-ordinate the operations of existing bodies, such as the Employment Agency Standards Inspectorate (EAS), HM Revenue & Customs (HMRC) and the Gangmasters and Labour Abuse Authority (GLAA) but will also have significantly expanded resource and remit.

Employers should expect particularly proactive enforcement in areas such as shortfalls in national minimum wage, holiday pay and statutory sick pay but also in transparency in supply chain abuses, modern slavery statement reporting and, for agency workers, greater regulation of umbrella companies. Although the new body will also play a vital role in educating employers, defaulters could face civil penalties of a minimum £100 or maximum of £20,000 per worker in many cases.

Action – *Employers should continue to audit and monitor minimum pay requirements to ensure compliance but should also ensure they have a paper trail of their actions and supporting evidence. Some of the areas of enforcement will not have previously been scrutinised externally, such as holiday pay, so practices should be reviewed in advance to assess any areas that may be vulnerable to challenge. Read* **our briefing**.

Greater working flexibility 03

The Government is expected to fulfil its commitment to extend current flexible working provision in the coming months. Exact details of how an extended right to request more flexible arrangements will operate in practice is awaited, including employer grounds for refusal. However, the revised scheme is anticipated to apply as a day one right and to require employers to be transparent over the reasons for refusal. Access to carer's leave is also expected to be introduced and will mean that carers will be able to take up to one week's unpaid leave, either in individual days or half days, up to a block of one week. Employers will need to consider carefully if and how requests can be accommodated but also to balance competing priorities for certain protected workers. The needs of the business will be paramount but will need to be demonstrable.

Action – *Review current flexible working policy and operation, particularly to check it is fit for purpose, post-pandemic. Is your approach fair and equitable? Bear in mind also that, although the legal right will continue to be one of request only, pressures upon employers to be more inclusive and to attract and retain staff may warrant a fresh look and more facilitative approach, if this can be accommodated.*

New duty to prevent sexual harassment 02

The Government has committed to imposing a new legal duty on employers to proactively prevent sexual harassment. This new duty will require employers to take 'all reasonable steps' to prevent harassment, with further details due to be clarified in a new statutory code of practice being developed by the EHRC. A failure to take preventative steps may give rise to claims against employers if an incident of harassment in the workplace occurs. In addition, the Government plans to re-introduce protection against third party harassment of staff, requiring employers to intervene in this respect also.

Action – *Importantly, a "reasonable steps" defence requires employers to be proactive and to not only have a policy but to engage in staff training and to offer regular reminders and updates, to refresh awareness. Employers should therefore be reviewing their policies and training and communications strategies in readiness for these changes which are due to take effect as soon as Parliamentary time allows.* **Read our briefing**.

Contractual changes – new rights and restrictions in 2022? 04

A number of Government consultations have proposed changes which could affect the validity of certain employment contract terms and introduce new contractual rights. They include legislation, expected in 2022, aimed at ensuring that a confidentiality clause (in an employment contract or settlement agreement) does not prevent an individual making a disclosure to the police, regulated health and care professionals or legal professionals. It will also provide that any limitations imposed by confidentiality clauses need to be clearly set out and explained by legal advisers. Read **our briefing**.

The Government is also expected to decide whether contractual restrictive covenants, in the form of post-termination non-compete clauses, should be more transparent and subject to a requirement of compensation, or whether they should be banned completely; and whether to extend the ban on exclusivity clauses in employment contracts, to prevent employers from contractually restricting low-paid employees from working elsewhere. Read **our briefing**. Finally, the Government's promise to introduce a right for workers to request a more predictable work pattern in their contract may be included in the Employment Bill, which is expected to be published in 2022.

Action – *Review contracts and settlement agreements to ensure that the use of confidentiality clauses is managed on a case-by-case basis and is explained clearly. Employers should also review their use of non-compete clauses and the potential impact, should the Government restrict their use. Employers of zero hours and on-demand workers should consider how they might respond to worker requests for greater certainty and stability in contractual working arrangements.*

Enhanced family-friendly rights – redundancy protection and neonatal care 05

Currently, before making a woman on maternity leave redundant, an employer must offer her a suitable alternative vacancy with the employer or an associated employer (if one exists). The Government intends to enhance this protection so that it applies to pregnant women from the point at which they notify their employer of their pregnancy until 6 months after they have returned to work. In addition, redundancy protection will be extended into a period of return to work for those taking adoption and shared parental leave.

The Government also has plans to introduce a new day 1 employment right to statutory neonatal leave for parents of babies aged 28 days old or less who require at least 7 days' neonatal care in hospital. Parents will have the right to take an additional week of leave for every week their baby is in neonatal care, up to a maximum of 12 weeks. Those parents with a minimum qualifying period of 26 weeks' service, and who earn above the minimum pay threshold, will be entitled to receive pay for their neonatal leave period at the current statutory rate.

Both of these rights are set to be included in the Employment Bill, which Ministers have confirmed will be brought forward "as soon as parliamentary time allows".

Action – *Employers should be prepared to change existing processes and policies, for example, to ensure that, during redundancies, alternative employment is offered as required or risk an automatically unfair dismissal. They should also consider whether their approach to the new rights to neonatal leave and pay will mirror the statutory entitlement or will be enhanced in any way. Line manager training in relation to both of these developments will also be crucial.*

Furlough-related case law 06

The introduction of furlough or the Coronavirus Job Retention Scheme (CJRS) played a significant part in mitigating the impact of COVID-19 on the labour market. However, although CJRS officially ended on 30 September, employers may be dealing with its aftermath for some time, given the growth of furlough-related employment claims.

The unprecedented nature of the CJRS meant that many employers were left struggling with how to reconcile the scheme with existing statutory and contractual employment rights. Frequent changes to the rules, and extensions of the scheme on a number of occasions, added to this confusion. It is not surprising therefore that employment tribunals are now hearing furlough-related cases such as: whether an employee had a right to be furloughed; whether furlough should have been considered as an alternative to redundancy; and unlawful deductions claims based on the calculation of furlough pay. The employment tribunals are still managing a backlog of claims, which was exacerbated by lockdown, so it is anticipated that there are more furlough-related judgments in the pipeline. **For further information on potential post-pandemic litigation see our guide**:

Action – *Employers should continue to monitor furlough case law developments. Although these tribunal judgments are not binding, they provide valuable insights into how employment judges are approaching such issues and offer useful learning points for employers.*

The role of HR in ESG – Environmental, Social and Governance - factors 07

ESG factors are increasingly used globally to assess the sustainability, value and reputation of organisations (both positive and negative) by investors, customers, employees, regulators and suppliers. The 'E' in ESG has received the most attention, driven by increased climate change awareness and questions over sustainability. However, Social and Governance factors have now moved from the fringes into the mainstream. Diversity and inclusion, pay fairness and transparency, employee engagement, culture and ethics, and human rights issues, including modern slavery and in supply chains are among the workplace 'S' and 'G' risks attracting attention. As ESG continues to occupy the boardroom in 2022, HR practitioners will play a key role in meeting ESG targets.

Action – **Increase awareness of ESG and workplace implications** *and identify key ESG issues for your employer. Will job roles be impacted by decarbonisation plans, necessitating re-skilling or reorganisations? Are new employee incentives appropriate to support environmental change? More broadly, 'S' and 'G' factors will increase scrutiny on how HR policies are applied in practice, including ensuring diversity and inclusion in recruitment, promotion and pay.*

Speaking up: whistleblowing in 2022 08

The pandemic highlighted the key role of whistleblowing procedures, reflecting a rise in workers speaking up against corruption, unsafe practices and other misconduct. Yet, despite many businesses having whistleblowing programmes and hotlines, some whistleblowers encounter retaliation or are simply ignored, reflecting a potential disconnect between policies and culture in the workplace. As ESG factors and corporate transparency, ethics and purpose (beyond the bottom line) continue to grow in importance, so will a well-organised and trusted whistleblowing programme which gives a voice to those reporting risks and non-compliance.

Employers failing to provide easy access to confidential reporting mechanisms, or handling disclosures and disclosers inappropriately, risk problems escalating, reputational damage and, increasingly, significant sanctions for breaching whistleblowing regulation (**Read our briefing on the new EU Whistleblowing Directive**).

Action – *Review whistleblowing policies and practices: are whistleblowers treated positively, or do they risk being stigmatised? Should policies be updated reflecting growing expectations? Are staff trained in the important role of whistleblowing to support corporate governance and the gravity of hindering those reporting or retaliating? How well are whistleblowing channels administered in terms of confidentiality, accessibility and timely investigation? What does your organisation's whistleblowing data reveal?*

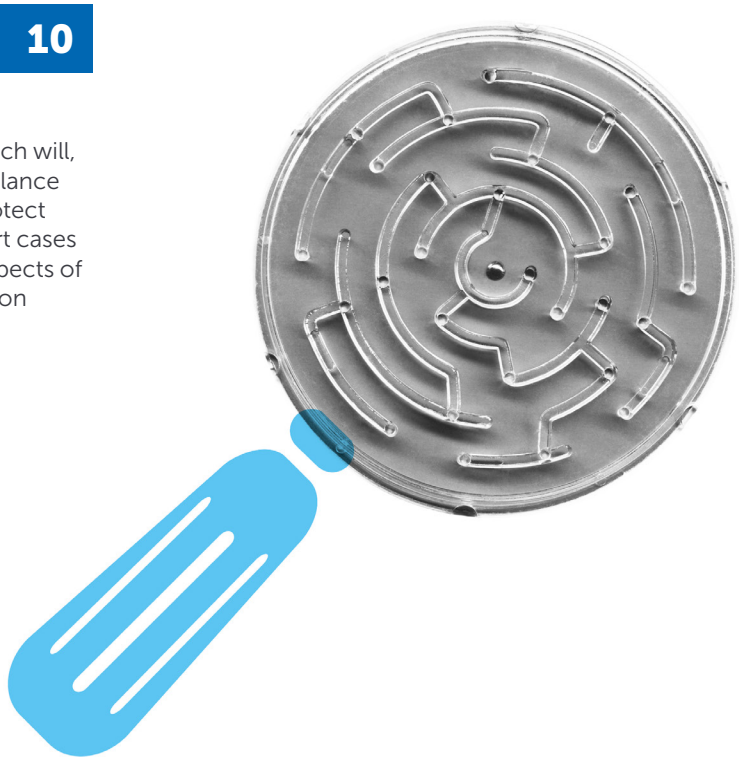
A new spotlight on collective bargaining agreements 09

The 2021 Supreme Court judgment in *Kostal UK Ltd v Dunkley* has propelled collective bargaining agreements into the spotlight - in particular, when unionised employers are involved in restructuring, changing terms and pay negotiations. The case concerns legislation prohibiting inducements for workers which undermine collective bargaining rights. The core issue addressed by the Court was: when can an employer, which seeks to make changes to pay or other collectively bargained terms but has reached an impasse in negotiations with its unions, lawfully step outside that collective bargaining process and make a direct offer to its workers? It decided that a direct offer to workers, in relation to a matter which falls within the scope of a collective bargaining agreement, cannot be made lawfully unless the employer has first followed, and exhausted, the agreed collective bargaining procedure and has a genuine belief that that procedure has been exhausted (**read our briefing**).

Action – *After Kostal, collective bargaining and dispute resolution processes will be a critical feature in the strategy and time scales associated with collective change projects and annual pay negotiations. Employers should ensure that collective bargaining agreements clearly define and delimit the procedure to be followed and any ambiguities are identified and resolved, where practicable.*

Diary note 10

Look out for future Eversheds Sutherland Alerts on employment developments during 2022, including potential news on the awaited Employment Bill which will, in particular, extend family friendly and work-life balance measures but also strengthen enforcement and protect lower-paid and casual/gig workers. Significant court cases are also anticipated and should clarify important aspects of holiday pay claims, worker status and industrial action protection.



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