

Changing direction? Employment update



July to September 2017 – a backward glance

Development	Impact on employers
<p>Gender pay gap reporting is in force, requiring larger private and voluntary sector employers and public sector bodies in England to publish pay differences between male and female workers (read our FAQs)</p>	<p>Employers have until next Spring before they must report. Media interest is already high as large employers publish their data. Auditing pay arrangements before data is published helps employers understand differentials, identify risks, present information meaningfully and manage challenging questions</p>
<p>The CA has handed down its decision in <i>Chesterton Global Ltd v Nurmohamed</i>; a significant whistleblowing case in which the meaning of “in the public interest” was considered</p>	<p>Going forwards, employers need to consider carefully the nature of an alleged disclosure, how many it might affect and how, before they assume an allegation relates to a purely personal issue, such as a contractual dispute, and falls outside whistleblowing legislation See our briefing</p>
<p>Possibly the most significant court decision of the year has found the UK ET fees regime to be unlawful, resulting in its immediate scrapping and the re-instatement of stayed cases See our briefings: here and here</p>	<p>Employers can expect to see an increase in ET claims. Furthermore, older claims which were not raised because of fees or were struck out on the grounds of non-payment of fees may potentially be resurrected</p>
<p>A new Data Protection Bill has been published</p>	<p>The new Data Protection Bill will implement the EU’s GDPR in the UK and give rise to significant changes to current practices. Employers should ensure they have appropriate compliance mechanisms</p>

	in place. See our countdown to compliance
The EAT has ruled that payments made for voluntary overtime that is normally worked must be included when calculating holiday pay for the first four weeks of holiday under the Working Time Regulations. See our briefing	Employers need to ensure that overtime undertaken on a regular basis is factored into holiday pay
New guidance for the calculation of pension loss has been published by the ET (See guidance)	For the majority of cases the new, simplified approach should prove more straightforward and, being based upon contributions during the period of loss, make it easier for employers to assess likely liability
The EAT has ruled that there is no onus on a claimant to show facts from which discrimination can be inferred before a claim can succeed	The case, which is being appealed, overturns previous understanding that claimants bear an initial burden of proof before pursuing a claim of discrimination. Employers must be prepared to put forward rebuttal evidence and explanation at the outset, if discrimination claims are to be defended
In the case of Asda Stores Ltd v Brierley, the EAT has rejected an employer's argument that pay comparisons in equal pay claims should not be permitted where the claimants and their comparators were doing work of equal value but at different establishments	The case acts as a reminder that employers need to be increasingly aware of pay differentials across their entire business and why they exist



October to December 2017 – short range forecast

What to expect	Impact on employers
Brexit negotiations continue at EU level whilst the Gov't will also press ahead with its EU (Withdrawal) Bill, setting out proposed provisions for the retention of existing EU employment rights after Brexit	Visit our Brexit hub for our latest news and guidance for employers
The Gov't is expected to indicate whether it will adopt any of the wide-reaching proposals of the Taylor Review published in July eg providing greater clarification of the legal test for employment status and the renaming the current intermediate category of 'worker' as 'dependent contractor'	Given Brexit parliamentary pressures and a minority Gov't, no immediate change is anticipated and a consultation is more likely in the short term. However, any future change to employment status, or the introduction of a new premium NMW rate and changes to agency worker rights (as proposed by the Review), would be

	significant if introduced. See our briefing
The CJEU is expected to give its decision in the case of Sash Window Workshop Ltd v King, concerning a worker's ability to carry over holiday entitlement to a subsequent year if an employer does not permit them to take paid leave	If the CJEU follows the AG Opinion in this case, employers who fail to recognise a worker's right to paid leave could face claims for back pay when employment finally ends. Particularly at risk are employers who misclassify workers as independent contractors
The independent review of electronic balloting in relation to industrial action concludes in December 2017	The Gov't has previously opposed e-balloting and is not required to accept the findings of the review
The CA will provide greater insight into when an employer is deemed to have knowledge of disability and the influence of occupational health reports	Clarification of what an employer is deemed to know and what steps it is appropriate to take based on that deemed knowledge should provide useful guidance in the workplace
The CA will hear the case of Kilraine v LB Wandsworth concerning the distinction between mere allegations and disclosures which are protected by whistleblowing law	Identifying disclosures which qualify for legal protection can prove a tricky issue for employers. The outcome of this case may provide some practical assistance
The Gov't is expected to publish secondary legislation and the FRC to consult on significant amendments to the Corporate Governance Code to come into effect next year, with a view to strengthening corporate governance . See our briefing	Whilst many of the new measures are aimed at listed companies and will require greater scrutiny of executive pay, pay ratios and employee engagement, corporate governance reporting is also expected to be extended to some large private companies
Following a hearing in September, the EAT is expected to rule on Uber's appeal against an ET's decision that drivers had the employment status of workers, entitled to the minimum wage and paid holidays. A separate appeal in the cycle courier case of Dewhurst v City Sprint is due to be heard in November	Employers in the gig economy and others who rely on casual "as-required" workforce will be watching the appeals closely



January to June 2018 – long range forecast

What to expect	Impact on employers
The countdown to Brexit continues. Withdrawal is anticipated in March 2019, unless a later date is agreed	Visit our Brexit hub for our latest news and guidance for employers

<p>The tax and employer NI advantages of salary sacrifice schemes set up before April 2017 will largely end so that only those relating to pensions, childcare, cycle to work and ultra-low emission cars are protected beyond April 2018 (or April 2021 for those relating to cars, accommodation and school fees)</p>	<p>Employers with existing arrangements should assess the impact of the changes before the end of the protected periods and communicate with affected employees</p>
<p>The tax treatment of termination pay is expected to be tightened from 6 April 2018. All contractual and non-contractual PILONs will be taxable as earnings and subject to employee and employer's NIC. However, unworked periods of notice under non-contractual PILONs will attract tax at the basic rate of pay only</p>	<p>Employers need to plan ahead to accommodate the new PILON tax calculation, including managing employee tax expectations on termination, as well as reviewing additional employer tax/NIC costs</p>
<p>A new right to time off for bereaved parents takes a step closer to the statute books as the Parental Bereavement (Leave and Pay) Bill makes its way through Parliament</p>	<p>The Bill, which has cross-party support, will eventually be followed by regulations setting out the detail of how the new right will operate</p>
<p>The SC is due to hear an appeal against a decision on employment status that a plumber was entitled to protection from discrimination and holiday pay, notwithstanding that he was self-employed for tax purposes. See our briefing</p>	<p>Against a backdrop of cases which have served as a reminder that self-employed contractors can also have workplace rights, this case, albeit not one involving the gig economy, should provide yet further clarification of such status</p>

NB This update covers England, Wales and Scotland. It does not cover developments that apply only in Northern Ireland



Key

SC	Supreme Court
Gov't	The Government
GDPR	General Data Protection Regulations
CJEU	The Court of Justice of the European Union
CA	Court of Appeal
ET	Employment Tribunal
EAT	Employment appeals tribunal
PILON	Pay in lieu of notice
FRC	Financial Reporting Council

For further information, please contact

Diane Gilhooley

Global Head, Human Resources and Pensions Practice

+44 161 831 8151

dianegilhooley@eversheds-sutherland.com

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