SLAUGHTER AND MAY

Employment Bulletin

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Government's response on regulation of confidentiality clauses

On 22 July 2019, the Government issued a response to its consultation on the regulation of confidentiality clauses/non-disclosure agreements in employment contracts and settlement agreements. It will legislate "*when Parliamentary time allows*" as follows:

- Confidentiality clauses will not be able to prevent disclosures to the police, or to regulated health and legal professionals.
- The limitations on confidentiality clauses will have to be set out clearly in written statement of employment particulars and in settlement agreements. There will not be mandatory wording, although the Government will work with regulators to produce drafting guidance.
- For a settlement agreement to be valid, individuals will have to receive advice not only on the nature of the confidentiality requirement but also on the limitations on confidentiality clauses in settlement agreements.
- There will be enforcement provisions for confidentiality clauses in settlement agreements and written statements that do not follow the new requirements. Full details of these provisions have not yet been published.

Analysis/commentary: Although the consultation document did not include proposals on making employers responsible for collecting data and reporting on discrimination and harassment complaints and NDAs in settlement agreements, the issue was discussed during the roundtable discussions with stakeholders. However, the Government has decided not to impose any additional duties on employers. It refers to the responsibility on boards, in the UK Corporate Governance Code and the Wates Corporate Governance Principles for Large Private Companies, to establish a company's values in line with the Code, and to ensure that workforce policies and practices are consistent with those values. There is also a reference to the duty on directors (under section 172 of the Companies Act 2006) to promote the success of the company for the benefit of shareholders, having regard, amongst other matters, to "*the interests of the company's*

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employees" and "*the desirability of the company maintaining a reputation for high standards of business conduct*".

Latest proposals on sexual harassment and maternity discrimination

On 11 July 2019, the Government Equalities Office launched a consultation on sexual harassment in the workplace. The consultation runs until 2 October 2019.

Earlier this year, the Government announced that it would introduce a statutory Code of Practice on workplace harassment (see our Employment Bulletin dated January 2019). The consultation paper confirms that work on the Code of Practice is underway, and that the Equalities and Human Rights Commission will produce technical guidance later this year, to form the basis of the Code. The Government concedes that employers very rarely feel able to use the existing defence of having taken "all reasonable steps" to prevent the harassment and its intention is that the Code should support employers to ensure they have the right preventative measures in place.

However, despite the commitment to a statutory Code of Practice, the Government is also considering the introduction of a new duty on employers to protect workers from harassment in the workplace, if there is "*compelling evidence*" that it would be effective. The "all reasonable steps" defence would apply to any new duty.

The consultation considers various enforcement options:

- The Equality and Human Rights Commission might be allowed to take enforcement action without an individual having to bring a claim.
- Breach of the duty would not necessarily be linked with any financial loss, so one option would be for breach of the duty to attract a financial penalty (irrespective of loss), along the lines of the protective award for breach of TUPE information and consultation obligations (a maximum of 13 weeks' pay).
- Another option would be to require organisations to report on prevention and resolution policies publicly, with board sign-off. This might be combined with a requirement to report internally on, and monitor rates of, harassment complaints, and on the results of exit interviews.

The Government is also considering re-introducing employer liability for third party harassment. The paper asks for views on whether liability should depend on incidents of harassment having already taken place. The previous position (under section 40 of the Equality Act 2010, now repealed) required two previous incidents of harassment before liability for third-party harassment could arise.

The Government also comments that there is "*a compelling case*" for a six-month (rather than three-month) time limit for employment tribunal claims under the Equality Act 2010.

Also in July, the Government published its response to consultation on pregnancy and maternity discrimination. The law currently provides that, before making an employee on maternity leave (or adoption or shared parental leave) redundant, an employer must offer a suitable alternative vacancy where one is available. The Government issued a consultation paper in January 2019 on the extension of this redundancy protection (see our Employment Bulletin dated February 2019).

The Government's conclusions, following this consultation, are:

- The redundancy protection period will apply from the point the employee informs the employer, orally or in writing, of her pregnancy.
- An extended redundancy protection period will apply for a period of six months from the date of return to work from maternity or adoption leave.
- Redundancy protection will also apply to those returning to work after shared parental leave. However, as shared parental leave is more flexible than other family leave, there will have to be a different approach, to ensure that the level of protection is proportionate to the amount of leave taken. The Government is currently "*developing the design of this new protection*".

Analysis/commentary: The Government confirms that, if introduced, a new duty to protect workers from workplace harassment "*would not require employers to take any practical steps they are not already expected to take*". However, it would represent a significant switch from potential liability after the event, with a defence for reasonable preventative steps, to a proactive duty to prevent harassment.

Agency worker not entitled to same contractual hours as permanent employee

Summary: The Court of Appeal held that an agency worker's right to equal treatment in relation to the "duration of working time" under the Agency Workers Regulations 2010 (AWR) did not entitle the agency worker to the same contractual hours as a permanent employee (*Kocur v Angard Staffing Solutions Ltd*).

Key practice point: The AWR ensure that agency workers receive equal treatment with permanent staff while at work but they do not regulate the amount of work which agency workers are entitled to be given.

Facts: K was employed by ASS, which supplied his services under an agency arrangement to RMG. He completed 12 weeks' service with RMG and became entitled to equal treatment with RMG's permanent employees under Regulation 5 of the AWR.

K claimed that ASS were in breach of Regulation 5 because his rest breaks and holiday were less generous than those for permanent RMG employees. The Employment Tribunal rejected his claim but the EAT overturned this. The failure to confer additional leave and paid rest breaks could not be compensated for by K's enhanced hourly rate – the AWR require a term-by-term approach.

K also complained that he was not allocated the same amount of work as RMG's employees. They had a 39-hour working week. The definition in the AWR of the "relevant terms and conditions" to which Regulation 5 applies includes "the duration of working time". The Tribunal and EAT rejected the argument that this meant that there was an entitlement to equivalent hours. K appealed on this point to the Court of Appeal.

Decision: The Court of Appeal dismissed the appeal. The AWR do not entitle agency workers to work the same number of contractual hours as a comparator. A term specifying the number of hours in the working week does not relate to the "duration" of working time. Duration connotes a continuous period. A term specifying a 39-hour working week would necessarily involve several discrete periods of work.

This conclusion was consistent with the purpose of the AWR and the Agency Workers Directive – to ensure the equal treatment of agency workers at work and in relation to rights arising from that work, but not the amount of work they are entitled to be given.

Analysis/commentary: The Court of Appeal acknowledged that a provision with the effect contended for by K would have undermined the purpose of using agency workers – to give the hirer flexibility in the size of its workforce from time to time.

Agency workers will in future be more aware of their rights. New regulations, which come into force on 6 April 2020, require employment businesses to give work seekers using their services a "key information document" informing them of the protections under the AWR.

Further Government consultation on modern working practices

In July 2019, the Government published a consultation paper, *Good Work Plan: One-Sided Flexibility,* taking forward proposals it made in its response to the Taylor Review of Modern Working Practices (see our Employment Bulletin dated January 2019).

The consultation, which closes on 11 October, contains proposals for:

- A right to **reasonable notice of work schedules**, prior to a shift starting. Where shifts are offered with less than reasonable notice (for example, because of staff illness or overtime), workers should not suffer any detriment from employers for turning down those shifts. The consultation, recognising the difficulty of setting a single period of notice for all industries and forms of work, asks for views on whether there would be some instances where reasonable notice would not need to be given, as well as on how the notice would be recorded and what would be an appropriate penalty. The paper gives no indication of the Government's thinking on what might constitute "reasonable notice".

- **Compensation for shifts cancelled at short notice**. The compensation would apply irrespective of whether the hours were replaced. The paper asks for views on the cut-off point, after which workers would be entitled to compensation, and options for the level of compensation.

The consultation paper discusses whether these should be day one rights and whether the protection should apply only to those below a certain income level, or those on specific contract types (such as zero-hours contracts).

The Government also confirms (without giving any more detail) a related proposal from its Good Work Plan - to introduce a right for all workers to request a more predictable and stable contract, such as minimum hours, or fixed days of work, after 26 weeks' service.

Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms

April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee); *López Ribalda v Spain* (ECtHR: covert workplace surveillance)

- **Discrimination / equal pay**: *Gray v Mulberry Company (Design) Ltd* (Court of Appeal: philosophical belief); *X v Y* (Court of Appeal: iniquity exception to legal advice privilege); *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

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