Myerson Employment Newsletter

October 2016

In this edition of our Employment Newsletter, we consider various employment law issues surrounding Brexit, recent cases involving dress codes, the gender pay-gap and details on the recent national minimum wage announcement.

What are the implications of Brexit for Employment Law?

On 23 June 2016, the Government announced that the people had voted and that the UK would leave the EU. The precise date of the UK's departure remains unclear but the Prime Minister has confirmed that Article 50 of the Lisbon Treaty will be invoked by the end of March 2017, resulting in a UK exit from the EU by Summer 2019.

A significant amount of UK employment law is derived from the European Union (EU) and so the vote to leave the EU has left many employers and employees thinking "*what does this mean for the future of employment rights?*" Only once negotiations begin will we start to get a clearer picture of what the UK's exit from the EU will look like.

EU derived UK employment law includes family leave and pay, discrimination rights, collective consultation obligations, protection of employees on the transfer of a business (TUPE) and working time regulations, amongst other examples.

It is unlikely that such laws will be repealed en masse by the UK Government for a number of reasons:

- Many employment rights are not driven by a European agenda: many EU derived employment laws replaced protections already afforded by UK law, such as those relating to equal pay and maternity rights. A number of UK employment rights also go further than EU law requires, including those relating to maternity leave and pay and TUPE. The exit from the EU is unlikely to result in the Government abandoning historical and established worker rights. Other rights, such as shared parental leave and flexible working, are purely domestic in origin, and will not be affected by Brexit in any event.

- EU laws provide protection for employees and employers: most employees and responsible employers regard employment protection rights as a good thing. Aside from the social advantages of good employment regulation, mandatory minimum rights and protections provide an economic baseline allowing for fair competition and an improved economy.

- The UK's future trading with the EU: going forward the UK will want to trade with EU countries. For non-EU members of the European Economic Area such as Norway, acceptance of EU social and employment regulations is a condition of trade agreements with the EU. Therefore, the UK continuing to match EU worker rights is likely to assist in negotiating trade agreements with the EU.

Since the vote to leave, there has been more speculation regarding certain laws than others:

Discrimination

It is highly unlikely that the Equality Act 2010 will be repealed but it is possible that amendments to it are introduced over time. For example, in 1993, the ECJ ruled that the UK cap (that applied at that time) on compensation in claims of sex discrimination was incompatible with EU law. In response, the UK Government removed the cap on all discrimination claims. Once the UK leaves the EU, the Government could reintroduce a cap on compensation for discrimination claims. That said, it is envisaged that any such cap would be significantly higher than the unfair dismissal cap.

Working Time Regulations

Whilst a repeal of the entire Working Time Regulations is unlikely, there is much speculation regarding holiday pay. Recent ECJ decisions regarding holiday pay have been unpopular with UK businesses such as: the right to accrue holidays whilst on sick leave and calculating

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holiday pay to include aspects of remuneration such as overtime and commission (and not just basic pay). It is possible that the Government will review these areas.

Agency Worker Regulations
The Agency Worker Regulations are considered by many to be complex and unpopular with businesses. Many UK businesses hope that they will be completely repealed or at least amended as a result of the UK leaving the EU.

Data Protection
It is unlikely that the current data protection regime will be changed significantly or repealed as a result of Brexit. This is because, if UK businesses want to operate in the EU (or vice versa), there will need to be adequate provisions in place to protect the rights of data subjects by ensuring that data remains in a country with sufficient protections in place.

Freedom of movement
The vote to leave the EU will impact UK nationals who currently live and work in other EU countries, and vice versa. Workers could be required to return to their countries of origin, adversely affecting both the individuals and their employers. Many commentators suggest that the UK Government may agree to an amnesty where EU migrants already settled in the UK could stay in the UK, provided that UK nationals are also allowed to remain in their country of domicile. The UK's ability to agree trade arrangements with the EU is likely to be much influenced by this issue. The UK already has in place an immigration system for non EU workers which may be extended and adjusted to accommodate EU nationals.

What happens next?
Under Article 50 of the Treaty of the European Union, the UK Government will have to give formal notice to the European Council of its decision to leave the EU. The Government has stated that this will be no later than March 2017. Then the Government will have two years to negotiate with the European Council on its exit. In the meantime, the laws that applied the day before the Brexit vote will continue to apply. Only time will tell what lies ahead but it would appear that whilst employment law might change in part it is unlikely that it will significantly change, at least in the short term.

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Dress Codes in the Workplace

There are many legitimate reasons why employers might require a dress code: for example, promoting a corporate image, enabling members of the public to identify members of staff or health and safety reasons. However, employers risk acting in a discriminatory way if the implementation of a dress code subjects workers to less favourable treatment on one of the protected grounds under the Equality Act 2010.

A series of recent cases has brought the issue of workplace dress codes into focus once again. The media made much of a case where a female worker was sent home from her role as a receptionist for not wearing high heels. The EU Court of Justice has also considered two cases concerning a ban on headscarves in the workplace. The issue of dress codes continues to be a difficult issue for employers for both legal and reputational reasons, as well as employee relations.

A female receptionist who was sent home on her first day for attending work without wearing high heels had breached the employer's dress code requiring women to wear high heels. The dress code went even further specifying that the shoes had to be between two and four inches in height.

There followed considerable adverse publicity because the female worker set up an online petition on the official Parliament website calling for a change in the law. As the petition reached the threshold of 100,000 signatories it raised the possibility of a Parliamentary debate on the issue. The unfortunate media attention and consequential reputational damage is likely to have completely out-weighted any advantage of corporate image achieved by way of the employer's dress code!

Religious beliefs can pose particular problems for employers because wearing an item of clothing or jewellery can be part of a worker's religious observance that conflicts with the employer's corporate image. The leading UK case on the

point concerned British Airways' uniform policy banning a member of check-in staff from wearing a visible Christian cross outside of her uniform. In that case, the European Court found that, while BA's wish to project a certain corporate image was legitimate, the UK Courts had given it too much weight and that the employee's right to manifest her religious belief had not been adequately protected by UK Law.

Whilst it is still permissible in the UK for a dress code to ban manifestations of a religion such as clothing or jewellery, an employer must be confident that it is able to fully justify its dress code. In the event of a dispute, a court or tribunal will balance the aims of the employer and the unfavourable impact that the dress code has on the worker.

Two recent European cases concerning the dismissal of employees for wearing headscarves demonstrate that this remains a difficult and confusing area for employers. The Advocate Generals who advise the European Court of Justice have issued conflicting views:

In a Belgian case, *Achbita v G4S Secure Solutions*, concerning a dress code banning Islamic headscarves, the Advocate General's opinion was that there was no discrimination by the employer because, through its policy, the company was pursuing the legitimate aim of political and religious neutrality and that it was applied equally to all staff.

However, more recently in the case of *Bougnaoui v Micropole* SA, where a French worker was not permitted to wear a headscarf in a customer facing role, a different Advocate General's opinion was that direct discrimination had taken place. The basis of the Advocate General's opinion was that, if the employee had not worn a headscarf as a manifestation of her religion, she would not have been dismissed. Further, the Advocate General stated that there was no basis on which the company could justify such a policy.

The case of *Bougnaoui* could potentially extend the law on religious discrimination and dress codes. In the past such cases have been considered in the context of 'indirect discrimination', where a neutral policy applied to all persons has the indirect effect of discriminating against a particular group. Cases of 'indirect discrimination' are capable of being justified by an employer as a defence. However, in *Bougnaoui* the Advocate General has suggested that dismissing an employee for not complying with a dress code is capable of being 'direct discrimination' where the individual was wearing an item of clothing in connection with their religious belief.

Such a development in discrimination law would be of concern to employers because the 'justification defence' that is available in claims of indirect discrimination is not available in claims of direct discrimination, and the Tribunals will simply assess the reason for the treatment. If the opinion in Bougnaoui is endorsed by the European Court of Justice, claims concerning dress codes could increasingly be pursued as claims for direct discrimination.

The Advocate Generals' decisions are not binding and are obviously conflicting. Only when the final judgements of the European Court of Justice are published at the end of 2016 will the position of EU law on this issue be clarified. In the meantime, UK employers should continue to enforce their dress policies with caution. In particular, employers implementing a dress code policy should clearly explain to staff the reasons for it and clearly identify the business purpose of it.

Whilst these examples concern discrimination on the grounds of sex and religion, employers should consider the potential for discrimination on any of the protected grounds under the Equality Act 2010. For example, disability discrimination could occur where a worker has a skin condition that is aggravated by wearing a uniform made of a certain type of material. Another example could arise where a male staff member undergoing a gender reassignment process is refused permission to wear a skirt.

Modern Slavery Statements

The Government has introduced a provision in the Modern Slavery Act 2015 which requires certain businesses to produce a statement each year setting out the steps they have taken to ensure there is no modern slavery in their own business and their supply chains.

Who must provide a statement?

Organisations with an annual turnover of £36 million carrying on a business or part of a business in the UK supplying goods or services, must publish a Slavery and Human Trafficking Statement. The turnover threshold figure includes the turnover of subsidiary undertakings. Organisations with a year-end of 31 March 2016 will be the first to publish a statement for their

2015/2016 financial year and many have done so already.

Organisations should aim to publish their statements "as soon as reasonably practicable" after the financial year end and are encouraged to report within six months of their financial year end. However, the guidance acknowledges that many organisations may choose to publish their statement alongside other annual accounts.

The effect of this new legislation will extend to organisations falling below the turnover threshold as they are likely to be subjected by larger customers to due diligence of employment practices and supplier relations. Smaller organisations should also expect to see larger customers vary their terms and conditions to comply with the legislation.

Gender Pay-Gap Reporting

In our last Employment Newsletter, we stated that the new gender pay-gap reporting obligations are expected to come into force in October 2016 but this has now been delayed to April 2017.

The first reports will be published in April 2018.

We will let you know when this legislation finally comes into force.

In the meantime, employers should be considering the potential impact of this new obligation. By way of a recap, employers which at April 2017 have 250 or more employees will need to analyse and report on workers' remuneration packages. Employers will need to consider which parts of the remuneration package are reportable and whether any steps should be taken to address any pay gap in advance of April 2017.

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National Minimum Wage (NMW)

The NMW increased with effect from 1 October 2016.

The new rates are as follows:

- workers aged 21 or over are entitled to £6.95 per hour (increased from £6.70).
- workers aged 18 or over (but not yet aged 21) are entitled to £5.55 per hour (increased from £5.30).
- workers under the age of 18 are entitled to £4.00 per hour (increased from £3.87).
- apprentices the first 12 months of their employment or engagement under Government arrangements or who are under the age of 19, are entitled to £3.40 per hour (increased from £3.30).

It is important that employers pay employees at least the NMW. The Government publishes details of employers who fail to pay their employees the correct NMW as part of its 'naming and shaming' scheme.

Further, there are financial penalties for employers who fail to pay their workers the NMW. Any employers who fail to pay the NMW face fines of 200% of arrears owed, up to a maximum of £20,000 per each underpaid employee. There will be no increase to the National Living Wage in October 2016 which has been set at £7.20 for workers aged 25 and over.

Further Information

If you would like to receive employment law news and developments on a more frequent basis through our regular blogs, please join our **Myerson Employment Law Forum** on LinkedIn which can be found here:

LinkedIn tiny.cc/myersonli

If you require any further information on the items featured in this newsletter or need advice on any other employment matter, please contact one of our employment solicitors.

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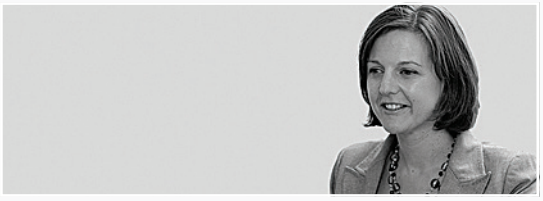

Joanne Evans
Partner & Head of Employment

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard before she joined Myerson in 2007 to head up the firm's team of employment specialists. Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

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Joanne Henderson
Partner

Jo has worked as an employment law specialist for many years at leading commercial firms, after studying Law at the University of Leeds. She joined us in 2009 from Eversheds to strengthen further the high level employment service that we provide to our commercial clients. Jo is an experienced Employment Tribunal advocate and deals with complex, high value claims. She also has extensive expertise in executive arrangements and terminations and has a particular interest in the employment law aspects of corporate and commercial transactions, insolvency, restructuring and redundancy.

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Charlotte Gilbert
Senior Solicitor

Charlotte is a specialist employment lawyer with over 7 years' experience in providing commercial and practical advice to our clients. She has particular experience in advising employers on all HR issues and processes as well as on more complicated restructuring and TUPE matters. Charlotte is a keen negotiator and in addition to acting for various employers, she advises senior executives and directors in respect of exit strategies and negotiation of termination packages. Charlotte also has a wide range of experience in dealing with Employment Tribunal claims for both employers and senior individuals, ranging from unfair dismissal to more complicated discrimination and whistleblowing claims.

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Helen Littlewood
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Helen worked as a specialist employment lawyer at Addleshaw Goddard, after having trained and qualified there in 2010. She joined us in 2012. Helen studied Biomedical Sciences at Newcastle Upon Tyne University before converting to a legal career. She is experienced in supporting HR Managers and In-House counsel, and in dealing with Employment Tribunal claims, Employment Tribunal appeals, employment contracts, policies, handbooks, disciplinary and grievance procedures and settlement agreements.

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David specialises in all aspects of employment law, acting for a range of employers, senior executives, and individual employees. David has particular experience in dealing with Employment Tribunal claims in relation to unfair dismissal, constructive dismissal, redundancy payments, and claims relating to discrimination and whistleblowing. David also has experience of group claims at the Employment Tribunal, such as those relating to employee consultation on collective redundancies and business transfers.

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