Skadden

UK Employment Flash

Insights into the latest employment news

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In this issue we discuss the new Labour government's proposals to strengthen protections for employees; an Employment Appeal Tribunal decision that affirmed that an employee's waiver of future claims that were unknown at the time of the waiver can be enforced; and updated guidance from the Equality and Human Rights Commission on prevention of sexual harassment in the workplace.

New UK Government Proposes Changes to Employment Law

On 17 July 2024, the new Labour government set out its priorities for the coming year, announced in the King's Speech. Charles III highlighted that the UK government will "legislate to … ban exploitative practices and enhance employment rights", confirming that a new Employment Rights Bill is expected to be brought before the UK Parliament in the coming months.

This commitment is in line with core proposals made by the Labour Party in its "Plan to Make Work Pay", which were endorsed in its election manifesto. While it is not clear at this stage which proposals will be included in a new Employment Rights Bill, Labour's Plan to Make Work Pay included proposals on banning "exploitative" zero hours contracts and fire and rehire practises, and advocated for enhanced employment rights from Day 1 of employment.

Zero Hours Contracts and 'Fire and Rehire'

The incoming government has committed to ensure that all employees have the right to an employment contract that reflects the number of hours they regularly work and therefore ban "exploitative" zero hours contracts where an employer is not obliged to provide any minimum number of working hours. Employers who use zero hours contracts should therefore consider alternative models for flexible staffing to ensure no disruption to their staffing model.

The new government has also committed to end "fire and rehire" practices in most circumstances, where an employer terminates an employee's employment and re-engages them on new, often less favourable, terms. This practice has created some high-profile controversies in recent years and is usually used by employers as a last resort. While the previous government developed a statutory Code of Practice on "fire and rehire", which came into force on 18 July 2024, the new government has confirmed that it will look again at this code and strengthen it, alongside introducing the ban on "fire and rehire". However, the government has highlighted that it will seek to ensure businesses that would otherwise not be viable will still have flexibility to make changes to terms and conditions of employment in exceptional circumstances.

Without "fire and rehire" as a last resort option, employers should consider working to strengthen relationships with employees and employee representative bodies and should consider whether it can offer further positive incentives to employees in the case of

proposals to change certain terms and conditions of employment. Negotiations over changes to terms and conditions of employment may become more drawn out if employers no longer have this last resort option available.

Expansion of Day 1 Employment Rights

The incoming UK government has committed to expanding protections for employees from the first day of employment to include protection against unfair dismissal, the right to take parental leave and the right to receive statutory sick pay. The new government has said that these rights will benefit both employers and individuals by encouraging labour market flexibility.

The proposal confirms that fair and transparent probationary periods will be retained, although we do not know how these will operate in practice until draft legislation is published. The removal of the two-year qualifying period for unfair dismissal is likely to have a significant impact on hiring decisions and means that employers would require a fair reason to dismiss an employee and follow a fair dismissal process following completion of a probationary period. Therefore, employers should consider whether their use of probationary periods, including for more senior employees, should be expanded in order to retain flexibility in relation to new hires at all levels, although it remains to be seen how flexible the new rules will be in allowing the use of probationary periods.

The removal of the two-year qualifying period may also result in a significantly increased number of employment tribunal claims brought against employers. In the Plan to Make Work Pay, the Labour Party committed to working to make Employment Tribunals more efficient (although there is no detail at this stage on precisely how this will be achieved other than a renewed focus on digitisation), but also highlighted its desire to increase the time limit for employees to bring a claim in the Employment Tribunal. While these proposals were not highlighted specifically as items to be included in the upcoming draft legislation, the impact on Employment Tribunals will be something that the new government will need to address.

The government has also announced that a reform to the flexible working regime will be included in the draft legislation, which makes flexible working the default position from Day 1 of employment, requiring employers to accommodate flexible working as far as is reasonable. This represents a shift from the current regime where it is the employee who has to make a request to work flexibly. Employers should consider the extent to which this default position affects business continuity, particularly in relation to recent hires.

Trade Unions and Enforcement

The new government also confirmed that it will introduce a regulated route to ensure workers and union members have a reasonable right to access a union within workplaces, and will simplify the process by which workplace unions can seek statutory recognition. These reforms will also reverse the previous minimum-service-level rules in the public sector that were introduced in 2023.

The draft legislation will also create a single enforcement body to strengthen enforcement of employment rights in the workplace. This should also mean that businesses are able to take authoritative advice on their obligations to employees and that the enforcement of labour standards is consistent and coordinated.

Other Proposals

The Plan to Make Work Pay included a number of additional proposals. No further details of these plans have been announced since the new government was formed, so we can expect that these are longer term plans to be developed over the coming months and years.

1. **Simplifying employment status.** The new government has previously proposed to consult about a two-part framework for employment status that merges the categories of "employee" and "worker" into a single category. Individuals would then either be in this new category, or genuinely self-employed. Currently, under English law, an individual who is a "worker" has certain limited employment rights. See our February 2022 UK Employment Flash. The government has not set out in detail the rights to which this single category of worker would be entitled, but these could include the right not to be unfairly dismissed, right to statutory notice, redundancy pay, statutory maternity pay, sick pay and parental leave. Changes of this nature would particularly affect those companies operating in the gig economy that currently benefit from the flexibility that "worker" status provides and could affect the status of other "workers" such as LLP members.
2. **Inequality and DEI reporting.** The government committed to remove the age bands that provide for a lower National Minimum Wage for young people so that every adult worker is entitled to the same minimum level of pay. The government has also committed to introduce additional transparency requirements so that employers with over 250 employees will be required to publish ethnicity and disability pay gap reports alongside the existing gender pay gap reporting requirement. The government also intends to further strengthen protection

for employees who return from maternity leave, and increase workplace support available for those employees going through menopause.

Waiving Future Claims in Settlement Agreements

While it is possible to waive future claims even if they are unknown to the parties at the time the settlement agreement is entered into, employers should take care and use clear and precise language when requesting a waiver of future claims to ensure that the waiver is valid.

The recent Employment Appeal Tribunal (EAT) decision in *Clifford v IBM United Kingdom Ltd [2024] EAT 90* has helpfully confirmed that it is possible to waive future claims relating to circumstances that are not known to the parties at the time the settlement agreement is entered into, provided that certain criteria are met.

In *Clifford* the claimant was disabled and was absent from work for five years as a result. The claimant then entered into a settlement agreement with his employer, which agreed to place him on its disability plan. The claimant continued to be paid his salary under the plan during his absence. In the parties' settlement agreement, the claimant waived his rights to bring certain specific claims, including disability discrimination claims, whether or not they were known to the parties at the time the agreement was entered into.

The claimant subsequently brought a claim because his salary payments did not increase under the disability plan. The claim was struck out by the Employment Tribunal at first instance on the basis that the claimant was prevented from bringing the claim because he had agreed to waive future claims under the terms of the original settlement agreement, and this was the case regardless of the fact that he remained in employment. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal.

The case highlights the following important issues for employers to consider when attempting to waive future claims:

- When waiving future claims, it is important that the settlement agreement is clear and certain as to the claims it is attempting to waive, and this applies equally to existing as well as future claims.
- In *Bathgate v Technip Singapore PTE Limited [2023] EAT 90*, the Scottish Court of Session held that this does not mean that the grounds or circumstances of any future claim need to be known at the time the agreement is entered into, but it must be clear from the terms of the settlement agreement that it is waiving such claims.
- The EAT and the Court of Session have both found that the rules on settling future claims apply equally to COT3 agreements, which are entered into between the parties as a result of settling a claim during Advisory, Conciliation and Arbitration Service (ACAS) conciliation. Therefore, employers should also be cognisant of these rules when negotiating and entering into COT3 agreements.

EHRC Consultation on Changes to Its Guidance on Preventing Workplace Sexual Harassment

The Equality and Human Rights Commission (EHRC) has published updated guidance on sexual harassment in the workplace, which includes a section on the new positive duty on the part of employers to take reasonable steps to prevent sexual harassment of their workers. The updated guidance is open for consultation until 6 August 2024.

On 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 comes into force imposing a positive duty on employers to take reasonable steps to prevent sexual harassment of their workers in the course of their employment. The EHRC has published its updated guidance on sexual harassment in the workplace (Guidance), which includes a new section on the preventative duty. The Guidance is open for consultation until 6 August 2024.

The Guidance makes clear that the preventative duty is an anticipatory duty, meaning that employers should take a risk assessment approach to determine scenarios where their workers may be subject to sexual harassment in the course of employment and take reasonable steps to prevent it. Significantly, the Guidance indicates that the preventative duty will apply not only to sexual harassment by other workers, but also to harassment by agents and third parties, even though the legislation does not explicitly extend the duty to such parties. Therefore, whilst employees may not be able to bring a statutory claim against their employer for sexual harassment by a third-party, the EHRC could take enforcement action against the employer (see below).

An objective test will be used to determine whether an employer has taken reasonable steps to comply with the preventative duty, and this will vary depending on factors such as the employer's size, the sector it operates in, the working environment and its resources. The Guidance suggests taking preventative measures

may include, for example, (i) updates to policies and procedures to clarify the law, expected behaviour and complaints mechanisms; (ii) training with staff to raise awareness of rights related to sexual harassment; and (iii) implementing a process for reviewing the effectiveness of the updated policies and training.

The EHRC has the power to take enforcement action if the preventative duty has been breached, regardless of whether sexual harassment has occurred. This could be by (i) investigating an employer; (ii) issuing an unlawful act notice; (iii) entering into a formal, legally binding agreement with an employer to prevent future unlawful acts and (iv) seeking an injunction to restrain an employer from committing an unlawful act. Additionally, whilst the Guidance is clear that an individual cannot bring a standalone claim for breach of the preventative duty, if an individual is successful in a claim for sexual harassment, an Employment Tribunal must consider if the employer has complied with the preventative duty and, if not, may increase compensation by up to 25%.

The Labour Party's election manifesto proposed to "strengthen the legal duty for employers to take all reasonable steps to stop sexual harassment before it starts". It will be interesting to see whether any amendments are made to the Guidance during the consultation period or to the legislation to include liability for sexual harassment by third parties. In the meantime, employers should review the EHRC's Guidance in tandem with their policies, procedures and reporting mechanisms and consider whether any modifications are required in order to comply with the new preventative duty.

European Works Councils in the UK Post-Brexit

The recent case of* HSBC European Works Council v HSBC Continental Europe *provides useful clarification on how European Works Councils may operate in the UK following the UK's departure from the European Union.

HSBC Continental Europe (HSBC) entered into an agreement with its European Works Council (EWC) in October 2015 which covered the bank's operations in the European Economic Area and acknowledged that central management for the EWC was located in the UK. Following Brexit, HSBC considered that central management of the EWC could no longer operate from the UK and instead gave notice that a representative agent in the Republic of Ireland would assume the role. In addition, HSBC's UK business, employees and representatives would now be excluded from the scope of the EWC agreement. The EWC objected and argued that, in compliance with the EWC agreement, the existing arrangements should have continued. The objections were dismissed at first instance and the EWC appealed that decision.

The Employment Appeal Tribunal upheld the decision of the Employment Tribunal and found that, at the time they entered into the EWC agreement, the parties had expressly contemplated that there may be changes to the scope of the EWC agreement. The Tribunal found that it was clear that the intention was to include HSBC's operations in European Union member states, as a changeable definition rather than as a set list of member states at the time the EWC was established in 2015. Furthermore, as EU law makes clear following Brexit, central management of an EWC cannot be located in the UK. This also has the effect of changing the scope of the EWC agreement by operation of law.

The case helpfully clarifies the law on EWCs in the UK following Brexit. EU law does permit an EWC to include representatives from parts of the business that are not located in EU or EEA member states, but only where the EWC agreement allows this. EU law also requires the central management of an EWC to be situated in the EU.

There has been some uncertainty recently about the future of EWCs in the UK, following a consultation that was launched by the previous UK government on abolishing the legal framework for EWCs, including repealing the current requirement to maintain already existing EWCs. The consultation proposed that, instead, existing employee representative bodies, including trade unions, could represent workers in the absence of the EWC. It is unclear what the intention of the current government will be and whether there could be any further changes.

Update on the US FTC Non-Compete Ban

A federal court in Texas enjoined implementation of the US Federal Trade Commission's ban on non-competes in its district, while one in Pennsylvania let the rule go into effect.

On 23 April 2024, the US Federal Trade Commission (FTC) issued a final rule that, if effective, would ban almost all non-compete clauses between "workers"[1] and employers both on a retroactive and go-forward basis. See our 24 April 2024 client alert "FTC's Final Rule Banning Worker Noncompete Clauses: What It Means for Employers."

[1] Including, but not limited to, employees, independent contractors, interns, volunteers and other forms of service providers

While the proposed rule was originally supposed to come into effect on 4 September 2024, this timing may be jeopardised by ongoing litigation challenging the validity of the rule.

On 3 July 2024, the US District Court in the Northern District of Texas in *Ryan LLC v. Federal Trade Commission* preliminarily enjoined the implementation and enforcement against the named plaintiffs of the proposed rule and stayed the rule's effective date with respect to the plaintiffs. In its ruling, the court indicated that a final decision on the merits of the claim would be delivered on or before 30 August 2024.

In issuing the preliminary injunction, the district court held that the plaintiffs are likely to succeed in establishing that the FTC lacks substantive authority to issue the rule and that the rule is unlawful. It remains to be seen whether, in its decision on the merits, the district court will issue a broader permanent injunction or vacate the rule. See our 8 July 2024 client alert "New Developments on the FTC Noncompete Ban: *Ryan, LLC v. FTC* Decision."

By contrast, on 23 July 2024, in *ATS Tree Services LLC v FTC*, the US District Court for the Eastern District of Pennsylvania rejected the plaintiff's application for a preliminary injunction. Among other things, it held that the plaintiff failed to establish a reasonable likelihood that the claim would succeed on the merits and concluded that the FTC was likely acting within its authority.

Any appeals, which are likely in both cases, would be referred to the applicable appellate courts and may end up before the US Supreme Court.

By way of comparison, on 12 May 2023, the previous UK government announced its intention to limit the length of non-compete restrictions in employment agreements to three months following the termination of employment. At the time, the government stated that legislation to effect the proposal would be introduced when parliamentary time allows. With the Labour Party now in government it remains to be seen how (and if) this proposal will come into effect. Nevertheless, employers should continue to keep an eye on this proposal, along with developments in the US, and remain vigilant to the global trend towards limiting employers' ability to restrict employees' activities post-termination of employment.

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