Welcome

We are delighted to share with you our bumper edition of Review 2015 Preview 2016, which following on from our 2014 edition provides a review of developments in 2015 and a forecast of significant proposals for 2016.

Last year saw employers gearing up for the new shared parental leave regime impacting parents with a child expected to be born or adopted on or after 5 April 2015. Although there was concern about how to practically manage these complex provisions, general feedback is that there has not been a huge take up of shared leave. Looking ahead, the Government announced in 2015 that by 2018 working grandparents will be able to take shared parental leave. Expect to see more on this.

Following the 2015 Election, the Government announced various proposals for employment reform. In 2016, we expect to see new laws from at least one of these proposals in relation to trade union activities and industrial action. These include increasing ballot thresholds, extending the notice of industrial action required to be given to employers, and new rules on picketing. Also in the pipeline is the outcome of the consultation about lifting the ban on the use of agency staff during strike action. The Government’s estimate is that between 17% and 27% of the working day lost due to industrial action could be covered by temporary workers. Given the difficulty employers face in making contingency arrangements during a strike due to the current ban, this reform will be a welcome change for some employers.

According to the Office for National Statistics, the gender pay gap overall in the UK is 19.1%. The Government plans to address this by introducing mandatory gender pay gap reporting for larger employers. This requirement will cover bonuses and not just salary information. Although regulations have not yet been finalised, they are expected to come into effect in October 2016. This will be quite a change for employers that have, to date, been encouraged to take a voluntary approach to gender pay reporting. While this is a positive step for gender diversity, employers need to consider whether to start monitoring gender pay differences more systemically, or conduct an equal pay audit to identify where pay gaps might exist.

In the financial services sector, significant changes take effect this month with the introduction of the new Senior Managers and Certification Regime and revised conduct rules. This regime will see increased responsibility for firms and we know that our financial services clients have been busy preparing for this implementation.

Cases on working time have continued to keep us occupied. The saga of calculating holiday pay resumes as these cases progress through the UK employment tribunals and courts. Employers have been scrutinising their own overtime and commission arrangements to assess their risk of claims for underpayments. Also, the Court of Justice of the European Union in Tyco has attracted much attention when it announced that time spent travelling between a worker’s home and the premises of the first and last client counts as working time for workers who are not assigned to a fixed or habitual place of work.

Finally, this year could mark a significant change in the UK’s relationship with the EU, which might lead to the repeal of some employment regulation derived from EU law.

We have written a number of articles on some of these interesting employment topics for Practical Law Company. A copy of these articles are included with this Review Preview.

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on behalf of the Employment Department
March 2016
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Atypical Workers

Coles v Ministry of Defence  
EAT, 31 July 2015

The EAT has held that the right of an agency worker to have access to information about job vacancies at an end-user is simply a right to information and does not give them any separate right to equal treatment when applying for the vacancy. It was lawful for the employer to give preference to permanent employees at risk of redundancy.

The EU Temporary Workers Directive (the "Directive"), implemented in the UK in the Agency Worker Regulations 2010 (the "Regulations") provide agency workers with a right to have access to information about job vacancies "to give them the same opportunity to find permanent employment" as other (comparable) workers of the end user.

Mr Coles was an agency worker supplied to the Ministry of Defence (the “MoD”). The role he was covering was advertised on a permanent basis. Although the advert was placed in a location where he would have access to it, he did not see it or apply for it. In any event, at the time the MoD was undertaking a substantial restructuring, which resulted in 530 permanent employees being placed into a redeployment pool. These permanent employees were to be given priority consideration for vacancies at their existing grade and one of these employees was given the permanent role. Mr Coles’ assignment was terminated.

He claimed that the MoD had breached his rights under the Regulations and the Directive by denying him the opportunity to apply for the role. The Tribunal dismissed his claim. On appeal he argued that the Directive and Regulations provided not only a right to be given information about vacancies but a right to equal treatment in consideration for vacancies. Otherwise, the right to information about the vacancy had no substance to it.

The EAT rejected the appeal. They noted that the Directive and Regulations provide agency workers with only a limited right to equal treatment in relation to hours and pay.

Against this background, the right of agency workers to be told of permanent vacancies was simply a right to information. The reference to them having the right to that information "to give them the same opportunity ... to find permanent employment" does not mean that they must be able to apply for the vacancies on an equal footing. ‘Same opportunity’ means simply that the information must be provided in just as useful a form, and at just as convenient a time, to the agency worker as it is to other workers.

The EAT rejected the argument that this was not a meaningful right on the basis that in reality, it would benefit agency workers to know of vacancies and there was no obvious reason why employers would turn down their applications, just because they were temporary workers.

Collective redundancies

Collective redundancy obligations can be complex and employers continue to be at risk of expensive lawsuits for getting it wrong. In 2015, we have seen useful clarification from the Court of Justice of the European Union (“CJEU”) on the meaning of “establishment” in the long running Woolworths case. The employers in E Ivor Hughes also paid the price for not taking legal advice on the closure of their school and faced the full 90 day protective award for failing to consult.

Although the Nolan case was heard by the Supreme Court this year, it unfortunately did not address the issue that employers are most interested in - when does the duty to consult arise (see our article “Collective redundancy: law protects US Government
employees”. We must await a future Court of Appeal hearing to deal with this issue.

**USDAW and anor v VW Realisation and ors (“Woolworths”)**

**CJEU, 30 April 2015**

The CJEU held that “establishment”, for collective redundancy purposes, means the unit to which the workers made redundant are assigned to carry out their duties and that in deciding if there are 20 or more dismissals, each establishment can be looked at separately. The impact in the UK is that where several sites meet the criteria for an “establishment”, each one can be looked at separately in order to decide if there is a proposal to dismiss 20 or more employees at an individual site and there is no need to aggregate the number of dismissals from all sites across the company. This is consistent with the earlier employer friendly opinion delivered by the Advocate-General.

Section 188 of the Trade Union and Labour Relations Consolidation Act 1992 (“TULRCA”) requires an employer to consult collectively where it proposes to dismiss by reason of redundancy 20 or more employees “at one establishment” within a 90 day period. There is no definition of “establishment” within the legislation. TULRCA is intended to implement the UK’s obligations under the EU Collective Redundancy Directive (“Directive”).

The trade union USDAW brought claims on behalf of former employees who had been made redundant from Woolworths and Ethel Austin. An important question in the Tribunal proceedings was whether the consultation provisions were triggered in respect of stores and workplaces with fewer than 20 employees. The Tribunal held that individual branches were discrete ‘establishments’, meaning that there was no duty to consult on redundancies at any branch with fewer than 20 employees. This meant approximately 4,500 former employees were denied a protective award.

On appeal, the EAT held that by including the words ‘at one establishment’ in S.188 TULRCA, the UK had failed properly to implement the Directive, and that those words had to be deleted to achieve a compatible interpretation. As a result, all dismissals across all of the company’s sites should have been aggregated.

The Secretary of State appealed to the Court of Appeal which asked the CJEU to consider two key questions:

- Whether the phrase “at least 20” in the Directive means the number of dismissals across all establishments together, or on an individual establishment-by-establishment basis?
- If it refers to each individual establishment, what does “establishment” mean? The whole of the relevant retail business, (being a single economic business unit), the part of that business making the redundancies, or the unit where the employee is assigned, e.g. in this case an individual store?

The CJEU confirmed that the Directive does not require all “establishments” to be aggregated for the purpose of the 20–employee threshold. It referred to its judgment in *Rockfon A/S v Specialarbejderforbundet i Danmark acting for Nielsen and ors* [1996] which ruled that the term “establishment” means the unit to which the workers made redundant are assigned to carry out their duties. The ruling in *Rockfon* also said that a unit could be regarded as an establishment even if its management does not have complete autonomy to make the redundancies.

The CJEU also relied on the judgment in *Athinaiki Chartopoiai AE v Panagiotidis and ors* [2007], which held that an “establishment” “may consist of a distinct entity having a certain degree of permanence and stability”. It clarified the words “undertaking” and “establishment” are different: an “establishment” may be a part
of a whole undertaking, and where an undertaking is made up of more than one unit, each meeting the criteria for “establishment”, it is the unit to which the workers made redundant are assigned to carry out their duties that constitutes the “establishment” for collective redundancy purposes.

It was further considered that if “establishment” was interpreted here to mean combining all establishments in an undertaking, this would be contrary to the objective of ensuring comparable protection of workers’ rights across Member States and would entail very different costs for undertakings in different Member States.

As the dismissals were made from two large retail groups with stores located throughout the UK, employing in most cases fewer than 20 employees, the Tribunal had regarded them as separate “establishments”. It would have been for the Court of Appeal to decide whether the Tribunal was right in treating each Woolworths and Ethel Austin store as a separate establishment. However, the case has recently settled and therefore we will not benefit from such a ruling.

Employers which (following the EAT decision) had begun to aggregate dismissals across each employing company will need to consider the employee relations aspects of reverting to the previous unit / location based approach, but it seems likely that retaining or moving back to this approach is lawful.

E Ivor Hughes Educational Foundation v Morris and others EAT, 19 June 2015

A Tribunal was entitled to conclude that a failure to consult on proposed redundancies which arose from a “reckless” failure to seek advice on the legal implications of the closure of a school meant that there were no “special circumstances” which made it impractical to consult. In these circumstances, a maximum 90 day protective award was held to be appropriate.

There is currently confusion as to the correct test for the trigger for collective consultation. In UK Coal Mining Ltd v National Union of Mineworkers [2008], the EAT determined that the need to consult arises where there is a “fixed, clear, albeit provisional intention”. However, the CJEU in Akavan Erityisalojen Keskusliitto AEk ry and others v Fujitsu Siemens Computers Oy [2009] (“Fujitsu”) decided that the duty to consult arises where there is a “strategic decision...compelling the employer to contemplate or plan for collective redundancies”. The decision is unclear though and the CJEU recently declined to clarify the matter in the case of USA v Nolan UKSC [2014].

An employer is not required to consult where there are “special circumstances” that render it not reasonably practicable to do so, but the employer must still take those steps towards compliance that are reasonably practicable. The “special circumstances” defence has been interpreted very narrowly by the courts to date.
This case concerned the closure of a school where numbers of pupils had been declining. At a meeting of the school governors in February 2013, it was decided that the school would close at the end of the summer term if the forecasted pupil numbers had not increased by April 2013 — which was considered unlikely. They did not, and at a further governors’ meeting on 25 April it was decided that the school would close as planned. Employees were entitled to one term’s notice of termination of employment and were hurriedly given such notice on 29 April so that their contracts would end on 31 August. The Foundation did not consult with the employees prior to the notice being given. The employees brought claims for protective awards on account of the failure to do so.

The Foundation stated that it had been unaware of its legal obligation to consult and had not taken legal advice. In any event, the Foundation submitted that there were “special circumstances” rendering it not reasonably practicable to consult. One reason relied on was that had consultation started in February, the potential closure of the school could have been leaked, resulting in parents removing their children and making closure unavoidable.

The EAT found that the Tribunal had been entitled to conclude that the Foundation had taken a decision in February 2013 to close the school unless numbers improved and this was sufficient to trigger the duty to consult whichever test applies to deciding the trigger (see above). Therefore it was not necessary to decide the correct test for the trigger for collective consultation.

The Tribunal had also been entitled to reject the Foundation’s special circumstances defence:

• First, special circumstances must be factors which an employer had actually addressed its mind to at the time. Here the Foundation had never considered consultation and the special circumstances relied on were only thought of in hindsight.

• In any event, the Tribunal was entitled to conclude that the Foundation could have addressed concerns about news of the closure leaking out if consultation began, by telling the staff that the matter was confidential and a breach would constitute gross misconduct.

Although the EAT did not rule out the possibility that a need for confidentiality might be a special circumstance in some situations, in this case it was not.

The Tribunal had also been entitled to make the maximum protective award of 90 days’ pay for each employee. The Tribunal was entitled to focus on the penal nature of the award. In this case there had been a complete failure to consult. Although the Foundation was not aware of its obligation to consult and so was not deliberately in breach, it had been reckless in not obtaining legal advice on its obligations.

It is unfortunate that we still do not have guidance on the correct approach to the trigger for collective consultation. We are waiting for clarification of this point from the Court of Appeal in *USA v Nolan*. The approach to the special circumstances defence is in line with previous cases, which have generally shown a reluctance to allow employers to rely on this defence.

**Pujante Rivera v Gestora Clubs Dir SL and another**

*CJEU, 11 November 2015*

The CJEU has held that the definition of ‘redundancy’ under the European Collective Redundancies Directive can include a situation where an employee resigns in response to a unilateral pay cut imposed by an employer for economic reasons.

In previous cases (*Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark v H Nielsen & Søn, Maskinfabrik A/S (in liquidation)*) the CJEU had found that the European Collective
Redundancies Directive (the “Directive”) at the time did not apply to constructive dismissals.

In the UK, the Directive is implemented by the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”). Under TULRCA the obligation to carry out collective consultation is triggered where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. For these purposes "dismiss" generally has the same meaning as in the context of unfair dismissal law (which includes constructive dismissal) but "redundant" has an extended meaning of "dismissal for a reason not related to the individual concerned".

In this Spanish case, the question arose whether sufficient redundancies were contemplated to trigger an obligation to carry out collective consultation under the local legislation implementing the Directive. This depended on whether the resignation of an employee in response to Gestora’s unilateral decision to cut her pay by 25% as part of a cost saving exercise amounted to a redundancy. The Spanish court referred the matter to the CJEU.

The CJEU held that although the Directive does not define ‘redundancy’, it would generally involve termination of employment not sought by the employee and therefore without his or her consent. However, the definition should not be construed narrowly. In this case, although the employee had requested the termination of her employment, the termination arose from unilateral changes made by the employer. The Court therefore concluded that a situation where an employer - unilaterally and to the detriment of the employee - makes significant changes to essential elements of the employment contract for reasons not related to the individual employee concerned, does fall within the definition of redundancy.

The decision confirms that European law can require collective consultation over what was, in effect, a constructive dismissal arising from significant and detrimental changes to essential elements of the employment contract.

In UK law, TULRCA has always provided that dismissal, in the context of collective redundancy, can include a constructive dismissal. However, there has been a question as to whether an employer can be said to “propose” a constructive dismissal, given that an employer making unilateral changes to employees’ terms will generally want employees to remain in employment and not (in the natural sense of the word) be said to be proposing to constructively dismiss them. Previous cases have pointed out that the word “propose” used in TULRCA does not properly implement the Directive, which talks about “contemplating” redundancies - a phrase which can more readily be applied to constructive dismissals. The decision in this case makes it more likely that a Tribunal would resolve any uncertainty in favour of finding that constructive dismissals are covered.

Contract

Three cases, Sparks, Norman, and Hart, looked at the issue of unilateral variations to employees terms and conditions of employment. In each, employers were unsuccessful in making a unilateral contract change relying on an earlier variation clause. The general rule for employment contracts is that employers are not permitted to vary employees’ terms and conditions of employment without the consent of the employee. Although employers will often include a general right to vary an employee’s terms and conditions unilaterally, tribunals will rarely enforce such provisions.

Where employers wish to protect themselves by requiring employees to observe bespoke confidentiality requirements, two particular cases emphasise the
need for employers to properly apply their mind to this prior to entering or amending a contract. Too often, it becomes apparent on termination that sufficient protection is not in place. In the Eurasian case, the High Court was unwilling to imply a term requiring delivery up of confidential information. Re-use Collections Ltd was also left high and dry when the High Court told it that it had not provided consideration when it amended an employee’s contract terms to introduce confidentiality and restrictive covenant clauses. On the facts, Re-use could not rely on continuing employment as consideration. Nor could it rely on other benefits which the Court found had not been granted in connection with acceptance of the new terms.

Employers may be required to adopt a more flexible approach to the right to be accompanied to a disciplinary hearing. There is relatively little case law in this area. The High Court decision in the Stevens case demonstrates how an employee may be able to claim a breach of the implied term of trust and confidence where the employer refuses to allow the employee to be accompanied by a companion who doesn’t meet the statutory criteria.

Sunrise Brokers LLP v Rodgers

Court of Appeal, 23 October 2014

The Court of Appeal has confirmed that an employee who resigned in repudiatory breach of his employment contract was still employed as the breach had not been accepted by his employer. The employer was also entitled not to pay him during his notice period as he refused to carry out work.

Mr Rodgers was employed by Sunrise Brokers LLP (“Sunrise”). His contract provided that:

- his employment could be terminated by Sunrise on three months’ written notice;
- he could not terminate his employment for an initial period of three years (until 21 September 2014) although thereafter he could terminate on 12 months’ written notice;
- he could not compete with Sunrise or solicit its customers or employees for 6 months after termination (less any time spent on garden leave); and
- Sunrise could place him on garden leave for the final six months of any notice period.

On 5 March 2014, Mr Rodgers accepted an offer of employment from EOX Holdings Ltd (“EOX”), one of Sunrise’s key competitors, to start employment on 1 January 2015. On 27 March 2014 he told one of the Sunrise directors that he intended to leave with immediate effect. He did not return to work again save for a meeting on 9 April 2014. At the meeting on 9 April 2014, Sunrise tried to persuade him to stay or agree a termination plan but Mr Rodgers refused. In light of his continued unauthorised absence Sunrise stopped paying Mr Rodgers from 1 May 2014 and sought an injunction requiring him to adhere to his contract until 16 October 2014 following which he would be bound by the 6 month non-compete.

The High Court found in favour of Sunrise. It granted an injunction requiring him to observe the terms of his contract (with the exception of having to work) until 16 October 2014 and upheld the post-termination restrictions for a 4 month period, running until 26 January 2015.

Mr Rodgers appealed to the Court of Appeal, arguing that:

- the High Court erred in granting an injunction in the absence of any undertaking by Sunrise to pay him;
- the High Court should not have restrained him for a total of 10 months when his contract contained only a 6 month non-compete; and
- the High Court had failed to properly consider whether damages was an appropriate remedy.
The Court of Appeal rejected his appeal. It accepted that it was common practice for employers to pay the employee for the period of any injunction but that was to avoid the risk of a Court declining to grant an injunction if the effect of it was to financially force the employee to return to work (because of the public policy principle against forcing employees to work for their employer). It did not mean that employers always had to make payment: if, as here, not paying him would not cause financial hardship, payment was not necessary. Further, he was not contractually entitled to be paid salary if he was refusing to work when required to do so.

In relation to the length of the restriction, the parties agreed that Mr Rodgers could not have objected to a 6 month restriction because of his non-complete clause (and during which time he would not have been paid). The fact he was subject to an additional four months’ unpaid restriction was purely a consequence of him refusal to return to work during his notice period.

The Court of Appeal accepted that the question of whether damages were an adequate remedy for a repudiatory breach of the notice period by the employee does not automatically terminate the contract but has to be accepted by the employer. The fact that an employee can be required to remain employed during their notice period is helpful for employers. It is also helpful that in appropriate cases, employers potentially do not need to pay employees during their notice if they refuse to work. However, that point needs to be treated with caution as in cases where the financial impact would force employees to return to work, that may be grounds for the Court not to grant an injunction. The Court of Appeal was also careful to distinguish this case from cases where the employee is placed on garden leave and has a right to be paid under the employment contract. In this case the scope for not paying Mr Rodgers arose because he was not on garden leave but was absent without authorisation.

Eurasian Natural Resources Corporation Ltd v Judge
High Court, 31 October 2014

The High Court has held that there is no implied term requiring a director to deliver up company confidential information on termination of the appointment. Employers should therefore ensure that directors’ terms of appointment contain an express obligation to do so.

Sir Judge was appointed as a non-executive director of Eurasian Natural Resources. His letter of appointment provided that all information acquired during his appointment was confidential to the company and should not, without the prior approval of the Chairman, be disclosed to third parties or used for any reason other than in the interests of the company, either during the appointment or following termination. There was no express obligation requiring him to deliver up confidential documents on termination.

Following allegations that Sir Judge had leaked confidential information to the press, he was not re-elected at the Annual General Meeting and his appointment came to an end. The company brought proceedings against him arguing, amongst other things, that he was required to deliver up confidential information belonging to the company on termination of his appointment. The company argued that such obligation arose either as an implied term of his contract or from his fiduciary duties to the company.
The High Court rejected the company’s claim on the following grounds:

- had it been the “obvious but unexpressed intention of the parties” that Sir Judge be required to deliver up confidential information on termination of his appointment, as the company had argued, the Court would have expected it to be incorporated into the terms of his appointment;
- the Court had not been shown any legal authority, code of practice, guidance or other evidence that would suggest that a requirement to deliver up was the “norm” for directorships;
- in practice, it would be difficult for directors to comply with this duty particularly where they are directors of multiple companies, as Sir Judge was, and where company documents had been sent to a mixture of personal and company email addresses; and
- fiduciary duties owed by directors do not require delivery up of confidential information.

The High Court made it clear that delivery up of confidential information could still be ordered as part of an injunction to protect the company’s confidential information.

In view of this decision, a requirement to give back confidential information on the termination of a director’s appointment must be expressly stated in the contract. The same would apply to contracts of employment for employees where the implied duty of confidentiality is limited, and does not extend to a requirement to deliver up confidential information.

It would also be prudent for employers to check their contracts to ensure that there is an obligation to return confidential information and not to retain any copies in any format.

**Re-Use Collections Limited v Sendall and May Glass Recycling**

*High Court, 19 November 2014*

The High Court found that a company could not rely on restrictive covenants contained in a former employee’s contract of employment, as the employer did not provide any consideration for the new covenants.

Reuse argued that it provided a number of new benefits under the new contract [such as, life assurance, an increase in salary and a company car]. The High Court found that there was no evidence to show that these benefits had been granted in consideration for Mr Sendall signing the new contract.

Mr Sendall started receiving many of the benefits before he signed the contract, including the increase in salary which took effect at the start of 2013.

Reuse also sought to rely on Mr Sendall’s continuing employment as consideration. The High Court found that there was no evidence that Reuse had
offered the contract on the basis that, expressly or impliedly, a refusal to sign it would or might lead to his dismissal. Therefore it found that Reuse could not rely on continuing employment as consideration.

The Court concluded that no consideration had been provided for the new restrictions and so they were not contractually binding on him.

This case is a good reminder of the need to provide consideration when introducing new post-termination restrictions and other contractual obligations during the course of employment. Continuing employment will rarely be enough to constitute consideration, unless it is clear to both parties that a failure to accept the new contract might result in the termination of employment. Practically, employers seeking to introduce new or updated post termination restrictions (or any new contractual obligations) should consider doing so at the same time as salary reviews or bonus announcements, and to make clear that any salary increase or bonus payment is conditional on the employee signing the new contract. It is good practice to consider whether existing covenants are fit for purpose when an employee is promoted. This case reminds us that it would be useful to conduct that exercise ahead of the formal promotion, so that any refreshed covenants can be expressly linked to the promotion.

One question which the case left open is whether there needs to be “adequate” consideration for the restrictive covenants (or whether any nominal consideration is sufficient). Although the High Court did not make any finding on the point, it did state that the adequacy of the consideration would be a relevant factor when assessing the reasonableness of the restrictive covenant and so could impact its enforceability. In practice, the question of “adequacy” is a difficult one to quantify in monetary terms, and it may be easier to show that consideration was adequate if that consideration was a promotion or the introduction of a valuable benefit, rather than a notional monetary amount paid to the employee at the time of signing the contract.

**Norman and others v National Audit Office**

**EAT, 15 December 2014**

In the first of the trilogy of cases concerning unilateral variation of terms (Norman, Sparks and Hart), the EAT in Norman found that the employer could not rely on a general flexibility clause to make unilateral changes to employment terms.

The National Audit Office (“NAO”) unilaterally made reductions to employees’ entitlement to privilege leave and sick pay after unsuccessful negotiations with the Public and Commercial Services Union (“PCS”). The employees’ contracts included a clause which stated that the terms were “subject to amendment”, and that significant changes affecting staff in general would be “notified by Management Circulars or General Orders”.

In addition, the “Settlement of Disputes” section of the HR Manual was incorporated into the employees’ contracts. This section regulated how changes which affect staff would be agreed and implemented. In particular, it stated that changes to “working practices or terms and conditions” would be negotiated between management and the union, and could not be implemented during negotiations, “unless management considers this essential to the operation of the NAO”.

The Tribunal found in favour of the NAO, holding that the combination of the general flexibility clause and the “Settlement of Disputes” section, was sufficient to allow the NAO to make such unilateral changes.

The EAT disagreed, noting that previous cases had established that in order for an employer to reserve for itself the right to make unilateral changes to employment contracts, the right needed to be clear and unambiguous. It found that the general flexibility clause
which said that the terms were “subject to amendment” came “nowhere near” being sufficiently clear and unambiguous to justify unilateral amendment. Further, the provisions regarding notifying employees of changes did nothing more than oblige the NAO to inform employees of any changes which were agreed with the union - it could not be construed as an intention to be able to make unilateral changes simply by notifying employees, as such a power would need to be much clearer.

The “Settlement of Disputes” section of the HR Manual was not apt for incorporation and so could not be relied on as a contractual right; it simply set out details of the collective bargaining machinery which was not “the stuff of” contractual terms. In any event, the changes would not have been permitted by that clause in any event as on the facts the change was not “essential to the operation of the NAO”.

Sparks and another v Department for Transport

High Court, 3 January 2015

The High Court found that the employer could not make a unilateral variation to terms in an employee handbook which it found to have been incorporated into employment contracts. The Department of Transport (“DfT”) sought to introduce stricter absence management provisions for short term absences contained in the Employee Handbook, after unsuccessful negotiations with its recognised unions.

The Handbook was split into Parts “A” and “B”. Part A expressly stated that its provisions should be incorporated into the employment contracts. The attendance management provisions were contained in Part A. The provisions regulating variation of Part A terms were not clear, but stated that DfT would be required to enter a consultation process prior to making any changes to employees’ contracts. Failing that, amendments could be made, but only where no detriment would be suffered by the employees.

The High Court held that although many provisions of Part A were clearly drafted as guidance, and accordingly not apt for incorporation, the attendance management provisions were sufficiently clear, precise and contractual in tone, and therefore apt for incorporation.

The Court went onto decide that the changes could not be unilaterally imposed by the DfT. Although the DfT argued that the new attendance management provisions would not be detrimental to employees, the Court disagreed, finding that the evidence showed that some employees were less willing to take absences to avoid triggering the attendance management process. Therefore, the clause permitting unilateral changes could not be relied on as it only applied where the changes were not detrimental.

Hart v St Mary’s School (Colchester) Ltd

EAT, 8 January 2015

The EAT found that the employer, St Mary’s School, could not rely on variation wording in its employment contract to unilaterally vary an employee’s working hours.

The School amended its timetable to provide core subjects across five days. This required Mrs Hart, a part-time learning support teacher, to spread her hours over five days, not three (which is what she had been working since her contract was put in place in 2003).

The School consulted with Mrs Hart, but could not agree a new timetable with her, particularly as she could not work Fridays due to family commitments. The School implemented the changes unilaterally, and Mrs Hart resigned.

The key clauses of Mrs. Hart’s contract provided:

- Clause 1.4 (for part-time contracted teacher): “the
fractional part may be notified separately and may be subject to variation depending upon the requirements of the School Timetable”.

- Clause 2.1: subject to clause 1.4, the teacher should work “all school hours while the school is in session...and at any other time...as may be necessary...for proper performance of her duties”.

The Tribunal found that the School had a contractual right under clauses 2.1 and 1.4 to vary her contract unilaterally.

However, on appeal, the EAT held that the contract did not permit such unilateral variation. The School had agreed three days, which the employee had worked for 10 years. The variation wording in clause 1.4 was not sufficiently clear to amount to a unilateral power of variation for the employer.

Further Clause 2.1 did not require Mrs Hart to work such hours as the School decided. It simply meant that part-time teachers could also be required to work when the School was not in term time.

These cases reiterate that a right to unilaterally vary terms of a contract must be set out in clear and unambiguous terms. The use of the phrase “subject to amendment” or “variation” will not normally be sufficient. Variation clauses will be narrowly construed.

**Stevens v University of Birmingham**

*High Court, 31 July 2015*

The High Court has held that an employer’s failure to allow an employee to be accompanied to a disciplinary investigation meeting by a companion who fell outside the statutory categories amounted to a breach of the implied term of trust and confidence.

Under S10 Employment Relations Act 1999 employees / workers have a statutory right to be accompanied by their choice of companion provided that the companion is either:

- a trade union representative or official; or
- a fellow employee / worker.

There are no other prescribed categories and the statutory right to be accompanied does not extend to attendance at an investigatory meeting.

The use of the phrase “subject to amendment” or “variation” will not normally be sufficient. Variation clauses will be narrowly construed.

Professor Stevens was employed as Chair of Medicine by the University of Birmingham. His employment was dependant on him holding an honorary appointment with the Heart of England NHS Trust (HEFT) for whom he undertook clinical duties as a consultant and in respect of which he had a separate contract.

Allegations of misconduct led to Professor Stevens being suspended by the University and he was invited to an investigatory meeting. Under the University’s disciplinary procedure he was entitled to be accompanied at that meeting by either a University employee or a trade union representative. Under the HEFT disciplinary procedure, the right extended to a representative of a medical defence organisation.

Professor Stevens asked to be accompanied by Dr Palmer, a representative of the Medical Protection Society (MPS) of which Professor Stevens was a member. Dr Palmer had assisted Professor Stevens with a previous allegation of misconduct and, importantly, was familiar with the process of the relevant clinical trials. The University refused the request, relying on the express term in

its disciplinary procedure that University employees could only be accompanied to a disciplinary meeting by either a trade union representative or a fellow employee. Since the disciplinary process had been initiated by the University, the University’s view was that it was not relevant that under the HEFT procedure, Professor Stevens would have been permitted to be accompanied by Dr Palmer.

Dissatisfied with the University’s decision, Professor Stevens brought proceedings in the High Court.

The High Court held that Professor Stevens had no right (express or implied) under his contract to be accompanied by Dr Palmer. Although such a right existed under his contract with HEFT, the University was not required to adhere to that procedure as it was the University that had initiated the disciplinary process. However, in refusing the request, the High Court held that the University had breached its duty of trust and confidence to Professor Stevens and made a declaration to that effect.

The High Court found that:

- the statutory categories of companion did not help Professor Stevens: he was not a member of a trade union, and he could not be accompanied by a colleague as the small group of employees who had been involved in the clinical trials, and who were therefore sufficiently familiar with the technicalities of the process, were to be called as witnesses at the hearing;
- Dr Palmer held an equivalent role to that of a trade union representative and, given his history with Professor Stevens, was a suitable choice of companion;
- the investigatory stage was critical and the seriousness of the allegations meant that Professor Stevens’s career could be in jeopardy. It was therefore very important for him to have as much assistance as possible from someone with the appropriate knowledge and experience;
- if Professor Stevens was not accompanied by Dr Palmer he would need to attend the meeting unaccompanied which would be “patently unfair” and put him at a significant disadvantage; and
- it was relevant that had HEFT initiated the disciplinary process, Professor Stevens would have been entitled to be accompanied by Dr Palmer.

The High Court’s decision is authority that notwithstanding the prescriptive statutory categories of companion, there may be circumstances where it is appropriate to allow an employee to be accompanied by someone who falls outside those groups. The ACAS non-statutory guide on disciplinary / grievance procedures provides that employers may do so but are not obliged to. As this case shows, however, employers should consider agreeing to such a request where the employee’s choice of companion is very limited and / or where a particular companion has the technical skills and expertise necessary for a proper understanding of the issues to be discussed. Employers may also be required to do so in compliance with their duty to make reasonable adjustments in respect of a disabled employee.

Cavendish Square Holdings BV v El Makdessi

Supreme Court, 4 November 2015

The Supreme Court has clarified and limited the circumstances in which a contractual clause will amount to an unenforceable penalty clause. In short, a clause will be a penalty if it “...imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party...”

A clause in a contract which provides that a sum be paid (or forfeited) by a party that breaches the contract, runs the risk of being challenged as a penalty...

Clause. In the employment context, examples of clauses where this issue arises are re-payment clauses in settlement agreements and provisions for forfeiture of deferred compensation on breach of a restrictive covenant.

However, there has been much confusion and debate as to what exactly constitutes a penalty clause. Earlier case law had tended to focus on whether the clause was intended to deter the parties from breaching the contract, or whether it was actually intended to provide for pre-agreed damages, which were a genuine pre-estimate of the losses likely to be suffered by the party not in breach. This posed obvious problems for employers, where the motivation for incorporating penalty type provisions, such as claw back clauses in settlement agreements, was precisely to deter the employee from breaching them.

The Supreme Court has now re-considered the law in this area. It has concluded that the focus on deterrence was unhelpful, and has expressly moved away from that test. Instead, the Court will now consider whether:

- the employer has a legitimate interest for including the clause; and
- whether the consequences of the clause are unconscionable or extravagant in the circumstances.

The true test is whether the clause imposes a detriment on the contract breaker which is out of all proportion to any legitimate interests of the innocent party in enforcement of the primary obligation.

The Supreme Court also clarified that a clause can only be a penalty clause if it operates as a result of a breach of the contract. This is helpful confirmation and in many cases enables employers to draft these types of provisions in such a way as to avoid the principles regarding unenforceable penalty clauses altogether. However, some caution is required, as it was noted in passing that courts should focus on the true substance of the clause, rather than just its form.

The Court stated that in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.

As a result of the Supreme Court’s decision, it is now likely to be easier to enforce ‘penalty’ clauses, such as claw back and forfeiture clauses. Employer’s should review existing provisions to determine whether:

- there is a legitimate interest in using the provision (and, if so, what it is); and
- whether the clause can or should be re-drafted to seek to avoid the penalty clause principles entirely.

Data Protection

Dawson-Damer v Taylor Wessing LLP
High Court, 6 August 2015

The High Court has refused to grant an order requiring a law firm to comply with a subject access request on the basis that (a) the data subjects had made the request in order to obtain documents to support litigation, which was an improper purpose unrelated to their rights under the Data Protection Act 1998 (“DPA”), and (b) the search for the relevant documentation would involve disproportionate effort.

This approach is consistent with the previous, limited, cases on this matter, but contradicts the guidance given by the Information Commissioner’s Office (ICO) in its Subject Access Request Code.

Under the DPA an individual has the right to request copies of personal data that an organisation (a data controller) holds about him / her on computerised or structured filing systems: a subject access request or “SAR”. There are some limitations and exemptions on the right to receive information in a SAR — for instance an individual is not entitled to receive

legally privileged information, nor to receive a copy of the information if the supply of that information would involve disproportionate effort.

The ICO Subject Access Request Code, which represents good practice, but does not have the force of the law, notes that an organisation:

• need not comply with a SAR where supplying a copy of the information would involve disproportionate effort. However an organisation should not refuse to comply with a SAR on the basis that the effort involved in searching the information would be disproportionate. This interpretation of the “disproportionate effort” exemption by the ICO means it can rarely be relied on because there will only occasionally be cases where the supply of the information involves a disproportionate effort; and

• must not take account of the motive of an individual making the SAR when deciding whether to comply with the request.

An individual may make an application to the courts under section 7(9) DPA for a data controller to comply with an SAR.

In this case, the claimants made subject access requests to Taylor Wessing, a law firm. At the time, the claimants were involved in ongoing litigation against Arndilly, a company which administered trusts of which the claimants were beneficiaries and which was represented by Taylor Wessing. Taylor Wessing refused to comply with the request as, in order to do so, lengthy and costly searches of files (many of these containing legally privileged information) dating back 30 years would be required.

The claimants made an application to the High Court, asking the court to order that Taylor Wessing comply with the SAR.

In the High Court, the Judge dismissed the claimants’ application, on the following basis:

• the SAR was not made for a proper purpose. It was made to obtain documents that may assist the claimants in their ongoing litigation against Arndilly and which they could not obtain through that other litigation. It would not have been made otherwise for a legitimate purpose under the DPA e.g. to check the accuracy of the personal data held. The Judge considered that the motive for making the application was important in deciding whether to grant it;

• the question of whether documents were protected by legal privilege was a matter that required consideration by skilled lawyers. This would be both time consuming and costly. As such, to expect Taylor Wessing to carry out the search and review of those documents was disproportionate.

The High Court has granted leave to appeal this decision to the Court of Appeal.

On the face of it, Dawson-Damer is a helpful decision for employers, as it would appear to provide a basis on which to refuse to comply fully with an onerous SAR from employees or former employees where the motive behind it is to get advanced disclosure in litigation, and where the search would involve disproportionate effort. However, there is a clear tension between the position of the ICO, and the developing case law in the courts. Individuals may refer breaches of the DPA to both the Courts and the ICO. Therefore whilst an employer might feel quite confident that it can successfully defend a court action in refusing to comply fully with a SAR (to the extent it involves disproportionate effort), it is quite possible that the ICO would take a different approach and require compliance with the SAR regardless of motive or effort to conduct the searches. It isn’t clear how far the ICO would push that requirement (i.e. whether they would take any formal enforcement action), but most employers will not want to be the test case on this point.
Maximillian Schrems v Data Protection Commissioner
CJEU, 6 October 2015

The CJEU has ruled that a longstanding decision of the European Commission ("Decision"), permitting transfers of personal data to US companies through the US/EU Safe Harbor Program ("Safe Harbor"), is invalid. As a result, Safe Harbour is no longer a reliable mechanism for transfers of employee data from the European Union ("EU") to the US.

The CJEU was asked to consider whether the Irish Data Protection Commissioner ("IDPD") "may and / or must" evaluate whether the US (through Safe Harbor) offers "adequate protection" for personal data within the meaning of the European Data Protection Directive (95/46/EC) ("Directive"), or whether it could rely on the Decision of the European Commission ("EC").

The concerns in the underlying case related to the extent of data accessed by the US National Security Agency and other US authorities as described in Edward Snowden’s revelations in 2013.

The CJEU found that Safe Harbour does not provide an “adequate” level of protection (i.e., a level of protection that is “essentially equivalent” to that guaranteed in the EU), because (i) it provides for a general and unlimited derogation from the Safe Harbor principles where national security, public interest, or law enforcement requirements are concerned, and (ii) it does not provide for effective legal protection against interference by US State entities with the rights of those whose data is transferred from the EU.

This judgment impacts any transfer of data from the EU to the US under the Safe Harbor arrangement. In the employment arena this will therefore impact transfers of employee data to service providers based in the US or to servers located in the US, such as HR systems providers, benefit providers, those hosting whistleblowing hotlines and, more generally, sharing employee data with US based group companies.

As a result, companies will have to consider applying other cross-border transfer mechanisms in order to remain compliant with EU privacy rules. The main alternatives for the transfer of employee data are as follows:

- EC model clauses – This is likely to be the swiftest and easiest interim solution in the UK and many other EU countries. Group companies can enter one intra-group agreement covering the processing and transfer of data incorporating model contract clauses. Employers can implement agreements with their service providers as data processors. However, the clauses must be tailored to be compliant in different EU jurisdictions. In some countries this may be time consuming where it requires consultation with works councils or other employee bodies and, in some cases, approval by local data protection authorities;

- Consent – However, employee consent to transfer of data is not a complete solution as in the majority of EU countries (including the UK, France, Germany, Poland and the Netherlands), consent is unlikely to be a feasible option in the employment arena as it is questionable whether such consent can be “freely given”. In some countries, such as Spain, where the model clauses option would not be acceptable for the national data protection authorities, employers may be able to rely on employee consent.

- Binding corporate rules – These only cover intra-group transfers and require approval by all relevant national data protection authorities. However, they may become more workable as a solution following the commencement of the new EU Regulation expected to come into force in 2017/2018.

- Repatriate data to the EEA or another country with adequate protections – It may be possible to limit data stored in or accessed from the US by operating more local systems, although this is unlikely to be a total solution particularly in respect of intra-group transfer.
  For companies using US-based HR service providers, consider changing the arrangements for storage in another jurisdiction.

Other limited options do exist which may be useful in particular circumstances, such as the exemptions for defence of a legal claim and contract performance at the request of the individual. Whichever option is chosen, the current CJEU ruling leaves open the prospect that the validity of these alternative mechanisms may also be subject to future challenge.

Undoubtedly this decision will lead to disruption of employer’s data protection compliance program. Organisations will have to consider implementing alternative solutions to legitimise any data transfers to the US which may result in the need to update filings with data protection authorities and information notices (e.g., privacy policies, IT policies, removal of Safe Harbor references). In addition, European companies may become subject to approval requirements with local data protection authorities for data transfers to the US.

The EC is expected to publish, together with the data protection authorities of the Member States, further analysis and guidance for companies trying to address the implications of this CJEU ruling. The EC is currently working with US authorities to reach agreement on a revised Safe Harbor. Although, like other EC decisions, this could also be challenged judicially. It will thus be important for employers to track carefully any updates or guidance on this subject.

Discrimination — Overview

A number of interesting decisions on discrimination have been reported in 2015. These include the controversial decision of the Court of Appeal in the Essop case that a claimant must show the reason for group disadvantage and that the claimant was disadvantaged for that same reason an indirect discrimination claim. A decision by the CJEU following a referral from the Bulgarian Courts in Chez Razpredelenie, extended the ability to claim associative discrimination in indirect discrimination scenarios rather than just direct discrimination cases. The precise impact of this decision is not yet clear, but it, has potentially, significant consequences for UK discrimination law. While we await to see exactly how the UK tribunals will apply this, we may be seeing expansion of the number of people who can bring a claim of indirect discrimination in relation to an unlawful provision, criterion or practice.

We have continued to see cases on the scope of “discrimination arising from disability”, a new type of discrimination introduced in the Equality Act 2010 to replace the concept of “disability related discrimination”, which had become too narrow following the House of Lords decision in London Borough of Lewisham v Malcolm. This includes general guidance from the EAT on the meaning of “unfavourable treatment” which it identified as different to the concept of “detriment”. Although this term is also used in relation to pregnancy and maternity discrimination there has not, before this case, been any reported case law on how this should be interpreted. In 2014, we reported on the Gallop case and the principle that employers should not “blindly” rely on their occupational health advisors’ advice as to whether an employee is legally disabled. This principle was reiterated in the 2015 EAT case of Donelia v Liberata.

Following a stream of conflicting Tribunal decisions about whether “caste” can amount to race discrimination, the EAT in Chandok v Tirkey has resolved the conflict.
It found that caste could fall within the wide definition of “ethnic origins” which is one aspect of the definition of race.

Discrimination — Age

Braithwaite and others v HCL Insurance BPO Services Ltd

EAT, 5 February 2015

The EAT held that whilst the employer’s decision to impose new terms on its employees placed older workers at a particular disadvantage, as they were more likely to lose their existing contractual rights when compared to younger workers, the decision was objectively justified.

HCL provided services to life insurance and pensions businesses. Over a number of years, it had acquired employees from different companies under TUPE. As a result, its employees were on different terms and conditions, particularly in relation to working hours, holiday, private medical insurance, carers’ leave, and enhanced redundancy. Following the collapse of Lehmans and the economic downturn, HCL incurred substantial losses. It reviewed its staffing costs. It considered that some of the employees’ terms and conditions were generous, not market competitive and in respect of enhanced redundancy, might be age discriminatory insofar as the entitlement was based on length of service. It therefore proposed introducing a standardised set of terms and conditions for all of its employees “to provide a more equitable and fair reward system, and potential savings in order to maintain financial stability”. In doing so, HCL removed or reduced some of the benefits mentioned above.

Following extensive consultation, the employees were told that if they did not accept the new terms, they would be dismissed. A number of employees refused to accept the new terms and brought claims for unfair dismissal and indirect discrimination on the grounds of age.

The Tribunal held that the requirement on the employees to accept the new terms or be dismissed was a provision, criterion or practice (“PCP”) which put employees in the age 38 to 65 bracket at a particular disadvantage as they who had built up greater entitlements through longer service. It accepted that the introduction of the new terms was objectively justified as a proportionate means of achieving the legitimate aim, namely reducing staff costs to ensure HCL’s future viability and to have in place market competitive, non discriminatory terms and conditions. The employees appealed against the finding that the PCP was objectively justified and HCL cross-appealed the Tribunal’s finding that it had applied a PCP.

The EAT dismissed the employees’ appeal and HCL’s cross appeal.

HCL argued, relying on the EAT’s decision in ABN Amro Management Ltd v Royal Bank Scotland [2009], that the introduction of the new terms was not capable of amounting to a PCP unless the new terms themselves gave rise to a particular disadvantage.

This wasn’t the case here, as the new terms applied to all of HCL’s employees and did not put any particular employee at a particular disadvantage.

The EAT distinguished this case from ABN Amro which considered whether a change in a discretionary bonus policy was discriminatory on the grounds of age. At no time in ABN Amro were some employees treated differently from others; rather there, the claimant was seeking to compare himself with what happened at a different time when a different bonus policy was in place. In those circumstances the EAT held that a change of policy could not amount to a PCP. On the present facts, there was a PCP that if the employees wished to remain in employment, they had to agree to new terms and conditions. This was applied to all employees and did put employees in the age 38 to 65...

Bracket at a particular disadvantage as they had existing contractual rights which were different from other employees. Therefore, the EAT held that the Tribunal had been entitled to find that the requirement to accept the new terms or be dismissed, was a PCP.

The EAT held that the Tribunal was also entitled to conclude that the PCP was objectively justified. It considered that the Tribunal had properly understood the task it had to carry out when assessing objective justification and had properly carried out the balancing exercise between the adverse impact on the employees and HCL’s needs. The Tribunal was entitled to find that there were no practicable alternatives available to HCL and that the requirement to accept the new terms or be dismissed was proportionate.

Employers proposing to change terms and conditions should consider whether the change is likely to have a discriminatory effect bearing in mind the EAT’s view here that a change could constitute a PCP. The facts of this case are particularly interesting given the TUPE context and serve as a reminder that harmonisation of terms is possible where it is unrelated to the TUPE transfer. In this case, the EAT and Tribunal accepted that the reason for the change was to ensure HCL’s financial viability and to establish non discriminatory and market competitive terms for its employees.

Discrimination — Associative

EAD Solicitors LLP and others v Abrams
EAT, 5 June 2015

The EAT has ruled that a limited company which was a member of a limited liability partnership could pursue a claim of direct age discrimination under the Equality Act 2010 against the partnership on the basis of the age of the company’s principal shareholder and director.

The Equality Act 2010 (EqA) protects members of (i.e. partners in) a limited liability partnership (LLP) from discrimination by the LLP. Both companies and individuals can be members of an LLP.

EqA defines direct discrimination as follows:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

This wording permits claims for what is often known as “associative discrimination” i.e. where ‘B’ is treated less favourably not because of B’s protected characteristic but because of a protected characteristic of a third party.

Mr Abrams was a member of EAD Solicitors LLP (EAD). For tax reasons, he set up a limited company, Gary Abrams Limited (GA Ltd) which replaced him as a member of EAD. GA Ltd agreed to supply the services of an appropriate fee-earner to EAD and became entitled to the profit share that Mr Abrams would have received had he remained a member. Whilst the parties envisaged that Mr Abrams would provide the services himself, there was no contractual obligation for him to be the fee earner provided. Mr Abrams was the sole director and shareholder of EAD but he was not its employee and did not have any contractual relationship with it.

When Mr Abrams reached 62, which was the retirement age for members of EAD, it objected to GA Ltd offering Mr Abrams’s services and also objected to GA Ltd continuing as a member of EAD. Accordingly, GA Ltd did not receive any further payment from EAD.

Mr Abrams brought a claim of associative direct discrimination in the name of GA Ltd i.e. that GA Ltd had been treated less favourably because of Mr Abrams’ age. EAD challenged the right of GA Ltd to bring a claim under EqA, arguing that companies cannot bring claims for discrimination.

because they do not have the protected characteristics under EqA (e.g. age, disability, sex, sexual orientation). The Tribunal rejected this argument and GA Ltd appealed.

The EAT dismissed the appeal. It noted that EqA protects “persons” from discrimination. Under the Interpretation Act 1978, which sets out general rules of statutory interpretation, “person” includes “a body of persons corporate or unincorporated” unless the contrary intention appears. Therefore, the starting point was that a company could bring a claim.

The EAT rejected EAD’s argument that EqA showed an intention that corporate bodies should not be protected, as they did not have protected characteristics. It was well established that claims for associative direct discrimination were permitted, based on the protected characteristic of someone other than the claimant. In this context, EqA does not deal with individuals on the basis of their protected characteristics, but identifies discrimination as treatment caused by a protected characteristic or related to it. As such, any person, natural or legal, may suffer detrimental treatment and is potentially covered by EqA.

This decision is important for LLP’s which have corporate members. It may well extend beyond claims of direct discrimination. Although EqA provides that only an individual can be ‘victimised’, there is no such restriction in relation to other parts of the legislation. Given the decision in CHEZ Razpredelenie Bulgaria there may be scope for a corporate body to claim indirect discrimination.

CHEZ Razpredelenie Bulgaria C-83/14
CJEU, 16 July 2015

The CJEU has found that the concept of associative discrimination can apply in cases of indirect discrimination, not just direct discrimination. The scope of the decision is not yet clear, but has potentially significant ramifications for UK discrimination law, which has not, to date, prohibited indirect discrimination by association.

The Equality Act 2010 is drafted so as to allow claims of “associative” discrimination for direct discrimination and harassment but not for indirect discrimination. This case suggests this is not consistent with EU law. Although not an employment case, the principles it considers are equally applicable in the employment context.

Ms Nikolova ran a shop in a Bulgarian district predominantly inhabited by persons of Roma origin; Ms Nikolova is not Roma herself. Chez Razpredelenie Bulgaria (CHEZ RB), the electricity supplier for the district, installed electricity meters approximately six metres up electricity poles, whereas in other districts the meters were fixed at a much lower height. CHEZ RB stated that the different treatment was because in districts with large Roma populations, a large amount of unlawful connections, damage and meter tampering occurred.

Ms Nikolova, contended that the height of the meter was preventing her from assessing the electricity she was using. Ms Nikolova brought a claim of discrimination on the grounds of ethnic origin (even though she herself was not Roma).

The Bulgarian courts referred various questions to the CJEU, to determine whether Ms Nikolova could bring a claim, despite not being of Roma ethnic origin, and whether the measures in question would amount to direct or indirect discrimination.

In considering whether Ms Nikolova could bring a claim, despite not being of Roma ethnic origin, the CJEU started not from the wording of the relevant Directive, but from a general principle of discrimination. It concluded that the concept of discrimination on grounds of ethnic origin must be intended to apply in the circumstances of this case (where in a district mainly inhabited by people of Roma origin, the electricity meters were placed much higher than in other areas) irrespective of whether

the measure in question affected persons with a particular ethnic origin or those who "without possessing that origin, suffer, together with the former, the less favourable treatment or particular disadvantage resulting from that measure". In effect, Ms Nikolova could succeed in a claim of either direct or indirect discrimination, irrespective of ethnic origin.

It went on to consider whether the measures taken by CHEZ RB would amount to direct or indirect discrimination. It concluded that:

- if the decision to introduce the measure was determined by ethnic origin (e.g. ethnic stereotypes or prejudices) then this would amount to direct discrimination. It did not matter that the measure affected some people who were not of Roma origin or that it did not affect people of Roma origin who lived in different areas; and

- if the measures were introduced for neutral reasons (e.g. it applied to areas where numerous instances of tampering with, damage to, and unlawful connections with electricity meters occurred) then this would be an "apparently neutral" provision criterion or practice, which could potentially be indirect discrimination. It held that the measure did put those of Roma ethnic origin at a particular disadvantage, given their numbers in the area. It would then be for CHEZ RB to show that the measure was objectively justified.

The judgment suggests that, on the facts of the case, the CJEU thought it likely that the measure amounted to direct discrimination. However, the CJEU were also of the view that Ms Nikolova could have succeeded in a claim of indirect discrimination, apparently extending the scope of indirect discrimination to those who do not have the relevant protected characteristic but suffer the same disadvantage.

For example, a woman with childcare whose request for flexible working was declined because of a practice of requiring full time working would potentially have a claim of indirect sex discrimination under current law (as women are statistically more likely to have child care responsibilities). This case suggests that a man with childcare responsibilities might also be able to bring a claim of indirect discrimination if his flexible working request was denied. This potentially expands the number of people who can bring claims of indirect discrimination.

It remains to be seen how broadly the concept of associative discrimination is interpreted. However, it is likely that UK tribunals will be able to interpret the Equality Act as permitting claims for associative indirect discrimination, if they consider EU law requires it and in any event previous CJEU decisions have held that discrimination is a general principle of EU law which can be relied on in disputes between private individuals in any case. Therefore, employers could face claims even without any changes to the Equality Act.

In a separate decision the EAT in Thompson v London Central Bus Company, whilst not conclusively deciding the point, left open the possibility of a claim of victimisation by association.

Together with the CJEU’s judgment in CHEZ RB, this suggests that we may be seeing a new trend in the expansion of claims of discrimination by association.

Discrimination — Disability

Donelien v Liberata

EAT, 16 December 2014

The EAT explored whether an employer had constructive knowledge (i.e. whether it "ought to have known") of an employee’s disability and whether it had relied too heavily on a report from its occupational health advisers.
In Ms Donelien’s last year of employment she was absent on 20 separate occasions amounting to 128 days absence. Her employer, Liberata, referred her to its occupational health advisers (OH) for a medical opinion and asked whether there was any underlying medical issue that explained her absences. OH provided a report but didn’t answer all of Liberata’s questions. Liberata followed up with OH but a number of its questions remain unanswered. Although Liberata didn’t question OH further, it had made other efforts to investigate whether the employee was disabled. This included holding return to work meetings with Ms Donelien, discussions with her, and corresponding with her GP.

Ms Donelien was dismissed for unsatisfactory attendance, failure to comply with the absence notification procedures and failure to work her contractual hours.

She bought a number of claims before the Tribunal all of which were dismissed. The focus of the appeal to the EAT was a claim that Liberata had failed to make reasonable adjustments and thereby discriminated against her by reason of her disability. The duty only arises where the employer either knows or could reasonably be expected to know that the employee has a disability. In this case although the Tribunal found that Ms Donelien was disabled at the relevant time, there was no suggestion that Liberata actually knew that she was disabled. The key issue was whether Liberata had constructive knowledge of her disability, i.e. whether it ought to have known she had a disability. The burden lies on the employer to show that it could not reasonably have been expected to know of the employee’s disability.

The EAT upheld the Tribunal’s decision that Liberata did not have constructive knowledge of the disability at the relevant time. The EAT accepted that the decision as to whether or not an employee is disabled, is one for the employer to make. This decision cannot be delegated to an occupational health adviser. Here, Liberata had made up its own mind and not simply deferred the decision to occupational health.

Although another employer might have followed up more strenuously on the questions Liberata had posed to OH, that particular issue should not be looked at in isolation. It should be viewed in the context of the other efforts made by the employer. These were enough to satisfy the EAT that Liberata should not be deemed to have constructive knowledge. Liberata could not have been expected to do more. The test is not one of “perfection”, but rather, reasonableness.

This case is reassuring for employers dealing with persistent short-term absences and difficult employees. Whilst employers must make reasonable enquiries to establish whether an employee is disabled, they do not need to take every step possible in order to avoid having constructive knowledge of the disability. It is also a useful reminder that employers should not accept occupational health advice uncritically; they must also give thought themselves to the issue of disability.

Metroline Travel Ltd v Stoute

EAT, 26 January 2015

The EAT held that type 2 diabetes controlled by diet did not automatically qualify as a disability. The claimant argued that he was disabled because he had type 2 diabetes. He controlled this by following a diet which avoided foods with a high sugar content such as sugary drinks. If he did not do this he might be at risk suffering a hypoglycaemic attack. The EAT held that the Tribunal had been wrong to find that type 2 diabetes is necessarily a disability. It is necessary to consider the circumstances of the case. It ruled that the need to abstain from sugary drinks which was caused by the employee’s diabetes, could not be considered a substantial adverse effect on

day to day activities. Moreover, when considering the effect of the diabetes, the effect of employee’s diet in controlling the diabetes should be taken into account. It was analogous to a “coping strategy” which diminishes the effect of a condition, rather than medication or a prosthesis the effect of which is generally ignored when assessing disability.

Although on the face of it, the EAT’s decision will be welcomed by employers, each case must be considered on its facts; it is possible that other claimants with type 2 diabetes will establish that they do satisfy the definition of ‘disability’.

Land Registry v Houghton and others
EAT, 12 February 2015

The EAT held that an employer discriminated against disabled employees by operating a bonus plan which automatically excluded employees who had received a formal warning for high levels of sickness absence.

The claimants were disabled employees who were automatically excluded from their employer’s bonus plan on account of having received a formal warning for high levels of sickness absence. Under the Land Registry’s bonus plan, formal warnings that had been received for conduct related matters could be ignored at a manager’s discretion. There was no such discretion in relation to warnings for sickness absence. Reasonable adjustments had been put in place for the disabled employees in other respects such as delaying the normal trigger point at which an absence warning would be given.

The employees brought claims under section 15 of the Equality Act 2010 for discrimination arising from disability. They were successful in the Tribunal. The Land Registry appealed.

The EAT dismissed the appeal. It found that:

- On the issue of causation, the link between disability and the non-payment of bonus was not too remote. The warning automatically disentitled the employees to the bonus. Without the disability the employees would not have run up the level of absence leading to the warning and would not have been automatically excluded from a bonus.

- Automatic disentitlement to bonus was “plainly” unfavourable treatment.

- It was irrelevant that the HR representative responsible for paying bonus was unaware of the employee’s disabilities. It was the fact of the employee’s disability related absences which led to the disqualifying warning. The motive of the HR representative who had the administrative task of linking the warning to non-payment of the bonus was not relevant to determining what caused the unfavourable treatment.

- The Tribunal’s reasoning on justification was permissible. It was accepted that there was a legitimate aim of acknowledging employees’ contributions and encouraging and rewarding good performance, and attendance. However, the bonus plan in place was not a proportionate means of achieving that legitimate aim. A manager had no discretion to decide that a employee would not be excluded from receiving a bonus and no account could be taken of any improvement in attendance post-warning.

This case illustrates that where employers have a link between attendance and bonus under their bonus plan, it is important to reserve discretion to avoid automatically withholding payment in circumstances where such exclusion would be potentially discriminatory. It was not sufficient to have a reasonable adjustment in place to delay the delivery of a warning for disability related absence, further flexibility was also required as to the effect of that warning. Had the Land Registry included such discretion at this stage, it may have been
The Trustees of Swansea Pension & Assurance Scheme and another v Williams

EAT, 21 July 2015

The EAT held that it was not unfavourable treatment to provide a reduced level of ill health early retirement pension to an employee whose disability required him to work reduced hours (and so receive a reduced salary) before retiring. It also gave general guidance on the meaning of “unfavourable treatment” in discrimination legislation, which it said was different from the concept of “detriment”.

Under the Equality Act 2010, “discrimination arising from disability” occurs when both:

- an employer treats an employee ‘unfairly’ because of something arising in consequence of the employee’s disability; and
- the employer cannot show that the treatment is ‘objectively justified’ as being a proportionate means of achieving a legitimate aim.

This was a new type of discrimination introduced in the Equality Act 2010. The reference to “unfavourable”, rather than “less favourable” treatment was intended to remove the need to identify a comparator in deciding whether there has been discrimination.

Mr Williams initially worked full-time for Swansea University. He suffered from various psychological problems, which amounted to a disability. The University agreed to reduce his hours to accommodate his disability, at his request. However, Mr Williams’ disability made him incapable of continuing to work and he took ill-health retirement.

Under the University’s pension scheme rules, he was entitled to a pension calculated as if he had worked until retirement age (67) at the salary he was earning at the date of retirement, paid immediately and without any actuarial reduction.

Mr Williams brought a claim for discrimination arising from disability, arguing that if he had been employed full time at the time of his dismissal, his enhanced pension would have been double that actually provided. The reason he was working part time was to accommodate his disability and so the reduced pension amounted to unfavourable treatment because of something (his reduced hours) arising in consequence of his disability.

The EAT held that it was perverse of the Tribunal to conclude that Mr Williams had been treated unfavourably in relation to his enhanced early retirement pension.

The EAT considered the meaning of “unfavourably” and made the following observations:

- it should not be equated with the concept of “detriment” used elsewhere in the Equality Act;
- it does not require a comparator. The comparison is not with the treatment of another (real or hypothetical) person but with “an objective sense of what is adverse as compared with what is beneficial”;
- it should be given the same meaning as in the context of pregnancy discrimination, where it has the sense of “placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person”;
- it is for a Tribunal to recognise when an individual has been treated unfavourably. This “involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be.”

- treatment which is advantageous cannot be said to be unfavourable, simply because it could have been more advantageous.

On the facts here, the Tribunal had failed to take into account that to qualify for ill health early retirement an employee had to be permanently incapable of fulfilling the duties of his post and such persons would (it was held) always have a disability under the Equality Act. Therefore, anyone who was not disabled would not qualify for the benefits. By comparison with any person without a disability, an employee taking ill-health retirement under the scheme would be treated favourably and it would be perverse to say they were “unfavourably” treated.

The EAT rejected the argument that Mr Williams could show unfavourable treatment by comparison with someone with a different disability, which came on suddenly, causing them to retire whilst still on full salary — that was a “less favourable treatment” rather than an “unfavourable” treatment test. Although apparently having ruled out the possibility of the claim succeeding, the EAT remitted the matter back to the Tribunal for further consideration of the facts.

This was the first EAT case to consider the meaning of “unfavourable” treatment under the Equality Act 2010. The guidance given is not entirely easy to apply and although the concept is said to be different from the concept of detriment, it may be that the two are in practice very close. In many cases the unfavourable treatment will be obvious.

The EAT appears to conclude that where favourable treatment is provided only to employees who have a disability an employee could not bring a claim simply because the effect of their particular disability made the benefit less generous than for others with a different type of disability. The EAT did not consider the fact that the Equality Act provides that references to a disability are to a particular type of disability. In practice, the point is fairly limited as it will be relatively unusual for benefits to be provided only to disabled employees, but not to employees who have sickness absence falling short of a disability. Consideration would also have to be given to the possibility of a claim for direct or indirect discrimination or a failure to make reasonable adjustments.

Discrimination — Fixed-term employees

Hall v Xerox UK Ltd
EAT, 11 July 2014

The EAT has upheld a Tribunal’s decision that less favourable treatment suffered by a fixed-term employee as a result of a term in a permanent health insurance (“PHI”) policy that restricted fixed-term employees from receiving the benefit if their contracts expired before the end of the 26 week qualifying period was not caused by the employer but the insurer.

Employees of Xerox were entitled to PHI under the terms of a policy between Xerox and Unum if they had been off work for over 26 weeks as a result of a qualifying injury. Under the policy, fixed-term employees would not be entitled to PHI where their fixed-term contracts expired before the end of the 26 week qualifying period. The employment contracts provided that the PHI benefit was governed by the terms of the underlying insurance policy and subject to the acceptance of the claim by Unum, and that Xerox was only liable to make payments to the employee under the scheme if payment had been received by Xerox from Unum.
Mr Hall worked for Xerox under a succession of fixed term contracts. In April 2012, he suffered a work-related injury. His contract at the time was due to expire in July 2012 but was subsequently extended until July 2013. Nonetheless, Unum rejected Mr Hall’s claim for PHI benefit as the relevant contract expired before the end of the 26 week qualifying period. He brought a claim for less favourable treatment on the grounds of his fixed-term status.

The Tribunal dismissed the claim. It found that whilst Mr Hall was treated less favourably than permanent employees, that was not caused by Xerox’s act or deliberate failure to act, it was a decision made by Unum. The Judge also considered that had the less favourable treatment been committed by Xerox, it would have been justified as there was no suitable alternative policy available which would not have disadvantaged fixed term employees. Mr Hall appealed to the EAT.

The EAT dismissed the appeal finding that the Tribunal was entitled to conclude that Xerox did not cause the detriment. Mr Hall argued that the less favourable treatment was caused by Xerox’s “act” of granting a benefit without taking the steps to ensure that the benefit would be provided in a way which did not discriminate between fixed-term and permanent employees. The EAT rejected this argument holding that a judge has to come to a “sensible, practical or (as has sometimes been termed) robust” view in identifying the cause of the less favourable treatment and that it is unhelpful to include every possible cause of a later consequence. The EAT accepted that the Tribunal was entitled to conclude that the reason why Mr Hall did not get the benefit was because Unum refused to pay Xerox. This was Unum’s act, not Xerox’s.

Mr Hall also argued Unum was acting as Xerox’s agent but the EAT rejected this. There was a clear distinction between a commercial provider of services contracted to provide these services and an agent acting on behalf of Xerox.

The EAT also held that the Tribunal was entitled to conclude on the evidence that if the less favourable treatment had been conducted by Xerox, it was justified. The Employment Judge was entitled to form a view on the evidence before it that no other insurer would have provided cover.

This is a helpful decision for employers. However, it should not be relied upon as establishing that employers can never be responsible for potentially discriminatory terms in underlying contracts with benefit providers. Employers who offer benefits which may have a less favourable effect on fixed-term employees or are otherwise discriminatory should ensure that the detriment can be objectively justified. The EAT appeared to accept that Xerox had a legitimate aim “to provide employees with PHI at no greater expense than the costs of an annual premium” but did not explore this in detail.

Discrimination — Race

Chandok v Tirkey
EAT, 2 December 2014

The EAT has upheld a Tribunal decision to allow a claim for caste discrimination finding that caste could fall within the wide definition of “ethnic origins” which is one aspect of the definition of race.

Ms Tirkey worked for Mr and Mrs Chandok as a live-in nanny, originally in India and then in the UK. She claimed that she was treated badly and in a demeaning manner in various ways by the Chandoks and brought a number of claims, including claims alleging that her poor treatment had been linked to her caste status. Ms Tirkey was part of the Adivasi caste, one of the lowest castes in the Indian caste hierarchy.

The Chandoks applied for this claim to be struck out on the basis that caste is not a “protected
characteristic” in its own right under the Equality Act 2010 ("EqA") and did not fall within the definition of "race". They relied on section 9(5) EqA, (which specifically requires Parliament to amend the definition of race to provide for caste), as evidence that caste is not currently covered by the EqA. The Tribunal however allowed the claim to proceed. The Chandoks appealed.

The EAT dismissed the appeal and allowed the amended claim to proceed to a full Tribunal hearing.

The EAT found that whilst caste is not specifically covered by the EqA, or expressly included in the definition of “race”, it was capable of falling within the scope of “ethnic origins” in view of the wide and flexible meaning given to that concept in the leading cases, (the House of Lords in *Mandla Lee* [1983] looking at Sikhs, and the Supreme Court in *R(E) v governing Body of JFS* [2010] considering the position of orthodox Jews). The EAT held that these cases established that discrimination on the basis of an individual’s descent at birth could amount to unlawful race discrimination, and that Ms Tirkey’s caste was similarly a status she had acquired at birth which she could not change.

The EAT also noted that “ethnic origins” and “ethnic group” are given a wide and flexible interpretation in the EHRC Code of Practice on Employment. The EAT held that the fact that the Government had decided to legislate to include caste as an aspect of race, but had not yet done so, was not determinative either way.

This is a useful decision confirming that caste can amount to an aspect of race for discrimination purposes notwithstanding that it is not specifically referred to in the Equality Act 2010. Earlier Tribunal decisions had reached conflicting conclusions.

**Home Office v Essop and others**

*Court of Appeal, 22 June 2015*

The Court of Appeal has found that in order to succeed in a claim for indirect discrimination claimants must demonstrate both (1) why a provision, criterion or practice disadvantages a group; and (2) that this same reason disadvantages them; a more difficult test than that suggested by the EAT.

Section 19 of the Equality Act 2010 provides that an individual (B) will have been subject to indirect discrimination where:

1. an employer (A) applies a provision, criterion or practice ("PCP") to B;
2. A also applies (or would apply) that PCP to persons who do not share B's protected characteristic;
3. the PCP puts (or would put) persons with whom B shares the protected characteristic at a particular disadvantage compared to others ("group disadvantage");
4. the PCP puts (or would put) B at that disadvantage ("personal disadvantage"); and
5. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

Staff at the Home Office were required to pass a Core Skills Assessment ("CSA") in order be eligible for promotion. Statistical evidence showed that candidates over 35 and from black and minority ethnic ("BME") backgrounds were less likely to pass the CSA. However, no one could identify why this was the case.

Mr Essop and his colleagues were BME and/or over 35 and had failed the CSA. They brought indirect race and age discrimination proceedings against the Home Office on the basis that the requirement to pass the CSA was a PCP; there was a statistically significant difference between their success rate and that of younger non-BME candidates (satisfying the "group disadvantage" element); and that, as they had failed the CSA, they could show "personal disadvantage".

...

The Court of Appeal found that the existence of a group disadvantage does not automatically mean that a particular claimant failing the CSA did so because they fall within that group — personal disadvantage cannot simply be established through proving group disadvantage. The Court was particularly concerned by the concept of “coat-tailing” — of allowing individuals to succeed in a claim simply by latching on to a disadvantaged group even though they personally did not share that disadvantage. The example given was of a BME individual who would otherwise fall within the disadvantaged group who turned up late to take the CSA, only answered a couple of questions and who therefore also failed the test. On the EAT’s analysis, once an individual had established group disadvantage, personal disadvantage could be demonstrated simply by showing that the individual was part of the disadvantaged group. Accordingly, following the EAT’s approach, their claim would succeed. In particular, the Court felt that the EAT’s suggestion that this issue could be dealt with sufficiently by tribunals either when they were considering objective justification for the PCP, or in the remedy ultimately applied to an apparent “tail-coater”, was impractical.

However, the Court of Appeal did note that the burden of proof rules mean that where claimants can show evidence from which a tribunal could infer group and / or individual disadvantage, the burden shifts to the employer [to show a non-discriminatory reason. In this case the employees could rely on the statistical evidence in trying to show both group and individual disadvantages. The decision is helpful for employers, who might otherwise have faced numerous “coat-tail” claims. In order to prove indirect discrimination, claimants need to be able to show why the PCP disadvantaged the group (i.e. group disadvantage), and also that this same reason disadvantaged them personally (i.e. personal disadvantage). However, the decision has been criticised for introducing a new element into the test for indirect discrimination and is being appealed before Supreme Court.

Discrimination — Sex

Sefton Borough Council v Wainwright
EAT, 13 October 2014

The EAT has held that the duty to offer a woman on maternity leave a suitable alternative vacancy in priority to other candidates under Regulation 10 of the Maternity and Parental Leave Regulations ("the Reg 10 duty") is triggered when the employer becomes aware that her role is redundant or potentially redundant, as defined in the Employment Rights Act 1996. The EAT also confirmed that whilst a breach of the Reg 10 duty will render a dismissal automatically unfair, it does not necessarily mean that the woman was directly discriminated against on the grounds of sex.

Regulation 10 of the Maternity and Parental Leave Regulations 1999 gives a woman on maternity leave a right to be offered a suitable alternative vacancy if a redundancy situation arises, even if there are other candidates who are better suited to the role. Breach of the Reg 10 duty renders a dismissal automatically unfair.

Faced with budgetary constraints, the Council decided to create a new Democratic Service Manager role ("DSM role"), which was a combination of two existing manager roles held by Mrs Wainwright and Mr Pierce. Mrs Wainwright and Mr Pierce were informed that their roles were at risk of redundancy in July 2012, by which point Mrs Wainwright had commenced maternity leave.

The Council invited both employees to apply for the new role. Following the interview process, Mr Pierce was confirmed in role as the...
Council considered him the better candidate. Mrs Wainwright was given notice of dismissal and ultimately dismissed for redundancy. She brought claims for breach of the Reg 10 duty, automatic unfair dismissal and direct sex discrimination.

The Tribunal upheld all her claims. In respect of the Reg 10 duty, the Council accepted that Mrs Wainwright was qualified for the DSM role and that it would have been a suitable alternative vacancy if the Reg 10 duty was triggered. However, it argued that the Reg 10 duty was not triggered until the restructuring was complete i.e. when Mr Pierce had been confirmed in the newly combined role. The Tribunal rejected this argument holding that the Reg 10 duty was triggered when Ms Wainwright’s role was identified as being at risk of redundancy. The Tribunal was entitled to find that this happened in July 2012. It would undermine the purpose of Reg 10 if the Council was free to wait until after the restructure had been completed before offering Ms Wainwright the vacancy.

The EAT also suggested that the Reg 10 duty may be complied with by offering “a” suitable alternative vacancy and that there was no need to offer “every” suitable vacancy to a woman on maternity leave.

In respect of direct discrimination, the Tribunal was wrong to assume that the breach of the Reg 10 duty inevitably meant that the Council had directly discriminated against Mrs Wainwright on the grounds of sex. The Tribunal should have investigated the reason(s) why Mrs Wainwright had been treated the way she had been, but had not done so.

This case is helpful in light of the limited authorities to date on the scope of the Reg 10 duty. It is important to note though that this case does not decide that a pregnant woman should be taken out of the redundancy pool where, for example, the roles are not being restructured but are merely being reduced in number. 

Dismissal

A number of significant decisions relating to dismissal were reported in 2015, in particular relating to employee misconduct.

The Court of Appeal’s decision in Shrestha provides comfort for employers conducting investigations in a disciplinary scenario. It confirms that an employer only has to carry out a reasonable investigation and is not required to investigate every explanation put forward by the employee. In Way, the Court of Appeal held that a final written warning given in bad faith could not be relied on to justify a dismissal for further misconduct. While this might seem an obvious conclusion, the EAT had reached a different conclusion earlier in the proceedings. The Court reached its conclusion even though the employee had not appealed against the written warning at the time and the employer had conducted a reasonable investigation into the allegations of bad faith as part of the dismissal procedure and had concluded that such allegations were unfounded. On a related theme, the EAT in Jinadu found that it won’t always be necessary to put disciplinary proceedings on hold where an employee makes allegations about the actions of some of the managers involved.
Decision managers in disciplinary procedures may sometimes look to HR to steer them on conducting the disciplinary hearing. Sometimes, the request for such guidance may spill over into input on the decision. The perils of this were highlighted in Ramphal, in which the EAT confirmed that HR’s role should be limited to the matters of law, procedures, clarity of reporting and consistency of sanction. Anything more than that might be seen as improper influence on the decision maker and render a dismissal unfair.

In the first EAT decision looking at misuse of Twitter in the context of unfair dismissal claim, Game Retail provides an interesting read. It is unfortunate that the EAT declined to provide general guidance for dealing with these types of misuse of social media cases, although it did list some “obvious” factors to consider.

**Game Retail Limited v Laws**

*EAT, 3 November 2014*

The EAT has overturned a Tribunal decision that an employee was unfairly dismissed for posting offensive tweets on Twitter. The EAT highlighted the more public nature of Twitter when compared to other forms of social media, and held that the employee had not taken any steps to restrict his Twitter account to private use. Further, it was not necessary for the employer to show that any of its customers had actually been offended by the tweets. It was enough simply that there was the potential for offence and resulting damage to the company’s reputation.

Game Retail Limited (“Game”) has over 300 stores in the UK and each store has its own Twitter account, managed by the store manager, and followed by a large number of customers. Mr Laws was employed as a Risk and Loss Prevention Investigator and was responsible for about 100 stores. He followed the stores using his personal Twitter account, with a view to monitoring their tweets for inappropriate activity e.g. offers of merchandise at reduced prices. His Twitter profile made no reference to him being a Game employee or being associated in any way with Game. However, out of the 100 stores he was following, 65 stores followed his personal Twitter feed in return. Many of these stores had begun to do so when encouraged by a tweet from one of the store managers, which Mr Laws had then retweeted on his personal Twitter feed.

Game was notified by a store manager about potentially offensive tweets that Mr Laws had posted. The tweets included many expletives and were expressions of his opinions on various non-work related, personal issues, some of which Game felt were discriminatory on the grounds of race and disability. After a disciplinary process, Mr Laws was summarily dismissed for gross misconduct. He claimed unfair dismissal.

The Tribunal found that he had been unfairly dismissed, on the basis that the dismissal fell outside the band of reasonable responses. It held that Mr Laws’ Twitter feed had been for private use, (partly on the basis that the posts had been made using his personal mobile phone and in his own time), and that Game had never established that any member of the public or any of its employees had access to or seen the offensive tweets, or had associated Mr Laws with Game. Further, Game’s disciplinary policy did not expressly state that offensive or inappropriate use of social media constituted gross misconduct. Game appealed.

The EAT upheld the appeal and remitted the case to a new Tribunal. The EAT held that the Tribunal had erred in finding that Mr Laws’ use of Twitter had been limited to his own private use for the following reasons:

- his followers were not restricted to friends or social acquaintances;
- he hadn’t made any attempt to use the Twitter privacy restriction settings;

- he hadn’t set up different Twitter accounts, one for monitoring as part of his work and another for personal use; and
- he was aware, (and indeed had encouraged via retweeting), that his tweets could be accessed by 65 stores and potentially also by their customers.

The EAT stated that a balance had to be drawn between an employer’s desire to remove or reduce reputational risk from the use of social media by employees on the one hand, and an employee’s right to freedom of expression on the other. On the facts, Mr Laws’ tweets could not be considered private.

The EAT held that the Tribunal had also erred by focussing on whether Mr Laws’ tweets had actually offended someone. The question that it should have asked was whether Game had been entitled to reach the conclusion that the tweets, which were accessible by 65 of its stores and potentially their customers, might have caused offence.

Finally, the EAT held that the Tribunal had wrongly considered that it was relevant that Mr Laws had not posted anything derogatory about Game or anything that might reveal he was their employee. Given that he was following 100 stores, and 65 stores were in turn following him, there was clearly some connection with the company which the Tribunal had failed to address.

This is the first reported EAT decision looking at misuse of Twitter in the context of an unfair dismissal claim and the EAT’s findings are helpful to employers. However, the EAT stressed that each case must turn on its specific facts and declined to provide general guidance for dealing with such cases.

The EAT did say that the following “obvious” factors will usually be relevant when considering the fairness of a dismissal based on misuse of social media:

- whether the employer has an IT / social media policy;
- the nature and seriousness of any alleged misuse;
- whether there have been any previous warnings for similar misconduct in the past; and
- any actual or potential damage to customer relationships.

It is clear from the EAT’s judgment, however, that whether or not the social media tool in question has been used privately is an important factor. In Smith v Trafford Housing Trust [2012], the High Court held that Facebook posts had not acquired a sufficiently work-related context partly because the employee had restricted access to his profile to “friends of friends”.

In Laws, the EAT contrasted the more public nature of Twitter and the fact that Mr Laws had not restricted his settings at all.

Finally, and unsurprisingly, the EAT’s judgment emphasises that employers should clearly set out what conduct is acceptable and what is not in their IT / social media policies.

Salmon v Castlebeck Care & others
EAT, 10 December 2014

The EAT has ruled that where an appeal panel decided that an original dismissal was “unsafe”, the employee’s contract of employment was automatically revived. There was no need for the decision on appeal to have been communicated to the employee for it to be effective.

Mrs Salmon was summarily dismissed for gross misconduct by Castlebeck Care Teesdale Limited (“Castlebeck”) on 10 July 2013. She had a contractual right to appeal, which she exercised. On 4 September 2013, the business of Castlebeck transferred to Danshell Healthcare Limited (“Danshell”) under TUPE. Mrs Salmon’s appeal was heard on 17 September 2013 by employees of Danshell, who had transferred to Danshell from Castlebeck’s employment under TUPE.
Mrs Salmon’s appeal was deemed “unsafe” by the appeal panel but no express decision was made to reinstate her employment or to indicate that her employment had revived as a result of the successful appeal. Instead, Danshell instructed their external employment consultants to agree a settlement agreement with her. Mrs Salmon was never told of the outcome of her appeal. No agreement was reached and she brought a claim for unfair dismissal against Castlebeck and Danshell.

The Tribunal upheld the claim against Castlebeck but dismissed the claim against Danshell holding that the latter had never been her employer. The Tribunal considered that for the appeal outcome to be effective, there needed to be a clear decision to reinstate her following the outcome of the appeal hearing, and for the reinstatement decision to be communicated to her; neither of which had happened here. Mrs Salmon appealed.

The EAT upheld the appeal. It held that the Tribunal had erred in “looking for a separate decision, consequent upon a successful appeal, that there should be “reinstatement”. It considered that there was no need for an express revival or reinstatement of employment following a successful appeal outcome and that “it must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to reverse or vary the decision made below”.

It also held that there was no need for the successful appeal outcome to have been communicated to Mrs Salmon for it to be effective. The position for appeal outcomes is different to a decision to dismiss, which does need to be communicated to an employee to be effective, ([Gisda Cyf v Barratt [2010]], not least so as to give clarity on when time starts to run for limitation purposes. Once a decision to allow the appeal is made, the decision automatically revives the contract of employment unless there is some contractual term or provision that prevents it, and there is no need for that decision to be communicated for it to become effective.

As the Tribunal had found on the facts that there had been a successful appeal in Mrs Salmon’s case, it followed that she was employed immediately before the transfer and that her claims were properly against Danshell and not Castlebeck.

It is clear from this decision that a successful appeal against dismissal will generally automatically revive the contract of employment. The facts of this case are fairly unusual, but employers who wish to take steps to protect themselves against this decision might consider expressly stating in a disciplinary policy that the outcome of an appeal is not final until it is confirmed in writing to the employee. Employers should also ensure that their appeal panel understands the implications of any decision they make, and where appropriate, take legally privileged advice on the decision before issuing it.

**Shrestha v Genesis Housing Association Ltd**

*Court of Appeal, 18 February 2015*

The Court of Appeal has upheld a decision of the EAT that an employee was fairly dismissed for gross misconduct. The employer had carried out a reasonable investigation and there was no need for it to investigate each “line of defence” put forward by the employee.

Mr Shrestha used his own car to travel to see clients and was entitled to claim expenses for the mileage travelled. His employer conducted an audit of his mileage claims which revealed unusually high mileage, in some cases nearly twice as far as the distances calculated by the AA / RAC route-finder. The employer initiated a disciplinary investigation which compared the mileage claimed by Mr Shrestha over the relevant period not just against the recommended AA / RAC figures but also against the same journeys...
carried out by him in the previous year. The distances claimed had significantly increased.

At the disciplinary hearing Mr Shrestha gave several explanations for the mileage discrepancies: difficulties in parking, one-way road systems and road works causing closures or diversions. He was questioned on two of the journeys he had claimed for but not in respect of every journey. The disciplinary manager considered Mr. Shrestha’s explanations but concluded that they could not provide a plausible explanation for the high mileage on every journey and found that Mr Shrestha was guilty of gross misconduct.

Following an unsuccessful disciplinary appeal, Mr Shrestha claimed unfair and wrongful dismissal. He argued that his employer had not carried out a reasonable investigation; it should have carried out further enquiries such as contacting the local authority to check the parking situation and attempting to recreate each journey in order to validate his claims that road works and parking problems had increased his mileage. The Tribunal and EAT rejected his claims.

Mr Shrestha submitted that the Tribunal should have considered the reasonableness of what the employer had failed to do, as well as the reasonableness of what it had done and an employer was obliged to investigate “each possible line of defence” raised by an employee.

The Court of Appeal dismissed Mr Shrestha’s appeal. It determined that the investigation should be looked at as a whole when assessing the question of “reasonableness”. Whilst an employer should consider any explanations for the misconduct put forward by an employee, the extent to which it should investigate them will depend on the circumstances of the case. However, it was wrong to suggest that an investigation could not be reasonable unless every line of enquiry was pursued. The Tribunal had been entitled to conclude that a reasonable investigation had been carried out.

Williams v Leeds United Football Club
High Court, 19 February 2015

The High Court has held that an employer was entitled to dismiss a senior employee without notice or notice pay after it discovered he had sent a pornographic email from his work account both externally and to a junior, female, employee. This was the case even though i) the employer had already given the employee notice of redundancy (prior to discovering the email) ii) the email had been sent 5 years prior to its discovery and iii) the email came to light because the employer was looking for something to justify dismissal.

Leeds United Football Club (the “Club”) employed Mr Williams as a director. The Club decided to restructure and in June 2013 instructed forensic investigations to look for evidence which would justify dismissing Mr Williams for gross misconduct. The club gave notice of redundancy to him on 23 July 2013. The following day it discovered evidence that 5½ years earlier he had forwarded an obscene and pornographic email from his work email account to a friend at another football club. Following a disciplinary process, the Club dismissed Mr Williams for gross misconduct without notice or pay in lieu of notice.
Mr Williams issued a claim for damages for his 12 month notice period in the High Court claiming wrongful dismissal. The Club subsequently discovered that Mr Williams had also forwarded the email in question to a junior female employee at the Club and another friend of his outside the Club. It argued that it could rely on these acts as well as the initial email which led to the dismissal to justify the dismissal.

The Court dismissed Mr Williams’ claim. It held that by his conduct he had breached the implied term of mutual trust and confidence such that he was in repudiatory breach of contract entitling the club to dismiss him immediately without notice. It held that, following *Boston Deep Sea Fishing and Ice Company v Ansell* [1888], the club was entitled to rely on conduct discovered after the dismissal to justify its decision to dismiss.

In assessing whether the breach of contract by Mr Williams was serious enough to be a repudiation, given that:

- Mr Williams held a very senior management post at the Club.
- The images in the email were obscene and pornographic.
- Sending the images to a junior, female, employee by a senior manager who had significant influence over her career might well have caused offence and left the Club vulnerable to a harassment claim.
- The club’s reputation was important when securing and retaining supporters and sponsors. The images were sent from an email address containing the name of the Club and would have been of interest to the media, so could easily have damaged the Club’s reputation.

In relation to various arguments made by Mr Williams, the Court also made the following findings:

- It was not relevant that Mr Williams had continued to work for the Club for some five and a half years after he forwarded the emails. The relevant issue was whether Mr Williams’ conduct was sufficiently serious to amount to a repudiatory breach when it was discovered by the Club.

- The fact that the Club was looking for evidence to justify dismissal and was motivated by its own commercial and financial interests, did not prevent it relying on the repudiatory breach to dismiss.

It comes as no great surprise that the High Court found that forwarding pornographic material from a work email account amounted to a serious breach of contract entitling the employer to dismiss a senior employee without notice. Previous cases have held that all breaches of the duty of trust and confidence are “repudiatory” and it is not necessary to go on and consider the seriousness of the breach.

Equally, it is well-established that for a breach of contract claim, an employer can rely on conduct coming to light after dismissal. Employers should note that the same is not true of unfair dismissal claims although subsequently discovered conduct can be used to reduce compensation.
There are generally more cases reported where employees claim their employer has breached the implied duty of trust and confidence so it is interesting to see one where the employer relies on this term.

**The Basildon Academies v Amadi**  
*EAT, 27 February 2015*

The EAT has held that employees are not under an implied duty to disclose to their employer allegations of their own misconduct.

Mr Amadi was employed as a tutor at The Basildon Academies (“Basildon”) for two days a week. His employment contract incorporated a number of documents including a Code of Conduct. Unknown to Basildon, Mr Amadi also worked as a tutor at Richmond upon Thames College (“Richmond”) over the remaining 3 days of the week. A female pupil at Richmond made sexual assault allegations against Mr Amadi and he was suspended. He was arrested by the police who contacted Basildon to make further enquires. This alerted Basildon both to his work for Richmond and the allegations of sexual misconduct.

Mr Amadi was subsequently dismissed by Basildon for gross misconduct for failing to inform Basildon of: his contract with Richmond, in breach of an express term in his Basildon contract; and the allegations of sexual misconduct made against him whilst employed by Richmond. Mr Amadi claimed unfair dismissal.

The Tribunal held that Mr Amadi had been unfairly dismissed on the basis that dismissal had been outside the band of reasonable responses open to Basildon. Basildon appealed to the EAT, but their appeal was rejected.

The EAT held that the starting point was to consider any express terms of Mr Amadi’s contract. There was a clear, express obligation for Mr Amadi to inform Basildon of any other employment, which he had breached. However, by itself, this did not amount to gross misconduct.

The EAT found that there was no express obligation for Mr Amadi to disclose to Basildon the allegations of his own misconduct. Mr Amadi’s contract of employment did not address the issue, and the Code of Conduct, which required disclosure by employees of significant and/or formal complaints made against them, was not sufficiently clearly drafted so as to extend to allegations of misconduct outside Mr Amadi’s employment with Basildon.

Given that there was no express term on which Basildon could rely, the EAT considered whether Mr Amadi had been under an implied duty to disclose the allegations. The EAT re-affirmed the long-established principle in *Bell v Lever Brothers* [1932] that there is no implied obligation requiring an employee to disclose their own misconduct to their employer. The EAT held that subsequent cases had not expressed a “concluded view” on the issue, as the point had been considered in the context of employees who also owed fiduciary duties, but neither had those cases detracted from the position in *Bell*, (see *Item Software (UK) Ltd v Fassihi and others* [2004] and *Lister v Hesley Hall Ltd* [2001]).

Accordingly, Mr Amadi had not breached his contract by failing to disclose the allegations of sexual misconduct at Richmond and the Tribunal had therefore been entitled to find that Basildon’s dismissal of Mr Amadi was outside the band of reasonable responses.

This case is a useful reminder that in the absence of a clear contractual term, an employee will not be under an obligation to disclose their own misconduct, or any allegations of such misconduct, even where the misconduct is serious, including of a sexual nature. Accordingly, employers should take care to ensure that employment contracts/handbooks expressly require such an obligation, and are drafted widely enough to cover misconduct within and outside the employment relationship.
Way v Spectrum Property Care Ltd
Court of Appeal, 22 April 2015

The Court of Appeal has held that a final written warning which was given in bad faith could not be relied upon to justify a dismissal for further misconduct. This was the case even where the employee had not appealed against the written warning at the time and the employer had conducted a reasonable investigation into the allegations of bad faith as part of the dismissal procedure and concluded that there was no basis for them.

A live, final, written warning can make it fair to dismiss an employee for misconduct which would otherwise not justify dismissal. The courts have previously considered the extent to which a dismissing manager must revisit the final written warning before relying on it. In Davies v Sandwell Metropolitan Borough Council [2013] the Court of Appeal concluded that: “...the essential principle is that it is legitimate for an employer to rely on a final written warning, provided it was issued in good faith, that there were at least prima facie grounds for imposing it and that it must not have been manifestly inappropriate to issue it.”

Mr Way was given a final written warning for a breach of Spectrum’s recruitment procedure. The warning required him to familiarise himself with all Group policies. He did not appeal against the warning, but this was because he was told that if he appealed the sanction might be increased to dismissal.

While this warning was still live, he committed a separate form of misconduct — sending inappropriate emails in breach of the computer usage policy. It was accepted that in the absence of prior misconduct, this would only have justified a final written warning. However, taking account of his existing written warning he was dismissed. He appealed against his dismissal and as part of the appeal claimed that the original written warning had been given in bad faith — alleging that the disciplinary manager was dishonest and seeking to cover up his own role in the recruitment process. This was investigated by the appeal manager who concluded that there was no evidence to substantiate the allegations of bad faith and the dismissal should be upheld.

The Tribunal and the EAT both rejected the claim for unfair dismissal. The EAT held that even if the warning had been issued in bad faith, the employer was entitled to rely on it in the circumstances of this case. This appears to have been because the warning was valid on its face (there were grounds for imposing it and it was not manifestly inappropriate), not appealed at the time and had been investigated by the appeal manager in the dismissal proceedings.

The Court of Appeal allowed Mr Way’s appeal. It held that in the circumstances of the case a warning which had been given in bad faith could not be taken into account in deciding whether there was sufficient reason to dismiss an employee. This was the effect of the decision in Davies v Sandwell (see above). It did not matter that Mr Way had not appealed at the time, or that the question of bad faith had been investigated reasonably when it was raised in the appeal against dismissal.

The case was referred back to the Tribunal to consider whether the warning had been issued in bad faith and whether the dismissal was fair.

The Court of Appeal applied existing principles from previous cases such as Davies v Sandwell (see above), highlighting a potential risk for employers in dismissing on the basis of a prior written warning. The thrust of the previous case law was that employers would generally not have to look behind a prior written warning before relying on it to dismiss. Provided there were — on the face of the matter — grounds for the warning and it was not manifestly inappropriate, it could be relied upon. This case shows the limits...
of that approach; if the warning was given in bad faith it cannot be relied upon even where it appeared on its face to be appropriate and based on reasonable grounds. Indeed, even if the employer conducts a reasonable investigation into allegations of bad faith this will not be a defence if the employee actually shows in the Tribunal that the warning was issued in bad faith.

Of course, it is likely to be rare for employees to be able to show that a warning was given in bad faith. However, the case leaves open the prospect that in a claim for unfair dismissal, where bad faith of a written warning is alleged, evidence will need to be brought to justify the final written warning as well as the appeal, adding to the length and complexity of the hearing. Where bad faith in relation to a previous warning is raised during a disciplinary process, the employer will need to consider the extent to which it looks into this to understand the risk of the allegation of bad faith succeeding.

**Ramphal v Department for Transport**  
*EAT, 4 September 2015*

The EAT has held that HR should limit its advice on disciplinary issues to guidance on the law and the policy / procedure to be followed and should not unduly influence the decision-maker on the finding in an individual case, including the appropriate sanction.

In order to establish a fair dismissal on the grounds of conduct, employers must be able to show that at the time of dismissal:
- the employer believed the employee to be guilty of misconduct;
- the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
- the employer had carried out as much investigation as was reasonable in the circumstances.

In terms of the investigation, the Supreme Court has previously held in *Chhabra v West London Mental Health NHS Trust* [2013] that “there would generally be no impropriety in a case investigator seeking advice from an employer’s Human Resources department, for example on questions of procedure...” (emphasis added).

Following reports of suspicious activity, the Department of Transport launched an investigation into Mr Ramphal’s use of the company credit card and of hire cars. Mr Goodchild was appointed as the manager to carry out both the investigation and the disciplinary hearing. As Mr Goodchild was relatively inexperienced, he asked HR initially for advice on the process, and subsequently to review his preliminary report. The report set out both the findings of Mr Goodchild’s investigation and his suggested finding / recommended sanction after the disciplinary hearing with Mr Ramphal. HR had not been present at the hearing.

Following exchanges between Mr Goodchild and HR over a 6 month period, the finding in Mr Goodchild’s report changed from one of misconduct with a sanction of a final written warning, to one of gross misconduct with a sanction of summary dismissal.

Mr Ramphal was subsequently dismissed and he claimed unfair dismissal. The Tribunal held that the dismissal had been fair as it found that the company had carried out a reasonable investigation, the decision to dismiss had been within the band of reasonable responses and, in particular, Mr Goodchild had not been “much influenced” by HR. Mr Ramphal appealed.

The EAT allowed the appeal. The EAT commented that it was “disturbing” to note the dramatic changes to Mr Goodchild’s report after the intervention by HR. The EAT felt that the changes were so striking that they gave rise to an inference of improper influence by HR.
Relying on the Supreme Court’s judgment in *Chhabra*, the EAT held that an investigatory / disciplinary manager is entitled to seek advice from HR, but HR must be careful to limit its advice to questions of law and procedure. Whilst HR could advise on issues of consistency for the organisation, HR should steer away from advising on findings of fact in individual cases, and which category of misconduct / which sanction should be applied in an individual case. The claim was remitted back to the original Tribunal to decide whether the influence of HR had been improper.

The EAT’s decision is a useful reminder of the danger of an unfair dismissal claim if HR over-step the mark when advising managers on appropriate findings / sanction in a disciplinary case, where they are not a joint decision maker. Advice on legal tests, e.g. the band of reasonable responses in dismissal cases, and the possible findings that might be available to the manager, including the range of sanctions and issues of consistency for the organisation, should not render any dismissal unfair. However, seeking to influence the decision-maker to take a different view on what they find and / or which sanction to apply could well do so.

On a practical level, the case is a reminder that employers should also be mindful that correspondence between HR and the manager(s) making the decision in a disciplinary case will not attract legal privilege and will therefore be disclosable in any legal proceedings. In the present case the fact that the hearing manager prepared a first draft of his decision and sent it to HR in a non-privileged e-mail and subsequent correspondence between the manager and HR left a clear paper trail showing the change of the manager’s decision. The manager was then unable to explain why he changed his mind, when he came to give evidence.

**Barton v Greenwich BC**  
*EAT, 1 May 2015*

The EAT upheld the Tribunal’s decision that Mr Barton was fairly dismissed for misconduct breaching an instruction not to contact the Information Commissioner’s Office (ICO). The employee’s claim that he had been unfairly dismissed for making a protected disclosure failed as the disclosure to the ICO did not satisfy the requirement (which is specific to disclosures to prescribed persons, rather than the employer) that Mr Barton considered it to be substantially true.

Mr Barton was contacted by a colleague who said that his supervisor had sent hundreds of emails containing personal data to her personal email address. Without looking into the matter further or speaking to his manager, Mr Barton emailed the ICO repeating this allegation. He then informed his head of department of this concern and told him that he had contacted the ICO. Mr Barton was instructed not to contact the ICO again without his manager’s permission while the matter was investigated. Despite this instruction, Mr Barton telephoned the ICO to seek advice about whether his employer could tell him not to contact the ICO.

The Council investigated the matter and concluded that the relevant employee had emailed only a small number of documents to her personal email address, and that her conduct in doing so was not inappropriate. Mr Barton was disciplined for this failure to follow a legitimate instruction, as well as for a separate matter. Considering the two forms of misconduct together, on top of a live final written warning for an earlier offence, he was dismissed. He argued that he had been unfairly dismissed as a result of protected disclosures relying on both the original email to the ICO and the subsequent phone call.

The EAT upheld the Tribunal’s decision that Mr Barton was fairly dismissed for misconduct. It agreed with the Tribunal’s rejection of the argument that the email and phone call be aggregated...

to form a single protected disclosure. Each disclosure must be considered separately. The telephone call could not on its own constitute a qualifying disclosure in the absence of information [following the decision in Bolton School v Evans (2006)].

In relation to the original email, while it did constitute a qualifying disclosure it was not protected. As the disclosure was made to a prescribed person (the ICO), rather than the employer, it could only be a protected disclosure if Mr Barton reasonably believed the information disclosed was substantially true. The EAT concluded that the Tribunal was entitled to find that Barton’s belief in the truth of the allegations was not reasonable. He had jumped the gun by going to the ICO so quickly and could have first sought verification of the allegations raised by his colleague.

Whilst this is a useful case for employers, it should be treated with a degree of caution, since the finding on unfair dismissal turned on the facts of the claimant’s state of mind at the time the relevant disclosure was made. Furthermore, the decision on the issue of whether disclosures could be aggregated to form a protected disclosure can be contrasted with the EAT’s decision last year in Norbrook Laboratories v Shaw (2013). In that case, the claimant sent a series of emails, which when read together, amounted to a communication about the health and safety of employees being at risk due to dangerous road conditions. The EAT held that an earlier communication can be read together with a later one as “embedded” within it, rendering the later communication a protected disclosure, even if taken on their own they would not qualify as qualifying disclosures. This can perhaps be distinguished from the situation in Barton where each communication related to a different subject matter.

**Jinadu v Docklands Buses**

*EAT, 17 March 2015*

The EAT has confirmed that it is not always necessary to put a disciplinary process on hold to deal with an employee’s grievance.

Ms Jinadu was a bus driver who was subjected to disciplinary proceedings due to alleged poor driving. During the disciplinary process, Ms Jinadu raised grievances alleging that certain of the managers involved were bullying and discriminating against her. Her employer continued with the disciplinary process and dismissed her.

The Tribunal had found that her dismissal was fair. On appeal the EAT rejected Ms Jinadu’s argument that the dismissal was unfair because the employer had not put the disciplinary process on hold to deal with her grievance.

The ACAS Guide on Discipline and Grievances at work states that an employer should consider adjourning a disciplinary process when an employee alleges a conflict of interest with the disciplinary manager, bias or possible discrimination. However, this case is a useful reminder that it will not always be necessary to put a disciplinary process on hold whenever such a grievance is submitted. The employer should consider whether it is appropriate to pause the process, but in in appropriate circumstances may choose to proceed notwithstanding the grievance.

**MBNA Limited v Jones**

*EAT, 1 September 2015*

The EAT has reconfirmed that disparity of treatment will only render a dismissal unfair where the circumstances of the case are truly parallel.

MBNA held a 20th anniversary celebration at Chester Racecourse. Prior to the event, staff were informed that it was a corporate event and that normal standards of behaviour and conduct would apply. Misconduct would be subject to MBNA’s procedures and guidelines.
Both Mr Jones and his colleague Mr Battersby had been drinking and, during the afternoon, Mr Battersby kneed Mr Jones in the leg. The disciplinary manager later found this was not done with any force or aggression. However, Mr Jones responded by punching Mr Battersby in the face.

The celebrations moved to a club, Mr Battersby waited outside the club for Mr Jones and sent him seven texts threatening physical violence. Ultimately Mr Battersby did not carry out his threats. After a disciplinary investigation and hearings, Mr Jones was dismissed for gross misconduct and Mr Battersby was given a final written warning.

Mr Jones claimed unfair dismissal arguing that the disciplinary sanction he received was inconsistent with that imposed on Mr Battersby and that his dismissal was therefore unfair. The Tribunal held that Mr Jones’s dismissal was unfair and MBNA appealed.

The EAT upheld MBNA’s appeal, finding that the Tribunal did not expressly address the question of whether the circumstances of Mr Jones and Mr Battersby were sufficiently similar to render an argument on disparity appropriate. They held that, had the Tribunal applied the guidance in Hadjioannou, it would have been bound to find that there were key differences. Mr Jones punched Mr Battersby in the face at a work event having already been informed that MBNA’s conduct rules applied. Mr Battersby’s conduct later in the evening was reprehensible but he did not carry out his threats and the events did not occur in the workplace.

Whilst inconsistent treatment can be relevant when reaching a decision to dismiss, the circumstances leading to the dismissal must be sufficiently similar. The most important question is whether an employer has reached reasonable conclusions and applied a reasonable sanction in relation to the dismissed employee, regardless of whether an employer has been unduly lenient or reached unreasonable conclusions in respect of another member of staff.

Stress

**Easton v B&Q Plc**

*High Court, 31 March 2015*

The High Court dismissed an employee’s personal injury claim based on work related stress on the basis that the psychiatric illness was not foreseeable, either in relation to an initial breakdown caused by stress at work or a second breakdown following his return to work. A risk assessment would not have put the employer on notice of the risk of psychiatric injury. Nor was it a breach of the employer’s duty of care to make a proposal on the employee’s return to work which was inconsistent with the return to work plan proposed by Occupational Health.

In order for an employee to succeed in a personal injury claim for psychiatric injury arising out of work-related stress, the employee must show that a psychiatric injury was reasonably foreseeable to his employer. Even where such injury is reasonably foreseeable, the employer will not be liable unless the injury was caused by a breach of the employer’s duty of care i.e. the employer’s failure to take reasonable steps to prevent the injury. In the leading case in this area, *Hatton v Sutherland* [2002], the Court of Appeal held that an employer is usually entitled to assume that an employee can withstand the normal pressures of the job, unless he knows of some particular problem or vulnerability.

All employers have a statutory duty to make a “suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work” (Health and Safety at Work Regulations 1999).

Mr Easton was a store manager for B&Q. He had successfully managed large stores for a long period of time. However, he suffered depression caused by work related stress following changes at the store which led to increased pressure and workload.
Following a period of absence, he returned to work in line with a phased return proposed by Occupational Health (OH). However, he suffered a relapse when his employer raised the possibility of a temporary role managing a different store, which would have involved full time work sooner than was recommended in the phased return plan. He claimed that he was put under pressure to accept the role. It was accepted that no risk assessment had been carried out in relation to stress, either generally or in relation to the changes introduced at the store, which led to Mr Easton’s first breakdown.

Mr Easton brought a claim for personal injury in the High Court both in relation to the initial breakdown and the further breakdown following his attempted return to work.

The High Court dismissed the claimant’s claims. It held that the first breakdown was not reasonably foreseeable. Mr Easton had been carrying out his role successfully for 10 years and had not alerted his employer explicitly to the effect the store changes were having on him. Nor was there any history of stress related illness among store managers generally. Therefore there was nothing in Mr Easton’s personal circumstances or in relation to the role generally which would give any indication that Mr Easton might succumb to psychiatric illness.

The Court accepted that the failure to carry out a risk assessment in relation to occupational stress might have been sufficient to establish liability if a risk assessment would have identified a general risk of psychiatric injury to store managers, such as to require individual risk assessments. However, in this case a general risk assessment would not have revealed any general risk of psychiatric injury.

In relation to the second breakdown, B&Q were clearly on notice of Mr Easton’s vulnerability. However, the Court found that there was no breach of duty in offering him a temporary but full time posting which started before the return to work plan (which OH had prepared). Nor was it foreseeable that this would lead to a second breakdown. B&Q were entitled to act on the basis that Mr Easton would be able to assess whether he wished to take up the opportunity. This was the case notwithstanding his recent illness and that he was still on medication; many people hold down demanding jobs with the support of medication for underlying psychiatric illnesses. The mere fact that a person remains on medication is not an indication as to how their work should be managed. The position would have been different if Mr Easton had been pressured or bullied into accepting the role.

The case is a useful reminder of the relatively high threshold employee’s face in establishing a claim for personal injury arising out of work related stress. The comments regarding the extent to which employers are able to rely on an employee’s own judgment even after a period of psychiatric illness (when they are fit to return to work) are helpful for employers.

Of course, employees who have suffered stress or psychiatric injury may also be protected by disability discrimination legislation, which needs to be taken into account in managing any return to work and could provide an alternative route for an employee to claim compensation for any relapse.

**Tax**

HMRC and the tax tribunals continue to grapple with the complexities of applying the income tax legislation to payments relating to discrimination. Further decisions in this area are expected.

**A v Commissioners for HM Revenue & Customs**

First-Tier Tax Tribunal, 5 May 2015

The First-Tier Tax Tribunal has held that a payment of £600,000
made to an employee in settlement of a race discrimination claim relating to pre-termination acts should not be treated as earnings for tax purposes, and so should not be subject to income tax and NICs.

‘A’ worked as a trader for a European bank. He complained to his employer that he had not been receiving appropriate bonuses and salary increases in light of the profits that he had made for the bank and the bonuses paid to other employees. He alleged that this was an act of race discrimination.

A was subsequently informed that he was to be made redundant due to an upcoming buy-out. He entered into a settlement agreement with the bank, under which he received stated amounts in respect of redundancy pay, and an additional sum of £600,000 in “full and final settlement” of all of A’s outstanding and potential future claims.

The £600,000 was not taxable as a termination payment under section 401 of ITEPA 2003 (which renders the first £30k free of tax), since it was not a termination payment. HMRC asserted that the £600,000 was taxable as earnings, since it represented discretionary bonuses and salary increases that A alleged he should have received in previous years. A asserted that the payment was not earnings, and so was not taxable at all. A therefore appealed to the Tax Chamber of the First Tier Tribunal (“FTT”) against HMRC’s assessment.

The FTT allowed A’s appeal against HMRC’s decision, concluding that the £600,000 payment did not constitute earnings.

The FTT took the view that the purpose of the payment was to settle the discrimination claim, and thus that the payment was therefore akin to an award of compensation for discrimination, and not remuneration for past services that A was contractually entitled to receive (nor a payment in connection with the termination of A’s employment). It was not necessary to consider the merits of the claim, nor even to consider whether A had in fact been treated in a discriminatory manner, as it was sufficient to show that the reason for the payment was to settle A’s discrimination claim and not to make up for any lost earnings owed to A. The fact that the payment was calculated by reference to alleged lost earnings was not enough to bring the payment within the scope of the general earnings charge under section 62 of ITEPA 2003.

This is the first decision as to whether a payment made to settle a discrimination claim, which related to an alleged a loss of earnings, should be treated as taxable earnings. The decision is, however, only a First-Tier Tribunal decision, and as it contradicts HMRC’s long-held view that compensatory payments calculated by reference to a loss of earnings should be characterised as earnings in arrears, HMRC are expected to appeal. Bearing in mind this decision appears to depart from current HMRC practice, employers would be well-advised to approach it with caution, and seek advance approval from HMRC to make settlement payments tax free in these circumstances. Alternatively, employers may simply tax the payment and leave it to the employee to make an application. It may also be helpful to expressly apportion the settlement between the various heads of claim.

It is important to note that, even though the payment was made after the termination of A’s employment, it was not contended that the payment was in connection with the termination and thus taxable under section 401 ITEPA 2003. Section 401 is wider in scope than the general earnings charge under section 62, and the FTT has previously held (in Moorthy v HMRC [2014] UKFTT 834 [TC]) that section 401 will apply to tax payments made to compensate employees for discrimination where the payment is in connection with the termination of the employment.

Employers should also note that employees’ entitlement is
generally to be compensated for their net losses, with the amount then ‘grossed up’ to reflect any tax payable. Therefore, if compensation is non-taxable, this should reduce the amount the employers have to pay (as they only need to be paid the net amount of their lost earnings) rather than representing a windfall for employees. Of course, if employers seek to calculate settlements on the basis of net earnings, the employee is likely to expect them to be responsible for any tax payable.

Territorial scope

Two cases illustrate the differing ends of the spectrum in relation to the right of individuals based overseas to bring claims in the English Employment Tribunals.

Lodge v Dignity & Choice in Dying and others

EAT, 2 December 2014

The EAT held that an Australian citizen employed by a British company, and working for the UK business, was entitled to bring unfair dismissal and whistleblowing claims in the English Employment Tribunals notwithstanding that she worked remotely in Australia for personal reasons.

Ms Lodge, an Australian citizen, was employed as Head of Finance. Her contract of employment was governed by English law and subject to the English courts’ exclusive jurisdiction. Her employer’s offices were based in London, but she also had a virtual private network (“VPN”) installed on her laptop enabling her to work remotely from her home in Ealing. Her mother became ill and the employer agreed to her request to work remotely from Australia, using the VPN. Following her move, she ceased to become subject to the UK’s tax and pensions regime. She resigned following an unsuccessful grievance and brought claims for whistleblowing and constructive unfair dismissal in a UK Employment tribunal.

The Tribunal held that it had no jurisdiction to hear her claims. Whilst it noted that Ms Lodge’s employment was clearly connected with Great Britain, it considered that Parliament could not reasonably have intended that an employee who was an Australian citizen, who had wanted to relocate to Australia for personal reasons, and who had submitted herself to the Australian tax and pension regimes, should nonetheless be able to bring claims of unfair dismissal and whistleblowing in England. Ms Lodge appealed.

The EAT upheld her appeal and held that the Tribunal had jurisdiction to hear her claims. Relying on the EAT’s decision in Bishop v Financial Times Ltd [2003], the EAT held that the decisive factor was whether Ms Lodge’s work abroad was for the benefit of the employer’s London business or for a business outside the UK. If the former, the Tribunal would have jurisdiction to hear the claim.

The EAT accepted that Ms Lodge did not fall “foursquare” within the posted / expatriate employee category referred to by the House of Lords in Serco Ltd. v Lawson [2006]. However, it noted that all the work she did from Australia was for the benefit of the employer’s London operation. The fact that the employer had agreed to her request to work remotely from Australia meant that she was in the same position as if it had been the employer who had posted her to work abroad with her consent.

The EAT also noted that the grievance which had led to her resignation had been handled in London in accordance with the UK Employee Handbook. Further, the employer had not disputed her assertion that she had no right to bring her claims in Australia.

This decision is unsurprising given both the facts of the case and previous case law. Employers who allow employees to work remotely from abroad should note that such employees will not be prevented from bringing claims in the English Employment Tribunals merely

because it is the employee who has requested to work remotely (rather than the employer), provided that the employee’s work continues to be for the benefit of the UK business.

**Olsen v Gearbulk**

_EAT, 28 April 2015_

In _Olsen v Gearbulk_ the EAT upheld the Tribunal’s decision that a peripatetic employee who lived in Switzerland and worked for a Bermudian company, was not entitled to bring claims for unfair dismissal and whistleblowing in the English Tribunal despite working in the UK for more days in the year than any other jurisdiction.

Mr Olsen, a Danish man, lived in Switzerland and chose an employment contract governed by Bermudian law over a contract governed by English law which would have required him to relocate to England. His contract specified his base as Switzerland, from where he managed around 100 employees internationally including around 20 in the UK. He spent more time in the UK office than in any other single international office. The Tribunal found, and the EAT agreed, that the employee was in an international role based in Switzerland, the contract was subject to Bermudian law and jurisdiction and he went to great lengths to structure his working arrangements in England so that he did not become subject to the British tax regime. On this basis, the connection with Great Britain was not sufficiently strong to allow him to bring his claims in the English Employment Tribunals.

**TUPE**

The complexity of TUPE continues to generate a steady stream of litigation as employers attempt to navigate their way through some of the legal uncertainties and commercial practicalities.

In _Jinks_, the EAT was required to decide who the client was for the purposes of the service provision change test, in a scenario involving a council, a primary contractor and a sub-contractor. On the facts, the EAT found that the service provision change test can apply to transfer the employees of a sub-contractor when the primary contractor loses his appointment. In _Jakowlew_, an unhappy client gave instructions to its service provider to remove an employee from working on the contract. Rather than remove the employee, the provider gave her a written warning. When the client then changed providers, it argued that its earlier, lawful, instruction to remove the employee meant that she was not assigned to the business and so did not transfer. Not so, found the EAT.

The BT case is another case concerning the question of whether an employee was assigned to the business at the date of transfer. The employee who had been long term sick for over six years, was found not to be assigned and so did not transfer, primarily because there was no prospect of the employee returning to work.

**Jinks v London Borough of Havering**

_EAT, 23 February 2015_

The EAT has confirmed that the service provision change test can apply to transfer the employees of a sub-contractor when the primary contractor loses his appointment. This will depend on a factual question of who the sub-contractor’s “client” was.

Under TUPE there will be a transfer of employees where there is either a transfer of an undertaking or a “service provision change”. The service provision change test generally applies in an outsourcing situation. It applies where there is a change in the person or company who carries out activities on behalf “a client”, whether on an outsourcing, a change of contractor or an insourcing. However, it was established in _Hunter v McCarrick_ [2012] that the client has to be the same both before and after the transfer.

London Borough of Havering contracted out the management of a site consisting of an ice rink and car park to Saturn Leisure Ltd. Saturn then sub-contracted the management of the car park to Regal Car Parks Ltd. When the ice rink closed the car parking activity continued for a few weeks, but ultimately Saturn gave up occupation of the whole site. The Council took control of the car-park, converting it into a public use car-park and managed this in-house.

Mr Jinks claimed to have initially been an employee of Saturn and that his employment transferred under TUPE to Regal (when the ice rink closed) and then to Havering (when it took over the management of the car park). When Havering refused to accept this, he claimed constructive unfair dismissal. The Tribunal struck out Mr Jinks’ claim on the basis that, even if he had been employed by Regal, his employment could never have transferred to the local authority, because there was a change of client when Regal’s contract came to an end: Regal’s client was Saturn and the client after the change was the local authority.

The Tribunal struck out Mr Jinks’ claim on the basis that, even if he had been employed by Regal, his employment could never have transferred to the local authority, because there was a change of client when Regal’s contract came to an end: Regal’s client was Saturn and the client after the change was the local authority.

The EAT overturned the Tribunal’s decision. It noted that TUPE explicitly contemplates that the service provision test might apply to activities carried on by a sub-contractor. It accepted that the client must be the same before and after the transfer, but said that the Horizon case established that:

- The question of who is a client is one of fact, not law.
- There can be more than one “client” in any given case.
- The person on whose behalf services are provided by the sub-contractor may not necessarily be the contractor from whom the sub-contract is held.

The case was referred back to the Tribunal to decide whether the Regal’s client was Saturn or the local authority. This would involve the factual questions of: who was it running the car park “on behalf of”; and who was Regal’s client or customer?

This case clarifies that there can be a service provision change from a sub-contractor where the primary contractor loses their appointment. However, it does not provide much guidance of how you identify whether the “client” of a sub-contractor is the primary contractor or the person who appointed the primary contractor. This will need to be considered on the facts of each case.

Jakowlew v Nestor Primecare Services Ltd and another
EAT, 22 April 2015

The EAT has held that, where a client has given a lawful instruction to remove an employee from providing services under its contract, the employee will remain “assigned” to the contract for the purposes of TUPE until the instruction is actually implemented.

Ms Jakowlew was a Care Manager at Saga Care (“Saga”) working on a contract to provide care services to the London Borough of Enfield. The contract between Saga and Enfield came to an end and Westminster was appointed to provide the services going forwards. There was no dispute that this was a service provision change and employees who were assigned to the organised grouping of employees providing the care services would transfer to Westminster.

However, before the transfer, Ms Jakowlew was suspended on disciplinary grounds. As the transfer date approached, Enfield gave a lawful instruction to remove her from the contract. Saga objected to the instruction and refused to comply. In fact, they concluded the disciplinary proceedings with a final written warning before the transfer.
and told Ms Jakowlew that she would transfer to Westminster. Westminster initially accepted this, but later Saga conceded that Enfield’s instruction to remove Ms Jakowlew had been lawful and that she had not transferred. Saga then dismissed her for redundancy. Ms Jakowlew claimed unfair dismissal against both Saga and Westminster.

At the Tribunal, the question arose as to whether Ms Jakowlew’s claim should be against Saga or Westminster. The Tribunal concluded that Enfield’s instruction had removed Ms Jakowlew from the provision of service before the transfer and her employment had not transferred under TUPE. The EAT disagreed and held that Ms Jakowlew had transferred to Westminster under TUPE when the service provision change took place. Enfield was not Ms Jakowlew’s employer and did not have the power to enforce her re-assignment. Saga might have been in breach of its contract with Enfield by not re-assigning Ms Jakowlew but until it did so, she remained assigned to the organised grouping of employees who would transfer under TUPE.

Whilst it was not argued that Ms Jakowlew’s suspension would have the effect of removing her from the organised grouping, the EAT nonetheless considered this. It observed that the same test would apply as to an employee who was on holiday, study leave or maternity leave; namely whether the employee would return to work in the same group in which he/she belonged prior to the absence. In the case of suspension, the expectation of the parties would be that, if the proceedings did not end in demotion or transfer, the employee would return to work in the same group. As such, Ms Jakowlew remained assigned and in scope to transfer during her disciplinary suspension.

Companies negotiating outsourcing agreements should bear in mind that an instruction to remove an employee from a contract will not prevent them transferring under TUPE if the instruction is not implemented and should consider whether to include specific indemnity protection.

**BT Managed Services Limited v Edwards and another**

_EAT, 2 September 2015_

The EAT has determined that an employee who had been absent from work on long term sick leave for six years, and who had no prospect of returning to work and so did not contribute to the economic activity of the group, did not transfer under TUPE to a new service provider.

Mr Edwards was employed by BT Managed Services Limited ("BTMS") as a Field Operations Engineer. He was a member of a team dedicated to a domestic network outsource ("DNO") contract providing operational maintenance for mobile phone networks, which involved accessing sites (often on foot) and scaling towers. In 2006, Mr Edwards commenced long-term sick leave and the attempts that were made by BTMS to find him less strenuous alternative work were unsuccessful. He was regarded as permanently incapacitated and received payments under a permanent health insurance ("PHI") scheme. When Mr Edwards stopped receiving this benefit, BTMS continued to make payments to him.

Mr Edwards did have continued links to the DNO contract. His PHI payments were treated as an expense of the DNO team, he counted against the headcount of the contract and his role could not be backfilled. All contact with him was through DNO managers. At no time was Mr Edwards assigned to another part of BTMS and if he had been able to return to work, the starting point would have been a return to the DNO team. However, BTMS had taken a decision in 2010 not to try to get Mr Edwards back to work for fear that it would jeopardise his PHI payments.

In 2012, the DNO contract transferred to Ericsson and in 2013, the team employed by BTMS on the DNO contract transferred to Ericsson. The question arose as to whether Mr Edwards transferred with the rest of his DNO team.

The Tribunal determined that Mr Edwards was not assigned to the ‘organised grouping’ of employees who transferred under TUPE and so did not transfer. BTMS appealed. They argued that the Tribunal had not given sufficient weight to previous cases on absent employees which held that where an employee is absent, they would be assigned to an organised grouping if that is where they would return if they came back to work on the day of the transfer.

The EAT dismissed the appeal and held that:

• Whether an absent employee is assigned to the relevant organised grouping for the purpose of a service provision change is a matter of fact to be determined on a case by case basis.

• A lengthy absence from work does not necessarily mean that an employee is not assigned to the grouping e.g. persons on long term sick leave and maternity leave may continue to be assigned provided the absence is temporary. In such cases the question of where they would return to work if able to do so is a useful criterion in deciding whether they are assigned. However, that approach is not applicable where someone is permanently unable to return to work.

• An employee who is permanently unable to return to work and has no connection with the economic activity of the grouping, and who would never do so in the future could not be regarded as assigned to that grouping. A mere administrative connection to that grouping is insufficient.

The case provides clarification of the position in relation to employees who are permanently absent. It is unlikely to change the position in relation to employees who are absent on a temporary (even if long term) basis, where the starting point is to look at where they would return to work, if able to do so. It is also important to note that BTMS had made a conscious decision to keep Mr Edwards on their books and treat him as permanently absent and this was a key factor in the decision of the Tribunal.

Whistleblowing

In June 2013, the law protecting workers who ‘blow the whistle’ changed, introducing a new requirement that a worker must have a reasonable belief that his whistleblowing disclosure was made in the public interest. In 2015 we saw the first few cases to look at the new provisions. In its decision in the Chesterton case, the EAT set a very low threshold for satisfying the new public interest requirement. It was held that the interests of 100 employees satisfied the public interest test. Then, in Wincanton, the EAT reinforced this very broad approach to what constituted being in the public interest.

At the end of 2014, useful clarification was provided by the EAT in McKinney on the date that the limitation period runs from for detriment claims. It found, following the approach in discrimination claims, that the date runs from the actual date of the detrimental treatment rather than the date that the employee becomes aware of it.

McKinney v London Borough of Newham
EAT, 4 December 2014

The EAT has held that the limitation period for bringing a claim for detriment on the ground of making a protected disclosure runs from the date of the detrimental treatment rather than when the employee becomes aware of it.
Mr McKinney brought a claim for a detriment on the ground of having made a protected disclosure after his employer rejected a grievance that he had raised. The grievance hearing was held on 6 October 2010 and the employer made the decision to reject the grievance on 8 October 2010. A letter setting out the grievance decision was sent to Mr McKinney on the same day, which he received on 14 October 2010. He brought a whistleblowing claim on 11 January 2011 but the claim was struck out by the Tribunal as being out of time. Mr McKinney appealed.

The EAT upheld the Tribunal’s decision and rejected Mr McKinney’s appeal. Although the EAT thought that the previous cases were not entirely consistent, it nonetheless found that a “clear thread” emerged from recent authorities:

- there were no substantive differences between the wording of the provision dealing with the limitation period for claims of detriment on account of whistleblowing in the Employment Rights Act 1996, (S 48(3) ERA), and the provision in the Equality Act 2010 dealing with the limitation period for discrimination claims, (S 123(1) EqA). It had already been established that in discrimination claims, time begins to run from the date on which an employer acts in a detrimental way, not from the date that the employee became aware of it;
- there may be circumstances where the detrimental treatment is not done until it is communicated to the employee but this was not the case here; and
- the concept of the effective date of termination (“EDT”) for dismissal purposes, (which is linked to the date on which an employee became aware, or ought reasonably to have been aware, of his dismissal), does not apply to detriment claims. According to the EAT, a claimant is entitled to know that he has been dismissed before the dismissal takes effect, but he can suffer a detriment without that knowledge.

Therefore, and “without enthusiasm”, the EAT held that the Tribunal had been correct to find that the limitation period for the whistleblowing claim began running on 8 October 2011 when the decision to reject the grievance was made, not the later date of 14 October when the employee received the letter, which meant that the claim was out of time on 11 January 2011.

The EAT’s decision is helpful in clarifying that the limitation period for a claim of detriment on account of whistleblowing is analogous to the limitation period for a discrimination claim. Whilst the decision may seem harsh on Mr McKinney, other claimants in his position may be able to persuade the Tribunal to extend time for submitting the claim on the basis that it wasn’t “reasonably practicable” for the claim to be presented in time. This argument was not explored by the EAT in this case.

**Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed**

EAT, 8 April 2015

The EAT has confirmed that a disclosure by an employee of accounting irregularities affecting the bonuses of 100 senior managers could satisfy the “public interest” requirement for a whistleblowing claim. This is the first authority on this point.

Mr Nurmohamed, a senior employee of Chestertons estate agents, complained to his employer that the company was deliberately misstating £2-3 million of actual costs and liabilities throughout the office and department network. He expressed concerns that the inaccurate profit and loss figures affected commission earnings for 100 senior managers, including himself.

He was later dismissed and brought a claim for, among
other things, automatic unfair dismissal for having made a protected disclosure under the whistleblowing provisions of the Employment Rights Act 1996 ("ERA").

When protection for whistleblowers was first introduced, there was no “public interest” test. The words “in the public interest” were added to the legislation for disclosures made on or after 25 June 2013. This was intended to reverse the impact of the EAT decision in *Parkins v Sodexho Ltd* [2002] that the definition of a qualifying disclosure was wide enough to cover a breach of the whistle-blower’s contract of employment even though this did not appear to have a wider public interest implication. The Government believed that this decision extended the scope of the whistleblowing legislation beyond what was originally intended and therefore amended the legislation to add an express “public interest” requirement.

The EAT considered the two grounds of appeal by Chestertons that: (1) it was for the Tribunal to determine objectively whether or not the disclosures were in the public interest; and (2) 100 managers were not a sufficient section of the public to satisfy the “public interest” test. The EAT concluded that:

- There was no need to determine objectively whether a disclosure is of real public interest. The test is whether the whistleblower has a reasonable belief that the disclosure was made in the public interest.
- The words “in the public interest” were introduced to the whistleblowing legislation to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is a personal one and there are no wider public interest implications. The sole purpose of the amending section 43(B) of the Employment Rights Act was to reverse the effect of *Parkins v Sodexho*.

The threshold for satisfying public interest is set very low and in this case it was a relatively small group (100 senior managers) that counted as a sufficient section of the public. The test of “public interest” does not seem to involve any assessment of the nature of the allegation raised (e.g. that it needs to relate to something important to society such as discrimination). It does not seem to matter that the employee is primarily motivated by self interest, provided he has in mind that others will be affected too. This can be a relatively small group although what is “sufficient” is fact sensitive.

In practice, it will be relatively easy in many cases for an employee who is advised to raise an individual grievance in a way which satisfies the public interest test.

**Underwood v Wincanton Plc**

*EAT, 27 August 2015*

The EAT has followed its previous decision in Chesterton and found that a complaint about the terms and conditions of employment of a small group of employees could be in the “public interest” and therefore amount to a protected disclosure enabling the employees to bring whistleblowing claims.

Mr Underwood was a HGV Driver working for Wincanton Plc. Along with three other drivers at his haulage depot, Mr Underwood made a complaint that overtime was unfairly distributed between

drivers and that this was a breach of their contracts of employment. The wording of the complaint was unclear but potentially included an allegation that it was those drivers who raised concerns about the safety and road worthiness of vehicles that were given less overtime. After making the complaint, Mr Underwood was dismissed. He claimed that he had been subjected to a detriment and automatically unfairly dismissed on the basis of having made a protected disclosure.

At a preliminary hearing which took place before the decision in Chesterton, Mr Underwood’s whistleblowing claim was struck out by the Tribunal on the basis that the complaint concerned only a group of workers with an identical grievance about the particular terms of their contracts, and so could not meet the “public interest” test. Mr Underwood appealed.

The EAT rejected an argument that it should not follow the decision in Chesterton and upheld the appeal. It rejected an attempt to distinguish Chesterton on the ground that in that case there was an allegation of fraud in relation to preparation of accounts which was “self evidently” in the public interest. This was on the basis that, in this case, it was possible that the complaint included an allegation that drivers were being deprived of overtime because they were being too onerous in detecting defects in their vehicles or carrying out checks, which might be thought to be a matter of public interest to other road users.

It confirmed that, in the light of Chesterton:

• each case must be assessed on its factual context;

• “public” could be constituted by a subset of the public, even where this comprised only of people employed by the same employer on the same terms;

• the Tribunal’s finding that disputes relating to terms and conditions of employment could never be said to be “in the public interest” was incorrect; and

• provided an employee reasonably holds the belief that a disclosure is in the “public interest”, a matter between employees and their employer is capable of being “in the public interest”.

This decision reinforces the narrow view of the public interest test which was adopted in Chesterton in a factual context where even fewer employees were potentially affected by the matter complained of.

The EAT did express some sympathy with a criticism by Wincanton Plc that the decision in Chesterton focused too much on who was affected. The reference to the importance of considering the factual context and to the public interest to road users in not discouraging vehicle checks, might suggest more scope than appeared to be the case in Chesterton for arguing that the nature of the allegation made it relevant and not simply the number of individuals affected. However, it remains the case that it is likely to be relatively easy for employees to satisfy the public interest test, at least until the Court of Appeal considers this matter in 2016.

Working Time

Working time cases have really dominated the caseload of our employment tribunals and courts in 2015. Holidays, in particular, have become a source of anguish for employers as they continue to grapple with the calculation of holiday pay as well as the rules on holiday carryover.

For some time, there was confusion about how far back a claimant’s claims for underpayments of holiday pay could go. This has been partially resolved by the Deduction from Wages (Limitation) Regulations 2014 which impose a 2 year long stop on claims for back pay in relation to claims brought on or after 1 July 2015. Additionally, the EAT in Bear Scotland found that a gap of three months or more between underpayments would break the series of deductions,
further limiting the scope of unlawful deduction of wages claims. However, with further claims being brought in this area all the time any one of which might seek to challenge this point, this remains an issue to watch.

On the issue of how holiday pay should be calculated, the EAT in Bear Scotland concluded that “non-guaranteed overtime” must be included in the calculation of holiday pay for the 4 week period of holiday conferred by the Working Time Directive (WTD). The question of whether voluntary overtime should be included remains open, though Patterson suggests that there is no reason in principle why it must be excluded.

After a referral to the CJEU, the Tribunal in Lock found that the commission structure British Gas had in place meant that commission also needed to be included in the calculation of holiday pay for the 4 week period of leave conferred by the WTD. British Gas appealed against this decision and the EAT has now dismissed the appeal although permission has been granted for an appeal to the Court of Appeal.

On the issue of carryover of holiday, Sash Window concluded that where a worker is prevented from taking annual leave conferred by the WTD due to sickness throughout a holiday year, that accrued entitlement may be carried forward into the following year. Plumb then held that the WTD does not require workers to show that they were physically unable to take annual leave due to their medical condition in order to be entitled to carry over that leave, though that carry over should be limited to a maximum period of 18 months from the end of the holiday year. Again, further developments on this front should be expected.

Later in 2015, the CJEU in Tyco held that for workers who did not have a fixed or habitual place of work, time spent travelling each day between their homes and the premises of the first and last customers designated by their employers constitute ‘working time’ under the Directive. Though this does not necessarily entitle such staff to more pay, it has the potential to have a material effect on the issue of whether maximum working time limits have been exceeded.

Bear Scotland Ltd & Others v Fulton & Others
EAT, 4 November 2014

Workers in the UK are entitled to a minimum of 5.6 weeks of paid holiday (including bank holidays) under the Working Time Regulations (“WTR”). That right implements the Working Time Directive (“WTD”), and also “gold-plates” it, since the WTD only requires that workers receive a minimum of 4 weeks of paid holiday, including bank holidays. In 2002, the Court of Appeal confirmed in its decision in Bamsey v Albion Engineering and Manufacturing plc that, in most cases, holiday pay need not include a payment to reflect overtime pay that an employee has earned, unless that overtime is both guaranteed (i.e. the employer must offer it) and compulsory (i.e. the employee must work it, if it is offered). As a result, staff who regularly work overtime often receive less pay during their holidays than they typically receive while working.

In 2012, the CJEU handed down its decision in Williams & Others v British Airways Plc [2011]. That decision suggested that holiday pay for the 4 weeks of holiday guaranteed under the WTD should correspond to the normal pay that an employee would receive while at work. Strictly speaking, that decision related only to staff in the civil aviation industry such as pilots and cabin crew to whom specific legislation applies. However, in the case of Lock v British Gas Trading Limited [2014], the CJEU concluded that the same principle applied to non-aviation sector employees under the WTD and required that holiday pay should include an element to reflect commission payments that the employees had missed out on under the commission schemes in issue as a result of going on holiday.
Claims for underpayments of holiday pay may be made under the WTR, where the time limit for bringing such claims is three months from the date on which the relevant holiday pay should have been paid. Alternatively, claims may be brought as claims for unlawful deductions from wages, in which case the employee can claim for a series of deductions, provided that the claim is brought within three months of the last in the relevant series of deductions. Until this case, it has been unclear how far back that series can go, with commentators typically suggesting that it is either limited to the last 6 years, or potentially extends to all underpayments in the same employment since the enactment of the WTR in 1998.

The claimants in these three conjoined appeals each regularly worked overtime, and were paid additional sums for working those hours. That overtime was “non-guaranteed”, in the sense that it was not guaranteed by the employer but it was compulsory on the part of the employees if it was offered. In addition, in two of the three cases, the employees received additional allowances if they were required to travel for work purposes. However, in all three cases, the employee's holiday pay consisted of basic pay only, and excluded the payments received in respect of overtime and travel allowances. The claimants relied on Williams and Lock in asserting that their holiday pay should include an element reflecting overtime pay and travel allowances. The respondents asserted that the principles outlined in Williams did not extend to “non-guaranteed” overtime. They further asserted that, if the WTD did extend to non-guaranteed overtime pay, the UK legislation which sets out how holiday should be calculated would be incompatible with European law, so if the employees had a claim at all, it was against the UK Government for failing to implement the WTD properly. The UK Government, intervening in the case, supported the respondents’ argument that “non-guaranteed” overtime need not be included in the calculation of holiday pay but argued that, if that was wrong, the UK legislation could be interpreted consistently with European law, such that any underpayments for past holiday pay should be made good by the employers.

The EAT accepted the claimants’ assertion that payments that the claimants received for “non-guaranteed” overtime should be reflected in the calculation of holiday pay for the 4 weeks of leave guaranteed by the WTD (although not for the additional 1.6 weeks required by the WTR or other enhanced holiday offered by the employer). It also accepted that the travel allowances should be included to the extent that they did not cover travel expenses, but reflected time spent travelling. If the payments had been intended merely to cover travel costs such as train fares, the payments would not have to be included.

The EAT also concluded that the UK legislation could be interpreted consistently with European law, with the result that the respondent employers were liable to pay the underpaid holiday pay to the claimants. The EAT achieved this result by rewriting the relevant part of the legislation. Though somewhat unclear, the result of this rewriting appears to be that, in most cases involving “non-guaranteed” overtime or allowances, holiday pay for the 4 weeks of leave guaranteed by the WTD should be calculated by reference to the average of such payments received over the twelve weeks preceding the relevant leave.

Finally, the EAT examined the question of whether the underpaid holiday constituted a “series of deductions”, such that the employees could claim underpaid holiday going back over a lengthy period. In a novel decision, the EAT determined that, a gap of three months or more between underpayments would effectively break the series. The EAT also indicated (without deciding the point) that the first 4 weeks of leave taken in any leave year should be
deemed to be the leave required by the WTD, and any additional holiday taken can be calculated under the normal principles of the WTR. Employees who will be impacted by this decision are reasonably likely to have had a three month period in the last year where they did not receive holiday pay (because it was not taken) or the holiday pay they received did not constitute an underpayment because it was not part of the 4 weeks required by the WTD. Based on the EAT’s decision, that three month break would have broken the series of deductions and the employee would be unable to claim for underpayments prior to that point.

This issue is very significant to employers who pay “non-guaranteed” overtime and travel allowances of the nature in issue in this case, but which are not included in holiday pay. Though the claimants were given permission to appeal, they chose not to do so, which potentially gives a degree of stability to the principles set out in the decision. However, given the number of other cases we understand are working their way through the Tribunal system on the issue of holiday pay, there remains some risk that one will seek to challenge Bear Scotland, particularly on the issue of whether a three month gap breaks the series of deductions.

Sash Window Workshop Ltd and another v King

EAT, 1 December 2014

The EAT has suggested that workers who have been unable or unwilling to take holiday for reasons beyond their control might be entitled to carry over holiday to the next holiday year and be paid in lieu on termination.

The Working Time Regulations (WTR) provide that holiday must be taken in the year in which it falls due, in the absence of any agreement to the contrary (Reg 13(9) WTR). However, in NHS Leeds v Larner [2012] the Court of Appeal, applying EU case law, held that the WTR did not properly implement the Working Time Directive in respect of employees who were unable or unwilling to take their statutory minimum holiday because they were on sick leave. The Court of Appeal held that Reg 13(9) had to be read as including an exception to the rule prohibiting carry-over of holiday in those circumstances.

Mr King worked for Sash Window Workshop as a commission-only salesman (purportedly on a self-employed basis). He was not paid for sick leave, nor was he entitled to paid holiday. His contract was terminated when he reached the age of 65 and he brought various claims, including a claim for unpaid holiday on the basis that he was a “worker”, and so entitled to paid holiday.

The Tribunal found that Mr King was a “worker” and was therefore entitled to claim for unpaid holiday he should have received. The Tribunal included in Mr King’s compensation both holiday pay for periods that Mr King had taken (which had not been paid at the time) and, in a novel departure, holiday pay for periods of holiday he had not taken in previous years. Relying on Larner, the Tribunal concluded that the prohibition on carrying-over statutory holiday entitlement should not apply where, as here, the employee was not able to take the leave by reason of sickness, but was unable to take it because he would have been refused paid leave if he had asked for it.

Sash Window Workshop appealed, arguing that Mr King had not been unable to take his statutory minimum holiday. In fact, he had taken a large proportion of his statutory minimum holiday each year (though he had not received holiday pay at the time), and therefore the Larner exception should not apply.

The EAT allowed the appeal. The Tribunal had made no findings of fact as to whether Mr King had been restricted by “reasons beyond his control” from taking his statutory minimum holiday in any of the holiday years in question. The Tribunal had simply assumed that the employer would have refused to pay Mr King for holidays...
if he had requested it, but there were no findings of fact by the Tribunal to support the assertion that Mr King was prevented from taking the leave. The EAT remitted that issue for reconsideration by the Tribunal.

The EAT also held that, even if that claim had been made out, he was not entitled to holiday pay for the days of holiday he was unable to take. He had continued to work during those periods which he would otherwise have taken as holiday and had been paid for that time in the usual way. There was therefore no loss of "wages", and to permit him to recover holiday pay for the same period would have led to double recovery. The appropriate remedy would be such compensation as the Tribunal considers to be "just and equitable" for the loss of the health and welfare benefits of taking holiday.

Although the Tribunal’s findings were overturned on the facts of this case, the EAT appears to have accepted that the principle in Larner is not restricted to sickness absence cases. Rather, in any case where a worker is unable to take his statutory minimum holiday entitlement, for reasons beyond his control, he is potentially entitled to have that entitlement carried over into the next holiday year.

Though the point was not taken before the EAT, it is likely that that principle only applies to the first four weeks of statutory holiday entitlement (being the portion guaranteed by European law), and not the additional 1.6 weeks guaranteed by the UK legislation.

**Lock v British Gas**  
*ET, 23 March 2015*

This case concerns the salesman Mr Lock who received variable commission based on sales achieved. He continued to receive commission for sales made before and after his holiday, but he received base pay only for the period he was on annual leave. He brought a claim in the Tribunal arguing that commission should have been included in his holiday pay.

The Tribunal referred the case to the CJEU. The CJEU concluded that EU law (the Working Time Directive (WTD) requires commission to be included in the calculation of holiday pay for the 4 week period of holiday guaranteed by the WTD.

This case returned to the Tribunal to decide whether this principle of EU law could be read into the UK domestic law i.e. the Working Time Regulations (WTR). The Tribunal ruled that the WTR should be read so as to be consistent with the CJEU’s ruling on the WTD and that, therefore, Mr Lock was entitled to commission payments in respect of the 4 week entitlement under regulation 13 of the WTR. The decision only applies to this 4 weeks and not to either the additional 1.6 weeks’ leave entitlement provided for in the WTR or to contractual holiday.

The Tribunal determined that regulation 16(3) of the WTR should be read as if it had the following paragraph added to it:

"(e) as if, in the case of the entitlement under regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration which varies with the amount of work done for the purpose of section 221."

The Tribunal also stated that separate hearings would be scheduled to deal with other issues, including the correct reference period for the calculation of holiday pay and the value of the claim for the particular claimants in this case.

It is important to note that the decision was on the facts of this case. It does not preclude employers with different types of schemes from arguing that their arrangement does not fall foul of the WTD and therefore commission is not due and the extra words should not be read in. Nevertheless, this decision is very significant for employers who pay commission but do not include it in holiday pay. Key points which employers should take away from this case are as follows:

- This judgment relates to the 4 weeks of holiday guaranteed by the WTD only. It does not oblige employers to pay commission for the additional 1.6 weeks of holiday required under the WTR or any additional contractual holiday pay over and above that. Employers will need to consider, however, whether operating different approaches for different types of holiday is too impractical.

- Employers may want to wait to see the outcome of a further hearing which will determine what reference period should be used for the calculation of such holiday pay. This can then assist employers to assess their potential exposure for such claims.

- The time limit for unlawful deductions from wages claims arising from underpaid holiday payments is three months after the last in the series of deductions. However, the EAT in Bear Scotland Ltd v Fulton and others determined that a gap of 3 months or more between underpayments would break the series. From 1 July 2015 a 2-year cap on backdated claims applies.

- If employers do amend their holiday pay calculations and, as is common, commission fluctuates over the year, some employees may see an opportunity to maximise their holiday pay by taking holiday immediately after a period when they expect to receive large commission payments. Employers may want to consider rejecting requests and requiring holiday to be taken at a different time when the impact of commission is less marked.

- The British Gas scheme involved regular amounts of variable commission, and the outcome could have been different with other types of schemes where absence on holiday would not impact the ability to earn commission.

British Gas appealed against the EAT’s decision, arguing that Bear Scotland had wrongly decided that the WTR could be interpreted purposively to give effect to the EU law. In any event, British Gas claimed that Bear Scotland need not be followed because it concerned non-guaranteed overtime, which is dealt with by a specific section of the UK legislation that does not apply to commission. The EAT has now dismissed the appeal. It concluded that the Tribunal was correct to follow the approach in Bear Scotland and that appropriate wording could be read into the legislation to give effect to the decision of the CJEU. However, British Gas has been given leave to appeal to the Court of Appeal and so the position is not yet settled.

Patterson v Castlereagh Borough Council
Northern Ireland Court of Appeal, 26 June 2015

In a judgment which does not bind courts and tribunals in Great Britain, the Court of Appeal in Northern Ireland has held that there is no reason in principle why remuneration for voluntary overtime should not be included in the calculation of holiday pay.

Mr Patterson regularly worked overtime on a voluntary basis for which he was paid time and a half. His holiday pay however was calculated on the basis of basic salary only. He claimed unlawful deductions from wages under the Working Time Regulations (Northern Ireland) 1998, (being the same in all material respects to those in the UK).

An NI Industrial Tribunal rejected his claim finding that the EAT in Bear Scotland had held that the WTD did not require voluntary overtime to be taken into account. Mr Patterson appealed to the Northern Ireland Court of Appeal (“NI CA”), there being no EAT equivalent in Northern Ireland.

The NI CA upheld the appeal. It found that the Tribunal had wrongly interpreted what the EAT in Bear Scotland had said. Given that one of the key objectives of the WTD was to ensure that workers were not disincentivised from taking holiday,

the NI CA could see no reason why, in principle, remuneration for voluntary overtime should not be included, subject to the same “normal remuneration” test. This point was in fact conceded by the employer such that the NI CA did not hear any argument on it.

The Court remitted the case back to the Tribunal for it to consider evidence of the voluntary overtime that Mr Patterson had actually worked.

This decision does not bind tribunals in Great Britain and so employers are unlikely to change their current practice on calculation of holiday pay on the basis of this decision. However, it will have a persuasive effect on tribunals and may be an indication of the direction of travel of the Courts.

It is significant though that the NI CA did not hear any argument on the point of principle, given the employer’s concession, and the Court stated that its (very short) judgment should be treated cautiously for that reason.

The Court did not analyse when remuneration for voluntary overtime might satisfy the “normal remuneration” test established by the CJEU in the case of Williams i.e. is there an intrinsic link between the performance by the worker of his / her tasks under the contract and the remuneration received? The NI CA simply stated that it will be a question of fact for each Tribunal to determine whether or not voluntary overtime was “normally” carried out by the employee and carried with it the “appropriately permanent” feature of the remuneration so as to trigger inclusion in the calculation of holiday pay.

**Plumb v Duncan Print Group Limited**

*EAT, 8 July 2015*

The EAT has held that a worker on long-term sick leave is only entitled to carry forward unused holiday entitlement for a period of 18 months from the end of the holiday year. The EAT also held that a worker who is on sick leave is not required to demonstrate that they were unable to take holiday by reason of their medical condition in order to be able to carry it forward.

The Working Time Directive (WTD) requires all EU member states to ensure that workers are entitled to paid annual leave of at least four weeks. In the UK this right is contained in the Working Time Regulations (WTR). The WTR state that annual leave entitlement must be used in the holiday year in which it is accrued and cannot be replaced by a payment in lieu except on termination (Regulation 13).

European case law, however, has confirmed that workers who do not wish to take annual leave during a period of sick leave are entitled to take that leave at a later time, even if this means taking it after the end of the holiday year in which the employee was absent due to sickness [see *Pereda v Madrid Movilidad SA* [2009]]. In *NHS Leeds v Larner* the Court of Appeal held that, to be consistent with the WTD, the WTR should be interpreted so as to mean that holiday does not have to be taken in the year in which it accrues where a worker is “unable or unwilling” to take it because of sick leave.

In *KHS AG v Schulte* [2012] the CJEU held that any such leave could not be carried over indefinitely and found that a period of 15 months from the end of the relevant holiday year (the period specified in the relevant German legislation which applied to Mr Schulte) was appropriate in that case. The CJEU did not make it clear however whether this 15 month limitation was a minimum period which should apply in all cases.

Following an accident at work, Mr Plumb was absent on long-term sick leave between April 2010 and the termination of his employment in February 2014. In September 2013 he asked to take all his holiday which had accrued during his sickness absence. His employer refused. On termination of his employment the employer agreed to make a payment in lieu of holiday which had accrued in the then current holiday year, but refused to make any payments in respect of holiday entitlement for...
earlier years. Mr Plumb brought a 
claim for payment in lieu of holiday 
which had accrued in those years.

The Tribunal rejected Mr Plumb’s 
claim on the basis that his medical 
condition had not been sufficiently 
serious so as to mean that he had 
been physically “unable” to request 
and take holiday in the earlier 
years. Mr Plumb had sustained a 
shoulder injury which had required 
surgery, and had subsequently 
been diagnosed as suffering from 
depression, but the Tribunal found 
that he had continued to work 
elsewhere at week-ends and had 
taken a week’s holiday in 2012. 
As Mr Plumb had not requested 
holiday during the earlier years it 
had therefore lapsed and had not 
carried over. Mr Plumb appealed to 
the EAT.

The EAT allowed Mr Plumb’s 
appeal in part. It held that workers 
are free to choose whether or not 
to take holiday during periods of 
sickness absence. If they choose 
not to do so, they are entitled 
to take it at a later date and do 
not have to show that they were 
physically unable to request / 
take holiday during their sickness 
absence because of their medical 
condition. The underlying purposes 
of periods of sick leave and periods 
of holiday were different.

However, the EAT rejected Mr 
Plumb’s argument that he was 
entitled to carry leave forward 
indefinitely. The EAT held that the 
WTD did not require employers to 
permit holiday which had accrued 
during sick leave to be carried 
forward beyond 18 months after 
the end of the relevant holiday 
year. Words could be read into the 
WTR to achieve that result.

Applying the 18 month limit, the 
EAT held that Mr Plumb was 
etitled to payment in lieu of 
annual leave for the 2012/2013 
holiday year, but not in respect of 
any earlier periods.

This case provides clarity on the 
period within which holiday must 
be taken where it has been carried 
over from an earlier holiday 
year on account of sickness. It 
is important to note though that 
the decision relates only to the 
minimum 4 weeks of holiday under 
the WTD. The additional 1.6 weeks 
of statutory holiday under the 
WTR, and any contractual holiday 
etitlement over and above that, 
would not be subject to any carry- 
over in cases of sickness absence 
unless expressly agreed by the 
employer (see the EAT in Sood 
Enterprises Ltd v Healy [2012]).

In 2011 the (then) Government 
announced proposals to amend 
the WTR so as to make them 
consistent with the WTD as 
regards the carry over of holiday 
in sickness cases. The current 
Government has taken no steps to 
make any such amendments.

Many employers have continued to 
apply their existing restrictions on 
carry forward of holiday, pending any 
changes to the WTR — or at least 
pending clarity from the courts. 
In this case the EAT gave leave 
to appeal to the Court of Appeal, 
so there might well be further 
developments. However, employers 
can take comfort from the current 
decision which suggests that they 
cannot face unlimited claims for 
accrued holiday.

Federacion de Servicios 
Privados del sindicato 
Comisiones Obreras v 
Tyco Integrated Security 
SL and another (“The 
Tyco case”) 
CJEU, 10 September 2015

The Court of Justice of the 
European Union (CJEU) has 
confirmed that where workers are 
not assigned to a fixed or habitual 
place of work, time spent travelling 
between a worker’s home and 
the premises of the first and last 
customers designated by their 
employer is “working time” for 
the purposes of the Working Time 
Directive (WTD).

The employees in this Spanish case 
were security technicians who 
used a company vehicle to travel 
between customers to undertake 
installation and maintenance work 
within their region. Originally, 
employees collected their vehicle 
each day from their regional
office and daily working time was calculated as starting when they arrived at their regional office to pick up their company vehicle and daily task list; and ended when they returned the vehicle to the office at the end of the day. Tyco then decided to close its regional offices.

Following the closures, the employees’ first journey (from their home to the first customer) and last journey (from the final customer to their home) were not classified as “working time”. Rather, their working day was calculated from the time they arrived at their first customer to the time that they departed from their last customer. The security technicians complained that this practice was in breach of the Spanish working time legislation. The Spanish court referred the question to the CJEU.

The CJEU agreed with the employees that time spent travelling between home and a customer at the start and end of the day was working time for the purposes of the WTD. The CJEU noted that under the WTD a worker’s time can be classified as either ‘working time’ or a ‘rest period’. There is no intermediate category. “Working time” is defined as any period of time during which the worker is (i) working, (ii) at the employer’s disposal and (iii) carrying out his activity or duties.

The CJEU found that travelling to customers was a necessary means of providing services to customers and so an integral part of the job. It also noted that the employer determined the list of customers, the order in which they were to be visited and the times of the appointment. Although the workers were free to determine the route they took, they would have to act on instructions of the employer during their journeys and the employer might cancel or change an appointment. Nor were the employees free to pursue their own interests during this time. In these circumstances, the time spent travelling between home and the first and last customer of the day fell within the definition of “working time”.

This was a direct result of the decision of Tyco to close the regional offices. Before they did so, employees could freely determine the distance between their homes and the usual place of the start and finish of their working day.

Tyco, along with the UK and Spanish Governments expressed concern that workers would conduct their personal business on journeys at the beginning and end of each working day. The CJEU indicated that it would be for the employer to put in place the necessary monitoring procedures to avoid this type of abuse.

The UK Government also argued that a finding in the employees’ favour would result in an increase in costs, but the CJEU pointed out that Tyco remained free to determine the level of remuneration for time spent travelling between home and customers.

Although the decision relates to the WTD, the CJEU held that “working time” is a concept of EU law and the WTR use essentially the same definition of working time as the WTD. The decision will potentially have a significant impact for employers of peripatetic employees who do not have a regular base which they attend at the start and end of each day.

If travel to and from home has not previously been classified as working time, employers must now ensure that their time recording processes are altered so that this time is now recorded as working time (unless an employee has opted out of the maximum working week). They will also need to assess whether the change affects their compliance with the 48 hour working week and with the worker’s entitlement to an uninterrupted daily rest period of 11 hours in every 24 hour period and an uninterrupted 20 minute rest break if the day’s working time is more than six hours.

It is important to note that the decision does not affect the interpretation of working time under the National Minimum Wage Regulations 1998, which do not derive from EU law. The CJEU was clear that employers are free to determine what remuneration they pay for travel to and from home in these circumstances.
However, employers of hourly paid employees, or employees who are paid for overtime should review individual contracts and collective agreements to check for any implications this decision might have on pay and also consider administratively how they can deal with different start and finish times for working time and pay purposes.

Employers should also consider how to deal with employees who carry out personal business on the way to and from home and give guidance to employees about what is permissible and how it is recorded.

**Greenfield v The Care Bureau Limited**

*CJEU, 11 November 2015*

The Court of Justice of the European Union (CJEU) has held that where a worker increases their hours, their statutory holiday entitlement should be recalculated to reflect the new working pattern. Leave taken in excess of the amount accrued under the old working pattern should be deducted from the new calculation going forward.

Under the Working Time Directive (WTD), workers are entitled to a statutory minimum of 4 weeks annual leave each year. In the UK, that right is implemented via the Working Time Regulations, which enhance the entitlement to 5.6 weeks’ annual leave each year.

In the 2010 case of *Zentralbetriebsrat der Landeskrankenhäuser v Land Tirol*, the CJEU considered what steps should be taken when a worker decreases their hours part way through the holiday year. In that case, the CJEU held that where an employee reduces their hours, an employer is not permitted to scale down the amount of holiday that the worker accrued when previously working a greater number of hours.

Mrs Greenfield was employed by the Care Bureau from 2009 and the days and hours that she worked varied week to week. The Care Bureau’s holiday year ran from the middle of June each year and Mrs Greenfield took 7 days paid leave in July 2012. During the 12 week period immediately preceding this period of leave she was working 1 day each week. From August 2012, Mrs Greenfield increased her hours - working 12 days on and 2 days off, which averaged a 41.4 hour working week.

In November 2012, Mrs Greenfield requested a week’s paid leave. This was refused as she had exhausted her entitlement to paid annual leave as a result of holiday taken in July. Entitlement to leave was calculated as at the date on which it was taken and based on the working pattern for the 12 week period prior to the leave. As Mrs Greenfield had taken her holiday at a time when her work pattern was one day each week, she had taken the equivalent of 7 weeks paid leave.

When Mrs Greenfield left the employment of the Care Bureau, she pursued an employment Tribunal claim for unpaid but accrued holiday. The Tribunal referred the question to the CJEU.

The CJEU noted that annual leave allows employees to take paid time away from work in order to rest. It follows that the greater the number of days / hours worked, the longer the period of rest. As such, holiday will accrue, and must be calculated, in accordance with the contractual working pattern i.e. by reference to the days and / or fractions of days or hours worked.

Where an employee increases their working hours the employer must recalculate holiday entitlement for that period. If there are units of paid annual leave already taken during the period of part time work which exceeded the leave accrued during that period they must be deducted from the rights newly accumulated during the period of work in which the worker increased the number of hours. However, there is no need to retrospectively recalculate and increase the holiday entitlement for the period of part time work.

This decision is unsurprising as it confirms that the same principle set out in *Land Tirol* applies when a worker increases the number of hours worked as opposed to decreasing the number of hours.
Future Cases

2016
# Future Cases: 2016

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### Whistleblowing

| Chesterton Global Ltd (t/a Chestertons) v Numohamed Court of Appeal          | Listed 11–12 October 2016. | What is the true meaning of the ‘in the public interest’ requirement? Will the requirement be fulfilled if only a relatively small group are affected rather than the public as a whole. |

### Working Time

| The Sash Window Workshop Ltd & another v King Court of Appeal               | Listed 9/10 February 2016. | Where an individual continues to work rather than take unpaid holiday leave, what is the breach and loss if the employer has denied any right to paid holiday. |
Legislation

2015 - 2016
## Legislation: 2015

### 10 March 2015

**Ban on employer’s use of enforced subject access requests to obtain employee criminal record checks**

From 10 March it became a criminal offence for employers to require prospective employees to provide them with a criminal record check by means of an enforced subject access request.

### 5 April 2015

**Shared parental leave**

A new system of shared parental leave and pay came into force on 1 December 2014, which applies to parents of children expected to be born or placed with them for adoption on or after 5 April 2015.

**Extension of unpaid parental leave**

Extension of existing unpaid parental leave regime to parents of children aged between five and 18.

**Time off to attend adoption appointments and changes to adopters’ rights**

Adopters can take time off to attend appointments to meet the child they intend to adopt (up to six and a half hours for each appointment).

Removal of the requirement for employees to have 26 weeks’ service before they become entitled to adoption leave.

Statutory Adoption Pay made consistent with Statutory Maternity Pay, by the introduction of a six-week higher-rate period at 90% of earnings.

Employees and eligible agency workers became entitled to bring a tribunal claim if their employer, temporary work agency orhirer refuses time off for adoption appointments, refuses to pay them for the time off or if they are dismissed as a result of exercising the right.

Extension of adoption leave to individuals fostering a child under the “Fostering for Adoption” scheme run by local authorities.

Extension of shared parental leave and pay provisions to couples adopting a child from outside the UK.
Legislation: 2015

26 May 2015
Increased penalty for not paying the National Minimum Wage

An extension of the financial penalty for failing to pay workers the national minimum wage to £20,000 per underpaid worker, rather than a fine of the same amount for each employer.

26 May 2015
Ban on exclusivity terms in zero-hours contracts

Exclusivity clauses in zero-hours contracts were made unenforceable from this date (see also entry for 11 January 2016). The ban renders unenforceable any provision in a zero-hours contract which prohibits the worker from either of the following: doing work or performing services under another contract or under any other arrangement; and doing work or performing services under another contract or under any other arrangement without the employer’s consent.

1 July 2015
Time limit for back pay for wages claims

In response to the EAT’s decision in the conjoined Bear Scotland Ltd v Fulton appeals, the Government introduced regulations which impose a two-year long stop on claims for back pay from the date of the ET1 and expressly provide that the right to paid holiday is not incorporated as a contractual term in employment contracts.

1 October 2015
Rights of Sikhs to wear turbans (instead of safety helmets) to all workplaces

Sikhs have for many years been exempt from a requirement to wear head protection when working on building sites. However, this exemption did not extend to other workplaces such as factories and warehouses. The exemption was extended to all workplaces from 1 October 2015, aside from certain roles in the emergency services and armed forces.

1 October 2015
Increases to National Minimum Wage

The following national minimum wage rates came into effect on 1 October 2015. Adult rate (21 years and over) rose to £6.70 an hour (£6.50 in 2014/15). Development rate (18 - 20 year olds) rose to £5.30 an hour (£5.13 in 2014/2015). Under 18 (16 - 17 year olds, a worker who has not attained the age of 18 but is no longer of compulsory school age) rose to £3.87 an hour (£3.79 in 2014/2015). Apprentices under 19 years of age, (or over 19 years and in first year of apprenticeship) rose to £3.30 an hour (£2.73 in 2014/2015). Accommodation offset (maximum deduction per day from National Minimum Wage where employer provides accommodation) rose to £5.35 per day (£5.08 in 2014/2015).
1 October 2015
Repeal of employment tribunals’ powers to make wider recommendations in discrimination cases

From this date employment tribunals no longer have the power to make wider recommendations in successful discrimination cases, for example, that an employer should introduce an equality policy. Tribunals retain the power to make recommendations that apply to an individual claimant, just not the wider workplace.

29 October 2015
Slavery and human trafficking statement

A new requirement (under the Modern Slavery Act 2015) for businesses with a turnover above £36 million to prepare a slavery and human trafficking statement in each financial year ending on or after 31 March 2016.
Legislation: 2016

1 January 2016
Whistleblowing – Report on Disclosures of Information

On 1 January 2016, legislation came into force which gives the Secretary of State the power to make regulations requiring prescribed persons to produce annual reports of the whistleblowing disclosures made to them by workers. The draft regulations set out the proposals in outline but these regulations are not yet active.

1 January 2016
New rules in financial services on deferral and clawback will apply for performance years starting on or after 1 January 2016

These rules - which apply to relevant banks, building societies and regulated investment firms will:
- extend the length of time for which variable pay is deferred to 7 years for Senior Managers, 5 years for senior PRA-designated risk managers, and between 3 and 5 years for all other staff whose actions could have a material impact on a firm;
- allow institutions, under certain circumstances, to ‘claw back’ part of an individual’s variable remuneration which has already been paid; and
- prohibit variable pay for Non-Executive Directors.

11 January 2016
Redress for zero-hours employees / workers to claim unfair dismissal and / or detriment

Following regulations in May 2015 (see above) that banned exclusivity clauses in zero-hours contracts, further regulations took effect on 11 January 2016 allowing claims for unfair dismissal and detriment where the individual was subject to dismissal and / or detriment because he / she breached an (unenforceable) exclusivity clause in a zero-hours contract.

Where an exclusivity clause is included in a contract and an employee breaches it, his / her employer is prevented from: dismissing the employee as a result of this breach, regardless of the length of time the employee has been employed; and subjecting the employee to any detriment as a result of the breach.

1 February 2016
Revised list of prescribed persons for whistleblowing

The list of prescribed persons to whom qualifying whistleblowing disclosures may be made takes effect on 1 February 2016.

7 March 2016
Senior Managers Regime

The new Senior Managers Regime will commence for relevant financial services firms (including UK branches of foreign banks) together with a similar regime for insurers.
Legislation: 2016

7 March 2016
Firms must appoint a whistleblowing champion
By this date relevant financial services firms must assign responsibility to a whistleblowers’ champion.

1 April 2016
National Living Wage / National Minimum Wage
The National Minimum Wage regulations have been amended to introduce a minimum national living wage rate of £7.20 for those aged 25 or older. The national minimum wage rates for other ages are not affected by the new national living wage rate.

April 2016
Industrial action and trade union obligations and activities
Major reforms to the laws on industrial action and trade union obligations and activities have been drafted in the Trade Union Bill. The first debate in the Lords took place on 11 January 2016 and the Bill is expected to pass by April 2016. The proposed reforms include increasing ballot thresholds, extending the notice period before industrial action required to be given to employers, introducing time limits and changes on ballots, and new rules on picketing.

At the same time as publishing the Bill, the Government launched three consultations seeking views on ballot thresholds for strikes in important public services, tackling intimidation of non-striking workers in relation to picketing and on the removal of the ban which currently prevents employers hiring agency staff during industrial action.

By 18 June 2016
Enforcement of the rights given to workers posted to work in a different country of the EU
The Posted Workers Enforcement Directive came into force on 17 June 2014. It is intended to improve the enforcement of the rights given in the Posted Workers Directive to workers posted to work in a different country of the EU. The UK and the other Member States have until 18 June 2016 to bring into force provisions to comply with its measures.
Legislation: 2016

**Being phased in before May 2016**

**Employment Tribunal Changes - Penalties and postponements**
Changes to employment tribunal procedures are being phased in by May 2016, including: the introduction of financial penalties if an employer does not pay an employment tribunal award or a settlement sum after conciliation; and limitations on the number of postponements that a party can apply for in the course of proceedings.

**1 October 2016**

**Gender Pay Gap Reporting**
Companies in the UK with more than 250 employees will have to publish information about the differences in average pay between male and female employees. Draft regulations have been published and are expected to come into effect on 1 October 2016.

**Some time in 2016?**

**Caste discrimination**
Under the Equality Act 2010 an order must be made providing for caste to be included as an aspect of race. No order has yet been made despite the Government indicating that a draft order would be published in Spring 2015 with a view to a final order being introduced into Parliament in Winter 2015. (Please also see our report in the cases section on Chadok v Tirkey where the EAT held that caste could fall within the definition of “ethnic origins”).

**Some time in 2016?**

**Bill of Rights**
The Queens Speech 2015 announced that proposals would be brought forward for a British Bill of Rights which would replace the Human Rights Act 1998.

**Some time in 2016?**

**Substance abuse**
The Queen’s Speech 2015 announced proposals for a Psychoactive Substances Bill which will outlaw the use of ‘legal highs’.

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Daniel Ellis and Paul Harrison of Baker & McKenzie LLP explore the new shared parental leave regime and some key challenges arising from its implementation.

A new regime entitling employees to paid time off for childcare in the first year after a child’s birth will come into effect for employees whose baby is due on or after 5 April 2015 (the new scheme). It will have significant implications for both employers and employees. The intention behind the new scheme is to allow families more choice over how they look after their children in the first year.

Under the new scheme, employees will have the same rights to maternity leave and ordinary paternity leave that they currently have but the system of additional paternity leave (APL) will be abolished (see box “Current rights”). In its place, where the eligibility criteria are met, mothers will be able to convert up to 50 weeks of their maternity leave and 37 weeks of their statutory maternity pay (SMP) into shared parental leave (SPL) and shared parental pay (ShPP), and share it with their partner. The new scheme will give parents significant flexibility: they can apply to take the time off together or separately, in one continuous period or discontinuously. Employers will be able to reject some, but not all, patterns of SPL requested.

This article considers the new scheme and sets out the regime of SPL and ShPP, the practical requirements of the scheme and the steps that employers should be taking to implement it.

The article focuses on the application of the new scheme in relation to the birth of a child. The scheme for adopted children broadly mirrors this scheme, but the detail is outside the scope of this article.

While the principle of SPL is simple, the new rules are detailed and complex. They are set out in 11 sets of draft regulations (see box “Draft regulations”). Pending approval by Parliament, the new scheme will apply where the expected week of childbirth begins on or after 5 April 2015. The government has published three sets of guidance in an attempt to clarify how the new scheme is intended to operate:


Acas (the Advisory, Conciliation and Arbitration Service) has also published a good practice guide on SPL for employers and
Current rights

The rights of parents to take time off to care for a newborn baby are well-established under the statutory maternity and paternity leave systems. Currently, parents have the following statutory rights following birth:

Maternity rights. All employees can take up to 52 weeks’ statutory maternity leave and eligible employees will receive 39 weeks’ statutory maternity pay (SMP) or maternity allowance. The first six weeks of SMP is paid at the higher of 90% of the employee’s normal average earnings or the statutory flat rate (the higher rate), and the remaining 33 weeks is paid at the statutory flat rate, currently £138.18 a week (the flat rate).

Paternity rights. Eligible employees can take up to two weeks’ ordinary paternity leave within 56 days of the child’s birth and two weeks’ statutory ordinary paternity leave pay, paid at the flat rate. In addition, for children born on or after 3 April 2011, eligible mothers can effectively transfer some or all of the last 26 weeks’ of their maternity leave to be taken by the father as additional paternity leave. Eligible fathers are entitled to receive additional statutory paternity leave pay for the unexpired portion of the mother’s SMP, paid at the flat rate.

Eligibility for SPL

SPL can be taken by a mother and someone who is either the child’s father or the mother’s spouse, civil partner or partner, and who has the main responsibility for caring for the child (other than the mother). “Partner” means a person living with the child’s mother and the child in an enduring family relationship, but is not the mother’s child, parent, grandchild, grandparent, sibling, aunt, uncle, niece or nephew.

Whichever parent is seeking to take SPL, there are eligibility criteria for both parents to satisfy (see box “Eligibility criteria”). The criteria vary depending on whether the employee seeking to take SPL is the mother or the partner. In addition, the partner does not have an autonomous right to SPL; this right only arises if the mother chooses to curtail her statutory maternity leave and share her remaining entitlement.

It will be seen from the eligibility criteria that only employees can take SPL but, provided that both parents have been economically active (that is, they satisfy the employment and earnings test) it is not necessary for both to be employees. For example, if the mother is an employee, but the father is self-employed, the father will not qualify for SPL but the mother will, and can still opt into the SPL regime. This means that she could take some maternity leave, then go back to work, and then take a further period of SPL at a later date. Mothers who do not have a partner, or whose partners have not been economically active, will not have this option.

Entitlement to SPL is the same regardless of how many children are born as a result of the same pregnancy.

Maximum amount of SPL

The maximum amount of SPL that can be shared between the parents is 50 weeks (or 48 weeks for factory workers). This is calculated as the mother’s 52 weeks of maternity leave less the two weeks’ compulsory maternity leave (or four weeks’ compulsory maternity leave for factory workers). However, the aggregate amount available in any case will be the amount by which the mother curtails her entitlement to maternity leave.

Timing of SPL

SPL may be taken at any time from the child’s date of birth to the day before the child’s first birthday (regulation 7, draft Shared Parental Leave Regulations 2014) (draft SPL Regulations). However, the mother cannot start SPL until she has completed her compulsory maternity leave (regulation 6, draft Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014) (draft Leave Curtailment Regulations). Also, partners will lose their entitlement to ordinary paternity leave if they take their SPL first (regulation 5, Paternity and Adoption Leave (Amendment) Regulations 2014). Therefore, in practice, most partners will take their ordinary paternity leave before taking SPL, to avoid losing that entitlement.

Apart from these restrictions, there is a lot of flexibility. A partner can take time off at the same time as the mother, or separately. This means that a partner can take leave when the mother is still on maternity leave, provided that she has given notice to curtail her entitlement to maternity leave. Each parent can take their SPL as one continuous period or up to three discontinuous periods of leave. SPL can be for a period as short as a week or as long as the maximum 50 weeks (see box “Shared parental leave: example timelines”). Provided that employees give sufficient and proper notice, their employers cannot refuse their request for leave.

Special rules apply if the parent or child dies, but these are outside the scope of this article.

Protection for employees

As in the case of maternity leave, the employee’s terms and conditions, other than entitlement to remuneration, are preserved during SPL.

An employee may attend up to 20 SPL keeping-in-touch (KIT) days without bringing SPL to an end, in addition to the ten KIT days that a mother may take. Therefore, a mother who takes maternity leave and SPL will be able to work for her employer for up to 30 days without bringing the maternity leave or SPL to an end. However, there is no obligation on employers or employees to agree to SPL KIT days.

The employee has a right to return to the same job after SPL if the total aggregate amount of relevant statutory leave taken by the employee, including the SPL, is 26 weeks or less. Relevant statutory leave means statutory maternity, adoption, paternity and shared parental leave. However, where more than 26 weeks were taken or the SPL was taken immediately after a period of unpaid parental leave of more than four weeks or a period of additional maternity or adoption leave, the right is to return to either the same job, or if that is not reasonably practicable, a job that is both suitable and appropriate for the employee to do, looking at the nature of the work set out in the contract of employment, capacity and the place where the employee was employed before the absence.

It is automatically unfair to dismiss, or select for redundancy, an employee when the reason or principal reason for the dismissal, or selection for redundancy, is connected to SPL. Employees are also entitled not to be subjected to any detriment by an act or failure to act by their employer for a reason connected to SPL. If the employee’s role becomes redundant during SPL, the employee has the same priority in relation to alternative employment as applies to women on maternity leave.

**STATUTORY AND ENHANCED PAY**

In addition to the new scheme in relation to ShPP, the question of pay is further complicated by the fact that many employers currently operate a scheme under which SMP is enhanced, whether by way of increased maternity pay during maternity leave or a return to work bonus. One of the most difficult issues for employers is deciding whether to offer enhanced pay for mothers and partners taking SPL. This gives rise to legal and practical questions for employers.

**Eligibility for ShPP**

As with eligibility for SPL, an employee’s entitlement to ShPP depends on whether the employee and the other parent satisfy the relevant conditions, as follows:

- Both parents must satisfy the continuity of employment and normal weekly earnings test. These are broadly the same as the tests under the SMP and statutory paternity pay regimes.
- Both parents have the main responsibility for looking after the child at the date of birth.
- The employee has complied with the relevant notification and evidential requirements.
- The mother became entitled by reference to the child’s birth to SMP (for a mother to be entitled to ShPP, she must be entitled to SMP, however, for a father to be entitled to ShPP, the mother can be entitled to either SMP or maternity allowance).
- The mother has reduced her entitlement to maternity pay.
- The employee intends to care for the child during each week that ShPP is paid to the employee and they are absent from work on SPL.

**Value of ShPP**

Statutory ShPP is paid at the SMP statutory flat rate. In practice, it is likely that most mothers will not end their statutory maternity leave during the first six weeks, where they are entitled to SMP at the higher rate of 90% of their normal weekly earnings, unless the employer offers enhanced ShPP.

Broadly, the maximum amount of ShPP that can be shared between the parents is the mother’s 39 weeks of SMP or maternity allowance entitlement, less the two weeks’ compulsory maternity leave period (or four weeks for a factory worker). However, the aggregate amount available in any case will be the number of weeks outstanding at the time the mother’s maternity pay period ends. In order for entitlement to ShPP to arise, the mother must have curtailed her SMP or maternity allowance period.

Parents can choose who will take the ShPP and when, subject to no ShPP being payable to the mother before the end of her maternity pay period, or on or after the child’s first birthday. It is possible, as with SPL, for both parents to be off work and receiving ShPP at the same time.

**Enhanced pay for SPL**

On the practical side, paying enhanced pay for SPL will be one of the main factors affecting whether employers choose to take up their rights to SPL. The low take-up rate of APL to date is likely to be related to the fact that most employers choose not to enhance pay for APL. For employers, the obvious factor in considering whether to offer enhanced pay is the increase in cost.

On the legal side, an important issue for employers is whether their approach to payment for SPL could give rise to discrimination claims. If employers offer enhanced maternity pay, but not enhanced...
ShPP, fathers, who can be at home at the same time as a mother on maternity leave, may claim that this is unlawful discrimination. Conversely, if employers offer enhanced pay for both maternity leave and SPL, will mothers be entitled to take paid maternity leave and then enhanced ShPP or can the two be set off against each other? Any employers considering reducing existing levels of enhanced pay will need to consider whether those payments have become a contractual entitlement.

**Legal obligation to enhance pay for SPL**

The key issue is whether an employer that enhances maternity pay would discriminate against men if it fails to provide a similar level of enhancement for ShPP. Certainly, there is no express entitlement under the draft Statutory Shared Parental Pay (General) Regulations 2014 (draft ShPP Regulations) to pay in excess of the minimum entitlement and no express obligation to mirror any existing enhanced maternity pay and the government is clearly of the view that this is not required.

The technical guidance states that an occupational maternity or paternity scheme may continue and not be extended to SPL, but a mother and father, or mother’s partner, must be on maternity and paternity leave, not SPL, to benefit from occupational schemes. This is reflected in the scheme for statutory pay where the guidance confirms that the

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**Eligibility criteria**

For mothers to be eligible to take shared parental leave (SPL) under regulation 4 of the draft Shared Parental Leave Regulations 2014 (draft SPL Regulations), the following criteria apply:

**Mothers must:**

- Have completed 26 weeks of continuous service with her employer by the relevant week, which is the end of the 15th week before the expected week of childbirth (EWC), and remain in continuous employment with the same employer until the week before she takes any period of SPL (the continuity of employment test).

- Have the main responsibility for the child’s care at the date of the child’s birth (apart from any responsibility of the partner).

- Be entitled to statutory maternity leave in respect of the child.

- Have ended any entitlement to statutory maternity leave by curtailling the leave or have returned to work.

- Have complied with the relevant notification and evidential requirements.

**Partners must:**

- Have been engaged in employment as an employed or self-employed earner for any part of the week for at least 26 of the 66 weeks immediately preceding the EWC and have average weekly earnings of not less than the maternity allowance threshold (the employment and earnings test).

- Have the main responsibility for the care of the child at the date of birth (apart from any responsibility of the mother).

For partners to be eligible to take SPL under regulation 5 of the draft SPL Regulations, the following criteria apply:

**Partners must:**

- Satisfy the continuity of employment test.

- Have the main responsibility for the child’s care at the date of the child’s birth (apart from any responsibility of the partner).

- Have complied with the relevant notification and evidential requirements.

**Mothers must:**

- Satisfy the employment and earnings test.

- Have the main responsibility for the child’s care at the date of birth (apart from any responsibility of the partner).

- Be entitled to statutory maternity leave, statutory maternity pay (SMP) or maternity allowance in respect of the child.

- Have curtailed her statutory maternity leave entitlement or returned to work, or where the employee is not entitled to statutory maternity leave, have curtailed her SMP or maternity allowance.

- Have complied with the relevant notification and evidential requirements.
first six weeks of higher rate SMP is not transferable to ShPP.

The government’s view has some support in both EU and UK law.

**UK law.** The Equality Act 2010 provides that, in relation to direct discrimination, no account is to be taken of special treatment afforded to a woman in connection with pregnancy and childbirth (section 13(6)). A similar defence exists in relation to an equal pay claim under paragraph 2 of Schedule 7 to the Equality Act 2010.

However, that is not necessarily a complete answer for two reasons. Firstly, section 13(6) was narrowly interpreted in *Eversheds v de Belin*, where the Employment Appeal Tribunal (EAT) found that it only applied so far as the treatment constituted a proportionate means of achieving the legitimate aim of compensating a woman for the disadvantages occasioned by her pregnancy or maternity leave (UKEAT/0352/10; www.practicallaw.com/9-506-1791). The EAT suggested that this would also apply to maternity pay.

**EU law.** It may be possible for employees to bring a claim relying directly on EU law. EU law and case law to date has generally recognised that women on maternity leave are in a unique position and that the purpose of maternity leave is to protect a woman’s biological condition during and after pregnancy, and to protect the special relationship between a woman and a child in the period following pregnancy and childbirth. A claim by a man for a lump sum bonus payment paid to women on maternity leave was rejected on the basis that women on maternity leave are in a different position (*Abdoulaye v Regie Nationale des USINES Renault SA C-218/98*).

Similarly, in *Hofmann v Barmer Ersatzkasse*, a claim by a male employee who took unpaid leave to care for a child for the daily allowance that would have been paid to a woman on maternity leave was rejected on the basis that it was legitimate to provide benefits to ensure the protection of a woman's biological condition during and after pregnancy, and her

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**Shared parental leave: example timelines**

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<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td>Father</td>
<td></td>
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</tr>
</tbody>
</table>

The mother and father take the first two weeks following the birth as maternity and ordinary paternity leave. The mother returns to work and transfers the remaining 50 weeks’ leave to the father to take as shared parental leave (SPL).

| Mother         |                          |                       |                       |                       |                       |
| Father         |                          |                       |                       |                       |                       |

The mother takes 26 weeks’ maternity leave and returns to work. The father takes two weeks’ ordinary paternity leave, immediately after which he takes 26 weeks’ SPL so that both parents are off together in the first 26 weeks.

| Mother         |                          |                       |                       |                       |                       |
| Father         |                          |                       |                       |                       |                       |

The mother takes 13 weeks’ maternity leave and curtails her leave. The remaining 39 weeks is taken by the mother and the father at different times.
special relationship with her child following childbirth (C-184/83).

On the other hand, following the government’s position is not entirely without risk. In Roca Alvarez v Sesa Sturt Espana ETT SA, the European Court of Justice (ECJ) considered a Spanish law that allowed time off for breastfeeding and bottle feeding, where the father could only take time off work if both he and the mother were employees, whereas the mother could take time off irrespective of the father’s employment status (C-104/09).

The ECJ held that the leave entitlement had become detached from the mother’s biological condition and amounted to parental leave. The different treatment could not be justified by the special treatment exclusion under the Equal Treatment Directive (2006/54/EC) as it was liable to perpetuate the traditional distribution of roles of men and women, by keeping men in a role subsidiary to that of women in relation to parental duties. Roca Alvarez potentially represents an evolving view of how to promote equality in the workplace in the context of childcare.

Implications for ShPP
Applying this approach to ShPP, could a man argue that the purpose of SPL is to promote the involvement of both parents in childcare and that, when taking SPL, he is in a comparable position to a woman on maternity leave (after the first two weeks of compulsory maternity leave) and so should be entitled to the same level of enhanced pay?

In practice, although the position is not certain, it is likely that men will face difficulties in running this argument. Realistically, a woman who has used only her two weeks of compulsory maternity leave would still be affected by the biological effects of pregnancy and childbirth, and is not in a comparable position to a man. It is possible that this changes at some point during the 52 weeks of maternity leave, but it is difficult to identify when that would be.

The Pregnant Workers Directive (92/85/EEC) guarantees a minimum maternity leave of 14 weeks, which EU law has consistently recognised as being an inalienable right of women who have given birth. It would be difficult to argue that, during this period, a woman is in the same position as a man taking parental leave.

Even beyond that period, the ECJ has held that women are in a different position to men. In Betriu Montul v Instituto Nacional de la Seguridad Social, the ECJ held that a Spanish system under which mothers had 16 weeks maternity leave was still intended to protect the woman’s biological condition, despite the total period of leave exceeding the 14-week minimum and the last ten weeks of that leave being transferable to the father (C-5/12). In fact, no court has yet found special treatment of women in relation to the period immediately after childbirth to be unlawful.

In the context of APL, an employment tribunal has held that a male employee was not directly or indirectly discriminated against when his employer paid him only statutory APL pay but a woman on maternity leave was given enhanced maternity pay (Shuter v Ford Motor Company ET/3203504/13; www.practicallaw.com/6-584-9565). This was the case even though women on maternity leave had received full pay for the entire 52-week period, although the tribunal considered that the employer needed an objective justification.

Even though the aim of SPL is to provide flexibility for both parents, it is only triggered when a mother feels ready to end her maternity leave, reinforcing the different nature of maternity leave. However, the case law continues to develop and it is possible that, at some point, a court could conclude that there comes a point during the current 52 weeks allowed for maternity leave when a mother ceases to be in a different position from a father who is caring for the child, and that both parents should be treated equally in relation to pay.

Other discrimination risks
One further issue is whether a man could bring a claim of indirect discrimination on the basis that paying enhanced maternity pay but not ShPP puts men at a particular disadvantage compared with women. The possibility of this claim succeeding was accepted in Shuter but the tribunal found that the policy was objectively justified as a means of promoting the recruitment and retention of women in a predominantly male workplace. There are good arguments that the treatment should be considered as
direct rather than indirect discrimination. However, the position is open to challenge and employers may wish to consider how they would justify their approach.

When it comes to pay during SPL, it is more likely to be unlawful to treat mothers and fathers differently. It is difficult to argue that women and men are in a different position once the woman has chosen to end her maternity leave and opted into the SPL, and the technical guidance supports this.

On this basis, allowing a woman on SPL to use up any unused enhanced maternity pay where a man would receive no enhanced pay, could give rise to a claim for discrimination. Conversely, providing enhanced ShPP for fathers but not mothers, on the basis that mothers have the benefit of enhanced maternity pay, could also be problematic. A mother could claim that when she is on maternity leave she is not in a comparable position to a man on SPL and therefore her maternity pay cannot be regarded as setting off a period of enhanced ShPP. However, there is no entitlement to enhanced

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**Minimum information for template notices**

Employers’ template notices of entitlement for a mother and a partner must contain the following minimum information and declarations:

### Mother’s notice of entitlement

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<th>Specified information</th>
<th>Mother’s declarations</th>
<th>Partner’s declarations</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Employee’s and partner’s name.</td>
<td>• Mother satisfies the eligibility conditions for SPL.</td>
<td>• Partner’s name, address and National Insurance number.</td>
</tr>
<tr>
<td>• Start and end dates of employee’s statutory maternity leave.</td>
<td>• Information in the notice of entitlement is accurate.</td>
<td>• Partner satisfies the eligibility conditions for SPL.</td>
</tr>
<tr>
<td>• Total amount of shared parental leave (SPL) available.</td>
<td>• Mother will immediately inform her employer if she ceases to care for the child.</td>
<td>• Partner is the father of the child or married to, or is the civil partner or partner of, the mother.</td>
</tr>
<tr>
<td>• Expected week of childbirth (EWC) or date of birth.</td>
<td></td>
<td>• Partner consents to the amount of SPL which mother intends to take.</td>
</tr>
<tr>
<td>• How much SPL each parent wants to take.</td>
<td></td>
<td>• Partner consents to mother’s employer processing the information in the declaration.</td>
</tr>
<tr>
<td>• A non-binding indication of the dates that the employee intends to take SPL.</td>
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### Partner’s notice of entitlement

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<th>Specified information</th>
<th>Partner’s declarations</th>
<th>Mother’s declarations</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Partner’s and mother’s name.</td>
<td>• Partner satisfies the eligibility conditions for SPL.</td>
<td>• Mother’s name, address and National Insurance number.</td>
</tr>
<tr>
<td>• Start and end dates of mother’s statutory maternity leave (or statutory maternity pay (SMP) or maternity allowance).</td>
<td>• Information in notice of entitlement is accurate.</td>
<td>• Mother satisfies the eligibility conditions for SPL.</td>
</tr>
<tr>
<td>• Total amount of SPL available.</td>
<td>• Partner is the father of the child or is married to, or is the civil partner or partner of, the mother.</td>
<td>• Mother will immediately inform partner if she fails to curtail her statutory maternity leave, pay or maternity allowance.</td>
</tr>
<tr>
<td>• Child’s EWC or date of birth.</td>
<td>• Partner will immediately inform their employer if they cease to care for the child or if the mother fails to curtail her statutory maternity leave or SMP or maternity allowance.</td>
<td>• Mother consents to the amount of SPL which the partner intends to take.</td>
</tr>
<tr>
<td>• How much SPL each parent wants to take.</td>
<td></td>
<td>• Partner consents to the partner’s employer processing the information in her declaration.</td>
</tr>
<tr>
<td>• A non-binding indication of the dates that the partner intends to take SPL.</td>
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Employer’s checklist

An employer should consider taking the following steps to prepare for the new shared parental leave (SPL) regime:

✓ Decide on the approach to SPL and shared parental pay, including: whether to pay enhanced pay for SPL, or statutory rates only; and whether to actively promote SPL?

✓ Draft and implement a new SPL policy and template notifications for employees to use.

✓ Consider changes to existing maternity, paternity or adoption policies.

✓ Ensure that those responsible for administering the scheme within HR and payroll understand the new regime.

✓ Make line managers aware of the new scheme and how they should deal with SPL requests.

✓ Decide how new policies will be rolled out to employees.

maternity pay and so, provided that a mother’s overall entitlement to enhanced pay is no less than a father’s and that she can choose to take the same amount of enhanced pay for SPL as a father can take, it may be that she could not claim to be treated less favourably.

Options for employers

One way of resolving the legal and policy issues is to enhance ShPP in the same way as an equivalent period of maternity leave; for example, the government has recently announced that it will pay enhanced ShPP in the civil service. However, this has obvious cost implications. Alternative options that employers may consider are:

• Removing enhanced maternity pay altogether and paying statutory rates only for both maternity leave and SPL. However, employers will need to consider whether this would be a breach of contract. Even if it is not, it is likely to have a negative impact on employee relations, which employers will need to manage carefully.

• Limiting any enhancement of maternity pay to, say, the first 14 weeks of maternity leave and providing a period of enhanced ShPP for both parents for the remaining period. As well as considering the breach of contract risk, employers will also need to consider how they treat mothers on maternity leave who do not qualify for SPL; for example, where they have broken up with the partner or the partner does not work. One option would be to allow mothers to take the additional ShPP in respect of either maternity or SPL.

• Retaining a practice of treating maternity and SPL differently, pending further clarification by the courts. Employers can point to the technical guidance to support this approach, although there remains some degree of risk.

PRACTICAL REQUIREMENTS

Parents wishing to take SPL may need to submit up to five notices to their employer. The mother will need to submit a notice to curtail her statutory maternity leave. Both parents will need to submit a notice of entitlement and intention to take SPL and a notice to take SPL to “book” the leave (see box “Example of notification timetable”). Variation notices will need to be submitted where these notices need to be changed.

There are similar notification requirements in respect of ShPP. In practice, therefore, employers may wish to create standard template notices for their employees that cover both SPL and ShPP in the same notifications.

Curtailment of statutory maternity leave

At least eight weeks before a mother wishes to end her statutory maternity leave, she must give her employer a written leave curtailment notice stating the date on which her statutory maternity leave is to end (leave curtailment notice) (regulation 6, draft Leave Curtailment Regulations). The leave curtailment notice must be given at the same time as the employee serves a notice of entitlement or declaration of consent and entitlement (see below).

Notice of entitlement

At least eight weeks before the start date of the first period of SPL, the employee must give a written notice of entitlement and intention to take SPL (notice of entitlement) that contains specified information and declarations by the employee and the other parent, including a non-binding indication of the dates that the employee is planning to take SPL (regulations 8 and 9, draft SPL Regulations) (see box “Minimum information for template notices”).

Within 14 days of an employee giving a notice of entitlement, the employer may ask for a copy of the child’s birth certificate and the name and address of the other parent’s employer. If an employer makes such a request, the information must be provided within 14 days of the request (unless the notice of entitlement was given before birth, in which case the employee must provide the child’s date of birth as soon as reasonably practicable after birth and, in any event, before taking SPL). Where no birth certificate has yet been issued, the employee must provide a signed declaration confirming the birth date and location, and stating that no birth certificate has yet been issued.

Curiously, the draft SPL Regulations only provide employers with a 14-day window to request this information. It is not clear why there needs to be such a restriction given that a later request would not prejudice an employee but might protect the employer from an abuse of the SPL regime.

Employers could expand their timeframe for making such a request beyond the statutory 14 days in their SPL policy, or require employees to automatically provide them with this information as part of the notice of entitlement. They would not be able to prevent an employee from exercising their right to SPL for failing to comply with such an extended requirement. However, they could, for example, make any enhanced ShPP conditional on compliance. In any event, it will be useful to set out these requirements...
explicitly in the policy so that employees are clear about what is expected of them.

While the draft SPL Regulations allow an employer to obtain information about the other parent’s employer, the government’s view is that there is no need for employers to contact the other parent or their employer. This is likely to be the employer’s standard practice so as to reduce the administrative burden involved, but there may be circumstances where the employer may wish to contact the other parent’s employer to confirm eligibility.

Employers should ensure that they comply with data protection requirements if they decide to take this approach. One way of doing this would be to include a consent form in its request for the other parent’s employer’s details.

Notice to take SPL
In addition to the notice of entitlement, an employee has to serve a formal notice to take SPL at least eight weeks before the start date of the first period of SPL requested (SPL notice) (regulation 12, draft SPL Regulations).

An employee can choose to submit individual SPL notices for each continuous period of SPL or make requests for multiple periods of discontinuous SPL in one notice. Each SPL notice must set out the start and end dates of each period of SPL requested in that notice.

Somewhat oddly, where an employee makes a request for multiple periods of discontinuous SPL in one notice, the employer can decline that request and then the employee has to decide whether to take the total amount of leave requested in that SPL notice as a continuous period of leave or withdraw the notice.

However, where the employee requests only one continuous period of SPL in that notice, the employee is automatically entitled to take that period of notice, subject to the employee being able to give a maximum of three SPL variation notices. This means that an employer cannot prevent an employee from taking three separate periods of SPL, provided that the employee serves a separate SPL notice in relation to each period.

Revocation of leave curtailment notice
A mother can only revoke a leave curtailment notice in limited circumstances. Where:

- The mother or her partner are not, or are no longer, entitled to SPL or ShPP, the revocation notice must be given within eight weeks of the date of the leave curtailment notice.
- The mother served her leave curtailment notice before the child’s birth, the revocation notice must be given within six weeks of the date of the leave curtailment notice.
- The partner dies, the revocation notice must be given within a reasonable time of the date of the co-parent’s death and state the date of death (regulations 8 and 12, draft Leave Curtailment Regulations).

In all circumstances, the revocation notice must be given to the employer before the leave curtailment date. Where the leave curtailment notice is revoked, both parents’ entitlement to SPL ceases immediately.

The guidance clarifies that a partner can take SPL while the mother is still on maternity leave as long as she has given binding notice to end that leave. This means that there may be situations where the partner has already taken SPL when the mother revokes her leave curtailment notice. The technical guidance states that in this situation, any SPL taken by the partner is ignored and the mother retains the full remainder of her entitlement.

Variation and cancellation of SPL notices
There are two types of variation or cancellation of SPL notices: variation of notice of intention to take SPL (variation of notice of intention); and variation of period of leave (SPL variation notice) (regulations 11 and 15, draft SPL Regulations).

Employees can give a notice to their employer varying how much SPL the employee intends to take. The variation of notice of intention must include details of when the employee intends to take SPL and a declaration from the other parent agreeing to the variation. As with the notice of entitlement, any indication given by the employee is non-binding. There is no express requirement in the draft SPL Regulations to submit a variation of notice of intention where the employee’s plans change but the technical guidance takes the position that employees would have a requirement to do so.

An SPL variation notice must be given in writing to an employer where the employee wishes to vary or cancel any SPL requested.

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At least eight weeks’ notice must be given before the date being changed or the new date, whichever is earlier.

There are additional provisions dealing with variation or cancellation in special circumstances, such as when a child is born early.

ShPP notices
The notice and evidential requirements for taking ShPP are fairly lengthy and are set out in regulation 6 of the draft ShPP Regulations. The information that is required includes the total amount of ShPP available to the parents, the number of weeks of ShPP that the employee wants to claim and the dates of those periods.

Notice must be given at least eight weeks before the period that the employee wishes to claim ShPP. The other parent must also provide a written declaration consenting to the employee’s claim for ShPP, that they satisfy the eligibility conditions, specifying their name, address and National Insurance number, and that they consent to the employee’s employer processing their information in the written declaration.

As with the notice of entitlement to SPL, the employer may ask for a copy of the child’s birth certificate within 14 days of receiving a notice for ShPP, which must be provided within 14 days of the employer’s request.

Next steps for employers
Employers should be acting now to prepare for the new scheme. At the very least, they will need to be ready to administer what is a very complicated scheme (see box “Employer’s checklist”). Those responsible for administering the new scheme will need to become familiar with it quickly as employees are already raising questions about their new rights.

However, employers also need to consider their approach to SPL on a policy level. Some employers will see the introduction of SPL as an opportunity to promote themselves as a family-friendly organisation and to support the government’s objectives of facilitating a new approach to childcare that challenges traditional gender stereotypes about the roles of mothers and fathers in childcare. However, few fathers are likely to take up SPL unless employers offer enhanced pay during SPL, take steps to publicise the right and establish a culture where fathers are encouraged to make use of their rights.

Daniel Ellis is a partner, and Paul Harrison is Of Counsel, at Baker & McKenzie LLP.

Practical Law

EMPLOYMENT: NEW RESOURCES

Practical Law Employment has published a number of materials to help lawyers get on top of the new shared parental leave regime. They include:

PRACTICE NOTES

Shared parental leave
uk.practicallaw.com/4-571-7405

Shared parental pay
uk.practicallaw.com/2-582-5585

Time off for antenatal appointments
uk.practicallaw.com/6-567-9167

Time off for adoption appointments
uk.practicallaw.com/5-569-1527

STANDARD DOCUMENTS

Shared parental leave (birth) policy
uk.practicallaw.com/7-570-2488

Shared parental leave (adoption) policy
uk.practicallaw.com/9-580-4565

Time off for antenatal appointments policy
uk.practicallaw.com/9-564-1247

Notice of entitlement and intention to take shared parental leave (birth)
uk.practicallaw.com/4-573-9105

Time off for adoption appointments policy
uk.practicallaw.com/1-587-6269

Notice of entitlement and intention to take shared parental leave (adoption)
uk.practicallaw.com/4-587-3325

In addition, we will shortly be publishing:

PRACTICE NOTE

Shared parental leave: FAQs
Collective redundancy: the meaning of establishment

Employers will be hoping that the European Court of Justice (ECJ) follows the Advocate General’s (AG) opinion in the long-running Woolworths dispute on the meaning of establishment in collective redundancy when it delivers its judgment later in 2015 (USDAW and another v WW Realisation 1 Ltd (in liquidation) and others C-80/14 (widely known as Woolworths)).

The Employment Appeal Tribunal (EAT) previously held that establishment effectively means legal entity, therefore requiring employers to aggregate all dismissals in the company, regardless of location or other employment unit, when assessing whether the threshold for collective consultation is reached (UKEAT/0547/12, 0548/12; see News brief “Collective redundancy: new approach to consultation obligations”, www.practicallaw.com/3-525-1425). However, the AG has adopted the more traditional, and employer-friendly, approach that establishment means the local employment unit to which the employees are assigned.

The dispute

Thousands of shop workers were made redundant when Woolworths plc and Ethel Austin went into liquidation and the stores where they worked closed down. An employer is required to collectively consult where it proposes 20 or more redundancy dismissals at one establishment within a 90-day period, but the liquidator had conducted only a very cursory process.

An employment tribunal agreed with the union representatives that there had been a failure to collectively inform and consult, but only at stores with 20 or more employees. The tribunal considered that each individual store was an establishment, and so the obligation to collectively consult had not been triggered at stores with less than 20 employees. The union appealed.

The EAT allowed the appeal, holding that section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 was too restrictive and did not comply with the Collective Redundancies Directive (98/59/EC) (the Directive) (see box “Legislative discrepancy”). It said that the words “at one establishment” should be deleted so that the obligation to collectively consult is triggered as soon as 20 employees are to be made redundant within 90 days, regardless of where they worked.

The Secretary of State appealed to the Court of Appeal, which, among other things, asked the EAT to consider two key questions:

- Whether the phrase “at least 20” in the Directive means the number of dismissals across all establishments together, or on an individual establishment-by-establishment basis?
- If it refers to each individual establishment, what does establishment mean? Is it the whole of the relevant retail business (being a single economic business unit), the part of that business making the redundancies, or the unit where the employee is assigned, for example, in this case, an individual store?

Advocate General’s opinion

The AG said that, for legal certainty, establishment must mean the same whichever definition of collective redundancy is chosen under Article 1(1)(a) of the Directive. The AG referred to previous cases addressing the Article 1(1)(a)(i) option, which had interpreted establishment as meaning the unit to which the workers made redundant were assigned to carry out their duties (Rockfon A/S V Specialarbejderforbundet I Danmark, acting for Niels & Ors C-449/93, www.practicallaw.com/3-100-0253; Athinaiki Chartepoia AE v Panagiotidis and others C-270/05). He saw no good reason to depart from this.

In those cases, the ECJ had expressly rejected the argument that establishment meant an undertaking or legal entity, or that it was relevant to consider how the entity was structured internally. The focus of the ECJ’s analysis was on the local employment unit, and a recognition that the Directive was seeking to protect the socio-economic effects of redundancies in a local context.

Legislative discrepancy

The Collective Redundancies Directive (98/59/EC) (the Directive) provides EU member states with a choice of two possible definitions of collective redundancy:

- The dismissal, over a period of 30 days, of at least: ten workers in an establishment with 21-99 workers; 10% of the workforce in an establishment with 100-299 workers; or 30 workers in an establishment of 300 or more (Article 1(1)(a)(i)).
- The dismissal, over a period of 90 days, of at least 20 workers, whatever the number of workers normally employed in the establishments in question (Article 1(1)(a)(ii)).

Section 188 of the Trade Union Labour Relations (Consolidation) Act 1992 (section 188) purportedly implements the Directive in the UK. Adopting the second limb of the definition, it requires an employer to consult collectively where it proposes to dismiss by reason of redundancy 20 or more employees at one establishment within a 90-day period. However, Article 1(1)(a)(ii) of the Directive refers to “establishments in question”, while section 188 requires the dismissals to be at one establishment.

In MSF v Refuge Assurance, which approach was followed in Renfrewshire Council v Educational Institute of Scotland, the Employment Appeal Tribunal (EAT) held that section 188 was so different to the Directive as to be “irremediable by construction”, so the EAT had to apply a straightforward construction of the language ([2002] IRLR 324; UKEATS/0018/12; www.practicallaw.com/1-522-6079). However, in Woolworths, the EAT held that it was entitled to interpret section 188 so as to be compliant with the Directive (UKEAT/0547/12, 0548/12).

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The AG said that the Directive aimed to provide minimum protection with regard to information and consultation where there are collective redundancies, but this must be balanced with the other aim of harmonising the costs to undertakings in the EU of offering that protection. He pointed out that the Directive has never sought to protect all workers; for example, dismissals that fall outside the relevant timeframe would not be covered. Therefore, in his view, there is no requirement to aggregate the number of dismissals across all establishments in a legal entity. It would be for the national court or tribunal to decide whether a local employment unit was an establishment, and an individual store may well be a separate establishment. However, that would be a factual analysis. The AG gave the example of an employer operating several stores in one shopping centre, which could, depending on the facts, be a single local employment unit. He also said that EU member states can, if they wish, increase the minimum level of protection to employees under the Directive, provided that the approach they take is more favourable to all of the workers being made redundant.

What should employers do?
The AG’s opinion is not binding, although it is frequently persuasive, and it remains to be seen whether the ECJ will follow it. If the ECJ does follow the opinion (as, in our view, it should) this will essentially reverse the position in the UK, and shift the focus back to the question of what the relevant establishment is, based on the facts of the case in hand. In deciding that question, employment tribunals will be guided by the principles in Rockfon and Athinaiki Chartopoiia, and the EAT’s decisions in Renfrewshire Council v Educational Institute of Scotland and MSF v Refuge Assurance Plc & Anor (UKEATS/0018/12, www.practicallaw.com/1-522-6079; [2002] IRLR 324).

Employers that, since the EAT decision in Woolworths, have begun to aggregate all redundancies across the company when deciding if they need to consult would be prudent to continue that approach, at least until we have the ECJ decision, and potentially until the issue is reconsidered by the English courts. Many employers have not changed their practice. For them, until we have a definitive decision, the risk of non-compliance remains, but there is at least some comfort that clarity is nigh.

Monica Kurnatowska is a partner, and Mandy Li is a professional support lawyer, at Baker & McKenzie LLP.
NEWS BRIEF

Gender pay reporting: a new lease of life

By Spring 2016, new regulations are going to come into force that will require employers with 250 or more employees to publish gender pay gap information. This will be a significant sea change for employers that have, to date, been encouraged to take a voluntary approach to gender pay reporting.

Mind the gap
It is now 40 years since equal pay laws came into effect in the UK, but there continues to be a gap between what men and women are paid. The figures from the Office for National Statistics for 2014 show that the gender pay gap (based on median hourly earnings for both full and part-time employees) is currently 19.1%, reducing to 9.4% for full-time employees (www.ons.gov.uk/ons/dcp171778_385428.pdf). However, this is not the complete picture.

In the private sector, the gender pay gap for full-time employees is 17.5%. When broken down further by occupation, provisional figures for 2014 suggest that the pay gap for those in full-time senior or management roles is around 16%, increasing to nearly 25% for those working in skilled trades.

One possible approach to tackling the gender pay gap is to promote transparency by encouraging or requiring employers to identify and publicise the gender pay gap within their own organisations.

Equality Act 2010 power
Section 78 of the Equality Act 2010 (section 78) contains a power for the Secretary of State to make regulations requiring private and voluntary sector companies with 250 or more employees to report on gender pay differences. The Labour government, which was in power at the time, included the provision as a reserve power to compel gender pay reporting if employers failed to do so on a voluntary basis. However, it was never brought into force.

Voluntary disclosure initiative
The coalition government initially decided that it would not use the power. Instead, in 2011 it launched a voluntary disclosure initiative called “Think, Act, Report” to encourage companies to report on their gender pay gaps (see box “Think, Act, Report”). In addition, the government introduced an obligation for tribunals to order employers to carry out an equal pay audit and publish the results where they lose an equal pay or pay-related discrimination claim, which came into force in October 2014 (see feature article “Compulsory equal pay audits: bridging the gender pay gap”, www.practicallaw.com/0-579-8026).

Although over 250 companies have signed up to the Think, Act, Report initiative (covering over one fifth of employees nationally in employers with more than 150 staff), so far only five companies have actually published their gender pay gap information.

What information must be published?
One difficulty in gender pay gap reporting is the issue of exactly what information should be reported. A gender pay gap can arise for many reasons, which can vary by industry and by organisation. For example, an employer may be unlawfully paying women less than men for doing the same job; equally, it may be lawfully paying its staff but certain lower paid roles may attract more female applicants, or more successful female applicants, or be predominately carried out by women. There is therefore a challenge to identify what information should be disclosed to make the data meaningful.

Section 78 gives the Secretary of State broad powers to prescribe what information employers will need to publish, in what form, and the manner and time of publication. Publication cannot be more frequent than annually, however, and the penalty for an employer that fails to comply could be a criminal fine of up to £5,000 or civil enforcement measures.

The 2015 Act provides that the Secretary of State must consult on the details of pay gap reporting before the regulations are published, so employers will have an opportunity to try to frame the rules and to prepare before implementation.

It is difficult to know at this stage what approach will be adopted. The Equality and Human Rights Commission (EHRC) has consulted in the past on gender pay gap reporting as a precursor to the Think, Act,
Report initiative, and this may give some guidance as to the approach that may be taken (see News brief “Unequal pay and sex discrimination: the workplace reality”, www.practicallaw.com/3-500-3172; www.practicallaw.com/1-501-5128).

As part of its consultation, the EHRC sought views on the best means of reporting on the gender pay gap. It concluded that there was a strong level of opposition to the use of a single figure to report on the gender pay gap. The EHRC suggested that employers should have a range of options to choose from:

- Narrative reporting to explain the context of the gender pay issues within an organisation.
- The single figure difference between the hourly pay of men and women.
- The difference between the average basic pay and total average earnings by grade and job type.
- The difference between men’s and women’s starting salaries.

At the time, it was proposed that companies employing 500 or more employees use at least two of the reporting measures, with companies employing between 250 and 499 employees reporting against at least one measure. However, a new government might revisit this approach.

Where next?

With all the major political parties committing to the introduction of gender pay gap reporting in their election manifestos, it appears as though gender pay reporting is here to stay, at least for the medium term. The consequence for larger employers is that they will have both the new gender pay gap reporting obligations and the possibility of being ordered to carry out an equal pay audit in the event that they lose a relevant tribunal claim.

While this is a positive step for gender diversity, employers will need to start thinking now about whether to start monitoring gender pay differences more systematically, or conduct an equal pay audit to identify where pay gaps might exist. This would enable them to prepare for potential negative publicity or address issues at an early stage. However, this has to be balanced against the risk of creating material that might need to be disclosed in litigation at a stage where gender pay reporting has not yet been implemented.

Paul Harrison is of counsel, and Kim Sartin is a senior associate, at Baker & McKenzie LLP.
**NEWS BRIEF**

**Gender pay reporting: disclosing and closing the gap**

The government has published a consultation on its plans to introduce mandatory reporting of information on gender pay differences for larger employers (the consultation). The aim of the proposals set out in the consultation is to increase transparency and, by so doing, to reduce the gender pay gap.

Employers have an opportunity to help shape these important regulations by responding to the consultation.

**Issues for employers**

There will be a number of issues of concern for employers in these proposals, including whether existing systems are able to collect the necessary gender pay data, and, if not, the administrative burden of ensuring that they do so. Of course, much will depend on what information will need to be reported, and this is not yet clear.

There can be complex reasons for gender pay differences, particularly in large and multinational organisations. A generic measure of the gender pay gap may be felt by employers not to give a full and accurate representation of the position, but could lead to adverse publicity, employee relations issues and possibly fuel legal claims. There could also be implications for what multinational employers report in other countries.

**Is there still a gender pay gap problem?**

According to data from the Office for National Statistics (ONS), and as reported by the government in the consultation, the overall UK gender pay gap, measured as the differential in pay between men and women for both full and part-time employees, and based on median hourly earnings, stands at 19.1%. This is, in fact, the lowest since records began in 1997, when it was 27.5%. The same is true for the figure for full-time employees, which is at its lowest at 9.4%.

However, the ONS’s figures for the private sector alone reveal a slightly worse picture than the average: a gender pay gap of 17.5% for full-time employees, with a differential of around 16% for full-time management and senior positions, and a differential of nearly 25% for employees in skilled trades.

In the consultation, the government states that, while much has been done to close the gender pay gap, it believes that greater transparency of gender pay gap information will encourage both employers and employees to consider what more can be done.

**Consultation on key questions**

The consultation raises a number of key issues on which the government is seeking views, including the following:

- Whether disclosure of a gender pay gap would meet the government’s objective of encouraging employers to take steps to close it.
- Whether 250 employees is the appropriate threshold at which to require this disclosure.
- Employees and other interested parties, such as shareholders, may want to compare the employer’s gender pay gap with those of similar organisations, and whether the ability to make that comparison is important.
- Where the gender pay gap information should be published, and whether that should be prescribed by legislation. The consultation gives the example of publishing the data in a prominent place on the employer’s website. This has echoes of the obligation to publish equal pay audit details when ordered to do so by an employment tribunal (see feature article “Compulsory equal pay audits: bridging the gender pay gap”, www.practicallaw .com/0-579-8026).
- The extent to which employers are able to obtain information on gender pay differences from their current data and systems. For example, can they obtain an overall gender pay gap figure, or could it be broken down by full-time and part-time employees, or by grade or job type? Related to this is the issue of the additional costs to employers of complying with the new obligation by way of additional infrastructure and new software and training.
- Whether employers should be required to publish additional narrative information or context to explain a single gender pay gap figure, or whether this should be optional. An associated issue is whether the government should publish guidelines on what supplemental information ought to be included.
- The frequency with which employers should be required to disclose gender pay gap information: annually; every two or...
three years; or some other period. It should be noted that section 78 of the Equality Act 2010 provides that disclosure of gender pay gap information may not be required of employers more frequently than once every 12 months (see box “Background to legislative change”).

• How to ensure compliance with the new requirement through the use of civil enforcement procedures, including enforcement notices that are enforceable by a court if an employer does not comply.

• Any other ways of increasing transparency which would limit the cost for employers, such as reporting to the government through the pay-as-you-earn system.

Next steps
The consultation closes on 6 September 2015. The government has stated that the results will be published in winter 2015, with draft regulations expected to be published in the first half of 2016, although it has said that it may choose to delay implementation in order to give employers time to prepare.

The consultation suggests that the government is fairly open-minded about how, and even whether, to proceed. Given the potential sensitivities of the new disclosure obligation, employers might want to consider whether it is worth investing time over the coming weeks to respond to the government’s consultation in order to ensure that their concerns are taken into account.

Employers might also want to start thinking now about whether more systematic monitoring of gender pay differences will help them prepare for the new disclosure obligation, including whether an equal pay audit might identify any potential gaps.

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The consultation is at www.gov.uk/government/consultations/closing-the-gender-pay-gap. Employers can respond online at https://dcms.eu.qualtrics.com/SE/?SID=SV_OppaSzAxDKo6UJv or by email to GenderPayGapConsultation@geo.gov.uk.
Collective redundancy obligations can be complex and often have important commercial consequences. In a dispute that has travelled through the employment tribunals, UK courts and up to the European Court of Justice (ECJ) and back, the Supreme Court has held that UK collective redundancy consultation obligations applied to the closure of a US military base in the UK (United States of America v Nolan [2015] UKSC 63). However, the parties will now need to await a further Court of Appeal hearing to determine the crucial question of when the obligation to consult arises.

Tribunal decisions
Following a decision by the US government to close a US military base situated in the UK, management informed and consulted employee representatives, and then gave the employees notice of dismissal. Mrs Nolan, an employee representative, brought tribunal proceedings against the US claiming a failure to consult under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) and arguing that consultation should have started earlier. An employment tribunal upheld her claim.

Before the remedies hearing, the US claimed state immunity but, since it had not sought to rely on state immunity earlier and had taken active steps in the proceedings, the tribunal found that the US had waived its right to assert immunity. The tribunal made a protective award of 30 days’ pay. The Employment Appeal Tribunal dismissed the US’s appeal against the protective award.

Court of Appeal referral
On appeal to the Court of Appeal, the US argued that a foreign government’s decision to close a military base is an act of state that should not be subject to scrutiny in the courts, and so collective consultation obligations should not apply.

The US also argued that, in the light of Akavan Erityisalojen Keskusliitto AEK ry and others v Fujitsu Siemens Computers Oy, the Collective Redundancies Directive (98/59/EU) (the Directive) and therefore TULRCA (which implements the Directive in the UK), there is no requirement for employers to consult about a proposed decision to close a workplace (C-44/08; www.practicallaw.com/1-500-5638) (see box “The Fujitsu issue”).

On the second issue, the Court of Appeal asked the ECJ whether the obligation to consult arises: when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies; or only when that decision has actually been made and the employer is proposing consequent redundancies (www.practicallaw.com/9-504-5602).

No ECJ jurisdiction
The ECJ concluded that it had no jurisdiction to answer the question. Article 1(2)(b) of the Directive exempts public administrative bodies from the requirement to inform and consult. Since civilian staff working on a military base are protected by this exemption, the case falls outside the scope of the Directive and so the ECJ declined to interfere with what it considered to be a matter of national legislation. The case reverted to the Court of Appeal.

Back to the Court of Appeal
The Court of Appeal found that nothing in TULRCA provides a special exemption for a foreign sovereign state in respect of collective consultation obligations. However, it ordered a further hearing on the so-called Fujitsu issue. The US appealed to the Supreme Court.

Conformity construction. The US focused on the fact that the scope of TULRCA goes beyond that of the Directive. The Directive contains an exemption from the requirement to consult with workers employed by public administrative bodies whereas the exemption in TULRCA is limited to those in Crown employment and certain others in public service. The US argued that, as a matter of legal construction, TULRCA should be interpreted in accordance with the Directive in regards to decisions of foreign states made in their sovereign or governmental capacity.

The Supreme Court rejected this construction. It found that the Directive leaves it open to EU member states to apply more favourable provisions for workers than those under the Directive. The scope of the narrower exemption in TULRCA was not mere oversight. Even though the redundancies arose in a rare situation not foreseen by the legislator, since the closure involved the only foreign state with military bases in the UK and its employees were not employed by the Crown, this was no reason for reading into clear legislation a specific exemption which would not reflect the wording or scope of any exemption under EU law. The court was influenced by the fact that the US could have relied on state immunity, had it invoked this on time.

International law. The US also argued that the application of TULRCA to the present situation conflicts with principles...
of international law. It asserted that international legal considerations require a tailored exemption from TULRCA in respect of redundancy dismissals arising from a decision taken by a foreign state in its sovereign capacity. According to international law, one state cannot legislate to affect the sovereign activity of a foreign state.

The Supreme Court rejected these arguments. The fact that a decision was taken at a governmental level in the US that led to redundancy dismissals in the UK did not mean that the UK was legislating extra-territorially. TULRCA expressly states that it only applies to redundancy procedures in England, Wales and Scotland. It is not appropriate to make clearly drafted legislation inapplicable to foreign states where it is open to them plead state immunity.

Ultra vires. The final prong of attack by the US was that the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587) were ultra vires in that they purported to extend the consultation obligation to public administrative bodies or public law establishments employing workers without trade union representation. The US argued that this went beyond the Directive and the power conferred by section 2(2) of the European Communities Act 1972.

The Supreme Court ultimately rejected this argument. Since TULRCA, in its unamended form, represents a unified domestic regime and since the amendments were enacted by primary, rather than secondary, legislation, the amendments in TULRCA were not ultra vires.

Final thoughts
While lawyers might study with interest the arguments unsuccessfully used by the US to seek to exempt itself from consultation requirements, employers must continue to wait to hear about the point that they are really interested in; that is, when the duty to consult arises.

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Time for a holiday? Overtime, commission and the holiday pay problem

Rarely do complex employment law issues form the subject of sensationalist tabloid headlines. Yet that is precisely what has happened for holiday pay, which has been catapulted from comparative obscurity to a headline matter. This article explores the issue in more depth and considers why it might constitute a lingering compliance issue for some time yet.

The basics

In the UK, all ‘workers’ are entitled to paid holiday. The concept of a worker is much broader than that of an employee, since it extends to any individual who undertakes to perform work or services personally, other than as part of their own business or profession. Genuinely ‘self-employed’ individuals (i.e. those who could truly be said to be in business on their own account) are excluded, but the entitlement nonetheless impacts a very wide category of individuals.

The following are examples of individuals considered to be ‘workers’ in decided cases:

- A window salesman earning commission from referrals who signed a contract which described him as a “self-employed salesman”;
- A doctor providing services once a week as a hair restoration surgeon to a private cosmetic surgery clinic; and
- Actresses who obtained parts in a fringe theatre production where remuneration was described as being on a “profit share” basis.

Under the Working Time Regulations (“WTR”), all workers are entitled to a minimum of 5.6 weeks’ holiday (a maximum of 28 days), including bank holidays. The first four weeks of leave represent the UK’s implementation of the Working Time Directive (the “Directive”), with the additional 1.6 weeks being UK “gold-plating”, which exceeds the minimum requirements of the Directive.

In this article, we refer to the first four weeks of leave as “Directive Leave”, and the additional 1.6 weeks as “Additional Leave”. The importance of this distinction will become clear.

A worker is entitled to be paid in respect of the 5.6 weeks of annual leave that they are entitled to under the WTR at the rate of a ‘week’s pay’ for each week of leave. The apparent simplicity of that test is deceptive, however. A combination of legislative complexity and judicial interpretation renders it a markedly more complex concept than it first appears.

The story so far

When the WTR came into force in 1998, the government simply adopted a longstanding legislative concept of a ‘week’s pay’ that had been used for many years in calculating statutory redundancy pay, amongst other things.

This definition effectively divides the method of calculating a week’s pay into four categories:

- **Category one** - those workers with normal working hours and whose pay does not vary with the amount of work done or the time at which they work during those normal working hours. For these individuals, a week’s pay is the amount payable under the contract of employment for each week of employment.

- **Categories two and three** - those with normal working hours, but whose pay varies either with the amount of work they do or the time at which they work during those normal working hours. For these individuals, a week’s pay is the amount payable under the contract of employment for each week of employment.

Stephen Ratcliffe, Partner, and Robert Marsh, Associate, at Baker & McKenzie LLP explore the issues surrounding the calculation of holiday pay in light of recent cases before the courts, and why this area represents an on-going compliance concern for most organisations.
• **Category four** - those with no normal working hours (e.g. those on zero-hours contracts). In this case, a week's pay is an average of all the sums earned in the previous 12 working weeks, including overtime and commission.

Historically, many companies took an understandably restrictive view on what would be included in normal working hours unless it is both compulsory and guaranteed, (Bamsey v Albion Engineering and Manufacturing Plc [2004] IRLR 457).

Further, the courts held that commission should not be included in the calculation as it was pay for success, rather than pay for the amount of work done, (Evans v. Malley Organisation Ltd t/a First Business Support [2003] IRLR 1 56).

Errors still arose, however, due to the surprising degree of analysis required to determine the applicable calculation. Perhaps the most significant of these was in the case of John Lewis, whose correction of one such mistake resulted in a reported one-off cost of £40m to the partnership in 2013.

However, the result of the general application of the case law was that, for many workers (particularly those who earned significant sums by way of non-guaranteed overtime and/or commission), holiday pay would be materially less than ‘normal’ pay. Perhaps unsurprisingly, that gap between perceived ‘normal’ pay and holiday pay has led to a number of challenges in the courts, the more recent of which has left the law in this area in a state of considerable flux.

The influence of Europe - from Williams to Lock and beyond

The first real challenge to the status quo came from airline pilots in the case of British Airways v Williams C-155/10 [2011] IRLR 948, [2012] ICR 147.

Although this case centred around separate legislation that applied specifically to those employed in aviation, the principles involved had important implications for the interpretation of the Directive, and thus the WTR.

Most importantly, in Williams, the Supreme Court referred to the Court of Justice of the European Union (‘CJEU’) the question of “whether the rate of payment must correspond precisely to, or be broadly comparable to the worker’s ‘normal pay’, and if so how such a concept should be assessed”.

Even though there was no evidence that any pilot was deterred from taking annual leave by the payment of basic pay only (a practice that was widespread in the aviation industry at the time), the CJEU ruled that a worker should be paid for annual leave at a rate equating to ‘normal’ remuneration for the tasks he or she was required to carry out under the employment contract, but excluding payments intended to cover incidental costs or expenses.

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**Commission**

The decision of the CJEU in Williams has since been taken up by workers seeking to challenge the established means of calculating holiday pay under domestic law. Perhaps the most high-profile of these cases is Lock v British Gas Trading Ltd C-539/12 [2014] IRLR 648, [2014] ICR 813.

Mr Lock was an energy salesman paid a basic salary and commission based on sales. Commission formed approximately 60% of his salary. However, Mr Lock’s holiday pay was calculated by reference to his basic pay only.

He took a period of annual leave over Christmas 2011, during which time he received basic pay only. The approach of British Gas in paying basic pay only was entirely in accordance with the law as it was understood at the time.

Mr Lock was considered to be a ‘category one’ worker whose guaranteed weekly pay consisted of his basic pay only. Commission was a reward for success and not for the amount of work done, so he did not fall into category two, under which he would have been entitled to an average of his actual earnings.

During the time when he was on holiday, Mr Lock received pay that was fairly representative of the amounts he would usually be paid whilst working (including commission for sales made in the periods before his holiday). However, in the months after his holiday, he received below average commission, as he made no sales during the period when he was on holiday. Mr Lock contended that this was unlawful following Williams.

Again, the case made it to the CJEU, which reiterated its statement that holiday pay should put the worker in a position during leave that, as regards salary, is comparable to periods of work. Although Mr Lock’s salary during his leave was broadly representative of ‘normal’ pay, the consequent reduction of pay in subsequent periods was a disincentive to take leave.

Since the commission he received

(Continued on page 4)
was intrinsically linked to the performance of the work he was required to carry out under his contract of employment, it must be taken into account in calculating his holiday pay.

The case was remitted back to the UK Employment Tribunal to decide how that pay should be assessed, and whether the WTR could be read in a manner consistent with the Directive.

In March 2015, the Employment Tribunal ruled that where a worker with normal working hours, (i.e. one who would otherwise fall into category one), also received commission or a similar payment, he should be deemed to have remuneration which varies with the amount of work done, thus making him a category two worker and entitled him to have average commission included in the calculation of holiday pay. The Employment Tribunal further concluded that that result could be achieved under domestic legislation, by reading appropriate wording into the WTR.

**Overtime**

The treatment of overtime, too, has come under attack following Williams. As noted above, the established position under domestic law was that, for employees with normal working hours, overtime need only be included in the calculation of statutory holiday pay if it was both guaranteed (i.e. the employer is contractually obliged to offer it) and compulsory (i.e. the employee is contractually obliged to work the overtime offered).

In Bear Scotland Ltd v Fulton [2015] IRLR 15, [2015] ICR 221, that approach was challenged by workers whose overtime was compulsory but not guaranteed, and who contended that, following Williams, the overtime was part of their ‘normal pay’ and should therefore be included in the calculation of holiday pay.

The Employment Appeal Tribunal (“EAT”) concluded that the established method of calculating a week's pay was not compatible with the purpose of the Directive. For Directive Leave only (i.e. the four weeks required by the Directive), holiday pay should be based on the much broader concept of ‘normal’ remuneration. Overtime which the employee had to work, but which the employer was not obliged to offer should therefore be included (at least, it is submitted, if it can reasonably be said to constitute part of ‘normal’ pay).

**Liability**

Since these developments represent a change in the courts’ interpretation of the law, rather than a change in underlying legislation, they expose employers to significant liability for past miscalculations that were in many cases entirely in accordance with the prevailing case law.

Provided that there is a ‘series’ of failures to pay correct holiday pay (which, according to Bear Scotland, requires that there is a break of no more than three months between each underpayment), the worker may claim for many years’ worth of underpayments. It is this element that sparked a number of the more sensational headlines in late 2014, as a fear developed that employers might be liable for back-payments totalling billions of pounds.

The implications of the EAT’s decision not only sparked the tabloids into action, but also the UK government. It set up a “task force” to address the issue of holiday pay, noting the need to take action to protect businesses against the damaging impact of large backdated claims.

Regulations were quickly introduced with the effect that, in respect of claims brought on or after 1 July 2015, compensation for underpaid annual performance bonuses, be included in holiday pay?

Must voluntary overtime be included? This is an issue which has yet to be played out in English tribunals, but it formed the subject of the recent decision of the Northern Irish Court of Appeal in Patterson v Castle-reeagh Borough Council [2015] NICA 47, which concluded that there was no reason in principle why that type of overtime should necessarily be excluded (though the question of whether it should be included in the particular case was for the Tribunal to determine).

**What Next?**

The decisions in Lock and Bear Scotland represent an indication of the direction of travel for holiday pay, but are far from a settled conclusion. The claimant’s union in Bear Scotland decided not to appeal the EAT’s decision, but at the time of writing the respondent’s appeal in Lock is before the EAT.

Regardless of its outcome, however, the precise ramifications of the existing decisions are unclear, in particular:

- How frequently must a payment be made to the worker to constitute an element of ‘normal’ pay?
- To what extent must other allowances, such as on-call payments, attendance bonuses and even annual performance bonuses, be included in holiday pay?

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*Continued from page 3*
What is an ‘appropriate reference period’? It is unclear whether the 12-week reference period anticipated in domestic legislation will always be an appropriate reference period, particularly given the scope for employees whose pay varies due to peaks of activity to game the calculation by only booking holiday immediately after periods in which significant overtime/commission has been paid.

How does an employer tell whether a period of leave is Directive Leave, Additional Leave, or a further period of leave offered in addition to the statutory minimum? The EAT in *Bear Scotland* suggested that it was for the employer to designate which leave is which, but this remains an obiter comment.

**Practical steps**

The difficult issue faced by employers is what to do now, given that the law remains in a state of flux and the precise details of the calculation are not yet settled. The calculations required are likely to be sufficiently complex that a technical solution is required, but the redesign of payroll systems to enable a revised calculation of holiday pay is likely to be a significant and costly undertaking.

On the other hand, simply letting the matter rest risks significant ongoing liability, particularly regarding compulsory overtime, in respect of which the law appears to be reasonably settled. That option is in any case unlikely to be available to employers with a unionised employee population, since unions are alive to the issue.

In practice, employers would be well-advised to:

- Review their holiday pay practices to assess what, if any, exposure exists in respect of claims for underpayments of holiday pay, and the quantum of that exposure.
- Consider amending pay practices to reduce the proportion of salary which is variable, thereby reducing the value of potential claims. Alternative options include, for example, replacing pay supplements for overtime with time off in lieu.
- Investigate the degree to which existing payroll systems would require redesign to accurately address a revised holiday pay calculation based on average pay over a defined period.
- In the context of acquisitions, focus on exposure to historic underpayments of holiday pay, and seek indemnities where appropriate.

An updated analysis and further advice will be discussed in this journal once the EAT has delivered its final ruling in *Lock*.

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