GIBSON DUNN

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UK EMPLOYMENT UPDATE - JANUARY 2018

To Our Clients and Friends:

In this update we:

- focus on two areas of UK employment law which are currently having a major impact on employers: the Gender Pay Gap Reporting Regulations which come into force in 2018 and one of the most talked about issues last year: worker status and the gig economy
- consider recent decisions of the European Court of Human Rights and the English High Court on data protection issues which will impact employers as they prepare for the General Data Protection Regulation.

A brief overview is provided below. More detailed information is available by clicking on the appropriate links to the Appendix. (click on link)

Gender Pay Gap Regulations *(click on link)*

By 5 April 2018, all employers who employed more than 250 employees as at 5 April 2017 must have filed a gender pay gap report. Our previous client alert considered the Regulations in detail and can be found here.

Worker Status and the Gig Economy *(click on link)*

"Worker" status was one of the most talked about employment law issues in 2017 and this trend looks likely to continue with a number of appeal decisions due in early 2018. We consider below the categories of worker and the protections they enjoy as well as key themes emerging from the recent cases.

Data Protection Update *(click on link)*

The GDPR will come into force on 25 May 2018, imposing significant stricter and, in some cases, new obligations on those entities which process the personal data of EU residents or which are otherwise subject to GDPR . We summarised the key provisions of the GDPR in previous alerts that can be found here. We are working with a number of clients to ensure that they have policies and procedures in place to comply with the GDPR. Those who have not yet done so, have only four months left to prepare.

Data protection has also been the subject of several recent decisions which we consider below and which emphasise the need for employers to ensure that they have updated data protection policies and procedures in place.

APPENDIX

Gender Pay Gap Regulations

Approximately 500 companies have taken the decision to file their gender pay gap reports at the time of writing and those reports have attracted considerable media interest.

The accuracy of those reports has also come under the spotlight, with the media accusing some employers of underreporting their gender pay gap.

With a little more than two months left before the deadline, we continue to advise clients on the most appropriate strategy in terms of presentation, explanation and publication of their reports. Gender pay gap issues are also under scrutiny in the United States and we are working in connection with our US offices to ensure our clients consider comprehensive strategies both in the UK and in the US.

Will the Regulations be enforced?

The Regulations do not set out a means for enforcement and it was initially thought that there would be no legal consequences for non-compliance. However, the UK Equality and Human Rights Commission ("EHRC"), which is empowered under UK law to enforce the Equality Act 2010, has recently acknowledged for the first time that it will take steps to enforce compliance with the Regulations and has published its proposed enforcement strategy which is subject to consultation until 2 February 2018.

The EHRC intends to select random "targets" from different industries, prioritising those employers who do not publish Gender Pay Gap Reports or who appear to have published inaccurate data. Those who refuse or fail to engage with EHRC to rectify their non-compliance would face prosecution and potential criminal liability.

Any attempt by the EHRC to exercise its proposed powers may well be met with a legal challenge given that the Regulations do not contain an enforcement regime and it has been argued (and, indeed, was the initial view of the EHRC) that the EHRC does not have the power to enforce them. However, it may be that the EHRC use non-compliance with the Regulations as a pretext for a wider investigation into employers that it suspects of engaging in discriminatory hiring, promotion or other practices (an area for which they have clear statutory authority).

Worker Status and the Gig Economy

Who is a worker?

Employment law in the United Kingdom is unusual in that it extends a number of employment protections to those who, while not employees, work under a contract to provide services personally to a customer or client. These persons, along with traditional employees, are classified "workers" and are to be distinguished from the genuinely self-employed, who run their own business. In the UK an

individual providing a service or services to an employer or client may therefore be considered a traditional employee, a worker who is not a traditional employee, or a truly self-employed independent contractor. Working out which of the three categories an individual falls into is far from straightforward and with the rise of the gig economy and agile working arrangements there has been a flurry of case law on the status of these workers.

Status matters – rights afforded to employees, workers and the genuinely self-employed

Determining whether an individual is an employee, worker or self-employed independent contractor is important when considering what legal rights they enjoy. We set out below a table highlighting key differences between the rights afforded to each category:

Right or entitlement	Employee	Worker	Self-employed contractor
National minimum wage	✓	✓	✗
Paid holiday/vacation	✓	✓	✗
Statutory sick pay	✓	✗	✗
TUPE protection upon the transfer of a business, undertaking service provision change	✓	✗	✗
Whistleblowing protection	✓	✓	✗
Protection from discrimination/harassment and related rights	✓	✓	✓
Special protection in the event of non-payment of wages	✓	✓	✗
Pension contribution from "employer" under auto-enrolment scheme	✓	✓	✗
Entitlement to paid rest breaks	✓	✓	✗
48 hour limit on a maximum week's work	✓	✓	✗
Statutory maternity/paternity/adoption/parental/shared parental leave and related rights	✓	✗	✗

Right or entitlement	Employee	Worker	Self-employed contractor
Entitlement to request flexible working	✓	✗	✗
Right as fixed-term/part-time employee not to be treated less favourably than a comparable permanent/full time employee	✓	✗	û
Minimum notice of dismissal	✓	✗	✗
Written statement of reasons for dismissal	✓	✗	✗
Protection from unfair dismissal	✓	✗	✗
Statutory redundancy payment and related rights	✓	✗	✗

Workers and the gig economy - themes emerging from recent cases

Many businesses operating in the gig-economy treat their workforce as self-employed contractors, thus avoiding the legal and administrative burden associated with employing or engaging employees and workers. This provides them with greater flexibility as their business grows and allows them to price their products and services more competitively than traditional businesses.

However, this business model has been threatened by a number of recent cases before the UK courts, all but one of which has resulted in the reclassification of individuals thought to be self-employed contractors as "workers", with all the associated legal protections.

The determination of worker status remains highly fact-sensitive and involves weighing up a series of factors. What the parties call themselves and how they document their arrangements is of limited importance.

We have drawn together a list of key factors upon which the UK courts have focused in recent cases when determining whether an individual is a worker or independent contractor (none of which are determinative):

Factor	Points towards worker status and away from self-employed independent contractor status	Points towards self-employed independent contractor status and away from worker status
Who actually performs the services?	A worker invariably performs the services personally.	An independent contractor tends to be free to engage and use their own personnel to perform the contract.
Is the individual dependent upon one client or customer?	A worker tends to works for and is dependent upon one client or customer and is required to accept work when offered. A worker has little or no bargaining power to amend or alter their terms of engagement.	An independent contractor tends to have multiple clients or customers and is not obliged to accept work when offered. An independent contractor has greater ability to negotiate their terms of engagement.
How integrated is the individual into the business of the client or customer? Does the individual appear to be operating in business on his/her own account?	A worker tends to work as an integrated part of the client or customer's business. For example, a client or customer may provide a worker with an email account and equipment for use when providing the services.	An independent contractor tends to provide skills and expertise which are not integral to the business of their client or customer. They tend to use their own equipment and to appear to operate as an independent business (e.g. with their own uniform, website, letterhead, business cards, marketing materials).
Does the individual have discretion as to how they carry out the work?	A worker tends to be tightly controlled by the client or customer as to when and how they carry out their work.	An independent contractor has a task to perform but tends to have both the expertise and authority to determine when and how they will carry out the work within set deadlines.

A recent decision of the Court of Justice of the European Union (CJEU) in *King v The Sash Window Workshop Limited* (C-214/16 CJEU EU:C:2017:914) illustrates how significant the consequences and costs of reclassification can be. This case started life in a UK Employment Tribunal with a decision that Mr King, a window salesman, was a worker and not a self-employed independent contractor as previously thought. The Employment Tribunal awarded Mr King holiday pay in respect of leave accrued and untaken in the previous years of his engagement (i.e. when he had been treated as a self-employed

contractor). That decision was upheld by the EAT. On appeal, the Court of Appeal referred the issue to the CJEU.

The Court held that Mr King was entitled to exercise his rights to take all the paid vacation that had accrued while he had been a worker, even before reclassification and without limit in time.

We are expecting decisions on a number of worker-status cases early this year, including from the Supreme Court. It is also possible that the Government may intervene and implement some of the recommendations from the Taylor Review which was published last year and which we commented upon in our previous alert which can be found here. Whilst worker status is primarily a UK issue, questions as to employment status arising from the gig-economy are also being considered by the courts in the US. We can assist clients across jurisdictions to ensure a strategic approach to these issues.

Data Protection Update

Employer vicariously liable for criminal data breaches

In a recent High Court case brought by a group of over 5,000 employees against the UK retailer Morrisons, the employer was found vicariously liable for the acts of a rogue employee who uploaded employees' personal data to a file sharing website.

In 2014, a file containing the personal details (including bank accounts, salary details and personal phone numbers) of 99,968 Morrisons' employees was uploaded to a file sharing website. Morrisons was alerted to the breach by the local newspaper that had anonymously received a CD that contained the uploaded data. Morrisons took immediate steps to get the website taken down, and alerted the police. An employee was found guilty of fraud and breaches of the Data Protection Act 1998 for uploading the data. He was sentenced to eight years imprisonment. The employee obtained the data through his role as an IT auditor but retained a copy for his own improper purposes.

5,528 employees whose data was disclosed claimed compensation for breaches of the Data Protection Act and the common law duty of confidentiality. The employees claimed that Morrisons was directly responsible for what had happened, or in the alternative, vicariously liable for the actions of its rogue employee.

The court found that the employee set out to deliberately damage Morrisons in retaliation for disciplinary action taken against him for an unrelated matter. The court held that Morrisons was not directly responsible for breaches of the Data Protection Act because it was not the data controller at the time of the breach (i.e. it was not controlling the processing in question). It also found that Morrisons had taken technical and organisational steps to prevent data breaches save for a failure to implement a system for the deletion of data (but even if such system had been implemented it would not have prevented the breach).

However, notwithstanding this, the court held that Morrisons was vicariously liable for the acts of the employee since when the employee received the data he was acting in the course of his employment and

there was a sufficiently close connection between the employee's position as an IT auditor and his wrongful conduct in order to establish vicarious liability.

The quantum of damages is still to be considered. In the meantime, we understand that Morrisons has been granted leave to appeal. In light of this case, and the GDPR coming into force this year, employers should be taking steps to ensure they have appropriate data security systems and procedures in place.

Monitoring employees in the workplace

The recent decision of the European Court of Human Rights in *López Ribalda and others v Spain* has ruled that, given the existing data protection rules on fairness and proportionality of data processing, and on information of data subjects, the indiscriminate use of secret CCTV cameras in the workplace that target all employees at all times cannot be used as evidence before courts to argue the dismissal of certain employees involved in thefts.

The employer had installed several visible surveillance cameras aimed at detecting theft by customers, and several concealed cameras aimed at recording theft by employees. Five employees were caught on video stealing items, and helping co-workers and customers steal items. The employees admitted involvement in the thefts and were dismissed. The employees contended that the use of the covert video evidence in the unfair dismissal proceedings had infringed both their privacy rights under Article 8 and their right to a fair hearing under Article 6(1) of the ECHR.

The court upheld the employees' Article 8 claim finding that the Spanish courts had failed to strike a fair balance between the employees' right to respect for their private life and the employer's interest in protecting its property. The majority found that the employer's rights could have been safeguarded by other means, notably by informing the employees in advance of the installation of the surveillance system and providing them with the information required by Spanish data protection law. The court unanimously rejected the employees' Article 6 claim, finding that the video evidence was not the only evidence the domestic courts had relied on when upholding the dismissals.

This case serves as a reminder to employers that reliance on CCTV and other monitoring in the workplace is limited to proportionate means and subject to informing employees of its use. Employers should ensure that employees have been notified of the purpose of CCTV and other means of monitoring if they wish to rely on it for investigations, disciplinary proceedings and dismissals.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these and other developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work or the following members of the Labor and Employment team in the firm's London office:

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