GIBSON DUNN

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UK EMPLOYMENT UPDATE - SUMMER 2019

To Our Clients and Friends:

In this, our 2019 mid-year alert, we look back at the key developments in UK employment law over the past six months and look forward to anticipated developments in the six months to come.

A brief overview of developments and key cases which we believe will be of interest to our clients is provided below, with more detailed information on each topic available by clicking on the links.

1. Political Developments in the UK *(click on link)*

We consider the impact of the plans of the recently appointed Prime Minister, Boris Johnson, and his Conservative government for employment laws in the UK including in relation to the UK's departure from the European Union which will take place on 31 October 2019 absent any further extension.

2. Changes in Corporate Governance *(click on link)*

We consider those UK corporate governance measures which have come into effect in 2019, increasing large companies' reporting requirements. In particular, we consider the requirement to publish the ratio between CEO and workforce median pay and the impact of the introduction of the 2018 UK Corporate Governance Code, which places greater emphasis on employee engagement for listed companies.

3. SMCR *(click on link)*

We highlight those provisions of the Senior Managers and Certification Regime (the "**SMCR**") which will be considerably expanded to apply to all UK financial services firms regulated only by the UK's Financial Conduct Authority ("**FCA**") with effect from 9 December 2019.

4. #MeToo and Use of NDAs *(click on link)*

We summarise recent developments in this area of law and consider government plans to change laws to stop NDAs purporting to prevent staff reporting allegations of illegal harassment and discrimination to the police.

5. Restraint of Trade *(click on link)*

We consider the impact of two recent cases in this area of UK law. First, the recent and much-anticipated judgment of the UK Supreme Court which has confirmed the circumstances in which courts have the power to strike out offending words from defective non-compete covenants. Second, a recent decision of the UK Employment Appeal Tribunal (the "**EAT**") confirming the validity of "bad leaver" provisions

contained in a company's Articles of Association which required the forfeit of deferred earn-out shares and loan notes upon resignation.

6. Whistleblowing *(click on link)*

We consider the impact of a recent decision of the UK Court of Appeal concerning the application of UK whistleblowing protections to employees of a UK employer working overseas.

7. SPL/Redundancy Pay *(click on link)*

We report on two UK Court of Appeal cases which have provided welcome guidance for employers on the correct approach on payment for parental leave. Failure to pay a male employee enhanced shared parental pay was found to be neither direct nor indirect sexual discrimination, and did not amount to a breach of the equal pay sex equality clause. However, both employees are seeking permission to appeal to the UK Supreme Court.

8. One Year On - General Data Protection Regulation ("GDPR") and Gender Pay Gap Reporting *(click on link)*

We consider the impact of the GDPR one year on including the Information Commissioner's Office's (the "**ICO**"'s) outlook for the future.

We also consider the reasons for the reported increase in the gender pay gap following the conclusion of the second full year of gender pay gap reporting.

APPENDIX

1. Political Developments in the UK

Following Theresa May's resignation, the Conservative Party has elected a new leader and the UK has a new Prime Minister, Boris Johnson. The new Prime Minister has undertaken a significant cabinet reshuffle. Along with a number resignations, half of Theresa May's cabinet are no longer in their roles. The new Government has not announced any changes to employment legislation, although it will be interesting to see whether they uphold the previous Government's commitment to extend the period of maternity redundancy protection to start at the point at which a woman notifies her employer of her pregnancy, whether orally or in writing, and to last until six months after the end of the maternity leave.

As readers will be aware, the UK did not leave the European Union on 29 March 2019 as originally planned. Brexit is now due to happen on 31 October 2019, although there is an impasse at the moment with the European Union having offered a deal that it has said will not be improved, but that has not been passed by Parliament. Boris Johnson has renewed his commitment for the UK to leave the European Union on 31 October 2019, with or without a deal.

The only thing that can be said for certain at this stage is that it remains impossible to predict how Brexit will unfold. As we previously reported, it is not currently expected that Brexit will have a substantial immediate impact upon employment rights in the UK, whatever form it takes.

2. Changes in Corporate Governance

Below we summarise the most recent important changes to UK corporate governance. Although the focus is on listed companies, these principles are likely to eventually be applied to private companies, and many non-listed companies are already voluntarily complying with various governance codes as best practice. Action will be required by heads of HR departments, company secretaries, in-house counsel and boards themselves.

As we reported in our last alert, a new set of regulations came into force on 1 January 2019 bringing in mandatory reporting of the ratio between CEO pay, including all elements of remuneration, and average staff pay for UK-incorporated companies that are quoted, with 250 or more employees in the group. We still await the publication of the first of these Directors' remuneration reports as companies are collecting and analysing data now for publication in 2020: the new requirements apply to remuneration reports for financial years beginning on/after 1 January 2019.

These regulations also include the following:

- **Section 172(1) statement.** All large private and public UK incorporated companies are to include in their strategic report a "section 172(1) statement" to explain how their directors have had regard to the duty to promote the long term success of the company when performing their directors' duties under section 172. This includes consideration of the interests of employees and other stakeholders: non-employee workers may be relevant. If the company is not quoted, the same information must be published on a free to access website.

- **Statement of engagement with employees.** All companies with more than 250 employees in the UK must include in their directors' report a statement on employee engagement which describes steps taken by the company to have regard to staff interests when taking decisions.

- **Statement of engagement with stakeholders.** All large UK incorporated companies must include in their directors' report a statement summarising how the directors have had regard to the need to foster the company's business relationships with suppliers, customers and others and the effect of that regard on the principal decisions taken by the company during the financial year.

- **Statement of corporate governance arrangements.** Non-listed UK incorporated companies that have either (1) 2,000 or more employees, or (2) both (i) a turnover of over £200 million and (ii) a balance sheet total over £2 billion, should include in their directors' report a statement to explain on a **comply or explain** basis their corporate governance arrangements, including whether they follow any formal code. Unquoted companies must also make the statement available on a website that is maintained by or on behalf of the company and identifies the company in question.

The 2018 UK Corporate Governance Code, which applies to companies with a premium listing for all financial years beginning on or after 1 January 2019, also provides for greater employee engagement for listed companies including: (1) appointing a director from the workforce; (2) creating a workforce advisory panel; (3) the creation of a designated non-executive director responsible for employee engagement; or (4) a combination of the foregoing.

3. The Senior Managers and Certification Regime

Major financial institutions in the UK have been subject to the SMCR since 2016, when parallel provisions were introduced by the Prudential Regulation Authority and the FCA. However, from 9 December 2019, a form of the SMCR will be extended to apply to all solo-regulated firms (i.e. UK financial services firms regulated only by the FCA). There will be three levels of regulation: (1) Enhanced, (2) Core, and (3) Limited Scope.

Under the Senior Managers Regime, individuals performing certain functions will be classed as "Senior Managers". Prior to being permitted to perform a Senior Manager function, individuals will need to be approved as being "fit and proper" by initially both their firm and the FCA, and subsequently annually by their firm. If a breach of a regulatory requirement occurs in the area for which the Senior Manager is responsible, and the Senior Manager did not take reasonable steps to prevent that breach from occurring, they could be held personally accountable. Each Senior Manager must have a Statement of Responsibility setting out that Manager's area of responsibility.

The Certification Regime will mean that individuals and their firms are responsible for certification of individuals as being "fit and proper", rather than the FCA. This new regime covers a wider range of people than those covered by the Approved Persons Regime, including anyone who could pose a risk of significant harm to the firm or its customers.

In addition to the Senior Managers Regime and the Certification Regime, a third limb, the Conduct Rules, will apply to these firms. This is backed up by certain training requirements.

The initial steps a firm needs to undertake are:

Type of Firm	Determine whether firm is an (1) Enhanced, (2) Core or (3) Limited Scope firm.
Senior Managers Regime	Identify which staff are Senior Managers, then formally and transparently allocate responsibilities amongst them.
Certification Regime	Identify those staff who will be subject to the Certification Regime, and then assess their fitness and propriety.
Conduct Rules	Train all staff, save for ancillary staff, in the Conduct Rules.

The key dates are as follows:

9 December 2019	Senior Managers and Certified staff must be identified and trained in the Conduct Rules by this date.
9 December 2020	Certified staff must be assessed and, if appropriate, certified as being fit and proper by this date. All other staff, apart from ancillary staff, must be trained in the Conduct Rules by this date.

4. #MeToo and Use of NDAs

The #MeToo movement continues to gather pace. As previously reported, the use of NDAs has already come under scrutiny from the UK Parliament and the Solicitors' Regulation Authority, of England and Wales ("**SRA**"). In particular, the use of NDAs and confidentiality provisions in settling claims in relation to harassment has come under the spotlight and become a political issue. The use of these clauses remains lawful, but there are calls for government action to regulate them.

The Women and Equalities Committee of the UK Parliament published a report on 11 June 2019 which found that a series of measures needs to be introduced. Measures proposed include: (i) to strengthen corporate governance requirements to require employers to name senior managers at board level to oversee anti-discrimination and harassment policies and procedures, and the use of NDAs in discrimination and harassment cases; (ii) that an employer should pick up the legal of costs of a successful employee; and (iii) that the payment awarded in relation to the cost of legal advice prior to entering into a settlement agreement should reflect the actual cost of that advice and should be made even if the employee decides not to sign the agreement.

On 21 July 2019, the UK Government published a response to its consultation on proposals to prevent the misuse of confidentiality clauses. The UK Government has committed to change laws on NDAs so that employers will be banned from drawing up NDAs which prevent individuals reporting allegations of illegal harassment and discrimination to police, regulated health and care professionals, or legal professionals. There will also be new requirements for the limitations of a confidentiality clause to be clear to those signing them, and for the mandatory independent legal advice on a settlement agreement to include the limitations of any confidentiality clause. Further, confidentiality clauses that do not comply with the new legal requirements will be void. However, this new legislation will be brought forward *"when Parliamentary time allows"* and it will be interesting to see whether the new UK Government follows through with these changes.

As previously reported, while settlement agreements containing non-disclosure provisions remain a lawful and appropriate means by which UK employers can resolve disputes in which allegations of sexual harassment have been made, care should be taken to ensure that: (i) NDAs are not used in circumstances in which the subject of the NDA may feel unable to notify regulators or law enforcement agencies of conduct which might otherwise be reportable; (ii) lawyers do not fail to notify the SRA of

misconduct, or a serious breach of regulatory requirements; and (iii) lawyers do not use NDAs as a means of improperly threatening litigation or other adverse consequences.

5. Restraint of Trade

An armoury of weapons is available to an employer who wishes to guard against the loss of a key employee. We report below on the first case concerning post-termination restrictions to reach the UK Supreme Court in over 100 years. We also consider financial disincentives, which are typically less discussed but still a useful tool for employers.

Restrictive covenants: The UK Supreme Court has handed down its much-anticipated judgment in *Tillman v Egon Zehnder [2019] UKSC 32*. Ms Tillman's employment contract included a number of post-termination restrictions, including a non-compete clause that meant she could not *"directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the Company or any Group Company"* for a period of six months. She tried to extricate herself from these non-compete restrictions by arguing that a clause restricting her from being interested in a competitor business had the effect of restraining her from even holding any shareholding in a competitor and was thus an unreasonable restraint of trade. We previously reported on the UK Court of Appeal judgment, where it was found that the non-compete restrictive covenant was unenforceable.

Whilst the UK Supreme Court agreed that the construction of the clause prohibited Ms Tillman from holding shares in a competitor, it held that the words *"or interested'"* could be severed from the offending clause rendering the non-compete clause enforceable.

This case is good news for employers who are looking to enforce restrictive covenants as the decision confirms that the courts have the power to strike out offending words from defective covenants, rendering the remaining restrictions enforceable so long as where removing the offending words from the covenant will not result in any major change in the overall effect of the restriction.

Bad leaver provisions: In *Nosworthy v Instinctif Partners Ltd UKEAT/0100/18/RN*, the UK EAT confirmed that a bad leaver provision in a Company's Articles of Association that required an employee to forfeit deferred earn-out shares and loan notes if she resigned was not invalid as she was not put at a serious disadvantage. Further, it was found that the provision was not void as a penalty clause, because the employer's argument was not reliant upon a breach of contract by the employee but rather on provisions in the Articles that applied to bad leavers regardless of breach. The bad leaver provisions were clear as to the consequences of voluntary resignation.

Ultimately, the deterrent effect of a bad leaver provision in an incentive scheme can be reduced by a new employer who is willing to make good the departing employee's loss. Hence post-termination restrictive covenants remain an important tool for preventing a departing employee from engaging in unfair competition.

6. Whistleblowing and Territorial Jurisdiction

The UK Court of Appeal overturned the UK EAT's decision in *Foreign and Commonwealth Office and others v Bamieh [2019] EWCA Civ 803* and found that the employment tribunal did not have territorial jurisdiction over whistleblowing claims brought by an FCO employee working at an international mission in Kosovo against individual co-workers. The claimant worked as an international prosecutor employed by the FCO and was seconded to EULEX in Kosovo. She claimed that the reason her contract was not renewed was that she had made protected disclosures and she subsequently brought claims against the FCO for unfair dismissal and whistleblowing detriment. In addition, she brought whistleblowing detriment claims against two individual co-workers who were also FCO secondees.

The UK Court of Appeal examined the factual reality of the relationships, and found that there was not a sufficient connection to British employment law, given that, in relation to the claims against the individual co-workers: (i) the co-workers worked together in Kosovo, (ii) it was an international mission, (iii) they were seconded separately, and (iv) that the whistleblowing detriment stemmed from "*the conduct of their EULEX roles*".

A degree of uncertainty remains however as to the correct approach for the employment tribunal to take in relation to jurisdiction over individual respondents in claims under the Equality Act 2010, such as discrimination. Leave to appeal to the UK Supreme Court has been sought, which will hopefully bring more clarity.

7. Enhanced Provisions Relating to Shared Parental Leave and Parental Pay

Failure to pay male employee enhanced shared parental pay was not direct or indirect sex discrimination

The UK Court of Appeal in (i) *Ali v Capita Customer Management Ltd ET/1800990/2016* and (ii) *Hextall v Chief Constable of Leicestershire Police [2019] EWCA Civ 900* ruled that employers can enhance maternity pay while only offering statutory shared parental pay for partners. It was found that this was neither direct discrimination nor indirect discrimination, nor a breach of the equal pay sex equality clause.

In *Ali*, the claim of direct discrimination failed because it was found that the correct comparator should be a female colleague on shared parental leave, and not a female on maternity leave. The purpose of statutory maternity leave is for the protection of the mother's health during pregnancy and thereafter, and also the protection of the special relationship between the mother and child during the period following childbirth.

Before the UK Court of Appeal in *Hextall*, the employer agreed that the claim should be characterised as an equal pay claim. Mr Hextall's case was that there was a breach of his terms of work as modified by the sex equality clause implied into all terms of work by the UK Equality Act 2010. His claim was that his terms of work had been modified by the sex equality clause to include a term entitling him to take care of his new-born baby at the same rate of pay as mothers on maternity leave. The UK Court of Appeal rejected this claim as the UK Equality Act 2010 provides that the sex equality clause does not

have effect in relation to terms of work affording special treatment to women in connection with childbirth or pregnancy.

Whilst this provides an element of clarity for the time being, we understand that the claimants in both cases are seeking permission to appeal to the UK Supreme Court.

Periods of part-time parental leave must not reduce average pay for redundancy pay purposes

In *RE v Praxair MRC SAS (C-486/18)* the ECJ has held that the calculation of compensation payments for dismissal and redeployment of an employee who was on part-time parental leave must be carried out on the basis of the full-time salary and not take into account periods of part-time parental leave.

Whilst the UK does not explicitly recognise the concept of part-time parental leave, this case provides useful guidance and confirms that EU law requires any benefits such as redundancy pay or holiday pay to be calculated on the basis of an individual's normal salary. Any periods of parental leave in which pay is either reduced or suspended should be ignored.

8. One Year On - GDPR and Gender Pay Gap Reporting

GDPR – One year on: There is much to be done before the GDPR is truly embedded in organisations and its impact is fully understood. Reports to the ICO of personal data breaches have increased manifold, though fewer than one in five required the organisation to act or led to enforcement or penalties. Similarly, data protection concerns received from the public have almost doubled to 41,000. The ICO stresses the importance of resourcing and board level engagement with Data Protection Officers.

On enforcement, the ICO has shown its willingness to deploy the full range of tools at its disposal: requisitioning information, making inspections, compelling action, setting penalties and issuing fines. Looking ahead, the ICO states its mission is to uphold "*information rights for the UK public in the digital age*" and "*trust and confidence in how data is used*", so its priorities will include online data usage and security, artificial intelligence, surveillance, facial recognition, political campaigns using personal data, freedom of information, and children's privacy. In addition to ICO written and interactive guidance, ICO statutory codes for data sharing, direct marketing, age-appropriate design, and journalism are in various stages of development and consultation.

Gender Pay Gap Reporting – One Year on: As regular readers of our alerts will be aware, we have previously reported on the requirement for, uptake and reception of gender pay gap reporting (January 2018 client alert, September 2017 client alert, 2016 Year-End client alert). The second year of reports showed a median gender pay gap of 9.6%. However, 45% of reporting employers had seen an increase in their gender pay gap over the year, while a further 7% saw no change. Overall, 78% of companies had a gender pay gap in favour of men, with 14% reporting a pay gap in favour of women and only 8% reporting no difference.

It is possible that one of the causes of the increasing gender pay gap is employers recruiting more women into lower paid positions within organisations as a long-term bid to tackle wage disparity. One of the

most influential factors in these statistics is the gender balance across each pay quartile, so where more women are entering companies in junior positions this will be reflected in the gender pay gap reporting.

In January 2019, the government confirmed that it will not be making any immediate changes to the regime, although it had taken on board some of the comments on the limitations of the regime. The UK Parliament Business, Energy and Industrial Strategy committee recommended a number of enhancements and extensions to the rules, however the government has said that this is a five year plan and so it will take time to see an impact in the numbers. The response by the government demonstrates that, while it is desirable to have action plans which set out how businesses intend to close the gender pay gap within their organisation, employers ultimately have the freedom to produce an action plan relevant to their individual situation.

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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