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# UK EMPLOYMENT UPDATE - JANUARY 2020

To Our Clients and Friends:

In this alert, we look back at the key developments in UK employment law over the final six months of 2019 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 and the Impact of Brexit** *(click on link)*

It continues to be a turbulent time in British politics. The 12 December 2019 general election resulted in the return of Boris Johnson as Prime Minister, with a significant majority Government. In this alert, we consider the potential impact of Brexit on international data transfers to and from the EU to the UK.

**2.** **Whistleblowing** *(click on link)*

We consider two recent decisions of the UK Supreme Court in respect of (1) whistleblowing claims concerning the right of judges as office-holders, to bring detriment claims as whistleblowers, and (2) the circumstances in which an employee may enjoy whistleblower protection on dismissal even though the person who made the decision to dismiss him was unaware that he was a whistleblower.

**3.** **Patent for Employee Invention** *(click on link)*

We report on a UK Supreme Court case which found that an employee of a Unilever subsidiary was entitled to compensation because the patents for his invention were of outstanding benefit to his employer.

**4.** **Updated Guidance for Holiday Entitlement for Part-Year Workers** *(click on link)*

There has been no shortage of holiday pay cases over recent years, and we report on revised government guidance published at the end of the Summer concerning the calculation of holiday pay for those who only work for part of each holiday year.

**5.** **Forthcoming Changes** *(click on link)*

We summarise a number of changes coming into force on 6 April 2020 that will affect employment law including those relating to taxation, such as new rules for off-payroll working in the private sector and a new NIC charge on termination payments. We also consider forthcoming changes proposed in the Employment Bill.

## APPENDIX

### 1. Current Political Environment and Impact of Brexit

After winning the December 12 general election with a strong majority, Boris Johnson returned as Prime Minister, with the political capital to extract the UK from the European Union on 31 January 2020 and move on to negotiations about our future relationship. The precise implications of Brexit on UK law are still largely uncertain given the wider climate of uncertainty around Brexit. The European Union (Withdrawal Agreement) Act 2020 has been enacted. This means that the UK will most likely leave the EU on 31 January 2020, with a transition period until 31 December 2020.

During the transition period the country will no longer be a member of the EU, but will still have to adhere to EU rules. During this period, the future relationship between the UK and the EU will be negotiated.

In relation to personal data transfers, during the transition period there will be no change. During this period, it is hoped that the EC would make an "adequacy decision" in favour of the UK which would allow the free flow of personal data from the EU to the UK once the transition period ends, without the EU data exporter having to implement additional safeguards. On a similar note, at the end of the transition period companies relying on Privacy Shield certification (the EU-US privacy shield framework of the US Department of Commerce and the European Commission) to receive personal data from the UK will need to update their public commitment to comply with the Privacy Shield to specifically include the UK.

### 2. Whistleblowing

***Status challenges***

In the case of *Gilham v Ministry of Justice* [2019] UKSC 44, the Supreme Court has held that judges are entitled to protection under UK whistleblowing legislation. The Supreme Court agreed that the Employment Rights Act 1996 ("**ERA 1996**") excludes the judiciary from its protection, but found this to be incompatible with rights under the European Convention on Human Rights ("**ECHR**"). It found that the making of complaints about working conditions, in the vein of a protected disclosure, and allegations of reprisals for the same, engaged article 10 ECHR (freedom of expression). The failure to extend whistleblowing protection to the judiciary was found to be a violation of article 14 ECHR, which makes it unlawful to interfere with Convention rights (here, article 10 ECHR) by discriminating on prescribed grounds, including status. Occupational status is capable of falling within this category. Hence, the Supreme Court held that it is possible to interpret the definition of a worker under the ERA to include judicial office-holders and thereby extend whistleblowing protection to them. The case was remitted to the employment tribunal to decide the substantive merits of the claim on this basis.

***Knowledge of the decision maker and the decision to dismiss***

In *Royal Mail Group v Jhuti* [2019] UKSC 55, the Supreme Court considered whether an employee who made a protected disclosure to her manager could claim protection as a whistleblower when she was dismissed on grounds of poor performance by a decision-maker who had no knowledge of her protected disclosure.

During her trial period of employment at Royal Mail, Ms Jhuti made "protected disclosures" under section 43A of ERA 1996 (commonly described in the UK as whistleblowing) to her manager. He forced her to retract them and retaliated by bullying her and creating a false picture of inadequate performance. Ms Jhuti then went off sick with stress, and the Royal Mail began a process to decide whether she should be dismissed for poor performance. As she was off sick, she was unable to present her case to the decision-maker in meetings or otherwise. The decision-maker had no reason to doubt the evidence of poor performance and dismissed Ms Jhuti for poor performance.

Ms Jhuti made two claims: firstly, that she had made protected disclosures and she had been subjected to detriments by the company on grounds of her whistleblowing and, secondly, automatic unfair dismissal.

The Employment Tribunal found that Ms Jhuti had been subjected to detriments, including harassment and bullying, but that she had not been unfairly dismissed as the reason for her dismissal was her performance. Following a series of appeals, the case reached the Supreme Court which held that Ms Jhuti had been automatically unfairly dismissed on grounds of whistleblowing, notwithstanding that the decision-maker was unaware that she had blown the whistle to her manager. This was because the allegations of poor performance for which Ms Jhuti was dismissed were concocted by her manager as retaliation for whistleblowing.

The Supreme Court confirmed that in looking for the reason for dismissal, generally courts need only look at the reason given by the decision-maker. However, if the real reason is hidden from the decision-maker and an invented reason is presented, the court must look through the invention. In the particular circumstances of this case, the real reason for Ms Jhuti's dismissal was the hidden reason and the UK Parliament clearly intended that if the real reason for dismissal was whistleblowing the automatic consequence should be a finding of unfair dismissal.

## 3. Patent for Employee Invention

In the recent Supreme Court case of *Shanks v Unilever plc and others* [2019] UKSC 45, an employee of a Unilever subsidiary was awarded compensation of £2 million because the patents for his invention created during employment, nearly 40 years ago, were found to be of "outstanding benefit" to his employer.

Professor Shanks, the appellant, was employed by Unilever UK Central Resources Ltd ("**CRL**") in the 1980s. CRL was a wholly owned subsidiary of Unilever plc and employed the UK-based research staff of the Unilever group. During his employment, Professor Shanks conceived an invention. The rights, owned by CRL, were assigned to Unilever plc and other entities in its group. The Unilever group was

later granted various patents relating to the invention (the "**Shanks patents**"). The Shanks patents provided a net benefit of approximately £24.3 million to the Unilever group over time. In 2006, Professor Shanks applied for compensation under section 40 of the Patents Act 1977 (the "**Patents Act**") on the basis that the Shanks patents had been of outstanding benefit to CRL and that he was entitled to a fair share of that benefit. It was found that the benefit provided by the patents fell short of being outstanding. Professor Shanks' High Court appeal was unsuccessful. His appeal to the Court of Appeal was partially successful but he was found not to be entitled to compensation. The Supreme Court allowed his appeal in 2019 for the reasons discussed below.

An employee whose invention belongs to his employer is entitled to compensation if a patent has been granted which is, having regard among other things to the size and nature of the employer's undertaking, of outstanding benefit to the employer, and by reason of these matters, it is just that he be awarded compensation. Here, "employer" refers to the inventor's actual employer, i.e. CRL. An "undertaking" is a unit or entity which carries on a business activity. CRL's undertaking was the business of generating inventions and providing those inventions and the patents which protected them to the Unilever group for use in connection with its business. To assess the benefit derived by CRL from an assignment of the patents to the Unilever group, the Supreme Court considered the position of CRL and the benefit which the Unilever group gained or is expected to gain.

CRL operates a research facility for the benefit of the whole Unilever group and the resulting patents are assigned by CRL to other Unilever group members for their benefit. Therefore, the question of whether the Shanks patents are of outstanding benefit to CRL must be the extent of the benefit they provide to the Unilever group, and how that compares with the benefits derived by the Unilever group from other patents resulting from the work carried out at CRL. The hearing officer had been wrong to assess the benefit of the Shanks patents by comparing it to the patent owner's overall turnover or profits. The Supreme Court found that the benefit CRL enjoyed from the Shanks patents was outstanding within the meaning of section 40 of the Patents Act.

The decision in *Shanks* may make it easier for inventors employed by large business entities to claim compensation under the Patents Act 1977. However, demonstrating that an "outstanding benefit" has been enjoyed by an employer is still a high threshold to meet and compensation will only be granted in exceptional cases.

### 4. Updated Guidance and Calculator for Holiday Entitlement

New government guidance has been published, following the decision in *Harpur Trust v Brazel* [2019] EWCA Civ 1402.

The Court of Appeal has affirmed the Employment Appeal Tribunal's decision in *Harpur Trust v Brazel* [2019] EWCA Civ 1402 that holiday pay for part-year only permanent employees should not be pro-rated to reflect the number of weeks worked.

In this case, a school music teacher, Mrs Brazel, was employed under a permanent contract whereby she was only paid for the hours she worked, which varied, and she had long periods without work during the school holidays. Her contract provided for 5.6 weeks' annual leave, which she was required to take

during the school holidays. The school decided that Mrs Brazel's holiday pay entitlement should be pro-rated because she worked fewer weeks than the standard working year. The school paid Mrs Brazel holiday pay of 12.07% of her annual earnings, in reliance on ACAS guidance which stated that the statutory 5.6 weeks' holiday equates to 12.07% of the working year. Mrs Brazel brought a claim for unfair deduction from wages, and argued that her pay should be based on the 12-week period immediately before the holiday was taken, which would equate to 17.5% of her annual earnings.

The Court of Appeal ruled that pro-rating holiday pay was not appropriate. The EU Working Time Directive (2003/88/EC) (WTD) requires that workers accrue entitlement to paid annual leave in proportion to the time that they work but this is distinct from the remuneration payable in respect of such leave. The Working Time Regulations 1998 are clear that a worker on a permanent contract, engaged for the whole year, is entitled to 5.6 weeks paid holiday as calculated under the formula in the ERA 1996. The calculation exercise required by regulation 16 of the WTR 1998, which involves identifying a week's pay and multiplying it by 5.6 weeks, should be followed even if it results in part-year workers receiving a higher proportion of their annual earnings as holiday pay (in Mrs Brazel's case, 17.5%).

A key takeaway is that the requirement to use average earnings to calculate holiday pay applies only when there are no normal working hours. If there are fixed hours of work, then holiday pay should be paid at the same rate the individual earns for their normal week's work. Regardless, this decision may lead to casual workers not employed on a permanent contract to make the same argument.

As mentioned below, from 6 April 2020, the 12-week reference period used to calculate statutory holiday pay will be extended to 52 weeks.

## 5. Forthcoming Changes

A number of changes to employment law will be introduced on 6 April 2020. Some key changes are considered in this section, including changes to off-payroll working and the extension of the right to written particulars to include workers as well as employees.

### *Off-payroll working in the private sector*

The issue of "worker" status has often come up for debate before the courts and we have reported on this previously.

From April 2020, large and medium-sized private sector companies will become subject to off-payroll working rules. At present, under UK legislation known as IR35, an intermediary (usually a personal service company ("**PSC**")) through which an individual supplies services to a private sector company is responsible for determining whether or not, but for the intermediary, that individual would be a deemed employee of the "client" company. If so, it must operate payroll and handle income tax and employee and employer national insurance contributions in respect of all sums received from the client engagement. Importantly, the burden to deduct payroll taxes falls on the intermediary (e.g. the PSC) and not the client.

However, all this is set to change from April 2020 in that the "client" company (rather than the intermediary/PSC) will become responsible for determining the individual's employment status for tax purposes, taking into account all the working arrangements, and must operate payroll deductions and pay employer's national insurance contributions on all fees paid to the intermediary in respect of the individual's services (i.e. the burden will be shifted to the client).

Affected "client" companies are potentially subject to a materially increased administrative burden and increased tax exposure. The changes may affect the manner in which companies choose to engage workers in future and may require an audit of current working arrangements to ensure compliance or put in place new arrangements.

The government has launched a review into the operation of the reforms, aiming to address industry concerns and ensure a smooth and successful transition. The review is set to conclude in February 2020.

***Employer national insurance contributions (NICs) on termination payments above £30,000***

From 6 April 2020 employer NICs of 13.8% will be payable on termination payments over £30,000.

***Changes to rules relating to agency workers***

Currently, if an agency worker is on a permanent contract of employment and is paid between assignments, the "Swedish derogation" from the Agency Worker Regulations allows the employer to avoid pay parity obligations. From 6 April 2020, the Swedish derogation provisions will be abolished and temporary work agencies will be required to inform agency workers whose existing contracts contain a Swedish derogation provision of the change and their right to pay parity, in writing. Agency workers who assert their right to pay parity will be protected from detriment and unfair dismissal.

Employment businesses will also be required to provide those seeking agency work with a key information document before agreeing the terms on which the work seeker will undertake work. This must set out the type of contract under which the individual will work, the minimum rate of pay that the agency reasonably expects will be paid, any deductions to be made to pay, intervals at which the individual will be paid and by whom, and annual leave entitlement.

***Changes to the reference period for determining an average week's pay for holiday pay purposes***

From 6 April 2020, the reference period for determining an average week's pay for workers with variable remuneration in order to calculate statutory holiday pay will increase from 12 weeks to 52 weeks, or the number of complete weeks for which the individual has been employed if this is not yet 52 weeks. The aim is that workers who have an irregular working pattern over the year are not disadvantaged where their holiday pay may have previously been calculated by reference to a less busy part of the year.

***Proposed changes in the forthcoming Employment Bill***

The new Conservative government is unlikely to significantly strengthen employment rights in the UK but we can expect them to continue to progress various employment law reforms already underway. The

forthcoming Employment Bill (a bill is a proposal for a new law that is presented for debate before Parliament) provides for a single labour market enforcement agency and the right to request a more predictable contract, all of which were anticipated by the Good Work Plan, on which we reported previously. The Employment Bill also looks to extend the period of special protection on redundancy afforded to new mothers so that they are protected from the point at which they notify their employer that they are pregnant until six months after the end of maternity leave.

*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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