EMPLOYMENT NEWS HEADLINES MAY-JUNE 2016 ISSUE 3

BREXIT IS A REALITY – WHAT NOW?

The media is awash with Brexit talk following the historic decision of UK voters to leave the EU on the 23rd of June. How will this impact employers, employees, employment laws and business in the UK in general is anyone's guess. At the moment there is much speculation and debate but, until Article 50 of the European treaty is invoked, the detail will have to wait.

What is becoming apparent in hundreds of blogs, articles and media discussions is that not a lot will change immediately or instantly. Although there is a two year period following the activation of Art 50 for the UK to negotiate the terms of its exit from the EU, there is an appetite on both the UK and the EU side to work through negotiations carefully and gradually. Some predict that it will take a lot longer than two years. This being the case, changes in UK employment laws in areas such as agency workers, TUPE, working time and holiday pay will also be gradual. It is unlikely and, it would be counter-productive, for a wholesale repeal of EU driven laws and it is expected that much will remain in the short to medium term with modifications, where needed, to ensure the UK remains attractive to global business.

Some significant UK employment laws are purely domestic in nature such as in the area of family-friendly legislation. The UK is also well known for "gold plating" some EU directives going above and beyond the EU minimum requirements - on holidays and TUPE for example. It is unlikely, therefore, that these will change in the near future.

A significant change is that decisions of the European Court of Justice (ECJ) will no longer be binding on UK courts once Brexit negotiations begin. During the Brexit campaign this issue was hotly debated as a part of the sovereignty argument. That said, ECJ decisions will, at least in the short term, influence if not bind, the UK courts and the legal reasoning it makes with respect to certain employment issues. For now, the recommendation is to wait and see what happens and, in the meantime, assess:

- Implications for highly skilled EU workers you wish to retain which may be impacted by new immigration requirements.
- Contract terms, particularly with respect to outsourcing and, in particular, if the contracts are set to run beyond two year and how this might impact employer obligations and redundancy budgets should TUPE protections fall away or be modified.

- Whether it makes sense to hold off from proactive compliance changes, for example, including non-guaranteed overtime payments in holiday pay calculations during this period of uncertainty.

GENERAL DATA PROTECTION REGULATIONS (GDPR) – STILL IMPORTANT AND RELEVANT

Notwithstanding the uncertainty in light of Brexit, the General Data Protection Regulations (GDPR) were adopted into law in April 2016 and member states will have two years to prepare for implementing the GDPR by the spring of 2018. Despite the complex negotiations which the UK now faces in extricating itself from the requirements that come with being a part of the EU trading bloc, it will still need to adopt some version of the GDPR if it wishes to continue trading with its European neighbours. It is, therefore, important to consider the broad GDPR framework in which the bloc will operate. Specifically;

- The GDPR is an EU wide regulation rather than national for each member state to adopt. That said, the lead regulator for each business will be the data protection regulator in the member state in which the main business (important for international businesses) is based.
- The broad aim of the GDPR is to increase the obligations on businesses in the way they use personal data whether that is employee data or customer or supplier data.
- There will be greater requirements for transparency not only in the use of personal data but also the rights of the data subjects with respect to the personal data held by businesses, not least, the right to be forgotten.
- There will also be an obligation for each organisation to appoint a data protection officer.
- A big change is in relation to the sanctions that can be imposed under the GDPR on businesses that are in breach of the GDPR, namely, a fine can be imposed of 4% of the businesses' global turnover for the preceding year or 20 million euros, whichever is the greater. This is a substantial increase in comparison to current sanctions at the national level which for the UK since 6 April 2010 is up to £500,000 under the Data Protection Act.

For UK businesses, it will still be important to prepare for the changes that any trade arrangements with the EU will require. Although this is uncertain at present and will require an ongoing assessment, the UK Information Commissioner's Office (ICO) has reiterated its commitment given that today's businesses do operate across borders and there is a need for international consistency around data protection requirements. It has released a 12 step guide of issues to start considering with respect to the GDPR or any other variation of that the UK will need to adopt post-Brexit. A link to the guide can be found here: www.ico.org.uk

Broadly, it advises that businesses should start:

- Raising awareness of the changes within the business that the GDPR will bring and require and take those requirements seriously;
- Reviewing all current personal data processing such as use, collection and purpose – the what, how and why?
- Reviewing all consent processes used by the business when collecting and processing personal data such as express consent by box ticking or signatures to implied consent. Consider

whether there are better or alternative ways to require consent for each stage than what is being done at present;
- Reviewing and assess all privacy notices and policies to ensure these are updated or revised to reflect compliance with the new requirements under the GDPR specifically with respect to transparency and notification requirements.

For specific data auditing of your business processes contact Maxlaw Global – details below.

THE EU-US NEW PRIVACY SHIELD FOR TRANSFERRING PERSONAL DATA

Following the case last year of *Schrems,* an Irish case which challenged the adequacy and validity of the safe habor gateway traditionally used to transfer personal data between the EU and the United States, the ECJ found that the safe habor principle, although endorsed by the European Commission, was in fact invalid and did not provide an adequate level of protection.

The practical consequences for all European businesses transferring personal data to the US meant that the safe habor principles were invalid and no longer open to them to legally transfer personal data across the pond.

In the short term, the only avenues open to businesses to transfer personal data to the US is by entering into an agreement with the recipient of the data, adopting what is known as "model clauses", which are standard data transfer terms approved by the European Commission or by entering into binding corporate rules. In terms of model clauses there are two sets of standard terms:

i) Where the US entity is the data controller – i.e., is the decision maker on how the data is processed once the transfer is made; or
ii) Where the US entity is the data processer – i.e., where the US entity acts as an agent on the EU entity's instruction, for example, a cloud service.

After a flurry of activity in the latter half of 2015 and the early part of 2016, the new EU-US Privacy Shield for personal data transfers outside of the European Economic Area (EEA) has been agreed. It is expected that the EU will finalise the terms this summer. In the meantime, the Art 29 Working Party, an EU regulatory body, has provided its opinion on the broad agreement and has recommended some clarity on the following issues:

- It has questioned the proportionality and necessity of the continued possibility of US intelligence agencies collecting massive and indiscriminate personal data from the EU in the absence of an express exclusion of this being permitted under the EU-US privacy shield.
- It also expressed concern about the independence of the Ombudsperson reviewing breaches if an EU citizen did suffer from indiscriminate collection of personal data and queried whether the mechanisms for EU redress were simple and adequate.
- It has questioned the absence of some of the key principles of data protection in the new agreement, specifically, data retention and how long data may be held for as well as limiting the purpose for data collection and processing. It has stated these principles are fundamental tenets of data protection and should not be excluded.

- A key and important point raised by the Art 29 Working Party is that any Privacy Shield organisation should be obligated to ensure that any onward transfer from it to a third country has the same level of protection. The Privacy Shield organisation should take steps to assess the data security measure of that third country before onward transfer of data.

Even with the UK operating outside of the EU, these issues will be critical to any data transfers made between the UK and the US once these terms are formally adopted and in use.

HEADSCARVES IN THE WORKPLACE - UPDATE

In the last issue we reported two ECJ cases relating to discrimination and whether the two Muslim women in the cases of *Bougnaoui v Micropole Univers* and *Achbita v G4S* were discriminated against for not being allowed to wear headscarves in the workplace. The cases were heard in March this year. In the *Achbita* case the ECJ has ruled that there is no direct discrimination by the employer if the prohibition of headscarves stems from the employer's general neutrality policy. The policy is not limited to religious belief and cannot, therefore, be directly discriminatory.

The ECJ stated even where there is the possibility that the policy may be indirectly discriminatory, in that, it is a provision, criterion or practice that affects a particular group more than other groups in the workplace, the ECJ stated that it could be objectively justified if:

- It was an occupational requirement;
- There had been a proportionality assessment such as the size and conspicuousness of the symbol;
- The nature and context of the employee's activity had been considered;
- The national identity of the member state concerned was taken into account.

Although not directly impacting the UK work place, more so in light of the Brexit vote, it is still of interest to consider the reasoning of the ECJ when assessing such situations. The ECJ makes clear that the identity of the member state concerned is a consideration which may explain the case outcome.

RESTRICTIVE COVENANTS: TO PAY OR NOT TO PAY - BARTHOLOMEWS AGRIC FOOD LIMITED V THORNTON

In the case of *Bartholomews Agric Food Limited v Thornton* the High Court emphatically ruled that there is no requirement to pay for restrictive covenants for them to be enforceable. Provided the employer can show that they protect a "legitimate business interest" there is no requirement to pay additional sums to the employee post-termination for the duration of the restriction. This is very different from other European countries where some compensation is required.

In the case of *Bartholomews* the employer sought to enforce a 6 month restrictive covenant which had included a term that the employee would be "paid his full benefits" should enforcement be necessary. The Court said, it would be contrary to public policy for an employer to purchase a restraint and ruled that no payment was necessary.

Although, this is good news for employers where employees are seeking extensive payments for entering into restrictive covenants, it is important to remember that restrictive covenants are viewed from the point they were entered into, not when the employee leaves the company and they become relevant. For this reason, it is advisable for restrictive covenants to be reviewed in the case of each employee on an ongoing basis, particularly, where employees have worked their way up over a long period of time and their knowledge, connections and position exposes the business to risks when they leave the company where they were no threat when they were hired. *Bartholomews* is also an important reminder in the drafting of restrictive covenants which should be relevant and applicable to the particular circumstances, industry and individual concerned and should be no wider than necessary to protect the legitimate business interests of the employer.

Interestingly, the Government has recently called for consultation on the use of post-termination restrictions, specifically non-compete provisions, and asks whether they stifle entrepreneurship and innovation. The consultation was published on 25th May 2016 and closes on 19th July 2016. More information can be found at https://www.gov.uk/government/consultations/non-compete-clauses-call-for-evidence.

DRESS CODES AND HEELS

On a lighter note, May saw the media report on the story of Nicola Thorp, a 27 year old London Receptionist who was asked to leave finance company, PwC, for refusing to wear high heel shoes of between 2-4 inches! Why was this newsworthy? Miss Thorp was so upset by this that she started a petition on Facebook which has secured more than the 100,000 signatures required to trigger a parliamentary debate. Many commented that it was sexist and discriminatory not to mention detrimental to health. The period for comments closed on 16th June 2016 and the issue of whether women should be forced to wear high heels at work will be listed for debate in parliament.

Regardless of the outcome of the debate, it is perhaps wise for employers to consider any grounds for justification if they have such a policy at present.

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