Gowling WLG’s employment, labour & equalities experts bring you the latest top five employment law developments that may affect your business - what they are, and what you can do about them.

1. Enhancing family-friendly pay: the baby elephant in the room
2. The Queen’s Speech: employment law implications
3. ICO updates its subject access Code of Practice
4. TUPE & restrictive covenants
5. New guidance expected on pension loss assessment in employment tribunals

Enhancing family-friendly pay: the baby elephant in the room

Can employers offer enhanced contractual maternity pay to mothers, but only statutory shared parental leave (ShPL) pay to fathers? At what point is maternity leave no longer designed to protect a woman's biological condition following pregnancy, or the special relationship between mother and baby, and instead becomes akin to childcare?

Whether an employer, who fails to match maternity pay enhancements, will face a successful discrimination claim from a man on ShPL has been the baby elephant in the room for some time. This month we had the Employment Tribunal decision in Ali v Capita Customer Management Limited tackling this question. The Tribunal found that disparity in policies offering enhanced contractual maternity leave pay to female employees but only offered statutory ShPL pay did directly discriminate against a male employee.
Employment tribunal decisions are 'non-binding' and as such do not set a precedent that future tribunals must follow. Nevertheless, it may be persuasive and an indication of the direction for such claims in the future. For more on this important decision see Should employers match enhanced maternity pay under Shared Paternal Leave?

Note: Capita Customer Management Ltd are currently seeking leave to appeal this decision. In addition an appeal is also currently pending before the Employment Appeal Tribunal in Hextall v Chief Constable of Leicestershire Police. Last year in Hextall, a different employment tribunal found an employer's policy of offering enhanced contractual maternity pay but only statutory ShPL pay was not discriminatory. We will keep you advised of future developments in this evolving area of equality law.

The Queen's Speech: employment law implications

On 21 June 2017, Theresa May's minority government set out its legislative programme for the next parliamentary session. It comes as no surprise that it is dominated by Brexit with the Speech beginning:

“My government's priority is to secure the best possible deal as the country leaves the European Union.”

From an employment law perspective there is little detail but key points of interest are:

Under new legislative measures:

- **Immigration.** A new Immigration Bill, covering the whole of the UK, will establish a new national policy on immigration, including new powers concerning the immigration status of European Economic Area (EEA) nationals. The Bill will end the EU's rules on free movement of EU nationals in the UK and make the migration of EU nationals and their families subject to UK law once Brexit has happened, while still - according to the government - "allowing the UK to attract the brightest and the best".

- **Data protection.** A new Data Protection Bill is intended to make the UK's "data protection framework suitable for the digital age allowing citizens to better control their data". It will replace the Data Protection Act 1998 and implement the EU General Data Protection Regulation (GDPR), putting the UK in a position to maintain the ability to share data with EU member states after Brexit.

Under the non-legislative measures heading:
• **Taylor Review.** The government simply states that The *Taylor review on employment practices in the modern economy* launched back in October "is an important step towards ensuring fairness for all and it looks forward to publication of the report shortly".

This eagerly awaited report has the difficult task of reporting on whether employment law is keeping pace with new business models as a result of advances in technology. On 12 June Matthew Taylor said his report would focus on:

- creating a "national strategy for work", with quality at its heart;
- making the tax system fairer to ensure "sound public finances";
- ensuring "a fair balance of rights and responsibilities", with clear progression routes;
- promoting technology that benefits the workforce while ensuring a "level playing field" with other businesses;
- creating clear, legal distinctions between employees, the self-employed and workers, which currently fall between the former two categories; and
- a greater role for the Low Pay Commission

Will these aspirational principles be backed up by specific and practical recommendations? We wait to see. As for timing, the report was originally due to be published mid-June, we await to see what "shortly" means.

• **National living wage.** The national living wage (NLW) will increase to 60% of median earnings by 2020. After 2020, the NLW will continue to rise in line with average earnings.

• **Gender pay gap and discrimination.** The Government broadly states that it intends to make further progress in tackling the gender pay gap and reducing discrimination on all grounds. No new measures are referred to in the Speech's accompanying background briefing notes, so again, we will need to wait and see what this will mean.

Interestingly, there is no specific reference to plans on "reforming" the Equality Act 2010 to extend protections from discrimination to those suffering fluctuating or intermittent mental health conditions, trailed by the government before the election, as a proposed legislative measure.

Other proposals announced pre-election by the Government that have not made their way into the Queen's Speech include:

• representation for workers on company boards, under the Conservatives’ wider reforms
to corporate governance;
• a new statutory right for employees to receive information about key decisions affecting their employer's future, subject to reasonable safeguards, and in keeping with but not exceeding the rights of shareholders;
• a "new" statutory right to request leave for training purposes;
• a new statutory right to leave to care for a family member;
• a statutory right to child bereavement leave; and
• introduction of new "returnships"

ICO updates its subject access Code of Practice

The Information Commissioner's Office (ICO) has updated its Subject Access Code of Practice (version 1.2) this month to reflect developments in two Court of Appeal judgments earlier this year: Dawson-Damer and others v Taylor Wessing LLP [2017] EWCA Civ 74 and Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others [2017] EWCA Civ 121.

The updates to the Code largely concern obligations on data controllers in responding to data subject access requests (SARs) made under section 7 of the Data Protection Act 1998 (DPA). In particular in relation to the "disproportionate effort" exception and SARs made for collateral purposes.

In other words, it is not open to a data controller to avoid substantive compliance by simply saying that work would be expensive or time-consuming. It is for the data controller to show that it has taken all reasonable steps to comply with a SAR. As the Court of Appeal pointed out, the cost of compliance is the price data controllers pay for processing data.

1. Disproportionate effort exception

Chapter six of the Code ("Finding and retrieving the relevant information") has been amended to note that "the DPA places a high expectation on you to provide information in response to a SAR". Regarding "information contained in emails" the Code now states that the disproportionate effort exception "cannot be used to justify a blanket refusal" of a SAR, as "it requires you to do whatever is proportionate in the circumstances".

In relation to assessing disproportionate effort, the guidance notes that:
data controllers may take into account difficulties which occur throughout the process of complying with a SAR, including any difficulties in finding the requested information;

data controllers are expected to evaluate the particular circumstances of each request, balancing any difficulties involved in complying with the request against the benefits the information might bring to the data subject, whilst bearing in mind the fundamental nature of the right of subject access;

the burden of proof is on the data controller to demonstrate that all reasonable steps to comply with the SAR have been taken and that it would be disproportionate in all the circumstances to take further steps;

it is good practice to engage with the requester in open conversation about what information they require, which may avert unnecessary costs and effort in searching;

if it receives a complaint about a SAR, the ICO may take into account a data controller’s readiness to engage with the requester and balance this against the benefit and importance of the information to them, in addition to the requester’s level of co-operation in handling the request; and

even if you can show that complying with a SAR would involve disproportionate effort, you must still comply with it in another way, if the requester agrees

2. Collateral purposes and court orders enforcing SAR compliance

The Code now expressly states that whether or not a requester has "collateral" purposes (that is, other than seeking to check or correct their personal data) for making the SAR is not relevant. As held by the Court of Appeal, there is "nothing in the DPA or the Directive that limits the purpose for which a data subject may request his data".

3. Other changes to the Code encourage data controllers to have well-designed and maintained information management systems to locate and extract data requested and to redact third party data.

TUPE & restrictive covenants

TUPE 101

Where the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to a transfer of a business, employees employed by the previous employer (the "transferor") automatically become employees of the new employer (the "transferee") on
the same terms and conditions (subject to certain exceptions). It is as if their contracts of employment had originally been made with the transferee. However, TUPE does not force employees of the transferor to transfer their employment to the transferee if they do not wish to do so. Employees of the transferor have the right to object to the transfer. Where employees object, their employment ends immediately, by operation of law, on the transfer date.

The restrictive covenant enfeeblement

For an employee who has objected to a TUPE transfer, there is no contractual relationship between them and the transferee as they never transfer to them. This may have the effect of nullifying any restrictive covenants, as the transferee has no contract by which to enforce them and the transferor will no longer have any legitimate interest to protect.

A reminder of this predicament arose this month in the case of Icap Management Services Ltd v Berry. In this case a senior executive resigned on 12 months’ notice and was placed on garden leave in accordance with the terms of his contract. He was subject to six month non-compete and nine month non-solicitation post termination restrictive covenants. These periods would be reduced by any time spent on garden leave. The effect would therefore be that they would have expired at the end of his garden leave period. Six months into his garden leave, Mr Berry alleged that there had been a TUPE transfer to which he objected. As a result, he claimed his contract and garden leave came to end and he was no longer bound by the restrictive covenants.

On the facts of this particular case, the High Court found there was no TUPE transfer as the alleged business transfer was in fact a share sale to which TUPE did not apply and in any event Mr Berry was employed at all times by a subsidiary not the parent company involved in the share sale. Nevertheless, it is important to note that had the Court found that a TUPE transfer affecting Mr Berry had taken place, Mr Berry would have most likely succeeded in his claim. Post termination restrictions falling away can also arise in relation to employees who have left shortly before the transfer (as opposed to being placed on garden leave as in this case).

Where a transferee acquires a business from which key employees have recently departed or are working a notice period/placed on garden leave and object to the transfer, the transferee needs to bear in mind in making its commercial considerations that there is no statutory novation of the employment contract. This means there will be no contractual relationship between them and the departed/departing employees, leaving any
restrictive covenants contained in their contracts with the transferor unenforceable in practice by the transferee after the transfer.

**New guidance expected on pension loss assessment in employment tribunals**

On 19 June, the President of Employment Tribunals in England & Wales, Judge Brian Doyle, indicated that Presidential Guidance on the assessment of compensation for loss of pension rights in employment tribunals will be published in late July or early August 2017.

Pension loss is often a very significant part of an unfair dismissal compensatory award. Pension loss may also be awarded as a result of a wrongful and/or discriminatory dismissal.

In simple cases, tribunals often adopted the rough and ready approach of awarding an amount of pension loss calculated as the total of pension contributions which the employer would have made since the dismissal. As long as this does not produce a figure which clearly does not properly compensate the claimant, this simple method remains an appropriate one where the case is straightforward and the sums involved are not too great. In more complex and/or valuable cases, in particular where the period of loss is likely to be more than two years, the 'substantial loss approach' outlined in the tribunal service's publication 'Compensation for Loss of Pension Rights' 2003 3rd edition is seen as more suitable. However, it is widely accepted that the 2003 guidelines are now no longer fit for purpose in light of important changes in pension law and practice since the 2003 edition was published.

On 30 March 2016 a consultation paper proposed:

- formal abandonment of the 2003 guidelines;
- the abandonment of lost additional state pension rights as a head of loss;
- a new category of 'simple' cases which will use the contributions method for both defined benefit and defined contribution schemes;
- a new category of 'complex' cases equivalent to the substantial loss cases, to be identified at an early stage of case management so that liability and remedy can be dealt with separately; and
- the revised Presidential Guidance would continue to not have statutory force and it would remain open to the parties to submit that other approaches should be taken in
appropriate cases.

It is hoped that the new guidance will assist in bringing more clarity and resolve issues of pension loss more efficiently than is currently the case.

As the revised guidance is expected shortly, those settling complex pension loss claims may wish to consider whether or not they ask the tribunal to stay the assessment of that loss until the new guidance is available.

And finally, see our latest webinars & podcasts:

- All about age - How to avoid age discrimination claims
- Pensions and TUPE - The tricky issues - 2017
- Employment status, the gig economy and conceptualising the future
- The first six episodes from our 'Pensions in 30 podcasts' continuing series:
  - Introduction to workplace pension provision in the UK
  - Contracting-out of the State Second Pension
  - Workplace pension reform and automatic enrolment
  - The Pensions Regulator - overview
  - The Pensions Regulator - duty to report breaches of the law - Pensions in 30 Podcasts
  - The Pensions Regulator - notifiable events - Pensions in 30 Podcasts

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