McDermott Will & Emery

January 2016

UK Employment Alert

# UK Employment Law Forthcoming Attractions in 2016

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Happy 2016! It's time to take a look at what this year will bring (apart from an Olympic Games and apparently lots of rain…). Here are the topics we will be keeping an eye on.

## January

### DATA PROTECTION: NEW EUROPEAN REGULATION

After four years of negotiation and lobbying, the new European General Data Protection Regulation has now been finalised.

The Regulation will govern the control and processing of EU citizens' personal data, regardless of where the controller/processor is based. It doesn't come into force until 2018, but all data controllers should start considering now how they should prepare. We will be issuing a detailed Alert on the new Regulation shortly.

### ZERO HOURS WORKERS

New regulations came into force on 11 January 2016, providing a remedy for zero hours workers against employers who include exclusivity clauses in their contracts of employment. Any dismissal of a zero hour contract employee is now automatically unfair if the principal reason is that s/he breached a contractual clause prohibiting him/her from working for another employer. No qualifying period is required to bring the claim.

It is also now unlawful to submit a zero hour worker to detriment if they work for another employer in breach of an exclusivity clause.

## February

### HOLIDAY PAY AND COMMISSION

British Gas' appeal in Lock v British Gas Trading Limited and BIS was heard at the Employment Appeal Tribunal on 8 and 9 December 2015, so the holiday pay saga rolls on into 2016 and, we expect, well beyond

For those who have lost track of events:

- Mr Lock argued that his commission should be included in holiday pay calculations; his employer disagreed.
- He went to the Tribunal, which wasn't sure of the answer and sent him to the Court of Justice of the European Union (CJEU).
- The CJEU, said, yes, commission should be included in the calculation of holiday pay, and sent the matter back to the Tribunal.
- The Tribunal remained unsure because the Working Time Regulations (WTRs) don't agree with the CJEU's judgment. The Tribunal got over this difficulty by devising words to be added into the WTRs.
- British Gas appealed, arguing that a tribunal can't just change the law by coming up with words to be added into legislation.

We will keep you posted on the outcome of the appeal.

### FLEXIBILITY CLAUSES

Sparks v Department for Transport is due to be heard in the Court of Appeal. The resulting judgment should provide some practical guidance on when an employer can use a flexibility clause to make broad brush changes to employment terms.

## March

### REGULATORY REFERENCES

The Financial Conduct Authority and the Prudential Regulatory Authority (PRA) are proposing changes to the way banks, building societies, credit unions and PRA investment firms seek and provide references for candidates of certain roles. The new regime is expected to come into force on 7 March 2016.

### GENDER REPORTING

By no later than 26 March 2016, employers with more than 250 employees will have to report on the differences in pay between male and female employees. We will let you know when the guidance has been released on exactly what information will need to be published and where.

## April

### NATIONAL LIVING WAGE

The National Living Wage arrives on 1 April 2016. As of this date, staff aged 25 and over will be entitled to be paid the National Living Wage, which is currently £7.20 an hour.

### TAX

In 2015, the government consulted on simplifying the tax and National Insurance Contributions treatment of termination payments. We will let you know what is proposed when the response to the consultation is issued.

## May

### EMPLOYMENT STATUS

*Pimlico Plumbers Ltd v Smith* is of interest to any company that engages self-employed contractors. The case will be before the Court of Appeal and we hope to get robust guidance on the circumstances in which someone can "flip" from being self-employed to being an employee in the face of contrary documentation.

## July

### DATA PROTECTION: UK SUBJECT ACCESS REQUESTS

*Dawson-Damer and others v Taylor Wessing LLP and others* is expected to be heard in the Court of Appeal in July 2016. This is an interesting case for employers who regularly receive subject access requests (SARs).

The appeal follows the High Court's attempt in August 2015 to try (yet again) to curb the use of SARs as a litigation tool. We will keep a sharp eye on this one as it could change the way that you have to respond to subject access requests.

## September

### COLLECTIVE REDUNDANCY CONSULTATION

The long-running *Nolan v USA* deals with the issue of whether an employer's obligation to collectively consult arises when it is proposing to make a strategic business or operational decision that will foreseeably lead to collective redundancies, or if the obligation is triggered only once the employer has made that strategic decision and is proposing consequential redundancies.

This is an important point for all employers and we hope that the Court of Appeal will deliver a decisive.

## October

### WHISTLEBLOWING

*Chesterton Global Ltd and anor v Nurmohamed* will be considered by the Court of Appeal and has major implications for employers' whistleblower obligations.

When the public interest test was added into the whistleblowing legislation in order to exclude complaints about breaches of a worker's own contract of employment from whistleblower protection, employers collectively sighed in relief.

However, in *Chesterton Global Ltd and anor v Nurmohamed*, the Employment Appeals Tribunal cut away at the public interest requirement by finding that it is only necessary to show that a disclosure was of interest to a few people and not "the public" as we would understand the term. If the Court of Appeal agrees, employers could be back at square one.

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## McDERMOTT UK EMPLOYMENT HIGHLIGHTS

*UK Employment Seminar – January 2016*

Join us for the next in our popular HOW TO practical seminars series: HOW TO… Get to Grips with Grisly Grievances.

An employee grievance can raise a discrete minor issue or relate to events going back many years. Employers need to be equipped to handle both types, and be aware that the more complex and historic a grievance is, the more likely it is that the issues will end up being considered by an Employment Tribunal.

The key is to handle the grievance properly, without its management becoming a drain on the business. Our seminar will focus on practical tips on how to effectively deal with an employee grievance.

*Register here.*



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