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Client Alert

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Labour's Proposed Employment Law Changes: Implications for Employers and Other Recent Developments

A general election is to be held in the UK on 4 July 2024. Although official election manifestos have not been released yet, last week the Labour Party published a policy paper, "A New Deal for Working People", setting out proposals to significantly reform UK employment laws. Should it win the election, Labour has promised to introduce an employment bill within its first 100 days in office. This month's alert summarises Labour's plans for employment law and highlights other developments over the past month, including public consultations which shed light on the Conservative Party's plans for employment and recent case law on protections for gender-critical beliefs, limits on claims by outsourced workers, volunteer status, and vicarious liability for discrimination.

WHAT WOULD LABOUR'S 'NEW DEAL FOR WORKING PEOPLE' MEAN FOR EMPLOYERS?

The Labour Party's employment proposals for the upcoming election include significant reforms aimed at improving workers' rights and protections. Key proposals include the following:

- **Unfair dismissal rights from day one**: Labour plans to expand 'day one' employment rights, most notably the protections against unfair dismissal, by removing the current two-year qualifying period. The 'New Deal' states that employers will still be able to use probationary periods but it is unclear what parameters will be placed on these. If this change is actioned, this would create a significant extra burden for employers.
- **Extension of time limits**: Labour proposes to increase the time limit for bringing Employment Tribunal claims from three to six months.

- **Single status of worker**: There are currently three tiers of employment status in the UK: employees, workers and self-employed. Subject to public consultation, Labour plans to simplify employment status into two categories – workers and the genuinely self-employed – to reduce ambiguity and ensure more workers receive benefits (such as parental leave) and protections such as unfair dismissal. This could have significant cost implications, including bringing a large number of additional workers under the employment tax regime.
- **Strengthened redundancy and TUPE rights**: Labour plans to expand collective consultation by aggregating employee reductions across different sites in assessing whether the threshold for collective consultation (20 or more proposed redundancies) is reached. This is currently assessed by reference to separate workplaces. Without providing specifics, Labour also says it will 'strengthen' the existing set of rights and protections for workers subject to TUPE processes.
- **Banning zero-hours contracts**: Labour proposes to ban zero-hours contracts (unless specifically requested by the worker) to ensure that contracts reflect the number of hours regularly worked, based on a 12-week reference period. Workers would also be entitled to reasonable notice of any changes in shifts or working time, with compensation that is proportionate to the notice given.
- **End 'fire and rehire'**: Labour plans to end the practice of an employer terminating an employee and then offering to re-engage them on reduced terms. It is not clear whether this will be a complete ban other than where the business can show the changes are needed for its survival, or a more limited restriction.
- **Flexible working a day one right**: This would become a right to flexible working, except where not reasonably feasible, rather than a right to make a request which is the current position.
- **Right to 'switch off'**: Labour proposes a 'right to disconnect'. It says this would be similar to the models in place in Ireland or Belgium, meaning it would take the form of non-legally binding guidance. Based on the Irish experience this would still however be a cultural shift.
- **Strengthened Trade Union rights**: In addition to repealing recent anti-strike laws, Labour plans to remove 'unnecessary restrictions' on union activity and ensure that industrial relations are based around good faith negotiation. Labour says it will make it easier for unions to obtain recognition and remove the requirement for them to demonstrate that at least 50% of workers support recognition. Labour also proposes easier union access to workplaces, with new rules that allow union officials to meet, recruit and organise members.
- **Bereavement leave for all workers**: Labour proposes to extend statutory bereavement leave for all workers (not just parents) and has committed to a review of parental leave within a first year of a Labour government.
- **Strengthened Statutory Sick Pay**: Labour plans to remove both the three-day waiting period and the earnings qualification threshold, to make SSP available to all workers from 'day one'.
- **Fair Pay Agreements**: Labour plans to implement fair pay agreements to set minimum pay and working conditions, starting with the adult care sector with a view to potentially expanding this model to other sectors.
- **Increased pay gap reporting**: Labour would introduce the obligatory publication of ethnicity and disability pay gap reports for employers with 250 or more staff and would extend gender pay gap reporting by including outsourced workers and requiring publication of action plans to close the gap.

- **Menopause in the workplace**: Labour says it will also require employers with more than 250 employees to produce Menopause Action Plans, setting out how they will support employees through menopause.

Further detail on these proposals may be provided by Labour in their awaited election manifesto but they are unlikely to become fully clear until public consultation starts and/or draft legislation is introduced. In some cases reforms will take years but, with Labour currently leading the polls, employers should be on standby for significant changes.

CONSERVATIVE PLANS FOR EMPLOYMENT LAW: TUPE, FIT NOTES AND ABOLISHING THE LEGAL FRAMEWORK FOR EWCS

The Conservative Party has not published their employment law plans ahead of the general election, but has recently launched a public consultation on reforms to reduce regulatory burdens on businesses. These changes are pro-business but would not be significant.

On 16 May 2024, the current government published a consultation paper on proposals to reduce the complexity and administrative burden of TUPE and 'abolish' the legal framework for European Works Councils (**EWCs**).

The consultation paper proposes to amend the TUPE Regulations, which safeguard employees' rights when their business or undertaking is transferred to a new employer or when a service is transferred to a new provider, to clarify that they apply to 'employees' but not 'workers'. This clarification comes in response to a 2019 Employment Tribunal decision which found that TUPE protections potentially applied to workers as well as employees. Although this decision is not binding on other tribunals, it created ambiguity for employers and has been widely criticised.

The consultation also proposes to clarify that an employment contract should only be transferred to one employer under TUPE, and should not be split among multiple employers when a business is transferred to more than one new owner. The concept of a fragmented transfer originated from a European Court of Justice ruling in 2020, which held that a cleaning contract divided between two companies should be split in proportion to the tasks performed for each company. Prior to this, it was widely understood that an employment contract could not be split as part of a TUPE transfer. The consultation submits that splitting contracts is impractical as it may force employees to work at multiple sites and presents challenges in dividing employees' terms and conditions. In cases involving multiple transferees, it is proposed that employers would be required to agree who should take on each employee.

The government also proposes to abolish the legal framework for EWCs in the UK, which serve as employee representative bodies that facilitate information and consultation with European employees of multinational companies, and to tighten the regime around employees being signed off sick from work.

RAPE CRISIS WORKER UNLAWFULLY DISCRIMINATED AGAINST FOR GENDER CRITICAL BELIEFS

An Employment Tribunal has found that an employee who worked at a rape crisis centre was constructively dismissed and discriminated against by her employer due to her gender critical beliefs. For the purposes of her discrimination claim, the claimant relied upon her belief that biological sex is separate and not to be conflated with gender identity, and that survivors of male sexual violence should be able to choose the sex of their support worker.

After an abuse survivor who did not want to deal with a man queried the gender of a non-binary colleague who had taken on a male name, the claimant suggested internally that the centre respond that the colleague was born a woman but now identified as non-binary. Pre-empting any investigation, the CEO emailed the non-binary colleague to say what the claimant had done was humiliating, implied that the claimant was transphobic and that they would not be working

together again. The claimant was invited to a disciplinary hearing and accused of gross misconduct. The claimant resigned after her grievance was dismissed.

The Tribunal determined that these actions constituted direct discrimination on the grounds of religion or belief and had resulted in the claimant's constructive dismissal. It also found that the employer indirectly discriminated against the claimant by treating the expression of her gender-critical beliefs as a disciplinary issue.

This is a further reminder to employers to approach clashes of values in the workplace with an open mind and avoid making assumptions. Genuinely held beliefs, including gender-critical beliefs, which are deemed 'worthy of respect in a democratic society', are protected under UK law. Before disciplining or terminating in these cases, employers need to be confident that they can show their reason has to do with an inappropriate way in which the employee has expressed those views or performed their job, rather than the simple fact of them holding a protected belief.

COURT OF APPEAL DECISION LIMITING SCOPE OF CONTRACT WORKER DISCRIMINATION

Last week, the Court of Appeal issued an important judgment in respect of discrimination claims by contract staff working in an outsourced service, who claimed discrimination by an end user.

Contract workers hired by an end user (principal) via an intermediary company are protected from discrimination in the context of the "principal-worker relationship" under section 41 of the Equality Act, which states (among other things) that a principal must not discriminate against a contract worker as "to the terms on which the principal allows the worker to do the work".

In this case, cleaning workers who were paid the National Minimum Wage brought claims of indirect race discrimination against the principal engaging their services, which paid its directly-employed workforce (who had a higher proportion of Caucasian employees) the higher London Living Wage.

The Court held that a complaint that the terms of an employment contract were discriminatory could only be made against the contract worker's employer, not against the end user. The Court further observed that the phrase "the terms on which the principal allows the worker to do the work" relates to a stipulation imposed by the principal on the worker as a condition of being allowed to do the work (e.g., a prohibition on wearing jewellery or clothes of religious significance), and not with any terms imposed by the principal on the supplier, such as financial constraints.

Agency workers can still potentially bring a claim against the end user for a pay differential where the end user has direct employees in comparable roles, where they are on assignment for 12 weeks or more, in Agency Workers Regulations 2010. But where these specific criteria are not met, a pay differential between the direct and third party staff will be difficult to challenge.

A VOLUNTEER WAS ENGAGED AS A WORKER WHILE UNDERTAKING PAID ACTIVITIES

The EAT has ruled that a 'volunteer' was engaged as a 'worker' whenever he attended activities in respect of which he was able to claim remuneration. The claimant was a volunteer in the Coastal Rescue Service. There was no contract in place but a volunteer handbook described the relationship as "entirely voluntary". Importantly, rescuers were allowed to submit claims for payment for certain activities "if they wished" to cover minor costs caused by their volunteering, and to compensate for disruption to their personal life and employment. Such "remuneration claims" were calculated by reference to a schedule of hourly rates. Volunteers could also claim payment for expenses associated with specific activities whilst on a call out.

The first instance Employment Tribunal concluded that the arrangement was a “genuinely voluntary one”, citing the absence of a contractual relationship, that there was no automatic remuneration for any activities and that many volunteers never actually submitted claims.

The EAT overturned this decision, stating that the need for volunteers to submit a claim for remuneration and the fact that many had not done so was irrelevant. The critical factor was the right to remuneration. The EAT rejected the argument that the sum payable for attendance was akin to the recovery of expenses. A payment in compensation for interference in a person’s use of their time is the “essence” of remuneration. The EAT concluded that a contract was formed whenever a rescuer engaged in an activity for which they had a right to remuneration.

There was no dispute that the claimant met the other elements of the statutory definition for worker (i.e. personal service and that he was not providing services to a customer or client). Establishing worker status meant the claimant could pursue his claim in relation to being denied the right to be accompanied at a disciplinary hearing but also opens the door to other rights and benefits, such as pension and annual leave.

EMPLOYER’S VICARIOUS LIABILTY DOES NOT PREVENT PERSONAL LIABILITY IN DISCRIMINATION CLAIMS

The EAT has held that individuals who commit discriminatory acts in the course of their employment may be personally liable even where the employer is found vicariously liable for the same conduct. The claimant, a newly qualified teacher, filed a disability discrimination claim against the school, her mentor teacher, and the headteacher. The Tribunal found the school vicariously liable for the acts of discrimination but dismissed the claims against the two individuals on the basis that their discriminatory acts were “misguided” attempts to address a complex situation.

Upon appeal, the EAT held that the wording of the Equality Act does not give the Tribunal a discretion to dismiss claims against individuals where the employer is vicariously liable. The ‘only’ conclusion open to the tribunal was that the individuals had also breached the Equality Act. The case has been remitted to the Tribunal to determine the split of liability between the school and the individual teachers. This case may affect litigation strategies for employers where they support their staff who have been named as co-defendants.

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