HR Hub – Legal Update

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Section A: Case Law update

Holiday entitlements for part-year workers

Harpur Trust v Brazel

Background

Mrs Brazel was a music tutor based at Bedford Girls School, which was operated by the Harpur Trust. She was engaged under a contract in which she was only required to work during school terms, and her hours each week during term-time would vary, depending on the need for her lessons. As a "part-year" worker, she remained employed from year to year, but was contractually only required to work at certain periods during each year.

Under her original terms, she was provided with 5.6 weeks paid holiday each year, which was deemed to be taken and paid in three equal parts of 1.87 weeks during the Summer, Christmas, and Easter school holidays. The amount of holiday pay for each part was based on her average weekly pay for the preceding 12 weeks she worked before each holiday period (the "**calendar week method**").

From September 2011, her holiday pay calculation was changed to the 'percentage method'. Her total holiday entitlement, as well as holiday pay, was directly based on how many hours she had worked in the preceding 12 weeks. As is common for other employers, the Trust calculated the total hours Mrs Brazel worked in the preceding term, and added 12.07% of those hours in respect of holiday. Holiday pay was based on her average pay for the preceding 12 weeks she had worked. The 12.07% uplift for holiday, as is often used for employees

with irregular hours, is essentially the proportion that 5.6 weeks of holiday bears to a total working year of 46.4 weeks (i.e. 52 weeks less 5.6 weeks taken as holiday).

Mrs Harpur raised a claim for underpayment of wages, being her holiday pay entitlement, for the period from January 2011 to June 2016. Whilst her claim was rejected by the Employment Tribunal, her case was upheld by both the Employment Appeal Tribunal and Court of Appeal. The Supreme Court considered these issues in November 2021, and judgment was given on 20 July 2022.

Decision

The critical finding of the Supreme Court was that the percentage method of calculating holiday entitlement for "part-year" workers did not comply with the Working Time Regulations 1998. All workers, regardless of their working hours, and regardless of the proportion of each year they work, have a statutory entitlement of 5.6 weeks each year. This entitlement is not reduced on a pro-rata basis if they work part of each year of employment. Consequently, the Supreme Court found that the calendar week method previously applied by the Trust was correct, as it ensured she received her full 5.6 week holiday entitlement each year, regardless of the number of hours she worked.

In contrast, the 12.07% method meant that if she worked fewer hours in a particular term, her holiday entitlement was reduced to below her 5.6 week entitlement. Whilst the Supreme Court acknowledged that the calendar week method meant that part-year workers would receive disproportionately more holiday entitlement than full-year workers, the wording of the Working Time Regulations was clear, and could not be interpreted as reducing below the 5.6 week minimum holiday entitlement.

It is important to distinguish part-year workers to part-time workers. A part-time worker, as well as part-year workers, will still be entitled to 5.6 weeks holiday, but their entitlement in days or hours will translate into a proportion of a full-time equivalent's entitlement. For example, a 0.5FTE worker will be entitled to 50% leave of that of the FTE. But this worker is still entitled to 5.6 weeks leave, so each week of leave will be 50% of the FTE worker's week of leave. If a FTE worker works 5 days per week, their 5.6 weeks entitlement will be 28 days. A 0.5FTE worker's 5.6 weeks entitlement will be 14 days.

A part-year worker is also entitled to 5.6 weeks, even though they may work a fraction of the year, during each year of employment. Extreme examples could result in employees who only work 1 month each year being entitled to 5.6 weeks' further holiday pay each year.

Comment

This decision clearly has direct relevance to sectors which use part-year employees who are retained on a year-round basis, such as education, agriculture, hospitality and tourism. It will also generally impact irregular work contracts, as many employers use the 12.07% method as a relatively easy way of calculating holiday entitlement and pay where employees are engaged intermittently on short-term assignments and have gaps of varying duration between assignments throughout the year. The real risk for these workers is that the overall holiday pay paid to them during each year under this method falls below 5.6 weeks of their average weekly pay based on a statutory 52-week reference period (discounting periods of non-working).

Criticising Whistle-blower not automatically unfair – Court of Appeal Update

Kong v Gulf International Bank (UK) Ltd

Background

As a reminder, the claimant was the head of financial audit. She made several protected disclosures regarding her concerns in respect of new products, to the Head of Legal. During these disclosures she questioned the professional competence and integrity of the Head of Legal. It was accepted by both parties that these disclosures were protected. A heated exchange took place which resulted in her storming out and slamming the door. Subsequently the Head of Legal said she did not want to work with the claimant going forward and complained about her conduct to a number of senior people, as a result of which the claimant was dismissed. She brought a claim of automatic unfair dismissal and detriment for making a protected disclosure.

The detriment claim, based on the conduct of the Head of Legal towards the claimant, was found to be out of time; but would have succeeded had it been brought within time. However, the tribunal found that she was not automatically unfairly dismissed because of making protected disclosures. She had been dismissed because of the way in which she conducted herself towards her colleagues in the process of making those disclosures, and that colleagues did not want to work with her any more as a result. The termination letter made it clear that her dismissal was due to her conduct towards the Head of Legal.

The claimant appealed to the EAT on the basis that the Head of Legal had sought to have her dismissed because she had made the disclosures, and that her motivation should be attributed to the respondent in accordance with the decision in Royal Mail Group Ltd v Jhuti.

Decision

The EAT held that the tribunal had come to the right conclusion, namely that the claimant had been dismissed, not for what she had said but the way in which she had conducted herself towards the Head of Legal in making the disclosures. The two matters were separable, and the dismissal was because of her conduct. Furthermore, the principle in Jhuti will only apply rarely and the criticism of the Head of Legal's integrity rather than her legal awareness was not enough invoke this principle.

The Claimant appealed to the Court of Appeal who dismissed the appeal on all grounds. The Court of Appeal held that just because the Employment Tribunal had found that the Claimant had not behaved in a way that justified her dismissal, it did not mean that the dismissal decision was taken on due to the alleged protected disclosures.

Comment

This decision ultimately widens an employer's ability to dismiss a whistle-blower in circumstances where the manner in which they make the protected disclosure is deemed to be unacceptable. An employer should however be specific and clear in their reasons, ensuring that the protected disclosure and the behaviour/conduct issues are separated out, and the decision to dismiss should be taken by someone who has not previously been involved in the situation that led to the dismissal. Given the potential for claims to arise in respect of whistleblowing detriment / unfair dismissal, it is always advisable to take legal advice before dismissing an individual in similar circumstances.

Termination and Re-engagement ('Fire' and 'Rehire') – Court of Appeal Update

USDAW & others v Tesco Stores Ltd

Background

In 2007-2009 Tesco agreed to pay staff 'Retained Pay' during a reorganisation and relocation of its staff working in distribution centres to avoid losing all of its staff. The Retained Pay was a permanent change to the terms and conditions of Tesco staff impacted by the reorganisation.

In January 2021 Tesco sought to sought to remove Retained Pay and offered staff the choice between a lump sum of 18 months' Retained Pay or being fired and rehired on the new terms. In response, USDAW applied to the High Court for the following:

- **Declaration**: A declaration that affected employees' contracts were subject to an implied term preventing Tesco from exercising the right to terminate for the purpose of removing the right to Retained Pay.

- **Injunction:** An injunction preventing Tesco from terminating the contracts.

The High Court found in favour of USDAW and granted relief on both points. There was an implied term that the staff could not be fired and then rehired to remove the Retained Pay, as the Retained Pay had been promised in language that clearly expressed its permanency. The injunction was granted as damages would not be an adequate remedy and so Tesco was prevented from commencing the fire and rehire.

Tesco appealed the decision to the Court of Appeal.

Decision

The appeal was allowed and the decision in the High Court reversed. The Court of Appeal decision hinged on four elements:

Express contractual terms: There was nothing in the wording of the 'retained pay provisions' that prevented the employer from giving notice to terminate an employee's contract. The CA held that the terms did not take into account the contracting parties' intention and did not show that there was mutual intention that the contracts would continue for life, until retirement, or until a redundancy scenario emerged. There was no intention for the employer to be limited in the circumstances in which they could terminate the contracts.

Implied contractual terms: It was unclear what term was implied. There was a notable burring between a dismissal being either unfair or unlawful, with the CA ruling that the employer would not have intended to imply a term whereby the employee was in that post for life and could not be dismissed. The obviousness test for implying a term therefore failed, and in any case was inconsistent with the express terms of termination in the contracts.

Estoppel: The argument that the pre-contractual statements regarding 'retained pay' amounted to promissory estoppel from Tesco exercising its right of termination was dismissed. In order to meet the definition of

promissory estoppel the promise needed to be clear and unequivocal and none of the pre-contractual statements mentioned termination, let alone that Tesco could not terminate employees.

Injunction: Finally, the CA held that the High Court could not be justified in granting an injunction. There had been no other case in which a final injunction had been granted to prevent a private company dismissing its employees for an indefinite period.

Comment

The High Court decision had represented a big shift in the law, even if it did turn on the 'extreme' facts of the case. Although the Court of Appeal decision had brought the case more in line with previous decisions, employers should be careful about engaging in 'fire and rehire' practices and follow ACAS advice, which is that the tactic must remain a last resort.

Direct discrimination for expressing gender critical beliefs that were not 'objectively offensive'

Forstater v CGD Europe and others

Background

Ms Forstater was a visiting fellow at CGD Europe (CGD). She believes that a person's sex is immutable, and it is impossible, irrespective of any change the individual makes, to change a person's sex. As a result, she believed that a trans woman was not a woman, and vice versa, a transman was not a man. Ms Forstater expressed these views on social media.

Several of Ms Forstater's colleagues found the comments to be offensive and transphobic and complained to CGD. Following an internal investigation, CGD decided not to renew her visiting fellowship. Ms Forstater claimed she had been discriminated against because of her gender-critical views.

Decision

At first instance, the Employment Tribunal found that Ms Forstater's belief did not amount to a philosophical belief under the Equality Act in that it failed the final of the criteria set out in *Grainger plc & others v Nicholson*, that a belief must be "worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others". The judge held Ms Forstater's beliefs to be "absolutist".

Ms Forstater appealed the decision to the Employment Appeal Tribunal. The EAT reversed the Tribunal's decision on the basis that only where a belief was akin to Nazism or totalitarianism or was espousing violence and hatred in the gravest of forms, could it be said to not be worthy of respect in a democratic society. The EAT held Ms Forstater's beliefs were not this extreme, regardless of the fact her views may cause offense to others and therefore her gender critical view was capable of being protected under the Equality Act 2010.

Comment

Gender critical views, that a person's sex is a material and immutable reality and should not be conflated or confused with gender or gender identity, is a protected characteristic under section 4 of the EQ 2010.

This case is being described by some as a landmark, particularly in relation to the expression of beliefs about gender inside and outside of the workplace. Importantly, the Tribunal acknowledged that where a belief is

protected, then straightforward statements of that belief must also be protected. The Tribunal also noted that how that statement or view is expressed is not entirely linear. As an example, satirising or mocking an opposing view could be deemed as the 'common currency of debate' and allowable to some degree. It was also acknowledged that a single instance of an inappropriate manifestation of a belief should not necessarily lead to action being taking, rather the conduct of the holder of the protected belief should be assessed on the whole.

Barrister discriminated against for having 'gender critical beliefs'

Bailey v Stonewall Equality Ltd and Others

The long-awaited decision in *Bailey v Stonewall Equality Ltd and Others* has further confirmed that gender critical views, that is that a man / woman is defined by their sex (as opposed to their gender), is a protected belief under the EQ 2010.

Background

Ms Bailey, a barrister at Garden Court Chambers held gender critical beliefs. In 2018 she complained to her colleagues about Garden Court Chambers becoming a Stonewall Diversity Champion. Ms Bailey considered Stonewall to hold trans-extremist views and was complicit in a campaign of intimidation to all those who did not share or questioned the belief of gender self-identity. Ms Bailey claimed that because of her complaints she was given less work by Garden Court and this led to a fall in income.

In 2019, Ms Bailey set up the Lesbian Gay Alliance to resist transwomen self-identifying as women, and posted several tweets about trans rights issues. This led to complaints being submitted to Garden Court Chambers from both individuals and trans rights campaign groups. The complaints contested that the tweets were transphobic and damaged the chambers' reputation as supporting trans rights and upholding human rights.

Garden Court responded by tweeting "*we are investigating concerns about Allison Bailey's comments in line with our complaints / BSB policies. We take these concerns very seriously and will take all appropriate action. Her views are expressed in a personal capacity and do not represent a position adopted by Garden Court. Garden Court chambers is proud of its long-standing commitment to promoting equality, fighting discrimination and defending human rights."* Garden Court investigated and found two tweets by Ms bailey that were likely to offend the Bar Standards Board Code.

Ms Bailey brought a claim for unlawful discrimination, victimisation, and indirect discrimination.

Decision

The Employment Tribunal upheld Ms Bailey's claim for unlawful discrimination as a result of her having gender critical beliefs which are protected under the EQ 2010, however her claims for victimisation and indirect discrimination were dismissed.

Comment

This case, which garnered much media attention, further confirms that gender critical views are a protected belief under the EQ 2010. Ms Bailey was found to have had a genuine belief and her tweets were deemed to have been protected acts. For Garden Court to have tweeted that Ms Bailey was under investigation for her tweets suggested that she had done something that required investigating and potentially face action. This was discriminatory and a comparator (that of an antisemitism complaint) did not elicit a similar response from

Garden Court. Garden Court had therefore, subjected Ms Bailey to less favourable treatment due to her views, and not the manifestation of those views.

Although the judgment may still be appealed to the Employment Appeal Tribunal, it is a pertinent reminder to employers of the law around protected beliefs and the dangers of discriminating against employees for protected views that they, or others, do not necessarily share.

Unfair dismissal

Pubbi v Your-Move.co.uk

Background

The Claimant was employed as a financial consultant with an estate agency which also arranges mortgages and offers various insurance products. Another company called First Complete Limited, also known as PRIMIS Mortgage Network, has a relationship with the Respondent as an appointed representative, under which it sets terms for the work that it will permit the Respondent's advisors, working as its representative, to carry out. Following a period of absence through sickness and an appraisal about which the Claimant was dissatisfied, the Claimant applied for bankruptcy which was granted. He did not tell the Respondent of the bankruptcy.

When the Respondent learnt of the Claimant's bankruptcy, his authorization with the company First Complete Limited was terminated with immediate effect and as a result he could no longer hold himself out as an Adviser. The Respondent confirmed that they would not consider the Claimant to be a 'fit and proper person' if he had been found to have entered into a bankruptcy order. It was also found to be relevant that he had failed to disclose this first to the Respondent and to the Network as this had "implications regarding his honesty and integrity." It was also said that his failure to disclose contravened section 2.1 of the FCA Handbook.

Decision

The Claimant lost his claim of unfair dismissal at the ET. There was no express term of his contract, nor any policy or regulatory requirement that applied to him, that specifically required him to disclose a bankruptcy. However, the ET found that the Respondent dismissed him because it nevertheless believed that, in all the circumstances, he knew, or should have appreciated, that it would regard his bankruptcy as a serious matter, and would have expected him to disclose it, and that he had deliberately not done so. The Claimant appealed.

The EAT dismissed the appeal. The ET found that the Respondent was entitled to view this conduct as warranting dismissal, and that the overall disciplinary and appeal process was fair. It did not err in finding this to have been a fair dismissal.

Comment

Despite both the ET and the EAT dismissing the Claimant's claim of unfair dismissal, employers should ensure their policies and codes of conduct accurately reflect any sector-specific requirements and standards that may apply to employees and that these are clearly communicated to employees.

Paid 'special leave policy' during COVID-19 was not discriminatory

Cowie and ors v Scottish Fire and Rescue Service

Background

During the COVID-19 pandemic the Scottish Fire and Rescue Service (the "**Respondent**") introduced a special paid leave policy for staff who remained at home because they were either shielding or had other childcare reasons which prevented them from working. The special leave pay allowed them to continue to be paid notwithstanding their inability to work. In order to benefit from the policy, staff had to firstly use up an accrued time off in lieu and annual leave entitlement.

Several employees of the Respondent brought claims against them in the Employment Tribunal, complaining of unfavourable treatment because of something arising from disability under section 15 of the EQ 2010, and of indirect sex discrimination under section 19 of the EQ 2010.

Decision

The Employment Tribunal upheld the section 15 complaints as the flexibility to take accrued time off in lieu and annual leave had been taken away from the employees, and this was capable of putting the claimants at a particular disadvantage. The section 19 claims were dismissed as the claimants had not established the necessary group disadvantage to women. The Respondent appealed against the finding of discrimination under section 15 of the EQ 2010, and the claimants appealed the section 19 ruling.

The Employment Appeal Tribunal ("**EAT**") considered two questions before finding whether there had been unfavourable treatment to the claimants, that was : (1) what was the relevant treatment?; and (2) was it unfavourable to the claimants?

The EAT accepted that the claimants had the flexibility to use their accrued leave or annual leave taken away from them, but only at the point at which they sought to gain special paid leave. The policy could not be discriminatory for the purposes of section 15 of the EQ 2010 as it provided them with an entitlement to paid leave on an indefinite basis. That conditions for which the entitlement was obtained could not detract from the favourable nature of the treatment and policy. The finding of the Employment Tribunal on the section 15 claims were therefore set aside.

In relation to the section 19 claim, the EAT found that on the evidence, no group disadvantage had been shown. Further, similar to the section 15 claims, the question of 'disadvantage' had to be contemplated by observing the policy as a whole. The policy was indisputably favourable and therefore could not have amounted to a disadvantage. The appeal by the claimants on this element was dismissed.

Comment

Although not broadly covering all policies that have favourable elements to employees, this ruling suggests that where an employer has a paid special leave policy that invariably offers favourable treatment, the preconditions for obtaining that favourable treatment cannot be separated from the policy itself for the purposes of a discrimination claim.

Long Covid

Burke v Turning Point Scotland

Background

Mr Burke contracted Covid in November 2020. Despite initially mild symptoms, he went on to develop severe headaches and symptoms of fatigue. He did not return to work following self-isolation and his employer, Turning Point Scotland (TPS), dismissed him in August 2021 on the basis of his continuing absence from work.

Mr Burke brought claims against TPS, including for disability discrimination. The respondent argued he was not disabled and the tribunal dealt with the issue at a preliminary hearing. The key issue in dispute was whether the claimant met the "long-term" element of the disability test.

Because the claimant was dismissed nine months after he contracted Covid, the tribunal had to deal with the forward-looking part of the statutory test; that is, at the date of the alleged discrimination, whether it was likely that his condition would have a substantial adverse effect on his ability to carry out normal day-to-day activities for at least 12 months.

TPS submitted that any symptoms had either ended or were now minor and, moreover, the real reason for his continued absence was unhappiness about a proposed restructure.

Decision

The tribunal held that he was disabled.

Overall, the Tribunal accepted the claimant's evidence about the fluctuating effects of long covid and his description of relapses. In addition, in the tribunal's conclusions about whether the impact was long term, it effectively used the respondent's dismissal letter against it. In the letter, TPS gave as a reason for the dismissal the fact that it was uncertain when, if at all, he would be fit enough to return to work. Given that his long Covid had already lasted nine months, the tribunal concluded that it could well happen that the substantial effects of the condition would continue at least until the 12-month mark.

Comments

As of 4 June 2022, the Office for National Statistics reported that an estimated 2 million people in the UK, 2.8% of the population, self-reported having symptoms of long Covid. Long Covid is clearly a potentially significant issue for employers.

In May the EHRC issued a statement giving its opinion that, while long COVID is not automatically a disability, it may amount to a disability for particular individuals.

This case was only a first instance decision so not binding on future Tribunals but there are some interesting points raised which are useful for employers to consider:

- The medical evidence in Burke was very sparse but this did not concern the tribunal which accepted that telephone consultations were the norm during the pandemic;
- The tribunal was happy to accept the claimant's evidence about fluctuating symptoms and that they could last for more than 12 months without there really being any other supporting evidence to back this up (other than a TUC report about fluctuating symptoms);
- Occupational health had indicated that the claimant was not disabled but this did not persuade the tribunal;
- It seems possible that where long covid is relied on as the alleged disability it may be for the employer to show it does not meet the requirements of the test

Employers should manage long Covid like other condition and seek medical advice as well as exploring adjustments. Any decisions should be fully justified so that if an individual is found to be disabled employers are in a good position to defend allegations of discrimination.

In relation to the question of disability, the case is a further reminder that ultimately it is a question for the tribunal and that although medical opinion on the question can be useful, it does not offer complete protection.

Section B: Immigration

Changes to Right to Work checks

Under immigration legislation employers are obligated to prevent illegal working by:

- Carrying out 'Right to Work' checks on all employees before their employment commences;
- Conduct follow up checks on employees who have a time-limited permission to live and work in the UK;
- Keep adequate records of all checks carried out; and
- Not employ anyone that it knows, or has reasonable cause, to believe does not have a right to work in the UK.

Failure to properly combat illegal working means that employers may be liable for a civil penalty or even a criminal offence. The civil penalty element arises when an employer employs someone without the right to undertake the work for which they were employed. The criminal offence element is reserved for matters where

the employer knew or had “reasonable cause to believe” that the employee did not have the correct immigration status.

There is a statutory defence against the civil penalty if right to work checks have been carried out correctly. Given the potential liability is £20,000 per illegal worker, it is important for employers to do the checks properly.

The right to work check process has changed a number of times to reflect the different documents the Home office deem to be acceptable, to address the end of free movement following Brexit and to reflect a partial move to digital checking. There were also temporary changes to assist with remote working during the pandemic.

Currently there are 3 different ways of carrying out a right to work check depending on the employee’s immigration status and the documentation they are relying on:

- Manual checks
- Checks through a third party a Digital Identity Service Provider (DISP)
- Online digital checks

Until 30 September employers can rely on the adjusted Covid process to checks documents virtually. From 1 October the original document will need to be seen unless a IDSP is used to carry out a digital check.

Manual Checks

The process requires you to see the documents, check they are valid and genuine and allow for the type of work involved and then keep a copy.

Documents suitable for manual checks are listed in List A and List B and summarised below:

List A – acceptable documents to establish a continuous statutory excuse

1. A passport (current or expired) showing the holder is a British citizen or a citizen of the UK and Colonies having the right of abode in the UK.

2. A passport or passport card (in either case, whether current or expired) showing that the holder is an Irish citizen.

3. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man, which has been verified as valid by the Home Office Employer Checking Service, showing that the holder has been granted unlimited leave to enter or remain under Appendix EU(J) to the Jersey Immigration Rules, Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008 or Appendix EU to the Isle of Man Immigration Rules.

4. A current passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK.

5. A current Immigration Status Document issued by the Home Office to the holder with an endorsement indicating that the named person is allowed to stay indefinitely in the UK, or has no time limit on their stay in the UK, together with an official document giving the person’s permanent National Insurance number and their name issued by a government agency or a previous employer.

6. A birth or adoption certificate issued in the UK, together with an official document giving the person’s permanent National Insurance number and their name issued by a government agency or a previous employer.

7. A birth or adoption certificate issued in the Channel Islands, the Isle of Man or Ireland, together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer.

8. A certificate of registration or naturalisation as a British citizen, together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer.

List B Group 1 – documents where a time-limited statutory excuse lasts until the expiry date of permission to enter or permission to stay:

1. A current passport endorsed to show that the holder is allowed to stay in the UK and is currently allowed to do the type of work in question.

2. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man, which has been verified as valid by the Home Office Employer Checking Service, showing that the holder has been granted limited leave to enter or remain under Appendix EU(J) to the Jersey Immigration Rules, Appendix EU to the Immigration (Bailiwick of Guernsey) Rules 2008 or Appendix EU to the Isle of Man Immigration Rules.

3. A current Immigration Status Document containing a photograph issued by the Home Office to the holder with a valid endorsement indicating that the named person may stay in the UK, and is allowed to do the type of work in question, together with an official document giving the person's permanent National Insurance number and their name issued by a government agency or a previous employer.

List B Group 2 – documents where a time-limited statutory excuse lasts for six months:

1. A document issued by the Home Office showing that the holder has made an application for leave to enter or remain under Appendix EU to the immigration rules (known as the EU Settlement Scheme) on or before 30 June 2021 together with a Positive Verification Notice from the Home Office Employer Checking Service.

2. A Certificate of Application (digital or non-digital) issued by the Home Office showing that the holder has made an application for leave to enter or remain under Appendix EU to the immigration rules (known as the EU Settlement Scheme), on or after 1 July 2021, together with a Positive Verification Notice from the Home Office Employer Checking Service.

3. A document issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man showing that the holder has made an application for leave to enter or remain under Appendix EU(J) to the Jersey Immigration Rules or Appendix EU to the Immigration Rules (Bailiwick of Guernsey) Rules 2008, or Appendix EU to the Isle of Man Immigration Rules together with a Positive Verification Notice from the Home Office Employer Checking Service.

4. An Application Registration Card issued by the Home Office stating that the holder is permitted to take the employment in question, together with a Positive Verification Notice from the Home Office Employer Checking Service.

Identity Service Providers

This option is only available for checking British and Irish citizens with valid passports (or Irish passport cards).

Online Digital checks

Since 6 April 2022 digital checks rather than manual checks must be carried out for individuals with biometric resident cards or permits as well as those with frontier permits.

Individuals need to log into the right to work system and obtain a share code which they pass to the employer. The employer then uses the code to log in and check the right to work. They must keep a record of the check.

Questions from the attendees

Q: What considerations are needed for the engagement of staff domiciled overseas?

A. There are a number of potential issues that need to be considered before engaging staff domiciled overseas. In summary, some of these are:

Immigration: Does the staff member have the right to work in the overseas jurisdiction? Have you checked the local immigration laws in that country?

Will the individual need to spend any time in the UK and if so do they have the right to work in the UK?

Employment Rights: When an employee is based in another country, sometimes they gain certain basic employment rights of that country. This could result in different holiday entitlements, minimum salaries, maximum working hours, and even enhancements in relation to termination. Local employment laws should be checked for any mandatory rights that the overseas employee may obtain.

Tax: Working overseas may inadvertently trigger tax implications. Tax may be due in the overseas country where the employee is working as well as (or, instead of) the UK. Tax advice should be sought from local experts.

Q: **Are there any implications of working with Ukrainian associates / contractors?**

A. As a result of the situation in Ukraine, the UK government introduced a new visa system for Ukrainian nationals. Under the scheme individuals can work and access benefits in the UK for up to 3 years.

Individuals who have a Ukrainian passport are given a permission to travel letter followed by a passport stamp which is then valid for 6 months. During those 6 months the individual needs to obtain a biometric residence permit.

If employing a Ukrainian national, the passport and entry stamp should be checked manually prior to employment starting. A follow up check should then be carried out using the online service before the temporary 6 month right expires.

Individuals without a Ukrainian passport need to provide biometric information and collect their BRP shortly after arrival in the UK. If necessary they can show their entry clearance stamp which will be attached to a

Form for affixing the visa (FAV) and this can be verified by the employer using the employer checking service. However, individuals are expected to collect their BRPs urgently.

If the Ukrainian National is not being employed but engaged as a contractor, right to work checks are not required.

Q: What can small businesses do to make the recruitment and visa process easier for non-UK applicants?

A: There are a number of steps businesses can take:

- The first step would be to consider whether a sponsor licence would be useful so as to be able to recruit non settled workers and if so apply for one. Having a licence at the outset (if one is needed and can be justified) can make subsequent recruitment processes easier as there isn't a delay while individuals wait for the licence to be granted.

- Ensure systems and processes are suitable and right to work checks are done correctly so as to increase the chance of a licence being granted.

- Request certificates of sponsorship with a licence so as to avoid future delays where possible.

- Consider financial and practical support for applicants (potentially with a clawback provision if people leave)

Section C: Future developments

UK GDPR

Potential reforms to the current legislation

On 17 June 2022 the Department for Digital, Culture, Media & Sport ("**DCMS**") issued a press release announcing the new data laws that would take effect as a result of the planned Data Protection and Digital Information Bill (the "**Bill**"). On 18 July 2022 the Bill was introduced into Parliament and at the time of writing is due to undergo its 2nd reading in the House of Commons.

The Bill can be viewed to broadly remove the prescriptive requirements of the UK GDPR, increase flexibility in data compliance, and seek to alleviate the 'data burden' on businesses. The Bill also seeks to establish a statutory corporation with a new governance structure to replace the Office of the Information Commissioner.

The Bill followed a government consultation process on a number of different proposals. The proposals for reform can be broken down into the following areas:

1. Reducing barriers to responsible innovation
2. Reducing burdens on businesses
3. Reducing barriers to data flows
4. Delivering better public services
5. Reform of the ICO

The second area is likely to be most relevant to HR practitioners with the key proposals to keep an eye on being:

- Changes to the requirement to carry out data protection impact assessments and to maintain records of processing activities so as to introduce a more flexible approach based on risk.
- Slight changes to the threshold for refusing to respond to a subject access request from "manifestly unfounded or excessive" to "vexatious or excessive". The government has decided not to reintroduce a fee for making such requests.
- A more agile approach to international data transfers

Whilst the Bill is not yet in its final form, a close eye should be kept on its progress and any impact that it might have on the UK-EU adequacy decision.

Consultation on public sector exit payments

HM Treasury has launched a public consultation titled: Public Sector Exit Payments: a new controls process for high exit payments.

The consultation identifies two exit payment processes. The first introduces a new process for high value exits of over £95,000 in central government. This requires approval from the Secretary of State before an exit is agreed. The second proposes a modified version of the current system for the special severance payments.

The consultation closes on 17 October 2022.