Annual Review of Employment Law

Part 2 – 2020 and beyond?

Introduction

All things being equal (which invariably they are not) there is some draft legislation waiting in the wings which is due to become law in GB April 2020. Why does that matter here? I hear you cry, well probably because the reforms and the related consultation documents give an inkling of where we might be going regarding employment law reform especially given that the old "traditional route" of EU law setting the direction via time bound Directives has now ended.

The domestic agenda for employment law reform was hinted at in the Queens Speech on October 14th 2019 whereupon fears of a deregulation agenda for employment law in GB were dampened somewhat with a speech which was "light" on regulation (tips) and Delphic on flexibility and what it means to workers and employers.

In terms of pending draft legislation pending in GB that will be of particular interest of practitioners in NI, the following will be of key importance given their potential cross jurisdictional importance –

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (GB only)

This is a significant statutory instrument because it is the first foray into the employee versus worker dynamic that now will effectively address a key initial entitlement to a main statement of terms and conditions regardless of the demarcation. The legislative context of this instrument covers three amendments. These are public commitments made as part of the Government's response to the independent Taylor Review of Modern Working Practices where Matthew Taylor made the legislative recommendations covered by this instrument.

The first reforms relate to amendments to sections 1 to 7B of Part I of the Employment Rights Act 1996 - Sections 1 to 7B of Part I of the Employment Rights Act 1996 ("the 1996 Act") entitles 'employees' to a written statement of employment particulars.

The 1996 Act only entitles those who fall within the definition of 'employees' (at section 230 of the 1996 Act) to this written statement of employment particulars. Other types of 'worker' (which is a broader definition at section 230 (3) (b)) have no right to this written statement.

This instrument amends the 1996 Act to make the written statement a 'day 1' right for all individuals who are entitled to a written statement. This means firstly that they will be entitled to receive the 'principal statement' of the written statement no later than the first day of their new job, where at present the employer has a period of two months in which to provide the statement.

Secondly, there will be no qualifying period of employment. At present employees are entitled to a written statement only if their employment has continued for at least one month. Under this instrument, that minimum period is abolished.

The Employment Rights (Miscellaneous Amendments) Regulations 2019, extends the right to all ‘workers’ rather than just ‘employees’. Taken together, the two instruments provide that the right to a written statement applies to all ‘workers’ from day 1.

In addition, the Government will be expanding the information that employers are required to provide as mandatory content in a written statement from day one (including any additional information provided e.g. through staff handbooks on sick leave and pay or other types of paid leave).

The additional information to be included in the principal statement includes both new information and information which employers are already required to provide but can provide separately: in a staff handbook for example. The additional information is as follows:

- How long a job is expected to last, or the end date of a fixed-term contract
- How much notice an employer and worker are required to give to terminate the agreement
- Details of eligibility for sick leave and pay.
- Details of other types of paid leave e.g. maternity leave and paternity leave.
- The duration and conditions of any probationary period
- All remuneration (not just pay) - contributions in cash or kind e.g. vouchers and lunch
- Which specific days and times workers are required to work

All of the above is in addition to the current mandatory information that must be provided in a written statement. All the information in a principal statement will need to be provided on the first day that a worker starts their job.

From a Northern Ireland perspective it may be a matter of engaging in pre-emptive and proactive good employment practice to adopt this change as it makes eminently good business and relational sense and there is little point waiting on legislation to tell employers to do something when the value of the reform speaks for itself.

The second reforms relate to an amendment to regulation 16 of the Working Time Regulations 1998 - Regulation 13 of the Working Time Regulations 1998 creates an entitlement to 4 weeks annual leave, as required by the EU Working Time Directive. Regulation 13A creates an additional entitlement (not required by the EU Working Time Directive) to 1.6 weeks annual leave.

Regulation 15A provides that the entitlement to accrue annual leave starts with the commencement of employment. Whilst there may be limitations on when leave can be taken, there is no qualifying period for leave to be accrued.

Regulation 16 makes provision for payment when on annual leave, as provided for in Regulation 13 and 13A. Regulation 16(1) "payment in respect of leave" states that workers must be paid for leave to which they are entitled "at the rate of a week's pay in respect of each week of leave".

Regulation 16(2) provides that a week’s pay is to be calculated by applying sections 221-224 of the Employment Rights Act 1996, but with certain modifications set out at regulation 16(3). These sections, with the modifications, provide that where a worker's remuneration varies:

- with the amount of work done;
- according to the time of work; or

- because the worker has no normal working hours; then a week's pay is the average weekly remuneration in the period of twelve weeks preceding the start of the leave. This is known as the ‘holiday pay reference period’.

These twelve weeks do not take account of "a week in which no remuneration was payable by the employer to the employee". In this case, "remuneration in earlier weeks shall be brought in" when calculating twelve weeks.

This statutory instrument amends modifications of sections 221-224 set out in regulation 16(3). It inserts a new modification which increases the reference period from twelve weeks to fifty two weeks. This means that payment in respect of annual leave for workers with variable remuneration will be based on their average weekly remuneration over a period of fifty two weeks.

The above reforms need to be read in the context of the BEIS advice and guidance from February 2019 in relation to zero hours situations which may have readers confused over the status of the Brazel ruling in the Court of Appeal in 2019.

Calculating holiday pay for workers with irregular hours or those on zero-hours contracts

Workers with irregular hours or zero-hours contracts are entitled to paid holiday.

For casual workers with no normal hours, including individuals on a zero-hours contract, the holiday pay they receive will be their average pay over the previous 12 weeks worked (taking the last whole week, in which they were paid, ending on a Saturday as the most recent week. Unless they are paid weekly on a day other than a Saturday – see previous section, ‘The definition of a ‘week’ for the purpose of the holiday pay reference period’).

The reference period must include the last 12 weeks for which they were actually paid, and so excludes any weeks where they were not paid. This may mean that the actual reference period takes into account pay data from further back than 12 weeks from the date of their leave.

A paid week will include a week in which the worker or employee was paid any amount for work undertaken during that week. Only if no pay at all is received in a week, should it be discounted as part of the 12-week reference period.

The calculation for all these workers in GB will change from 6 April 2020 when the calculation of holiday pay under Reg 16 WTR, currently based on the preceding 12 weeks, will be based on pay averaged over the preceding 52 weeks (or whatever period they have been working if less). If there are weeks unworked, the changes to the WTR provide that the calculation will not look further back than the preceding 104 weeks. This will mean that if 52 paid weeks cannot be found in the previous 104, the calculation is based on the average earnings of the preceding weeks which count, however many that is. This will apply in other cases where the 12 week averaging period is used, such as where pay differs according to the time of work (e.g. night shifts).

The Agency Worker (Amendment) Regulations 2019

The issue of the “Swedish Derogation” has always proved controversial since its inception in NI in 2011 with many trade unionists stating that the de facto loophole drove a “coach and horses” through the underpinning intention of the legislation. Matthew Taylor wrote in his Review of Modern Working Practices that workplace flexibility must be reciprocal and benefit

the employee as well as the employer. In NI there was controversy when the legislation was implemented because as a devolved matter there was an expectation that it would not be replicated in its GB form but EU related national trans-positional protocols/superiority on such EU wide matters won out.

The aforementioned Taylor Review identified concerns that Swedish derogation, or pay between assignments, contracts were being misused to avoid giving agency workers their equal pay entitlements. Abuse identified by the review included that workers may never receive material pay between assignments by being kept on artificial, minimum hours contracts, or that their 'between assignments' pay is deducted from their 'on assignment' pay.

Agency workers may have little choice when it comes to contract type and can be engaged under Swedish derogation contracts without necessarily understanding what they entail. The government's agency workers recommendations consultation showed limited evidence that agency workers are benefitting from pay between assignments contracts, with little awareness that they are waiving their right to potentially higher pay after twelve weeks.

This statutory instrument revokes the Swedish derogation in regulations 10 and 11 of the AWR to ensure that agency workers receive the rate of pay to which they are otherwise entitled after twelve weeks.

The Swedish derogation will be revoked on 6 April 2020. From this date agency workers will no longer be able to opt out of equal pay entitlements after twelve weeks in the same assignment.

Employment businesses will still be able to offer pay between assignments contracts to agency workers after revocation, but workers will not be able to opt out of equal pay entitlements after twelve weeks in the same role with the same hirer.

To ensure workers are aware that they are no longer opted out of their equal pay rights, employment businesses using Swedish derogation contracts must issue a written statement to affected agency workers informing them of their revised entitlement in relation to pay

The Employment Rights (Miscellaneous Amendments) Regulations 2019

The legislative context of this instrument covers amendments in three areas. These are public commitments made as part of the Government's response to the independent Taylor Review of Modern Working Practices where Matthew Taylor made the legislative recommendations covered by this instrument.

This statutory instrument is also the main vehicle for the employment particulars for workers reforms discussed previously but also for increasing punitive sanction on employers via an amendment to section 12A of the Employment Tribunals Act 1996 - Where an employment tribunal finds that an employer has breached a worker's employment rights and believes that the breach has one or more aggravating features, section 12A of the Tribunals Act 1996 prescribes the maximum penalty that the employment tribunal may award.

Section 12A (12)(a) of the Tribunals Act 1996 allows the Secretary of State to amend the maximum penalty available for an aggravated breach. The amendment under this instrument increases the maximum penalty to £20,000. The intent is that alongside illustrative guidance on its use the increase in the maximum will act as a stronger deterrent and sanction against aggravated breaches of employment law. This amendment actually came into force on 6 April

2019 in GB (increasing the £5,000 limit) but this was one of the reforms that did not get replicated in NI during the NI Review of Employment Law.

In addition there will be an amendment to the Information and Consultation of Employees Regulations 2004 - The ICE Regulations transpose the Information and Consultation Directive 2002/14/EC ("the Directive"). The Directive sets a general framework for informing and consulting employees in the European Community.

The ICE Regulations provide an exercisable right for employees to request/trigger that their employer, if in scope (i.e. having 50 or more employees), sets up information and consultation arrangements. For a request to be valid it must be made by at least 10% of the total number of employees employed by the employer. These amendments reduce the 10% requirement to 2% of the employees.

This is subject to the existing limits in the Regulations that the threshold can never be fewer than 15 employees or more than 2,500 employees. The 2% threshold only applies to a request that is received on or after the commencement date of 6 April 2020

Extending redundancy protection for women and new parents

In GB during the summer 2019 period the Government engaged in a consultation on key reforms in the discrimination field especially in the area of redundancy with particular reference to pregnant employees.

In its response to the consultation document the Government made commitments to –

- ensure the redundancy protection period applies from the point the employee informs the employer that she is pregnant, whether orally or in writing;
- extend the redundancy protection period for six months once a new mother has returned to work. We expect that this period will start immediately once maternity leave is finished;
- extend redundancy protection into a period of return to work for those taking adoption leave following the same approach as the extended protection being provided for those returning from maternity leave – it will be for six months;
- extend redundancy protection into a period of return to work for those taking shared parental leave, taking account of the following key principles and issues:
- the key objective of this policy is to help protect pregnant women and new mothers from discrimination;
- the practical and legal differences between shared parental leave and maternity leave mean that it will require a different approach;
- the period of extended protection should be proportionate to the amount of leave and the threat of discrimination;
- a mother should be no worse off if she curtails her maternity leave and then takes a period of Shared Parental Leave; the solution should not create any disincentives to take Shared Parental Leave
- establish a taskforce of employer and family representative groups. The taskforce will make recommendations on what improvements can be made to the information available to employers and families on pregnancy and maternity discrimination. It will also develop an action plan on what steps Government and other organisations can take to make it easier for pregnant women and new mothers to stay in work.

IR35 – The new regime – April 2020 – Employers must categorise the employment "status"

The Battle Royale between employment law and tax law is demonstrated nowhere better than in the arena of IR35 or "off-payroll working". To increase compliance with the existing off-payroll working rules (often known as IR35), medium and large organisations (turnover in excess £10.2 million) in all sectors of the economy will become responsible for assessing the employment status of individuals who work for them through their own limited company. The reform does not introduce a new tax or apply to the self-employed, who are outside the scope of the existing rules.

The reform was introduced in the public sector in 2017. At Budget 2018, the Government announced that it would be introduced to other sectors from April 2020, giving organisations time to adjust and prepare. Outside the public sector, the reform will not apply to the smallest 1.5 million organisations, minimising their administrative costs.

Following a further consultation in early 2019, the Government has published its response to the submissions received, confirming the detailed design of the reform and the obligations on different parties. It has also published the draft legislation for the reform.

Treasury have advised as follows - From 6 April 2020, medium and large organisations outside of the public sector will need to decide whether the rules apply to an engagement with individuals who work through their own company. All public sector organisations will continue to make determinations as now.

Where the rules do apply, the organisation, agency, or other third party paying the worker's company will need to deduct income tax and employee NICs and pay employer NICs.

The Government has listened to stakeholders and has taken into account insight from the introduction of the public sector reform alongside consultation responses. As a result:

- Medium and large organisations will have until April 2020 to implement the changes;
- The existing rules will continue to apply to engagements with the 1.5 million smallest organisations;
- the legislation will make clear when non-public sector organisations, including unincorporated organisations, will be considered to be small;
- the legislation will include provisions to ensure that all parties in the labour supply chain are aware of the organisation's decision and the reasons for that decision; and
- the Government will introduce a statutory, client-led status disagreement process to allow individuals and fee-payers to challenge the organisation's determinations.

HMRC has already developed the Check Employment Status for Tax (CEST) service to help organisations determine whether the off-payroll working rules apply. HMRC is working with stakeholders to enhance CEST and develop new guidance before the reform comes into effect.

Since the introduction of the public sector reform, and during consultations, the Government has listened to the views of stakeholders. On the basis of their feedback, it can confirm:

- The reform is not retrospective. As was the case in the public sector, HMRC will focus on ensuring businesses comply with the reform for new engagements, rather than focusing on historic cases. HMRC will not carry out targeted campaigns into previous

years when individuals start paying employment taxes under IR35 for the first time. Organisations' decisions about whether workers are within the rules will not automatically trigger an enquiry into earlier years.
- The reform will not stop anyone working through a company if that suits them.
- HMRC will provide extensive support and guidance to help organisations implement the off payroll working rules to ensure they apply them correctly. This will include the publication of detailed guidance for organisations and both general and targeted education packages, including webinars, workshops and one-to-one sessions with businesses in particular sectors.
- HMRC continues to work with stakeholders to make improvements to CEST and wider guidance. Enhancements will be rigorously tested with stakeholders, and operational and legal experts, and will be available for use later in 2019.
- The vast majority of decisions in the public sector are made on a case-by-case basis, and the new client-led status disagreement process will allow the organisation's decision to be challenged in real time.

It is clear that there will be massive scope for disagreements between client and the private service company over "status" and the construct of mutuality of obligation will be at the heart of many of these disputes.

The HMRC guidance even sets the scene for said disagreements by stating –

Taking reasonable care when making a determination

You must take reasonable care when you make a determination about the employment status of a worker.

Failure to do so will result in the worker's tax and National Insurance contributions liability becoming your responsibility.

Who to tell about your determination

From 6 April 2020, you must tell the worker, agency, or other organisation you contract with of your determination. Do this whether your determination shows that the off-payroll working rules will apply or not.

You must provide reasons for your determination.

You must pass on your determination on the date, or before the date, the contract is entered into. If the work starts later, give your determination before that later date.

You'll hold the liability for tax and National Insurance contributions until you tell the worker, and the person you contract with, of your determination and the reasons for it.

A status determination statement issued before 6 April 2020 is valid under the new rules. If the working practices of the engagement change or you negotiate a new contract with the worker, you need to make sure that you re-check the rules to see if they still apply.

What to do if a worker disagrees with your determination

A worker or the agency paying the worker's intermediary may disagree with the employment status determination you reached.

If this happens you'll need to:

- consider the reasons for disagreeing given to you by the worker or agency paying their intermediary
- decide whether to maintain the determination because you feel it is correct and give reasons why, or withdraw the determination because you feel it was wrong
- keep a record of your determinations and the reasons for them

You must provide a response within 45 days of receiving the disagreement. During this time you should continue to apply the rules in line with your original determination.

Tell the worker if the determination has not changed.

Tell the fee-payer and the worker if the determination has changed.

If you do not respond within 45 days, the responsibility for paying tax and National Insurance contributions will become your responsibility.

The above reforms are interesting especially in the context of a recent first tier tax tribunal decision below as reported by contractor calculator.co.uk –

In July 2019 consultant urologist George Mantides received a split decision when appealing tax bills imposed by HMRC for two engagements in 2013, after the taxman had concluded that he was "caught" by IR35. The construct of mutuality of obligation in a tax tribunal context is of major significance in this and many other related cases.

Mr Mantides successfully overturned the decision on his IR35 status for one of the contracts. Now he is to appeal against not only the second engagement, but what he refers to as "the unfair false employment of myself and other healthcare professionals". It is this notion of false employment that is the frequently ignored in the gig economy debate which prefers the false independent contractor debate that surrounds cases such as City-sprint, Hermes, Addison Lee and so on.

Tax and accounting professionals are asking - Is it really the case that individuals are being bundled into employment with health trusts? Is there is greater examination the tax treatment of locums within the NHS thus undermining the role-based blanketing agenda that HMRC has encouraged throughout much of the public sector.

The employment status of locums has seemingly been a source of contention for some time (eg) alleged blanket assessment of locums. In May 2018 in GB the IHPA (then trading as the Locum Doctors' Union) and the Healthcare Professionals' Union (HPU) secured a successful legal challenge to NHS Improvement (NHSI), and its plans to place all healthcare contractors inside IR35 irrespective of their circumstances. After conceding a Judicial Review at the pre-action stage, NHSI sent out instructions to trusts, informing them that locums must be assessed on a case-by-case basis.

Contractor Calculator reported in September 2019 that for many locum nurses, the impact of blanket assessments was compounded by the unlawful deduction of employer's National Insurance (NI) from already capped rates. Combined, these factors have reduced the net income of some nurses by roughly a third overnight, and mean that long distant assignments are no longer a viable option for many. .

The IHPA are quoted as saying - “Delivering HMRC a defeat that sets binding precedent, while underlining the taxman’s flawed approach to mutuality of obligation (MOO), should help many people escape HMRC’s snare for the genuinely self-employed. This is also a great opportunity to send a loud and clear signal to the Sir Amyas inquiry that HMRC’s assertions that whole professions fall inside the rules without assessment are incorrect and unlawful.”

“A win at Upper Tribunal would set binding precedent and not only positively affect me, but all other independent healthcare professionals, independent non-healthcare professionals and patients alike,” notes Mantides on his CrowdJustice campaign funding page. “If you’re a fellow independent healthcare professional, this is a good chance to expose and stop this horrendous injustice.”

According to the IHPA, the FTT’s decision to deem Mantides’ 2013 engagement with Royal Berkshire Hospital (RBH) within scope of IR35 was largely drawn from suppositions based on a lack of evidence.

With the NHS trust in question failing to provide testimony, and in the absence of a physical contract, the judge was required to make assumptions as to what the terms of the notional contract *might* have been.

One was that the hospital would likely have been expected to try to provide Mantides with 10 half-day sessions of work per week, which contributed to the judge’s determination that a sufficient degree of MOO existed between the two parties. However, as Dr Campbell highlights, the assumptions made were questionable:

“While we do not know the individual circumstances of the engagement any more than the judge would have done, we do feel that the terms of the notional contract used in reaching this judgment do appear atypical.

“They look quite unorthodox to those of us with experience in the locum health worker market, where one to four-hour notice periods are often the norm and there is almost invariably no guarantee of continuing work or minimum hours.”

Dr Campbell concludes: "We are confident that, equipped with the necessary evidence, the UT will draw a more accurate conclusion as to Mr Mantides' engagement, and more importantly, help usher in positive change to the treatment of contractors under the Off-Payroll rules."

Termination Payments (NIC) –

Following on from the 2019 taxation reforms, all payment above the £30,000 threshold will be subject to class 1A National Insurance contributions (employer liability only). This decision was deferred from April 2019 to allow the reforms regarding the taxation of PILON related termination payments (as per the Finance Act (No2) 2017 to bed in.

The summer 2019 GB Consultations – direction of travel for NI?

As indicated in Part 1, the consultation documents from summer 2019 in GB are the closest thing to a roadmap for direction of travel for possible reform that we have and even if they do not all come to fruition it is clear where the logic lies and as such can act as a nudge for pro-active employers.

Let's look at them individually in a bit more detail -

One Sided Flexibility 11/10/19

The Government said in their consultation document - In July 2017 the Review of Modern Working Practices (the review) was published, which included 53 recommendations. The review considered a range of issues, including the implications of new forms of work, the rise of digital platforms and the impact of new working methods on worker rights, responsibilities, freedoms and obligations.

At the heart of these recommendations was an overarching ambition that all work should be fair and decent and for employers to offer opportunities that give individuals realistic scope to develop and progress. This ambition, to generate good jobs and greater earning power for all, is set out further in our modern Industrial Strategy, and we are committed to ensuring the UK labour market remains successful and competitive.

Flexibility has been a key part of enabling business to respond to changing market conditions and has supported record employment rates. Individuals have the opportunity to work in a range of different ways, on hours that fit around other responsibilities. Through the Good Work Plan, the Government have set up a taskforce to work with business to make flexible working a reality for all employees.

However, one of the issues raised through the Taylor review was that a minority of employers abuse this flexibility to transfer excessive amounts of risk to workers, and there is no corresponding benefit to the worker from the flexible arrangement. This has been termed as 'one-sided flexibility', with examples of employers cancelling shifts at short notice or sending workers home when customer demand is low.

Following the recommendations from the review, Government commissioned the independent Low Pay Commission (LPC) to provide advice on the prevalence of one-sided flexibility, the impact of introducing a higher minimum wage for non-guaranteed hours and alternative policy ideas to address the issue. The LPC's research and engagement with stakeholders found that one-sided flexibility is indeed a problem in some parts of the modern economy, where some employers misuse flexible working arrangements to create unpredictability, insecurity of income and a reluctance among some workers to assert basic employment rights.

The Commission did not endorse the proposal to introduce a premium to the National Living Wage (NLW) for non-guaranteed hours worked but instead recommends alternative action. While The Government agree with the LPC's conclusion that the NLW premium would not be an effective option, we are determined to tackle one-side flexibility while retaining the flexibility that many individuals find so valuable.

Good Work: Proposals to support families 11/10/19 and 29/11/19

The Government said in this 75 page consultation document that - The consultation focusses on additional support for employed parents as employees do not have the same level of flexibility and autonomy over the time they take off as self-employed people do. We are not ruling out providing further support for self-employed parents in the future but, as Matthew Taylor recommended in his review of modern working practices, this needs to be carefully considered in the wider context of tax, benefits and rights over the longer term.

Parental leave and pay entitlements

Maternity Leave and Pay were introduced to enable women to take time off work to prepare for and recover from birth and bond with their child. But its length – when compared to Paternity Leave (for fathers and partners) – can reinforce the view that the mother should be the primary carer in the early stages of their child's life. There is some evidence that fathers who spend time caring for their children in the early years are more likely to stay involved and play a greater role in caring for their children in later years.

Shared Parental Leave now offers mothers the flexibility to transfer leave to the father and has given families much greater choice over who cares for their new child in the first year. But this kind of cultural change takes time, and evidence tells us that mothers still take on the majority of the childcare responsibilities.

The government is committed to giving parents equality of opportunities at home and work. The recent Gender Equality at Every Stage: A Roadmap for Change (the Gender Equality Roadmap) sets out a range of actions that the government is taking to support women's economic empowerment and close the gender pay gap.

We are now seeking views on options for reforming parental leave, and the role it can play in achieving these objectives. We recognise that parental leave is only part of the picture in achieving greater gender equality. There are other important ways in which government can help families to manage their caring responsibilities and incentivise businesses to support those choices.

Transparency of employer work-life balance policies.

Many employers already consider carefully how to offer roles that can be done flexibly. However, to help ensure this good practice is spread more widely, we are consulting on measures to encourage all employers to consider advertising all jobs as flexible from the outset. We are also consulting on a requirement for employers to make public their parental leave policies.

This would help ensure that job applicants can make informed choices and eliminates concerns around asking about employer policies which could discourage employees from applying to a wide range of jobs.

Neonatal Leave and Pay

An internal review by the Department for Business, Energy and Industrial Strategy highlighted that parents of premature, sick and multiple babies can experience significant challenges, particularly in cases where their baby or babies need neonatal care for a number of weeks or months.

Evidence gathered so far suggests that current leave and pay entitlements do not adequately support parents in these circumstances. In response, the government is seeking views on a proposed new entitlement to Neonatal Leave and Pay for parents of babies who require neonatal care following birth. See Annex 2 for more information on BEIS' review of provisions for parents of premature, sick and multiple babies.

Structure of the consultation –

Chapter 1 of this consultation document explores the high-level options for reforming parental leave and pay, and seeks views on the benefits, costs and trade-offs.

Chapter 2 sets out our proposals for new entitlements for parents of babies who require neonatal care.

Chapter 3 considers new measures to increase transparency of the employer offer on flexible working and family-related leave and pay.

Confidentiality Clauses and Non-Disclosure Agreements in a sexual harassment or discrimination context.

Adam Brett spoke on this matter earlier today (see his excellent summary notes in your packs regarding practice in GB and NI) and the consultation on this began in March 2019 and responses and outcomes have now been reported. The Government has said - earlier this year, we launched a consultation to seek evidence and views of the use of confidentiality clauses in the employment context.

We also consulted on a number of proposals to limit the misuse of confidentiality clauses and enhance clarity for individuals on what they should and should not cover. We ran 6 round tables across the UK to gather further evidence and to discuss our proposals. It is clear that there is a legitimate place for confidentiality clauses signed as part of an employment contract.

These are used by employers to protect commercially sensitive information and to prevent their employees sharing such information with their competitors. We also heard evidence that many employees who sign a settlement agreement at the end of their employment with an organisation value the inclusion of confidentiality clauses, as they allow them to move on and make a clear break.

However, using these clauses to silence and intimidate victims of harassment and discrimination cannot be tolerated, which is why we are introducing reforms. We would like to thank the Women and Equalities Committee for their inquiry report into the use of NDAs in discrimination cases.

Their work on this topic has challenged misuse. A number of their recommendations are addressed in this consultation response. We will respond fully in due course to all their recommendations. We would also like to acknowledge and thank all the respondents to the consultation and participants in the roundtable discussions.

This is a highly sensitive, emotional and technical topic. We particularly wish to recognise the individuals who responded and their courage in speaking out and taking a step to move on with their lives. Our reforms set out in this document are part of a wider response to sexual harassment in the workplace.

The Government Equality Office launched a consultation 11 July 2019 on sexual harassment in the workplace, focusing on steps to tackling inappropriate workplace culture. It is also relevant to our wider reforms to create a fairer labour market through the Good Work Plan.

In response to the consultation to tackle misuse of confidentiality clauses the Government are taking a number of measures. We will:

•Legislate to ensure that a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals;

•Legislate so that the limitations of a confidentiality clause are clear to those signing them

•Legislate to improve independent legal advice available to an individual when signing a settlement agreement;

•Produce guidance on drafting requirements for confidentiality clauses; and

•Introduce new enforcement measures for confidentiality clauses that do not comply with legal requirements.

Health is everyone's business: proposals to reduce ill health-related job loss

This consultation closed on 7/10/19 and at the heart of it the Government said in its core consultative document –

This consultation sets out proposals which aim to reduce ill health-related job loss. There is a case for employers to do more to support their employees who are managing health conditions, or who are experiencing a period of sickness absence. In return, the government can provide more help for employers, recognising the differences in employers' capacity and capability to act.

The benefits of achieving this ambition are great. For employers, investing in employee health and wellbeing can lead to increased workforce productivity and help retain key talent in an organisation. For government, keeping more people in work is good for the economy and reduces spend on out-of-work benefits, and potentially reduces demand on the NHS. For individuals, good work is generally good for mental and physical health and wellbeing.

Chapter 1 sets out what needs to change to support people with health conditions to remain in work. Disabled people and people with long-term health conditions are at greater risk of falling out of work. Once people fall out of work for health reasons, the barriers preventing their return are high – and the likelihood of returning to work reduces the longer the individual is off work sick.

Evidence shows that early and sustained support by an employer is important in reducing ill health-related job loss. While many employers already provide support to their employees who are managing health conditions at work or returning from sickness absence, there are wide differences in employers' ability and capacity to act. Smaller employers in particular face a range of challenges, even when they want to support their employees, including a lack of time, expertise or capital. The proposals set out later in this consultation seek to address those barriers by providing greater government support.

Chapter 2 proposes changes to the legal framework to set clear expectations of employers' responsibilities towards their employees. Changes to an employee's work or working

environment can help employees return to work more quickly and enable them to stay in work. Under the Equality Act 2010, employers have a duty to provide reasonable adjustments for disabled employees. However, there are some employees who may miss out on support from their employer, for example because they do not meet the definition of disabled. The government is considering introducing a new right to request work (place) modifications on health grounds, empowering those employees not covered by the reasonable adjustments duty to seek the support they need from their employer.

Once an employee goes on sickness absence, evidence shows that early and sustained support by their employer is important. There is evidence to suggest that some individuals experiencing ill health may be dismissed before their employer takes steps to reintegrate them. The government believes there is scope to strengthen statutory guidance to support employers to take early, sustained and proportionate steps to support a sick employee to return to work, before that employee can be fairly dismissed on the grounds of ill health.

The system of Statutory Sick Pay (SSP) is inflexible and does not reflect modern working practices, such as flexible working. The government proposes to reform SSP so that it is better enforced and more flexible in supporting employees. This includes amending the rules to enable an employee returning from a period of sickness absence to have a flexible, phased return to work. It also includes extending protection to those earning less than the Lower Earnings Limit (LEL) (currently £118 per week) who do not currently qualify for SSP, as recommended in the Taylor Review of Modern Working Practices. Where employers fail to pay SSP where it is due, the government could increase fines on employers.

The government will also consider whether enforcement of SSP should be included within the remit of a proposed new, single labour market enforcement body. To provide clarity for employees of their rights, the government intends to make access to a day one written statement a right for both employees and workers. This would include details of eligibility for sick leave and pay.

This government recognises that smaller employers may need additional support to help them meet their legal obligations, due to limited resources and the challenges of running a small business. The government is interested in how a rebate of SSP, targeted at small and medium enterprises (SMEs), might work to support greater employer action in helping their employees to return to work. The consultation also considers the extent to which the rate and length of SSP drive employer and employee behaviour.

Chapter 3 sets out proposals to improve access to high quality, cost-effective OH services for employers and self-employed people. The government anticipates that encouraging employers to take early action to support employees will result in more employers wanting to purchase OH services. The government recognises that cost is a barrier faced by SMEs when purchasing OH, with small employers 5 times less likely to invest in OH services than large employers. Through this consultation, the government is seeking views on ways to reduce the cost for SMEs through potential co-funding of OH, for example through a direct subsidy or voucher scheme, so that smaller employers can access the benefits of good OH advice and support.

OH is largely provided commercially. There may be a role for government, and others, in ensuring that the market can respond effectively to increased demand with an increased supply of high quality and cost-effective services.

Shortages in the OH clinical workforce risk limiting what the OH market can offer. To address this in the short term, the government could work with partners to encourage an increase in

the numbers of doctors and nurses working in OH. It could also help put in place leadership to oversee the development of the workforce in the future, and improve the information needed to support this. In the longer term, new workforce models and different approaches to training could help providers to make better use of a more diverse range of healthcare professionals and non-clinical staff, ensuring the workforce is fit for future challenges.

Innovation can drive quality and improvements in services, contributing to better outcomes for employers and employees as well as potentially reducing costs. The government is interested in supporting innovation in the ways that employers buy services and in how services are delivered, including harnessing the potential of technology to support service provision. Research provides a rich base to support innovation in services, but there are signs that the academic research base for OH services is in decline. The government is considering ways to support the prioritisation and co-ordination of working-age health research and development, as well as ways of strengthening dissemination so that providers are able to make best use of it.

Quality standards and quality marks are useful tools for both providers and employers. Standards can enable providers to benchmark their performance and help them maintain or improve their offer. For employers, standards can help them judge the outputs of the services they receive. Quality marks can help purchasers quickly and easily choose between providers. There is an opportunity to build on existing standards and arrangements to help improve access to appropriate, quality services for employers and employees.

Chapter 4 sets out proposals to provide employers with the advice and support they need to understand, and act on, their responsibilities. It is important that employers feel confident in engaging with their employees, and that they have access to good quality advice to understand and comply with their legal obligations and provide the appropriate support to their employees. Employers often misunderstand or are uncertain of their obligations around workplace disability and sickness absence, or fear ‘doing the wrong thing’. Larger employers tend to feel better informed than smaller employers. When purchasing OH services, smaller employers are less likely to have access to in-house support, such as HR staff, to help them make purchasing decisions. The government is seeking views on improving the provision of advice and information to support management of health in the workplace and encourage better-informed purchasing of expert-led advice. This would be promoted by a national, multi-year communications campaign outlining the advice and information available, and particularly targeted at SMEs and the self-employed.

The government is exploring the possibility of employers automatically reporting sickness absence through their payroll system, so that government has the data to be able to provide timely and targeted guidance to employers on how to manage sickness absence.

The government will use the evidence and views gathered during this consultation to develop these proposals further, considering an approach which offers the best value for money and is affordable in the context of the next Spending Review.

The UK Government is committed to working with the devolved administrations to support more disabled people and people with long-term health conditions to stay and thrive in work and will consult with them on the proposals set out in this document.

Criminal record reform to help ex-offenders into work

In July 2019 the Government issued press release regarding rehabilitation of offenders to be boosted by removing barriers to employment. In essence what the Government are saying is as follows - For the first time, some sentences of over four years will no longer have to be disclosed to employers after a specified period of time has passed. This change will not apply where offences attract the most serious sentences, including life, or for serious sexual, violent and terrorism offences.

Regular work is a major factor in breaking the cycle of crime but many ex-offenders find it impossible to get a job, with just 17% in employment a year after release from prison, and as half of employers would not consider hiring an ex-offender.

In addition to the rule change for longer sentences over four years, the period of time for which shorter sentences and community sentences have to be revealed to employers will be scaled back. The exact length of these 'rehabilitation periods' will be determined following discussions with stakeholders.

The proposed reforms recognise that the longer someone goes without committing a further crime, the lower the risk they will reoffend.

Secretary of State for Justice, David Gauke, said:

The responsibility, structure and support provided by regular work is an essential component of effective rehabilitation, something which benefits us all by reducing reoffending and cutting the cost of crime.

That's why we are introducing reforms to break barriers faced by ex-offenders who genuinely want to turn their lives around through employment.

While these reforms will help remove the stigma of convictions, we will never compromise public safety. That is why separate and more stringent rules will continue to apply for sensitive roles, including those which involve working with children and vulnerable adults.

Currently, where a sentence of more than four years is passed, crimes committed decades earlier, including those committed as a child, must be disclosed to employers for the remainder of the offender's life. For example, an individual sentenced to a lengthy sentence for theft half a century ago would still have to tell employers to this day.

This creates a disproportionate barrier to employment which prevents ex-offenders from moving on with their lives.

In his review into the treatment of and outcomes for BAME individuals in the criminal justice system, David Lammy MP found that current rules are "trapping offenders in their past, denying dependents an income, and costing the tax-payer money."

The Government has acted in light of his recommendations, as well as those of the Justice Select Committee and of Charlie Taylor made following his review of youth justice. The reforms set out will be introduced as new legislation when parliamentary time becomes available.

They will only apply to non-sensitive roles, with separate and stricter rules for those working with children or vulnerable adults, as well as national security roles or positions of public trust.

Establishing a new single enforcement body for employment rights

This consultation closed on the 6/10/19 and the Government has essentially said in their consultation document that - Workers need to be able to enforce their rights effectively. This also creates a level playing field for the vast majority of businesses who are doing the right thing and complying with the law – ensuring they are not undercut by unscrupulous and exploitative employers.

While most employment rights are enforced by an individual through an employment tribunal, the state has an important role to play in protecting the most vulnerable workers from exploitative practices. We already spend £33 million a year on enforcement covering:

- National Minimum Wage and National Living Wage (NMW and NLW)
- Domestic regulations relating to employment agencies
- Licenses to supply temporary labour in high risk sectors in the fresh food supply chain
- Labour exploitation and modern slavery related to worker exploitation.

We have committed to do more, by extending state enforcement to cover holiday pay for vulnerable workers and umbrella companies operating in the agency worker market. Government has already committed to provide adequate funding for enforcement through the Spending Review.

To carry out enforcement effectively, we need the right institutions in place. That is why, through this consultation, we want to consider the case for a new single labour market enforcement body and whether this could deliver:

- extended state enforcement, delivering our commitments to enforce holiday pay for vulnerable workers and regulate umbrella companies operating in the agency worker market
- a strong, recognisable single brand so individuals know where to go for help. In a single organisation we could improve the user journey, making it easier for individuals to raise a complaint and to tackle cases that might currently be handled by different organisations
- better support for businesses to comply with the rules, including
- coordinated guidance and communications campaigns, and a more easily navigable and proportionate approach to enforcement coordinated enforcement action, with new powers and sanctions to tackle the spectrum of non-compliance, from minor breaches to forced labour and increased focus on high harm cases to disrupt serious, repeated offending
- pooled intelligence and more flexible resourcing enabling greater sharing of intelligence and national tasking and coordination of operational activity targeted at tackling serious breaches
- closer working with other enforcement partners, including immigration enforcement, benefit fraud, health and safety, the Pensions Regulator and wider local authority enforcement.

This would not be an exercise to reduce costs – resource for enforcement would be maintained, but used more effectively. Funding for new areas, such as enforcement of holiday pay for vulnerable workers will be considered through the spending review.

Through this consultation we are also seeking views on:

- The core remit of a new body
- The interaction with other areas of enforcement
- The approach to compliance
- The powers such a body would need

A proposals to establish a new central government arm's length body would be subject to the usual, separate, government approval process, based on a business case.

Consultation on Sexual Harassment in the Workplace

This consultation closed on 2/10/19 and has been the subject of great debate and is certainly the most talked about of all the consultations commenced over summer 2019. What the Government said was as follows - The Government is committed to tackling sexual harassment in all its forms, both at work and outside it.

Sexual harassment has been against the law for decades and strong, clear laws against it are set out in the Equality Act 2010. However, even though these laws are in place, recent reports, including those of the #metoo movement, have shown that there is still a real, worrying problem with sexual harassment.

We want everybody to feel safe at work so they can succeed and thrive; so we are looking at whether the laws on sexual harassment in the workplace are operating effectively. At the moment employers can be legally held responsible under the Equality Act 2010 for the sexual harassment of their staff at work, if the harassment is carried out by a colleague, and the employer did not take all steps they could to prevent the harassment from happening.

We think this law is strong and effective. But questions have been raised over particular elements of sexual harassment law, and so we want to explore in more detail:

- what more could be done to ensure that employers do take all steps they can to prevent harassment from happening;
- whether employers need to be made explicitly responsible for protecting their staff from harassment by third parties, like customers and clients;
- whether, in practice, there are any interns who are not currently covered by equality protections in the workplace;
- what the right balance is between the flexibility of volunteering and equality protections for volunteers; and
- whether people are being denied access to justice because of the three-month time limits for bringing an equality claim to an Employment Tribunal. Our consultation also welcomes thoughts on non-legislative solutions to the specific issues raised, and the wider problem of workplace sexual harassment.

This technical consultation focusses on the details of the legal system underpinning the topics outlined above. It is accompanied by a public consultation that invites the views and experiences of members of the public, to help the Government understand people's lived-reality of these issues.

Anyone is welcome to contribute to either or both processes, but as a general rule we would recommend that members of the public engage with the public consultation, and that organisations respond to this technical consultation.

Pending Bills and direction of travel

Workers (Definition and Rights) Bill 2017-19

A new Private Member's Bill to amend the definition of worker has been laid before Parliament; to make provision about workers' rights; and for connected purposes. The bill will have its second reading at the House of Commons, today Friday 4th October. An extract from the bill setting out the proposed definition of worker is set out below:

5 Definition of "worker" and related expressions

a) In this Act "worker" means an individual who—
b) seeks to be engaged by another to provide labour,
c) is engaged by another to provide labour, or
d) where the employment has ceased was engaged by another to provide labour, and is not genuinely operating a business on his or her own account.

(2) In this Act "employee" means an individual who—

a) seeks to be engaged by another to provide labour,
b) is engaged by another to provide labour, or
c) where the employment has ceased was engaged by another to provide labour, and is not genuinely operating a business on his or her own account.

(3) In this Act a person is an "employer" if he or she engages another to provide labour, whether directly or through another, and the person providing the labour is not genuinely operating a business on his or her own account.

Whilst Bills and consultation documents inofthemselves are not hard law, they are always a fair indicator of a direction of travel and always provide the basis of any strategic HR planning and corporate planning that is predicated on a 3 year rolling programme.

HR practitioners can be quite sure that there will always be developments in areas such as – family friendly, atypical workers, dispute resolution, working time and dispute resolution.

The question is – how proactive and progressive do you think your organisation should be on things such as – bereavement leave, reasonable adjustments for staff in a sickness context as opposed to a DDA context, more stringent anti-harassment policies regarding 3rd party behaviour on employees, the employment of ex-offenders with serious criminal records, a firm company policy on the wording of settlement agreements related to social protected identities and so on and so forth.

The Queens Speech is normally the best indicator of what is going to happen in the short to medium term for employment law reform and based on what we know from 14/10/19 the only employment related Bill of the 22 Bills set out, relates to tips (not the horse racing kind, the gratuity kind).

Conclusion

I have given up on making predictions where the worlds of politics and law collide and here in Northern Ireland with the absence of a devolved Assembly and Executive the enigma/mystery that is looking forward (in the - into the future sense not the warmly anticipating sense) to what might happen seems to be the preserve of the entire population and has overtaken the weather as most discussed topic of every day.

In late October (the time this paper went to print) the only real conclusions that can be drawn are that from a Brexit perspective on 31/10/19 (unsure as we go to print what sort of Brexit we will have/not have so please delete as appropriate) employment law with a European parentage will not disappear overnight and so rights remain intact.

Various commentators have hypothesised over what will happen if a conservative government gets into power and similarly what will happen if a Labour government gets into power and theories abound regarding – the levels of the minimum wage, the fate of the cap on the maximum working hour's provision, holiday pay calculation and so on.

Some commentators proffer an opinion that a "repeal or tweak" agenda regarding – TUPE (post transfer harmonisation to be lawful), collective redundancy consultation (increase threshold trigger point), working time (scarp the hours cap, reverse the current case law position on holiday pay calculation), agency worker regulations (repeal entirely), discrimination cases (cap compensation) – will ensue shortly after the government gets into power but with no definitive timeframe.

The Queens speech, as indicated above, simply referred to the seventeenth Bill out of the twenty two listed as the Employment (Allocation of Tips) Bill which harks back to the 2016 consultation document which mooted, amongst other things, a code of practice for restaurants, bars and cafes to make the system of tipping transparent. The concept of passing on all tips, gratuities and service charges to workers without deductions has been around for some time but now it looks as if it is to become a legal obligation on the relevant business owners.

A more opaque component of the Queens speech related to the following form of words – "we will increase fairness and flexibility in the labour market by stopping workers and employers from experiencing significantly different outcomes from flexible forms of working". This could be a narrow reference to the summer 2019 consultation on one sided flexibility or it could be a much broader reference to gig working and the re-imagining of flexible working. Who knows?

At the time of writing the Secretary of State for BEIS was quoted (16/10/19) as saying to a Brexit Select Committee that "previous commitments to level the playing field on workers' rights will no longer apply" (my emphasis) but appealed to MP's to trust the Governments' intention on this matter, so who know?

Who knows indeed? As we stand in the mouth of Brexit day (scratch out if now inappropriate) and a looming general election whether any of the aforementioned consultations, Bills or initiatives actually become statute is essentially a guessing game and no-one will stake their reputation on calling it one way or another. Indeed it's when conversations head in the direction of "…but on the other hand…." That you beg for single handed mind reader. Until next year!

Mark McAllister (Director of Employment Relations Services), October 2019