

## Workplace Law

We wish our readers all a very merry Christmas and best wishes for 2017. In this edition we look forward to 2017 and what you need to watch out for. Brexit will no doubt be the one thing that we will all be talking about so we look ahead to the changing landscape of employment law in 2017 as well as our obligatory word of caution about Christmas parties!

# Christmas frivolity – where does an employer’s vicarious liability start and end?

It would be wrong if we did not discuss employer risks at the Christmas party in our December edition of Workplace Law; they always have their fair share of high jinx and drama.

In the recent case of *Bellman v Northampton Recruitment Ltd*, the Christmas party went without a hitch. The employees did not want the night to end so a spontaneous drinking session was arranged after the party ended in a nearby hotel. During the spontaneous session, a manager challenged a director over the recent promotion of another employee. Fuelled by alcohol, the director punched the manager twice, the second punch causing the manager to fall, hitting his head, resulting in severe brain damage.

The manager brought action against both the director and the employer.

Employers are vicariously liable for the actions of their employees and previous case law has established that vicarious liability is present when the responsibilities entrusted by the employer to the employee who has committed the wrongdoing are sufficiently close to their wrongful conduct to make it right for the employer to be held liable under the principle of social justice.

This case is important because it sets out clearly vicarious liability and the limitations of it. In particular, it was held that:

- Had the incident occurred at the actual Christmas party, there would likely be vicarious liability. Work Christmas parties with an expectation of staff attendance tend to be closely enough linked to employment to result in vicarious liability.
- As the after party drinks here were spontaneous, the connection with the employer ceased to be close enough.
- The fact that the conversation preceding the assault was work-related did not produce an assumption of vicarious liability. The surrounding circumstances are always highly relevant.
- The position the director was employed in was not closely enough related to the assault on the claimant to make it right for the employer to be held liable under the principle of social justice. Although he was responsible for the smooth running of the Christmas party, his duties did not cover the subsequent hotel-based drinking.

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- The fact that the employer paid for the alcohol at the Christmas party, and likely would contribute to the cost of the after drinks, did not mean it would be subject to vicarious liability. Any added risk of confrontation the extra alcohol provided at the hotel caused was too far removed from the employment relationship to create liability.

These types of cases are very fact dependent but this is a helpful case to establish more clearly when an employer may or may not be vicariously liable.

## What's coming up in 2017

With 2017 right around the corner, we thought that it would be helpful to consider some of the more important changes that are on the horizon.

### **Brexit – a quick look at what may or may not change**

- It is likely that arrangements will be put in place to continue to facilitate UK nationals working in EU countries and EU nationals working and living in the UK in the short to medium term with the UK introducing an immigration system similar to that currently in place for non-EU citizens, but this is the area that is causing most concern for employers and the sooner we know what the arrangements around this are the better.
- The Equality Act 2010 will not be affected as it is primary legislation and to repeal the act would be highly controversial. There are some who say that a cap could be introduced on discrimination compensation.
- Parental leave and pay looks unlikely to change and there seems little political interest in changing this legislation.
- There are some aspects to the right to paid holiday that the government may want to change such as the right to keep accruing holiday while on sick leave and the maximum 48 hour week.
- Works councils and transnational works councils could go, but the impact of these obligations is minimal for most UK businesses.
- It is likely that the Agency Workers Regulations 2010 will be revoked.
- The Data Protection Act 1998 is unlikely to be changed particularly as we will still want to operate in the EU and will have to transfer personal data between the UK and EU member states.

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### What is the likely timetable?

If Article 50 is triggered as planned, then:

By the end of March 2017: Article 50 will be invoked and the two year formal negotiations for withdrawal from the EU will commence.

In April or May 2017: the Great Repeal Bill will be introduced.

In the first quarter 2019: the UK will formally leave the EU and the Great Repeal Bill will take place before the next European Parliament elections.

### Final Draft of Gender Pay Gap Reporting Regulations Published

We have known since July 2015 that the government has planned to introduce a requirement for companies with over 250 employees to report annually the gap in between what, on aggregate, they pay men and women.

On 6 December 2016 the final draft of the Gender Pay Gap Regulations were published. These remain subject to parliamentary approval. This approval will likely be forthcoming without significant amendment. The regulations are set to come into force on **6 April 2017**.

#### Who do the Regulations Apply to?

- Employers with 250 or more employees on the relevant 'snapshot' date (5 April). The Regulations focus on the employer's situation on 5 April each year. This means, if an employer has less than 250 employees on that date, they do not need to report.
- The regulations do not apply to public sector employers.
- The definition of 'employee' used in the Regulations is a wide one. It includes workers and independent contractors under a personal service contract.
- Partners (including members of Limited Liability Partnerships) are excluded from the definition of employee.

#### What must Relevant Employers Report?

- Key figures on 5 April, including:
  - Median and mean gender pay gap figures (in the form of percentages) for pay, based on the hourly pay. This is the difference between what men and women were paid per hour overall by the employer.
  - Median and mean gender pay gap figures for bonuses paid in the year ending with the snapshot date.

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- The percentage of men and the percentage of women who received a bonus.
- The number of men and the number of women in each pay quartile (pay quartiles are the full spectrum of salaries divided into 4 brackets: lower, lower middle, upper middle and upper).
- The pay to be reported on is that in the 'relevant pay period,' i.e. the pay period April 5 falls into. A pay period is the period for which employees are paid- weekly, monthly or otherwise. Where the pay is monthly, the relevant period is likely that covered by the April payslip.
- Employees that are receiving less than full pay, for instance, because they are on sabbatical leave, or sick leave, or maternity leave will not need to be reported on.

### How should Employers Prepare?

- Be certain that the facilities are in place to know the total numbers of male and female employees and what their average hourly pay is.
- For the calculation of mean and median bonuses paid in a year, the date from which calculations must be made is 6 April 2016. Ensure that this information is readily available.

The above described information must be published by 4 April 2018. Employers can choose a date any time before then (after 5 April 2017) to publish on; this will then be their annual gender pay gap reporting date. There is the option to publish a narrative alongside the figures to explain any discrepancies between what men and women are paid and what is being done to rectify this. Publishing such a narrative will be advisable where the figures published cast the employer in a negative light.

## Grandparental leave

Initially, we expected consultations on this to commence as early as May 2016 but it was shelved until after the EU referendum.

### What is grandparental leave?

This is an extension of shared parental leave and pay to working grandparents with the intention being to help support working families.

Will it take off? Well, evidence has suggested that nearly **two million** grandparents gave up work or reduced their hours to assist with child care costs. Despite this potential huge uptake, we have found in respect of shared parental leave we suspect that grandparent leave may be a lot more popular.

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### When should we expect these changes

With the initial consultation being delayed from May 2016, we are expecting to see consultation begin some time in 2017 to consider how to implement these changes.

The consultation will also consider how to streamline shared parental leave and the pay system, including simplifying eligibility requirements and notification systems, which at present are somewhat perplexing.

Following the consultation, it is expected that the government will bring this legislation into force by 2018.

### Apprenticeship levy

The apprenticeship levy requires all UK employers (public & private) who have an annual wage bill of more than **£3 million** to pay **0.5%** of their annual wage bill towards the cost of apprenticeship training.

Draft regulations were published on the 19 September 2016 alongside further consultation in relation to calculation, reporting and collection of the levy.

The levy is anticipated to come into effect in April 2017.

### Tribunal fees

Tribunal fees are at the centre of a lot of controversy at the moment. Whilst employers must be pleased with the drop off of circa **70%** of the total number of employment claims, those against the tribunal fees argue as strongly that they impede an individual's access to justice.

On the 27 and 28 March 2017, the Court of Appeal will hear ***R (Unison) v Lord Chancellor***. This is a judicial review on the grounds that the introduction of fees breached the EU principle of effectiveness and equivalence of the public sector equality duty and amounts to indirect discrimination.

We will be keeping an eye on this particular case with thought as to how this may affect those in the private sector as well. That being said, Unison is not the only party applying pressure for change to tribunal fees with many others claiming they are too high. Indeed, even the Justice Committee, tasked with reviewing the fee structure came out with damning remarks on how they had been reconciled and implemented.

The government is yet to release their own review of the fees but we suspect it will be at some point this year as it is currently outstanding.

We consider that it is likely that a decrease in fees will lead to a much increased volume in claims being issued.

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### **Meet the team**

For more information on anything mentioned in this newsletter please contact a member of the employment team.



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