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GIBSON DUNN

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UK Employment Update and Outlook 2025

In this update, we reflect on the major developments within the UK employment landscape during the course of 2024 and look ahead to what is to come in 2025.

Provided below is a brief overview of developments and cases which we believe will be of interest, with more detailed information on each topic available by clicking on the links.

1. Preventing sexual harassment *(view details)*

We consider the recently introduced legal duty requiring employers to take reasonable steps to prevent sexual harassment in the workplace – which extends to sexual harassment by clients, customers and other third parties – as well as the practical steps employers can take to ensure compliance.

2. Spotlight on dismissal and re-engagement (*view details*)

We report on recent legal developments regarding the practice of 'firing and rehiring' employees in order to impose unilateral changes to employees' contractual terms of employment.

3. Case updates *(view details)*

We consider three significant cases from 2024 dealing with the determination of employment status, the process to be followed in relation to small-scale lay-offs and a recent decision on the enforceability of post-employment restrictive covenants in investment agreements.

4. Employment Rights Bill update (*view details*)

We provide an update on two amendments which the Labour Government has proposed to the Employment Rights Bill.

5. What to expect in 2025 (*view details*)

We review the potential developments and cases which we expect will shape UK employment law during the course of 2025.

Appendix

1. Preventing sexual harassment

Since 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 has required employers to take "reasonable steps" to prevent sexual harassment in the workplace. This new duty creates a positive and anticipatory legal obligation on employers to assess the risks and take action to prevent sexual harassment from taking place (and, where sexual harassment has taken place already, from taking place again).

The consequences for employers who do not take "reasonable steps" to prevent sexual harassment in the workplace can be severe: the Equality and Human Rights Commission now has the power to take enforcement action against such employers, while the Employment Tribunal can uplift compensation for sexual harassment by a maximum of 25% where employers are found to have breached this duty.

The test of whether employers have taken "reasonable steps" is objective, depending on the nature of the employer and the facts and circumstances of each situation. How this duty comes to be interpreted by the courts and tribunals remains to be seen and whilst what amounts to "reasonable steps" will vary from case to case, based on guidance published by the Equality and Human Rights Commission (which can be accessed here) and detailed advice provided by the Advisory, Conciliation and Arbitration Service (**ACAS**) (which can be found here) the following steps should be taken:

a. Survey attitudes

Employers should conduct anonymous organisational reviews to measure employees' understanding and awareness of sexual harassment, as well as employees' perceptions of how the employer will respond to reported incidents of sexual harassment. Such reviews should be conducted on a regular basis, with the findings used to identify where action is needed and to develop training and policies.

b. Develop policies

Employers should develop detailed sexual harassment policies which include: (i) a clear definition and examples of sexual harassment; (ii) an explanation of to whom and where the policies apply; (iii) a description of the reporting channels available; (iv) an overview of the complaint procedures and the possible sanctions for committing sexual harassment; and (v) a statement of zero tolerance for victimisation. Employers should commit to monitor the effectiveness of sexual harassment policies and to implement changes to them as and when required.

c. Raise awareness of policies

Employers should communicate sexual harassment policies to all staff, highlighting the reporting channels available. This may include advising new employees of sexual harassment policies during induction procedures and sending annual reminders to all staff. Sexual harassment policies may also be referenced in (even if not incorporated into) contracts of employment and/or other terms and conditions of work.

d. Conduct risk assessments

Employers should make assessments of the risks relating to sexual harassment in the course of employment, with particular emphasis on the workplace culture and the working environment. In order to address the risks identified, employers should take mitigating actions and communicate openly with employees about any such steps taken. It is critical for employers to regularly conduct risk assessments to ensure compliance with the new duty.

e. Provide training

Employers should provide training to all staff on sexual harassment and victimisation. While the training provided should be tailored based on the nature of the employer and the working environment, the training should cover as a minimum: (i) how to recognise sexual harassment; (ii) the action required if employees experience or witness sexual harassment; and (iii) how to handle sexual harassment complaints. It is recommended that employers also maintain records of who has received sexual harassment training and provide refresher training on a regular basis.

f. Consider third parties

Employers should assess the risks of sexual harassment arising from any third parties with whom staff will come into contact, including clients, customers, and contractors. In order to reduce this risk, employers should encourage staff to report any sexual harassment by third parties. Employers should also consider including express terms in standard contracts with third parties requiring them to adhere to any sexual harassment policies in place.

g. Formalise reporting channels

Employers should offer multiple reporting channels for those who wish to raise sexual harassment complaints. Wherever possible, employers should offer both anonymous and named reporting routes and give anonymous complainants the option to make named reports at later

stages if they so wish. Employers should consider providing external online or telephone reporting tools for those who wish to make anonymous complaints.

h. Deal with complaints

Employers should make clear that sexual harassment complaints can be made at any time: there should be no time limit within which complaints must be made. Employers should ensure any complaints raised are investigated fairly and thoroughly. Consideration should be given to the wishes of the complainant and care taken to respect the confidentiality of all parties. The outcomes of any formal complaints of sexual harassment should be as transparent as possible to encourage future complainants to come forward.

i. Prevent victimisation

Employers should consider the risks relating to victimisation when conducting risk assessments. It may be necessary for employers to take measures to limit the contact between complainants and alleged harassers to protect complainants and to minimise any risks of victimisation. Employers should give careful consideration to all viable alternatives to mitigate any such risks before suspending the alleged harasser.

j. Evaluate steps taken

Employers should conduct evaluations of the effectiveness of policies to prevent sexual harassment in the workplace. One recommendation is that employers evaluate sexual harassment policies through anonymised surveys. Any such surveys should ask staff to describe whether they have been subjected to or witnessed behaviours which would constitute sexual harassment, and, if so, whether they reported these behaviours. Employers should compare the data received from these surveys against the number of sexual harassment complaints formally raised. This will allow employers to obtain as clear a picture of sexual harassment in the workplace as possible and to put in place further measures to encourage reporting if needed.

2. Dismissal and re-engagement

a. Code of Practice

In July 2024, the Labour Government published a new Statutory Code of Practice on Dismissal and Re-engagement (the **Code**) which sets out employers' responsibilities when seeking to change employees' contractual terms using the controversial method of 'fire and rehire' (where the employee is dismissed and offered re-engagement on less favourable terms).

A failure to follow the Code does not itself make an employer liable to proceedings, however, any failure to comply with the Code must be taken into account by the relevant court, tribunal or committee when assessing the fairness of an employer's conduct and, in particular, when assessing compensation. From 20 January 2025, the Employment Tribunal will also have the power to vary any awards made by up to 25% for any unreasonable failure to comply with the Code.

A brief overview of the major provisions of the Code is provided below:

- employers proposing changes to employees' contractual terms and conditions must be open and transparent with the relevant employees and should consult with the employees "for as long as reasonably possible in good faith" to try to reach agreement concerning any changes;
- before raising the prospect of dismissal and re-engagement with employees, the Code suggests that employers should consult ACAS for impartial advice on their rights and obligations;
- the Code emphasises that employers should not use the threat of dismissal as a "negotiating tactic" to pressure employees if they are not genuinely considering dismissal as a means of achieving the intended objectives;
- in the event that employers opt for dismissal and re-engagement:
    - the Code recommends employers give employees "as much notice as reasonably practicable" of the dismissal and consider extending the employees' contractual notice periods to enable them to accommodate the changes; and
    - the Code suggests employers seek feedback from employees and commit to reviewing the changes at a fixed point in the future; and
- importantly, the Code does not apply to the dismissal and re-engagement of employees arising out of a genuine redundancy (lay-off) situation.

b. Employment Rights Bill

In parallel to the publication of the Code, the Labour Government has committed to fully ending the practice of 'fire and rehire' during the lifetime of this Parliament. Under the Employment Rights Bill, the dismissal and re-engagement of employees will be rendered unfair dismissals, apart from in certain limited circumstances. Employers will continue to be able to engage in this practice (subject to further safeguards) if: (i) the variation to the terms of employment could not reasonably have been avoided; or (ii) reducing or eliminating financial difficulties which are impacting the employer's ability to carry on the business as a going concern are the reason for the variation. These carve outs are intended to ensure that businesses can restructure to remain viable where business or workforce demands necessitate it.

c. Supreme Court Injunction

Meanwhile, the Supreme Court has reinstated an injunction preventing an employer from terminating employment contracts as part of a 'fire and rehire' operation to unilaterally remove a permanent enhanced "retained" pay feature that had formed part of the employees' contractual entitlements following previous negotiations with the employees' union.

In *Tesco Stores Limited v Union of Shop, Distributive and Allied Workers*, the High Court had originally granted the injunction on the basis that there was an implied term within the employees' contracts that precluded termination of employment as a method to remove the employees' entitlement to retained pay. The Court of Appeal overturned this decision; however, the Supreme Court reinstated the injunction, holding that the intention of the parties when negotiating the

enhanced pay provision could not have been for Tesco to retain an unrestricted unilateral right to terminate the employees' contracts in order to deprive them of this right.

While the facts underpinning the Supreme Court decision were highly unusual, the case highlights the importance of clarity of drafting when seeking to crystallise the outcome of rights negotiated with unions, as well as the vulnerability of 'fire and rehire' practices to legal challenge. If employers are seeking to use this process to change employees' terms of employment, employers should give careful consideration to the specific circumstances and history of the arrangements they are proposing to change.

3. Case updates

a. Determining employment status

Whether an employment relationship exists is guided by the three tests from *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* which are, in summary, that (i) the individual agrees to perform a service for a company in exchange for remuneration (**mutuality of obligation**); (ii) the individual is subject to a degree of control, such as to how, when and where work is done (**control**); and (iii) the contractual provisions and relationship between the parties as a whole are consistent with an employment relationship.

HMRC v Professional Game Match Officials Ltd was a case brought by HMRC which asserted that part-time football referees were employees and therefore national insurance and income tax should have been deducted from payments made to them. The Supreme Court found that mutuality of obligation and control were present in individual match day contracts for these referees. In its decision, the Supreme Court held that mutuality of obligation need not exist for the entirety of the contractual relationship and can subsist only for the period while the work is carried out, and that control is fact specific and can be sufficient even where it is over only incidental matters. With that guidance now issued, the Supreme Court has submitted the case back to the First-tier Tribunal (**FTT**) to determine whether the contracts amounted to contracts of employment considering the third test described above.

What this means for employers

This case serves as a useful reminder of the elements required to establish an employment relationship and highlights the risk of reclassification of self-employed contractors even where on first glance the circumstances for reclassification may seem unlikely. The Supreme Court has also given some guidance on the extent to which mutuality of obligation and control are required for such reclassification and we will look with interest at the next judgment in this case once the FTT has reconsidered it.

b. Redundancies

In the UK, whether a dismissal for redundancy (i.e., a lay-off) is considered 'fair' depends on whether an employer has reasonably treated redundancy as a sufficient reason for dismissing the employee. Case law has determined that an employer will usually not have acted reasonably in a redundancy dismissal situation unless they have consulted with the relevant employees when the

proposals for redundancies are still at a formative stage. In addition, where an employer is proposing to make 20 or more employees redundant at one establishment within 90 days, it must engage in collective consultation with affected employees in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**).

Whilst the requirement for collective consultation has only been legally required under TULRCA for what are considered 'large-scale' redundancies, some have argued that, as a matter of good industrial relations practice, the general workforce should also be consulted in the case of 'small-scale' redundancy exercises falling below the threshold in TULRCA. In the case of *De Bank Haycocks v ADP RPO UK Ltd,* Mr. De Bank Haycocks claimed he had been unfairly selected for redundancy. Upon initially having his claim dismissed at the Employment Tribunal stage, his claim was upheld by the Employment Appeal Tribunal which found that there had been a lack of meaningful consultation at the formative stage of the redundancy process due the lack of a general workforce consultation by ADP RPO UK Ltd (**ADP**) which it determined was a requirement of good industrial relations practice in all redundancy situations.

ADP appealed this decision to the Court of Appeal, who allowed the appeal, confirming that where there is no requirement for general workforce consultation in the case of 'small-scale' redundancy exercises below the thresholds in TULRCA. Provided that there is adequate consultation at an individual level, this will suffice.

What this means for employers

This case should bring some comfort to employers engaging in small-scale or individual redundancies that general workforce consultation is not required for a fair redundancy process. However, it also emphasises the importance of allowing individual employees to express their views on issues that might affect the employer's decision, such as the rationale, selection pools and criteria for redundancies, at a formative stage of the redundancy process where their views could impact outcomes.

c. Post-employment restrictive covenants

In the UK, the use of post-employment restrictive covenants is enforceable only if they protect a legitimate business interest and do so in a reasonable manner. This means the duration and scope of any restrictive covenants should not exceed what is necessary to protect the legitimate interests of the employer.

Literacy Capital Plc v Webb concerned a founding director of the business Mountain, who entered into an investment agreement as a loan note holder with Mountain after resigning from her previous position. The investment agreement contained restrictive covenants. After Mountain applied to the High Court to enforce the restrictive covenants against the former director, the High Court found that the restrictive covenants in the investment agreement arose as a result of the defendant's status as a former director and as an employee of the relevant company. In such circumstances, the High Court undertook a restraint of trade analysis to determine the validity of the provisions. The High Court found that the covenants were unenforceable as they were: (i) too long (ten years in duration as opposed to the conventional one or two years); (ii) too wide in geographical scope (extending to the entirety of the UK and Channel Islands when the

company's business only covered two English counties); and (iii) restricted too broad a range of business activities, extending far beyond the operating core of the company.

What this means for employers

This case highlights the importance of ensuring the reasonableness of both duration and scope when drafting restrictive covenants. In particular, employers should be cautious about tying duration to events that may cause the restrictive covenants to become too protracted (such as, in this case, the redemption of loan notes). It also serves as a timely reminder that even if restrictive covenants form part of a commercial agreement, a court may apply a restraint of trade analysis if it is of the view that the restrictive covenants are connected to an individual's status as an employee.

4. Employment Rights Bill update

In our last publication "A New Deal for Working People"? – Labour Government Introduces Employment Rights Bill in the UK on 16 October 2024, we outlined the steps the Labour Government has taken and intends to take under the Employment Rights Bill. An Amendment Paper was published on 27 November 2024, setting out various amendments to the Bill proposed by both the Labour Government and other Members of Parliament. We have provided a brief overview of two of the amendments proposed by the Labour Government which we believe will be of interest to our clients. The Bill is currently being scrutinised by the Public Bill Committee, which is expected to report to Parliament on 21 January 2025.

a. Unfair Dismissal during Initial Period of Employment

The Labour Government has previously promised that, while the Bill makes unfair dismissal a "Day One" right, there would be a "lighter touch" process for dismissals that occur during an initial period of employment. The Labour Government has now proposed an amendment that would allow the Secretary of State to specify a cap on the compensatory award for employees who successfully claim unfair dismissal during the initial period of employment. A cap could provide employers with further comfort around the quantum of any potential liabilities incurred when making dismissals during the initial period of employment.

b. Employment Tribunal Time Limits

The time limit for bringing many types of UK employment claims in an employment tribunal currently expires three months from the date the claim arises, subject to an extension of up to six weeks for pre-claim conciliation. The Labour Government have proposed in the Amendment Paper that this time limit is to be increased to six months. This amendment should come as no surprise as it was previewed in the extensive reforms the Labour Government proposed in the lead up to the UK General Election. We explored this proposal in our publication What Employers Can Expect in the UK under the New Labour Government on 8 July 2024.

5. What to expect in 2025

Further to the amendments to the Employment Rights Bill outlined above, we expect the Labour Government to continue its comprehensive reviews of the various longer-term measures which were set out in its original "Plan to Make Work Pay" prior to the 2024 General Election. We explored these commitments in our publication "A New Deal for Working People"? – Labour Government Introduces Employment Rights Bill in the UK on 16 October 2024. The longer-term measures on which the Labour Government has committed to consult include:

- *employment status* – the Labour Government has committed to consult with businesses on its proposals to strengthen protections for the self-employed and to simplify the existing employment status framework by shifting towards a single status of 'worker';
- *parental and carers' leave* – the Labour Government will conduct wide-ranging reviews on the impact of potential reforms to the parental and carers' leave systems; and
- *collective grievances* – the Labour Government has committed to consult with ACAS on its proposals to enable employees to raise collective grievances about conduct in the workplace.

Please click on the link below to view the complete update and appendix on Gibson Dunn's website:

Read More

The following Gibson Dunn lawyers prepared this update: James Cox, Heather Gibbons, Georgia Derbyshire, Olivia Sadler, Finley Willits and Josephine Kroneberger*.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any leader or member of the firm's Labor and Employment practice group, or the following authors in London:

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