

<b>Committee(s)</b>	<b>Dated:</b>
Establishment Committee	30 April 2019
<b>Subject:</b> Developments in Employment Law	<b>Public</b>
<b>Joint report of:</b> Director of HR and the Comptroller & City Solicitor's	<b>For Information</b>
<b>Report authors:</b> Carol Simpson, Town Clerk's HR Jillian Bradbeer, Comptroller & City Solicitor's	

### Summary

As media headlines continue to be dominated with all matters related to Brexit, it is important that UK employment legislation developments are not overlooked.

The purpose of this report is to update Members on developments in employment law and implications for the City of London Corporation, including: i. updates following the last employment legislation report to Committee on 15 January 2018; ii. known forthcoming changes; and iii. future changes.

### Recommendation

Members are asked to note the report.

### Main Report

#### Update on employment law developments from 2018

##### 1. Gender pay gap reporting<sup>1</sup> – Implementation date: 30 March 2018

The City Corporation's second annual gender pay gap return was published ahead of 30 March 2019 and a separate report to this Committee details the findings.

##### 2. Taxation of termination payments – Two stage implementation: 6 April 2018 and 6 April 2020

Employers need to pay Income Tax and Class 1 National Insurance Contributions (NICs) on PILONS (payments in lieu of notice) for all termination payments, whether or not they are contractual payments<sup>2</sup>. This was effective from 6 April 2018.

It was originally intended to impose Class 1A NIC employer charges on termination payments of more than £30,000 at the same time; whereas such payments currently only attract income tax. However, the 2018 Budget subsequently confirmed that this will not now take place until April 2020<sup>3</sup>.

<sup>1</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

<sup>2</sup> Finance Act 2017 amends Chapter 3, Part 6 of The Income Tax (Earnings and Pensions) Act 2003 (ITEPA).

<sup>3</sup> As an amendment to s10 of the Social Security Contributions and Benefits Act 1992. The amendment specifies that a Class 1A charge will apply to termination payments that count as employment income under section 403 ITEPA, provided the earner also pays Income Tax on that termination payment.

**3. Public sector exit cap and repayment arrangements** – Consultation closes: 3 July 2019

The government originally proposed in 2016 to introduce powers to cap exit payments in the public sector at £95,000<sup>4</sup>, with the aim of helping public sector employers to ensure exit payments represent value for money to the taxpayer who funds them. Whilst the regulations to enact these changes were expected to be effective from 6 April 2018, this lapsed. Consultation has now commenced from 10 April until 3 July 2019.

**4. Data protection changes** – Implementation date: 25 May 2018

Implementation of the General Data Protection Regulations and the Data Protection Act 2018; to ensure effective data protection measures, given developments in information technology and the digital economy.

**5. Trade union facility time** – Implementation date: 31 July 2018

A new requirement to report annually on paid time off provided to trade union representatives<sup>5</sup>. These figures are included within the City Corporation Audited Statement of Accounts.

**6. Salary sacrifice limitation** – Implementation date: 4 October 2018

Following the introduction of the government's Tax-Free Childcare Scheme, all employer assisted childcare voucher schemes closed to new joiners from 4 October 2018<sup>6</sup>.

**7. Trade union check off arrangements** – Implementation date: deferred

The proposed new arrangements for check-off for public-sector employers<sup>7</sup>, aimed at reducing the administrative costs to employers were originally due to be effective from 10 March 2018; however, these have not yet been made into a Statutory Instrument.

### Forthcoming changes

**8. Brexit implementation date** – To be confirmed

If there is no deal the European Union (Withdrawal) Act 2018 (EUWA) brings across the powers from EU Directives so that UK workers will continue to benefit from UK rights that derive from EU law<sup>8</sup>. In the long term, the UK will be able to amend or repeal any retained EU law.

It remains unclear how big an impact a no deal Brexit will have on recruitment strategies as a result of the loss of EU workers in key sectors. There is no definitive figure in terms of the numbers of EU workers within the City Corporation's workforce. Those who can prove they have resided in the UK for 5 years can make an application under the EU Settlement Scheme<sup>9</sup> allowing them to remain indefinitely (this does not require employer sponsorship).

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<sup>4</sup> The Small Business, Enterprise and Employment Act 2015 is amended by Section 41 of the Enterprise Act. Current consultation on draft Public Sector Exit Payment Regulations proposes a cap on the value of any exit payment of £95,000.

<sup>5</sup> The Trade Union (Facility Time Publication Requirements) Regulations 2017 (SI 2017/328).

<sup>6</sup> Exceptions being only for existing employees who registered by 24 August 2018 and had at least one salary deduction before the scheme closed, who are able to continue as childcare voucher scheme members.

<sup>7</sup> The Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017.

<sup>8</sup> Noting exceptions of: i). the Insolvency Protection Directive 2008/94/EC in a no-deal scenario will leave UK and EU employees working outside the UK in an EU country, subject to variations in protection according to the country they work in; and ii). the statutory framework that applies to European Works Councils 2009/38/EC would require a reciprocal agreement from the EU to continue to function in their present form within the UK.

<sup>9</sup> EU workers must have started living in the UK by 31 December 2020 to apply (or by the date the UK leaves the EU without a deal). The deadline to apply will be 30 June 2021, or 31 December 2020 if the UK leaves the EU without a deal.

Those who do not meet this requirement can apply for temporary status, allowing them to remain until they have accrued enough residency to be granted settled status. An intranet page provides information for relevant staff to keep them apprised of the current situation and this will be updated as necessary.

In the event of a no-deal, it will remain important to remain alert to developments of EU employment legislation, particularly so in respect of the impact upon staff based in EU countries albeit on a temporary or permanent basis.

## **9. Independent review of the Modern Slavery Act 2015 – Final report: end of March 2019**

The government has commissioned an independent review of the Modern Slavery Act 2015 to strengthen and enhance the current legislation as modern slavery evolves. Engagement on all phases of the review is now complete. Expert advisers and reviewers are now considering the evidence for the final report to lay before Parliament.

## **10. The Good Work Review – Implementation date: Various**

In December 2018 the government published the Good Work Plan, an independent review of working practices conducted by Matthew Taylor. The aim of the review is to ensure all work in the UK economy is fair and decent with scope for development where possible.

The majority of Taylor's proposals were accepted by the government but will require consultation and legislation to implement. Some of the primary accepted proposals are cited below, including references to effective dates where the government has already taken steps to regulate:

- Consultation to streamline the employment status tests so they are the same for employment and tax purposes.
- Extension of the right to written particulars to all workers from day one<sup>10</sup>, and amendments to the mandatory statement information (effective from 6 April 2020).
- Extension of the right to an itemised payslip to all workers from day one; showing hours worked for workers whose wages vary (effective from 6 April 2019)<sup>11</sup>.
- Changes to the rules on continuous employment, so that a break of up to four weeks (currently one week) between contracts will not interrupt continuity.
- An increase in the holiday pay reference period from 12 weeks to 52 weeks<sup>12</sup> to take account of holiday variations (effective from 6 April 2020).
- Agency workers must be given specific information ("key facts") to help them make informed choices about the work they accept.
- Provision for agency workers of the right to request a contract (after 12 months with the same hirer) for more predictable and secure working conditions.
- Right to request a contract that guarantees hours for those on zero-hour contracts who have been in post for 12 months which better reflects hours worked.
- Lowering the threshold required for a request to set up Information and Consultation arrangements from 10% to 2% of employees<sup>13</sup> (effective from 6 April 2020).
- A reversal of the burden of proof in employment tribunal hearings regarding employment status i.e. the employer must prove the individual is not entitled to the relevant rights.
- The introduction of a scheme to publicly name employers who fail to pay out on tribunal awards.

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<sup>10</sup> Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018.

<sup>11</sup> Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 and Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018.

<sup>12</sup> Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018.

<sup>13</sup> Employment Rights (Miscellaneous Amendments) Regulations 2019, the current 15 employee minimum threshold will remain.

- An increase in the level of penalty that can be levied against employers for their aggravated breaches<sup>14</sup> (effective from 6 April 2019).

The City Corporation will need to be prepared to make a number of adjustments to its practices, employment policies and procedures as appropriate; and ensure monitoring of compliance to avoid falling foul of legislative breaches.

#### **11. Non-disclosure agreements changes** – Consultation closes: 29 April 2019

Non-Disclosure Agreements (NDAs) originated to protect intellectual property when employees moved from one company to another. However, recent media coverage has emphasised that such agreements are frequently used to silence victims of bullying, harassment (including sexual harassment) and discrimination in the workplace. As a result, the government is now consulting<sup>15</sup> on tightening the rules around the use of NDAs and confidentiality clauses. In the interim it still remains legitimate to enter into an NDA. The NDA cannot prevent the employee reporting to the police, regulatory authorities or whistleblowing. Solicitors must consider the interests of their client and the public, where there is a conflict between the two, then prioritise the interest of the public.

#### **12. Ethnicity pay reporting** – Implementation date: proposed 6 April 2020

The government ran a consultation exercise on mandatory ethnicity pay reporting from 11 October 2018 to 11 January 2019 and are presently analysing the feedback received. New legislation could be introduced from April 2019 with the first annual reporting date occurring in April 2020. If implemented this is likely to be a much more complex exercise than gender pay reporting. There are many different ethnic groups, staff are not obliged to disclose their ethnicity and many staff are unwilling to disclose it. A separate report to this Committee details the findings of the City Corporation's ethnicity pay gap.

#### **13. Parental bereavement time off and pay** – Implementation date: 6 April 2020

The Parental Bereavement (Leave and Pay) Act 2018 provides at least two weeks' leave for employees following the loss of a child under the age of 18, or a stillbirth after 24 weeks of pregnancy. This extends beyond parents to include adopters, foster parents and guardians, as well as more informal groups such close relatives or family friends who have taken responsibility for the child's care in the absence of parents.

The City Corporation's maternity leave and pay arrangements apply (subject to meeting eligibility requirements), where an individual has a stillbirth during or after the 16<sup>th</sup> week prior to the expected week of childbirth (EWC).

### **Future changes**

#### **14. Grandparental leave** – Implementation date: On hold

The government announced that its plans to extend shared parental leave and pay to working grandparents were shelved whilst it carries out a wider review of the entire Shared Parental Leave (SPL). However, grandparents can exercise their rights to ordinary parental leave albeit in very limited circumstances i.e. where they have formal parental responsibility for a child either by adopting a child or by a residence order. Alternatively, there is the option of making a statutory request for flexible working, or taking a period of unpaid leave.

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<sup>14</sup> Employment Rights (Miscellaneous Amendments) Regulations 2019 increase to the maximum level of penalty that ETs can impose in instances of an aggravated breach, from £5,000 to £20,000.

<sup>15</sup> Gov.uk consultation: Confidentiality clauses, measures to prevent misuse in situations of workplace harassment or discrimination.

The City Corporation under the Special Leave and Time Off Policy may grant up to a maximum of 5 days total paid compassionate / emergency dependants leave in any one leave year. Furthermore in exceptional circumstances only, additional paid leave may be granted of up to 10 days per year if approved by the Chief Officer after consulting with the Director of HR.

**15. Increase of state pension age brought forward** – Implementation date: Proposed between 2037 and 2039

The Pensions Act 2007, 2011 and 2014 put in place provisions to increase the state pension age<sup>16</sup>. However, in July 2017 the government announced proposals to bring forward the increase in pensionable age to 68 to between 2037 and 2039 instead of between 2044 and 2046. These proposed changes would have to be approved by Parliament before they are agreed.

**16. Statutory code to tackle sexual harassment at work** – Implementation date: To be confirmed

A report by the Women and Equalities Commission (a parliamentary committee) on Sexual Harassment in the Workplace makes recommendations for a more proactive no-tolerance approach to workplace sexual harassment. This includes a new duty on employers to prevent harassment, supported by a statutory code of practice outlining the steps they can take to do this and raising awareness of the area.

**17. Extension of redundancy protection for women and new parents** – Implementation date: To be confirmed

The government commenced a 10 week consultation period from 25 January to 5 April 2019 recommending changes to the Maternity and Parental Leave etc. Regulations (1999) (“MAPLE”)<sup>17</sup>. Women on maternity leave currently have special protection in a redundancy situation. It is now proposed to extend this protection to throughout the pregnancy and to continue for up to six months after they return to work, thereby allowing the new mother to reestablish herself back into the workplace. The government will also seek views on giving the same rights to parents returning from adoption leave and shared parental leave.

**18. Whistleblowers protected when applying for jobs in children's social care sector** – Implementation date: To be confirmed

The Children and Social Work Act 2017 includes a provision that provides protection from discrimination to job applicants who have previously made a protected disclosure when applying for children's social care local authority roles.

**19. Re-introduction of employment tribunal fees** – Proposal

A tribunal fee structure was introduced in 2013 but then ruled unlawful by a landmark 2017 Supreme Court judgment: R (on the application of Unison) v Lord Chancellor. Fees were charged for filing the claim and then for the hearing of the claim, totalling £1,200 typically.

The cessation of fees has led to a sharp rise in claims which when coupled with a shortage in employment tribunal judges, has resulted in some cases taking 12-18 months to be heard. This leaves businesses with cases hanging over them and witnesses finding it difficult to recall events when giving evidence. The government is now considering introducing a new fee scheme at a much reduced rate, but there are no immediate plans to do this.

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<sup>16</sup> The Default Retirement Age (DRA) was phased out in October 2011.

<sup>17</sup> Employers currently have an obligation to offer women on maternity leave a suitable alternative vacancy where one is available, this gives woman on maternity leave priority over other employees who are also at risk of redundancy.

## **Conclusion**

- 20.** Many of the proposals cited are either at consultation stage or require parliamentary approval, with the most significant employment law changes anticipated to take effect from April 2020 or beyond.

The legal debate will evolve arising around modern ways of working, and their incompatibility with our current employment status tests, especially within the gig economy. It is therefore important to start to ascertain the potential implications for the City Corporation employment policies, procedures and practice; in order to be leading from a position of good employment practice.

This report does not contain a full statement of the law and it does not constitute legal advice. Legal advice should be sought, when needed, from the Comptroller and City Solicitor's department.

## **Background Papers**

Developments in Employment Law, Establishment Committee, 15 January 2018 (Public).

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