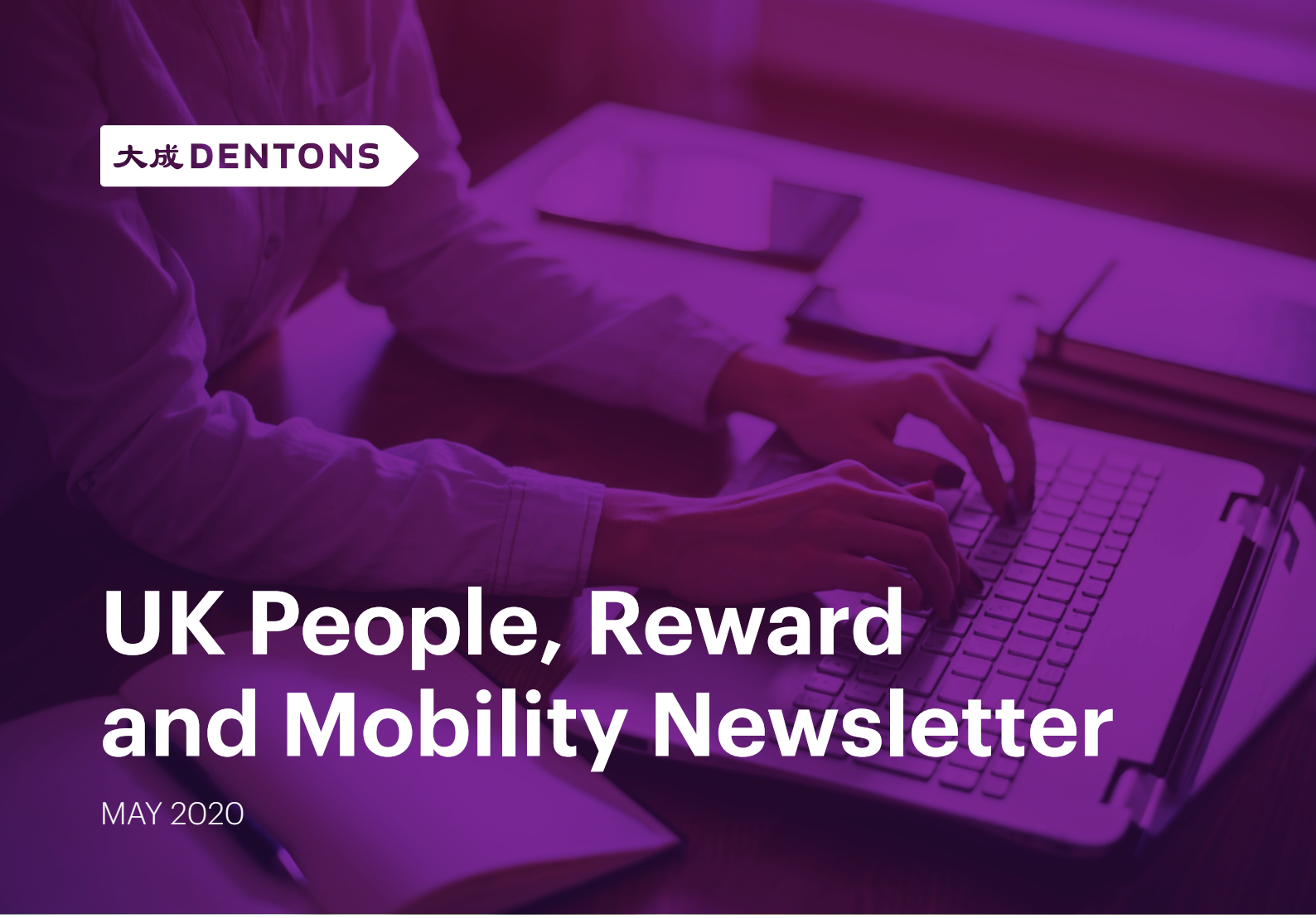

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UK People, Reward and Mobility Newsletter

MAY 2020

IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: the new points-based immigration system which will be introduced in the UK on 1 January 2021; proposals for reform arising out of the Law Commission Report on employment law hearing structure; the role of virtual tribunal hearings in the UK; and the postponement of IR35 reforms and what employers should be doing now.

Find out more about our team, read our blog and keep up with the latest developments in UK employment law and best practice at our UK People Reward and Mobility Hub – www.ukemploymenthub.com

Is your business ready for the new points-based immigration system?

On 1 January 2021, the UK will introduce a new points-based immigration system for EU and non-EU citizens alike, treating all equally and signalling an end to free movement previously enjoyed under EU law. Employers will need to adapt proactively to these changes and it is prudent to plan now to become approved sponsors before applications open in autumn 2020. Doing so may save unnecessary delays in future rounds of recruitment, especially if there is an extensive backlog of sponsorship licence applications. Once obtained, licences will last for a period of four years. Employers must also take into account the extra costs related to the sponsorship of migrant workers when preparing financial projections.

In summary, the new system is largely geared towards applications from skilled workers but it will also see the Global Talent and Student routes extended to EU nationals, amongst others. Points will accumulate according to specific skills, qualifications, salaries and shortage occupations with visas being awarded to those applicants who gain the required number of points and meet the suitability criteria.

So what are some of the key changes that employers should be aware of?

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- People Management – How has coronavirus affected right to work checks? Marianne Hessey
- Society of Human Resource Management – UK adopts temporary employment policies driven by pandemic, Laura Morrison quoted
- Property Week – What furloughing means for employers and employees, Laura Morrison quoted

Skilled workers with a job offer

Skills threshold, salary and tradable characteristics

The minimum skills requirement is to be reduced to the regulated qualifications framework (RQF) level 3 (A-levels equivalent) from the current RQF level 6 (degree level equivalent). This means that migrants in so-called "medium-skilled occupations" are eligible to apply for visas as skilled workers.

The government accepted the proposal from the Migration Advisory Committee (MAC) to reduce the skilled workers' minimum salary threshold to £25,600 from the previous figure of £30,000 and this will apply across the whole of the UK with no regional variation. As per the current rules, migrants should still receive the higher of the specific salary threshold for their chosen occupation (which is known as the "going rate") or the minimum general salary threshold of £25,600.

However, the key difference with the new system is that, should a migrant's salary be lower than £25,600, it may be possible to "trade" certain characteristics against this lower salary to boost the number of points on their application. This is providing that their salary does not drop below £20,480 and the particular characteristic that they want to trade is one that is actually capable of being traded. Bear in mind that 70 points are required if they are to be eligible to apply for a visa, and 50 of those points must come from the compulsory criteria. A visual representation may be helpful here:

Characteristics	Tradable	Points
Offer of job by approved sponsor	No	20
Job at appropriate skill level (in other words, RQF level 3 or above)	No	20
Speaks English at required level	No	10
Salary of £20,480 (minimum) – £23,039	Yes	0
Salary of £23,040 – £25,599	Yes	10
Salary of £25,600 or above	Yes	20
Job in a shortage occupation (as designated by the MAC)	Yes	20
Education qualification: PhD in subject relevant to the job	Yes	10
Education qualification: PhD in a STEM subject relevant to the job	Yes	20

Removal of the Resident Labour Market Test and the upper cap

Two further changes that will be welcomed by employers are the suspension of the cap on the total number of skilled worker applications to come to the UK and the abolition of the resident labour market test (RLMT). The government's intention is to make the recruitment process simpler and more efficient.

The RLMT applies to UK employers with a Tier 2 (General) sponsor licence and, subject to exemptions, essentially means that a job must be advertised to settled workers for a period of 28 days before a migrant can be recruited to fill the post. This will no longer apply, thus saving employers' time as they will no longer need to document evidence proving compliance with this process.

Removal of the upper cap of 20,700 Tier 2 applications per year gives more clarity for employers wishing to on-board migrant workers in that it cuts the risk of their applications being excluded from the pool under the previous cap.

Highly skilled workers with no job offer

An expansion of the Global Talent application route for talented individuals, which is currently available to non-EU citizens, will be made available to EU citizens under the same terms (for more information on eligibility and process, see the Home Office "Global Talent Guidance" published on 20 February 2020).

In short, while there are no English language or employer-led sponsorship requirements, applicants must still possess the required number of points and be endorsed by a relevant and competent

body. These include: the Royal Society; the Royal Academy of Engineering; the British Academy; Tech Nation; the Arts Council England; and UK Research and Innovation. There will be no cap on Global Talent visas and a fast-tracked process will be implemented for certain fields.

Unsponsored skilled workers

An unsponsored route will be introduced for skilled workers, which will operate within the parameters of the points-based system, with the biggest difference being that the total number of applicants will be capped. The intention is to permit a smaller pool of highly skilled workers to obtain a visa while maintaining the integrity of the employer-led skilled worker application route. We await further details from the government about how this route will operate which will be released following key stakeholder engagement.

New entrants

The new entrants category, which currently applies to workers aged up to 26 years old and students entering into the workplace for the first time, will have a 30% lower salary threshold compared to experienced workers in any industry. What this means is that these applicants must earn a minimum of £17,920 (excluding pension contributions and other allowances). However, if there is a "going rate", it must still be paid. As with skilled workers, no regional variations will be introduced.

Lower skilled workers

There will be no immigration route open to new unskilled and lower skilled workers, unless they apply to a specific visa category such as the Seasonal Agricultural Workers Scheme. Workers in this category who have already been accepted under the EU Settlement Scheme will be entitled to stay with no restrictions on their rights to work. This development may be of some concern for those employers operating in tourism, retail and hospitality. After the Brexit transition period, they must look domestically to fill these posts. Whether this is achievable is yet to be seen and it may result in a gap in the UK workforce.

Self-employed persons

There will be no separate application route for self-employed persons such as freelancers. It is expected that the innovator route (currently in force) and the proposed unsponsored route will cater for these types of migrants. In addition, some occupations such as artists, entertainers and musicians are already allowed to apply to be in the UK for up to six months and receive payment for certain performances or one engagement of up to a month without the need to apply for formal sponsorship or a work visa.

If you would like tailored advice relating to sponsorship, or the general makeup of your workforce, feel free to contact our dedicated team of immigration and employment lawyers who would be happy to help.

Proposals for reform arising out of the Law Commission Report on employment law hearing structure

Back in the autumn of 2018, the Law Commission for England and Wales (the Commission) published a consultation document that focused on the jurisdiction of employment tribunals and civil courts. Users of the judicial system acknowledged that there were issues.

- Having received input into the consultation from various parties, the Commission published its report on employment law hearing structures at the end of April 2020. The report sets out 23 recommendations.

Employment tribunals v. civil courts

Employment tribunals have always had different characteristics from civil courts and were intended to do so. The Commission's view is that these different characteristics are important and should be retained.

These differing characteristics include that the employment tribunal is generally a no-costs jurisdiction; has a three-member composition for discrimination and equal pay claims; tends to be less formal than the civil courts; and is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. Any party is also entitled to have lay representation.

Often considered unhelpful by users and practitioners alike, there are a number of discrepancies between the extent of the jurisdiction of the civil courts on the one hand and employment tribunals on the other, in relation to the same or similar types of claim. Indeed the Civil Courts Structure Review led by Lord Briggs from 2015 to 2016 noted what he described as an "awkward area" of shared and exclusive jurisdiction in the fields of discrimination and employment law, which has generated boundary issues between the courts and the employment tribunal system.

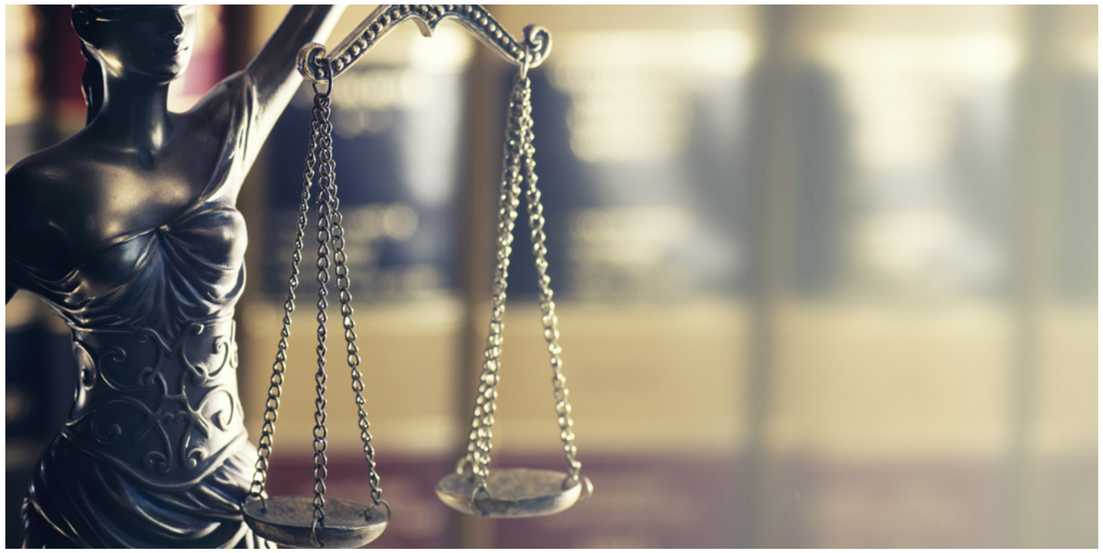
Despite far-reaching suggestions in the Briggs Review, including the creation of a new "Employment and Equalities Court", the government has indicated that it has no plans to restructure the employment tribunal system. There was, therefore, never any expectation that the current review would focus on anything more radical than improving the existing system and removing any illogical anomalies arising from the demarcation of the jurisdictions of employment tribunals and the civil courts.

Terms of reference and objectives of the report

The Commission wanted to consider in particular:

- the shared jurisdiction between civil courts and tribunals in relation to certain employment and discrimination matters, including equal pay;
- the restrictions on the employment tribunal's existing jurisdiction;
- the exclusive jurisdiction of the county court in certain types of discrimination claim; and
- the handling of employment disputes in the civil courts.

The main objectives included seeking to increase efficiency and consistency of approach by ensuring that employment and discrimination cases are, where possible, determined by the judges who are best equipped to hear them. It also sought to review whether the demarcation of jurisdictions and the restrictions on employment tribunals' jurisdiction are fit-for-purpose and in the interests of access to justice.



UK-wide consistency, England and Wales applicability

The Commission can make recommendations for changing the law in England and Wales. The recommendations in the report do not extend to Scotland or Northern Ireland. The report does point out, however, that the Commission had the benefit of responses from outside England and Wales including the President and Vice President of Employment Tribunals (Scotland) who, we are told, agreed with the response of the Council of Employment Judges, while adding some observations on the extent of devolution. The Council of Employment Judges, Employment Tribunals (Scotland) and Employment Lawyers Association emphasised the importance of maintaining consistency in relation to employment tribunal claims north and south of the Scottish border. The Commission states that it can "see the case for maintaining consistency in relation to certain aspects of employment tribunals in both England and Wales, and Scotland".

Exclusive jurisdiction and time limits

The Commission's provisional view was that unfair dismissal, discrimination in employment, detriment of various specified types and redundancy should remain the exclusive jurisdiction of employment tribunals. This was almost entirely agreed upon by the consultation responders. The main reason appears to be a recognition of the significant expertise employment tribunals have developed in the areas over which they have exclusive jurisdiction. Ultimately, the Commission concluded that employment tribunals should retain this exclusive jurisdiction over these types of employment claim.

One recommendation that could, if implemented, lead to fairly wide-ranging ramifications is time limits. Recommendations include that: there should be a single time limit of six months for claimants to bring employment tribunal claims; and that the test for extending time limits should be the "just and equitable" test in all cases (not whether it was "reasonably practicable"). This "just and equitable" test is currently used in discrimination cases.

Jurisdiction in discrimination claims

The consultation paper focused on the desirability and feasibility of softening the hard line between the civil courts (which hear non-employment discrimination claims, such as in goods and services) and employment tribunals (which hear employment discrimination claims). It explored two options for optimising the use of employment judges' discrimination expertise: formally sharing jurisdiction between the tribunals and the county court, or deploying employment judges to hear discrimination cases in the county court.

Whilst there was significant consensus from responders that the court system as a whole would benefit from having expert discrimination judges hear non-employment discrimination claims, there is also widespread concern about exacerbating the call on limited judicial resources in employment tribunals.

In conclusion, the Commission recognised that transferring non-employment discrimination jurisdiction entirely to the employment tribunal would be a major alteration of the nature of employment tribunals. It would, in substance, create a single "employment and equalities tribunal" which (as discussed earlier) was outside the Commission's terms of reference). Further, the balance of consultee opinion was against such a combination.

Breach of contract claims

Recommendations in respect of breach of contract claims include that employment tribunals should have jurisdiction to hear breach of contract claims, and related counterclaims, arising during or after employment. (Currently such claims can only be raised in tribunals in respect of claims arising from or outstanding on termination of employment.) The Commission has also recommended that the limit on the tribunal's contractual jurisdiction is increased from £25,000 to £100,000. All or any of these amendments would no doubt see a rise in tribunal claims overall.

Equal pay and equality of terms

An equal pay claim may be brought either in an employment tribunal or in the civil courts. In an employment tribunal there is, in practice, no time limit so long as the claimant remains employed in the relevant employment. A time limit of six months runs from the date that the claimant ceases to be so employed.

There is no discretion for the tribunal to extend the deadline, save in the limited circumstances set out in the Equality Act 2010 (the 2010 Act). In the English civil courts, the time limit is six years from the date of the breach. In Scotland, that limit is five years. Both jurisdictions enable claimants to claim arrears of pay going back six years (England and Wales) or five years (Scotland) – this means that a claimant who delays making a claim may receive less compensation as a result. Equal pay claims are most commonly pursued in employment tribunals.

The recognition of the specialist knowledge, procedures and expertise of employment tribunals in determining equal pay claims is implicit in the existence of these powers. It is also expressly acknowledged in the Explanatory Notes accompanying the 2010 Act.

There was somewhat of an "if it ain't broke, don't fix it" response to proposals that the concurrent jurisdiction of equal pay claims should change. Another argument advanced was that claimants' choice of forum should be preserved, particularly in relation to choosing whether to bring their claim in a costs-shifting or a no-costs jurisdiction, since there are benefits and disadvantages to both.

Ultimately, in respect of equal pay claims, the Commission recommended:

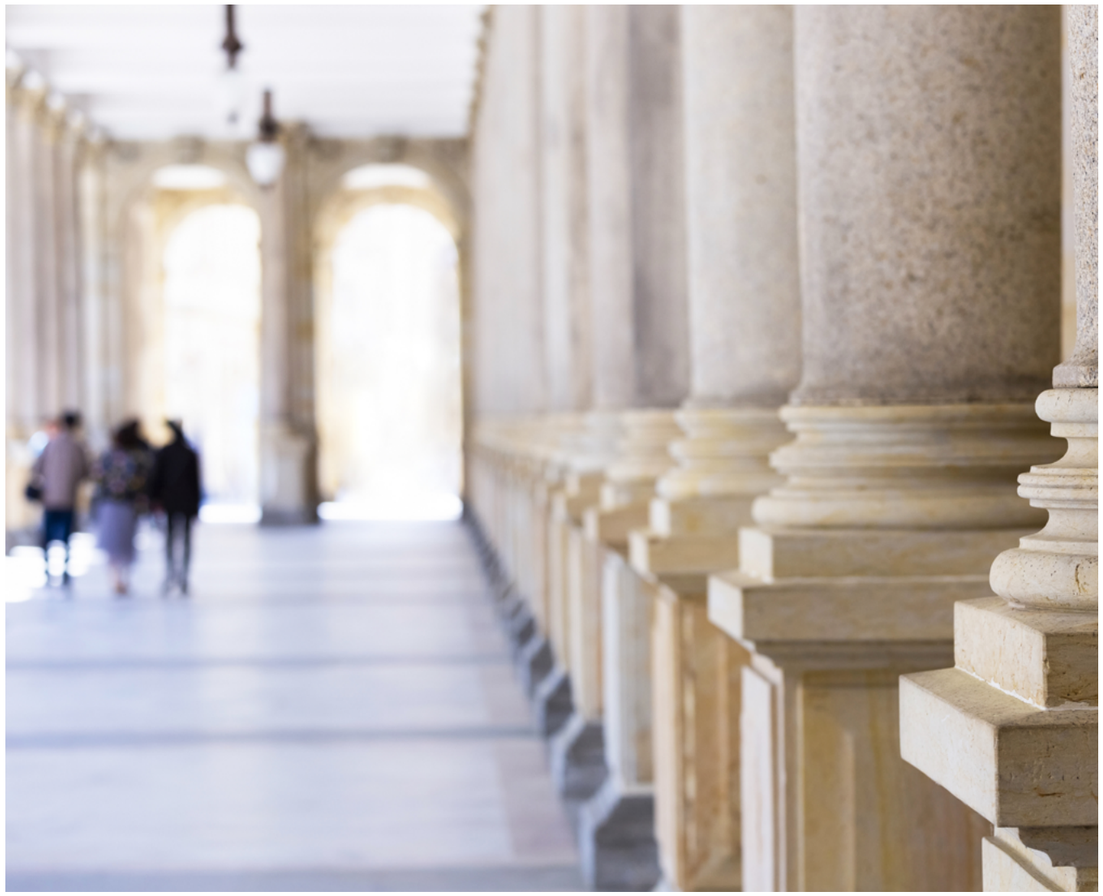
- the 2010 Act should be amended to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer; and
- employment tribunal judges should be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so.

Enforcement powers

There has for some time been significant concern raised about the number of tribunal judgments which are effectively ignored by respondents. The consultation specifically asked whether employment tribunals should "be given the jurisdiction to enforce their own orders for the payment of money".

The Commission recognised that there are enforcement possibilities available, but that the enforcement of tribunal awards is not satisfactory. In particular, claimants have to complete a new set of paperwork and pay additional fees. These difficulties are exacerbated by the fact that claimants have to engage with a new institution, which will not be familiar with the details of their case. All of this is particularly resented (and vocalised by law clinics and trade unions in their responses, as you might expect) because it would not be necessary if employers simply paid sums due on receipt of the judgment.

Despite claimants facing understandable confusion when, having won their case in front of the employment tribunal, they are then required to go somewhere else to enforce the decision, the Commission was not persuaded that giving enforcement powers to employment tribunals would alleviate all of the problems with enforcement. The most common suggestion from consultees was that employment tribunals could be granted the same range of powers that civil courts have to enforce orders. This would involve duplicating the significant infrastructure which has built up in the civil



courts to enable the enforcement of orders. It is not clear that this duplication would necessarily result in a higher enforcement rate of tribunal awards.

Ultimately, the Commission has recommended that the government should investigate the possibility of:

- creating a fast track for enforcement which allows the claimant to remain within the employment tribunal structure when seeking enforcement;
- extending the current BEIS employment tribunal penalty scheme so that it is triggered automatically by the issuing of a tribunal award (including sending a copy of the judgment to the BEIS enforcement team);
- sending a notice with the judgment to inform an employer that, if it does not pay the award by a set date, it will be subject to a financial penalty; and
- improving the information sent to successful claimants on how to enforce awards.

The report does address a number of anomalies and discrepancies that users of the judicial system have highlighted over the years. The Law Commission has taken a pragmatic approach to addressing these. The government is now to consider the recommendations. An interim response should be published by the end of October this year and a full response by next April. The full response should set out which recommendations are accepted, rejected and modified. Whether or not the current COVID-19 pandemic and associated legislative changes and delays will result in a delay to the interim or full response remains to be seen. We will keep you advised of the government's response in due course.

Virtual tribunal hearings in the UK – is COVID-19 paving the way for a "new normal"?

Waiting rooms, tribunal desks, paper bundles … how about your living room, the sofa and a pdf?

Traditionally, Employment Tribunal (ET) hearings have always taken place in person, the rare exception being where a witness is unable to give evidence due to location, or safety concerns. However, such cases are few and far between. This might all be about to change due to COVID-19.

What is driving the change?

As a result of the pandemic, tribunals shut their doors on 23 March 2020 and, since then, hundreds of hearings have had to be cancelled.

Presidential Guidance has since been issued, confirming that hearings will be going ahead after the end of June. However, with cases stacking up and social distancing measures likely to be in place for many months to come, attention is now turning to how the tribunals are going to provide access to justice in these new and unusual circumstances.

What is changing?

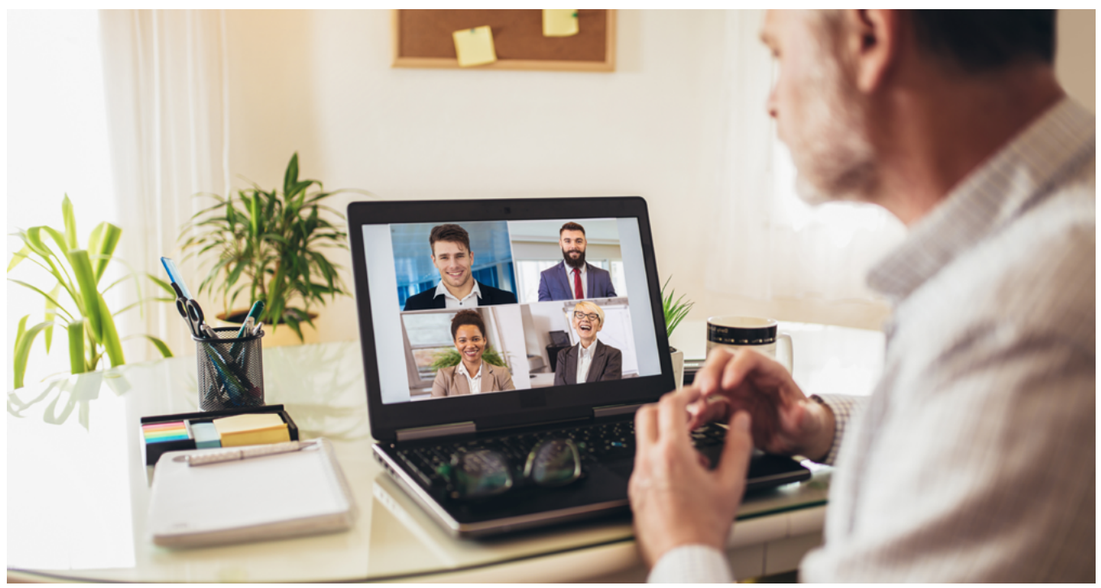
As is so often the case, technology is coming to the rescue.

The tribunal system is about to engage in possibly the most unusual use of technology it has ever seen, by undertaking virtual hearings. There are still many unanswered questions about how this will work in practice, but trials have shown that it can. In addition, with multi-day trials happening virtually in other jurisdictions, there seems to be no reason why the tribunal system in the UK cannot replicate this success.

Practical implications

With this in mind, we have set out below a few practical implications of these changes, for those who are (or expect to be) involved in tribunal litigation going forward.

- The President of the ET has confirmed that it will now only be in "extreme" cases that there will be a postponement because a hearing cannot happen virtually. This means that parties planning to request tactical postponements on this basis will be hard pressed to succeed with their arguments.
- Public access will be maintained, either by people dialling in to the virtual hearing or by the proceedings being streamed onto a screen in a separate room, with social distancing measures ensured. Parties must remember that a virtual hearing does not necessarily mean a private hearing.



- Given how new this process is, parties to tribunal litigation will be expected to proactively liaise with each other and write to the tribunal with proposals as to how their case should be handled. Thought is going to have to be given as to how confidential client instructions will be provided virtually (with multiple screens, instant messenger and even email being options) and bundle preparation is going to have to move into the 21st century and become electronic.

Can the technology support this change?

With some technology providers boasting the ability to support up to 150 virtual judicial rooms at one time, and with more funding for employment judges on the horizon, we can expect hearings to be listed at greater speed than ever before. We might even start to see a combination of in-person and virtual hearings, which could be used moving forwards where physical disabilities have historically created a barrier for witnesses or parties to attend a tribunal in person.

When will virtual hearings not be appropriate?

Of course, there may always be some circumstances where it will not be appropriate to hold a virtual hearing.

One such example might be where one of the parties has a particular mental health condition which could mean that they are placed at a disadvantage by not attending in person. These cases will need to be assessed by an employment judge to determine the most appropriate method for ensuring that access to justice is met for all.

Food for thought?

Interestingly, some commentators have suggested that the additional level of collaboration which will be required between parties in order to hold a virtual hearing could result in a greater number of cases settling. Food for thought, perhaps. However, others have pointed out that for those dealing with litigants in person, virtual hearings could result in a whole new raft of issues.

So, could this be the start of one of the biggest shake-ups to the tribunal system that we have ever seen? Time will tell. However, if the technology works, we could all be litigating from the comfort of our own sofas very soon.

Save the new date! The postponement of IR35 – what should UK employers be doing now?

In light of the ongoing COVID-19 pandemic, the UK government announced in March that the extension of off-payroll working (IR35) reforms to the private sector would be postponed for a year. This measure is to help individuals and businesses through this difficult and uncertain time. The reforms will now come into force on 6 April 2021.

While private sector employers have a temporary reprieve from the new regime, there are a number of steps that should be taken over the next 10 months, to ensure they are ready for implementation.

Correspondence from the House of Lords

The House of Lords wrote to the Treasury on 26 March 2020, welcoming the postponement of IR35, but restating issues that had previously been raised ahead of the original implementation date, prior to the pandemic. The letter requested that Treasury defer the IR35 reforms until it resolves the questions put forward.

The main concerns identified include:

- the "significant" cost to businesses in preparing for the off-payroll reforms;
- whether the implementation of off-payroll working in the public sector has proved successful;
- the potential for contractors to face reduced business;
- potential issues around blanket assessments leading to a loss of key workers;
- the role of umbrella companies and how their compliance with the reforms will be regulated;
- the reliability of the CEST (Check Employment Status for Tax) tool which omits key information used to determine employment status;
- whether the reforms will support the growth of the gig economy; and
- the fairness of the changes on those individuals who are treated as employees for tax purposes but will not benefit from other employment rights.

Lord Forsyth, who drafted the letter, requested a response within 10 working days. At the time of preparing this article, a response has not yet been received, although we will share any updates on this on our blog, which can be found here.

What should employers be doing?

At present, it appears the changes will come into effect in April 2021, as recently confirmed. While this might seem a long way off, employers should now be making preparations to ensure they are organised when the time comes.

In short, the IR35 reforms are committed to maintaining that employers are liable for ensuring that contractors working through limited companies pay the right levels of tax and National Insurance contributions. The intention is for the rules to apply to any individual who (but for the supply of their services through a company or agency) would otherwise be an employee for tax purposes. This puts an onus on businesses to establish the employment status of contractors. Assessing contractor arrangements and employment status early on will ensure that employers have ample time to collate requisite information and/or make necessary changes in the workplace ahead of the implementation date without increasing the burden on contractors and businesses when we emerge from the COVID-19 pandemic.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- Heard it on the radio: discriminatory statements fall within EU's Equal Treatment Directive
- Furloughed workers to receive full family leave pay entitlement
- Administrators and the furlough scheme
- Self-Employed Income Support Scheme – Treasury Direction published

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Key things employers can now be doing to prepare for next April include:

- **Understand your obligations**
  Now is the time for employers to get to grips with their obligations under the new rules and how to implement the changes. It is also a good time to get a plan of action in place to simplify the process of determining worker status.
- **Understand your workforce**
  Assessing the make-up of a workforce, in which contractors will fall within the remit of IR35, will be key. A good starting point would be to see which, and how many, contractors are engaged through personal service companies and agencies. It is important that this exercise be carried out for any contracts that are due to start shortly before, or extend beyond, April 2021.
- **Check terms of engagement**
  Ensure that terms of engagement with contractors and consultants fairly and accurately reflect their employment status. Things to consider include: what the workers' responsibilities are, who controls them (when/how/where they work), how they are paid and if they are directly in receipt of any benefit or expenses. Recent case law has repeatedly demonstrated that, while a court or tribunal will use the terms of a contract as a starting point, it will always look beyond these terms to the reality of the working relationship in order to determine worker status.
- **Work out the costs**
  Implementing the relevant processes and procedures will inevitably be costly for businesses, so it is critical to include IR35 work streams within monthly or annual budget forecasts. This is currently particularly important while navigating the uncertainties associated with the COVID-19 pandemic, which is having an impact on all businesses, albeit at differing levels.
- **Get the payroll teams up to speed with the changes**
  April is the financial year-end for many businesses and payroll teams are often at their busiest in the lead up to, and during, this period. Therefore, updating payroll processes as necessary ahead of April will reduce the burden on payroll teams and ensure that the practical transition is as timely and streamlined as possible.

For more information, or to find out how Dentons can help your business prepare for IR35, please get in touch with your usual Dentons contact or Virginia Allen.

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