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EVOLVE

"WE'RE REINVENTING HOW WE ARE STRUCTURED AND HOW WE WORK... BP WILL BE A VERY DIFFERENT COMPANY BY 2030"

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THE LEGAL ROADMAP AHEAD

"PERHAPS OUR BIGGEST FEAR SHOULD BE NOT AN INVISIBLE VIRUS, BUT THE PERSONAL INFORMATION AND MONITORING CAPABILITIES OF THE MACHINES THAT FORM PART OF OUR EVERYDAY LIFE"

In the short-to-medium term, the shadow of the pandemic looms large. Employment law practitioners have faced many challenges and legislative developments in the past year, starting with the furlough scheme in March 2020 through to innumerable iterations of guidance on everything from health & safety risk assessments, through shielding and various stages of lockdown measures. It has been an immensely difficult time and more changes lie ahead.

Now that we have a vaccine rollout programme, employers can begin to plan for normality. However, it is not a case of going back to the past, because the pandemic has created significant changes to the workplace landscape. The consensus is that prohibiting employment to those who are not vaccinated throws up significant legal issues and is unlikely to be lawful, particularly if the individual has conscientious objections to vaccination. However, there may be a stronger case in certain sectors if supported by empirical evidence, such as in the care and health sectors. There are subsidiary issues such as objections to customer-facing roles, international travel and from those with shielding responsibilities, given the higher risk of infection - so COVID-19 and ramifications will still be with us for several years.

The UK has not only had to deal with the global pandemic, but also the exit from the EU as of 1 January 2021, which is expected to bring uncertainty to trade and economy. The Trade & Cooperation Agreement (TCA) that was reached with the European Union, has introduced a level playing field provision, one of the most contested areas of dispute during the negotiations. Both parties have made a commitment not to reduce employment rights in a manner affecting trade or investment. In other words, the level playing field provisions ensures that neither can undercut the other by means of lower, cheaper employment standards. One of the requirements under the TCA is that there is, in place, an effective domestic enforcement, including labour inspections, court actions and remedies. The UK does not have an effective system of labour inspections, although it has committed to setting up a single enforcement body as part of the Employment Bill (which, incidentally, still has not been introduced to Parliament, at time of writing). The obligations relating to court actions and remedies means that the UK may not be able to reintroduce fees for ET claims or

impose a cap on discrimination compensation, as has been suggested. There is, although, a specific reference to interim relief. But at the moment, this is not available for discrimination cases (only available for whistleblowing cases).

Looking at employment law as a whole, we do not envisage wholesale changes to legislation as a result of Brexit or the TCA. For example, discrimination law is not likely to see much, if any, impact at all and no immediate changes are expected for working time and holidays. The Government has decided not to introduce any changes to working time in a recent announcement. Neither is family-related leave and pay likely to see any Brexit-induced impact. Rather, changes to how we work and workers' rights are more likely to come from within in 2021. We have already had three consequential Supreme Court decisions on matters of worker status (Uber), sleep-in worker (Mencap) and equal pay comparators (Asda). If we are keeping scores, I would say, so far, workers are on the winning side. The Supreme Court in Uber held that Uber drivers were workers under the Employment Rights Act 1996 given that, among others, drivers would be penalised if they turned down a certain number of ride requests. In the most recent Asda case, the Court sided with the female retail staff - that they can use as comparators - male distribution workers, who did not have the same job or in the same location, using what is known as the North hypothetical. Although the matter must now go back to the employment tribunal for a determination as to whether the claimants carried out work of equal value as their comparators, the scope for comparison has been broadened by the judgement. The Mencap judgement, although decided in favour of the care home, is consequential for the care sector which employs tens of thousands of workers and carers throughout the country, that would have been placed in a very vulnerable position had the decision gone the other way, as the sector itself would have faced extinction.

We are also likely to see developments on equality issues. Several developments were expected in 2020 including; legislation curbing the use of non-disclosure agreements, an extension of redundancy protection for pregnant women and new parents and the Government's response to the consultation on workplace sexual harassment. We have yet to see when or how these proposed legislations will be implemented. The possibility of ethnicity pay gap reporting remains very much alive, despite the consultation on the issue closing two years ago in January 2019. An online petition reached the necessary 100,000 signatures for it to be considered for debate by Parliament in spring 2020. Meanwhile, the Black Lives Matter movement will keep race discrimination a live issue, with debates about the efficacy of unconscious bias training, use of quotas and the relegation of race to the bottom of the business diversity agenda. In other areas, there are some important cases to watch out for in the rest of 2021. The Supreme Court is due to hear *Kostal UK v Dunkley* on 18 May which addresses the tricky issue of when employers can approach staff directly to agree temporary changes to contracts following the breakdown of negotiations with unions under collective bargaining arrangements. On 23 June, the Court is also due to hear *Chief Constable of the Police Service of Northern Ireland v Agnew* which concerns whether a 'series' of unlawful deductions from holiday pay is interrupted by gaps of more than three months. Towards the end of the year on 9 November, the long running case of *Harpur v Brazel*, will be heard by the Court which looks at whether workers who work only part of the year should have their annual leave capped at 12.07 percent of annualised hours.

> "OUR FOCUS SHOULD BE LESS ON THE IMMEDIATE CHANGES, BUT TO PONDER WHETHER WE ARE ON THE BRINK OF A FOURTH INDUSTRIAL REVOLUTION, WHICH WILL FUNDAMENTALLY ALTER THE WAY WE WORK AND RELATE TO ONE ANOTHER"

Perhaps what is most predictable, at least for the short-to-medium term, is that most employers will choose some form of hybrid between working from home and office work, with the split varying from employer to employer. Since that's how we have operated for some time now, employees desire and demand such way of working. Consequently, there will be issues as to the health and safety obligations of employers in relation to remote working and the tax implications for any support provided. There is demand for regulation to create a roadmap for the future. With transparency as a defining feature, we may see the emergence of a right not to suffer detriment from inaccurate data, reversing the burden of proof in relation to discrimination claims in data discrimination and perhaps even a statutory right to disconnect from work. Consequently, our focus should be less on the immediate changes, but to ponder whether we are on the brink of a fourth industrial revolution, which will fundamentally alter the way we work and relate to one another. If that is the case, the scale, scope and complexity will lead to a transformation, which will require a new legal framework to regulate the new world of work. Perhaps our biggest fear should be not an invisible virus, but the personal information and monitoring capabilities of the machines that form part of our everyday life.

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