The Evolution of Employment Law in 2021 and beyond

Thursday 2 December 2021
Agenda

Introduction

2021 Learning Points
- IR35 and umbrella companies – Kathryn Dooks
- Equal pay – James Champness
- TUPE transfers and split employment – Justin Terry
- Developments in discrimination law – Andrew Howard

2021 Global Mobility Trends
- Bronte Wagenfeller (Global Workforce Transformation, Tax)

Preparing your business for 2022
- The Employment Bill - Xabier Reynoso
- Duty to prevent sexual harassment - Rachel Kendall
- Ethnicity pay gap reporting - Olivia Baxendale
- Trade unions and collective action - Lucy Sorell

Questions and Wrap Up
2021 Learning Points
IR35 and umbrella companies

Kathryn Dooks
An intermediary which employs or engages temporary workers on a number of short-term contracts

Acts as an intermediary between the end client and contractor; lots of different contractual chains

Primarily administrative function: managing timesheets, invoicing, payroll obligations etc

- **Umbrella companies** can in some cases also be referred to as ‘employment businesses’ or ‘professional employment organisations’; we will use ‘umbrella companies’

- Should not be confused with **agencies or recruitment businesses** who may perform all of the above, but whose main business is to identify resource for clients
Compliant umbrella models can provide labour market flexibility and reduce admin

But there appears to be a spectrum of compliance which presents risk

Currently a surge in use of umbrellas due to IR35

No official kitemark, but reports in media of non-compliance by those with unofficial kitemarks

Risks largely twofold:
• reputational for end client engager
• individuals disadvantaged by virtue of not receiving rights they are entitled to
Supply chain compliance: responsibilities and risk

Taylor Review recommendation:
The new Director of Labour Market Enforcement should consider whether the remit of EAS ought to be extended to cover policing umbrella companies and other intermediaries in the supply chain.

Supply chain due diligence principles
- The Principles are not a definitive checklist but are good practice examples of what businesses can do to minimise risks in their supply chains

Check
Know your own risk-legal, financial, tax and social obligations, and those of your suppliers. You can check:
- your risks by performing risk assessments to understand what they are and how to mitigate them
- your own compliance with legal, financial and social obligations to safeguard against risks within business supply chains
- your suppliers' tax and legal compliance, for example, submitting their tax returns and payments on time, complying with legal and social responsibilities, and having reasonable procedures to prevent the criminal facilitation of UK and foreign tax evasion, as per the Corporate Criminal Offences (CCO) brought in by the Criminal Finance Act 2017
- for modern slavery and exploitation risks, for example, check for published slavery and human trafficking statements and for indicators of modern slavery and exploitation

HMRC Guidance on Labour Supply Chain due diligence principles
- The Principles are not a definitive checklist but are good practice examples of what businesses can do to minimise risks in their supply chains

Supply chain compliance: responsibilities and risk


Single Enforcement Body

Supply chain
Clients undertake diligence of arrangements; at UC selection stage and periodically moving forward

Clients consider Corporate Criminal Offences obligations under the Criminal Finance Act and ensure reasonable preventative procedures have been introduced

Also, as a minimum, clients should ensure UCs warrant that they will comply with all relevant legislation and give tax and employment/worker rights indemnities
The rise of the Equal Pay Claim
James Champness
The rise of the Equal Pay claim

Equal pay covers:

- “Like work” (e.g. the same job)
- “Work rated as equivalent” (e.g. by a Job Evaluation Study or benchmarking exercise)
- “Work of equal value” (e.g. in terms of the demands made on the claimant and comparator)

Comparator “in the same employment” covers:

- “Same establishment”; or
- Different establishments where “common terms” of employment apply.
TUPE transfers and split employment
Justin Terry
TUPE or no TUPE?

1. **Standard business transfer**
   - Most common in sales of businesses

2. **Service provision change**
   - First-generation outsourcings
   - Taking services back in-house (insourcing)
   - New contractor (second-generation outsourcings)
Service provision changes - fragmentation

- Is it possible to have more than one transferee under a service provision change?
- To which transferee do employees’ contracts transfer?

Transferor

Transferee 1

Transferee 2
One transferor, two transferees

Employment of one employee could transfer

Employee’s employment would be split between both transferees

As long as the division of the contract was possible and would not cause worsening of the employee’s working conditions or rights
One half of contract awarded to Mitie and the other half awarded to McTear

Employment Tribunal:
• There could be two transferees
• Employees’ employment had to transfer (whole) to either McTear or Mitie

Employment Appeal Tribunal:
• Employment Tribunal should have considered Govaerts
• Transferring employees’ employment could transfer to and be split between transferees
Developments in discrimination law
Andrew Howard
Developments in discrimination law

Gender reassignment

Being gender fluid/non-binary is protected under gender reassignment definition in the Equality Act.

Parliament intended gender reassignment to be a “spectrum moving away from birth sex, and that a person could be at any point on that spectrum”.

Philosophical belief

Claimant’s gender critical belief was a philosophical belief qualifying for protection under the Equality Act.

Requirement that a philosophical belief be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others only excludes beliefs that would be a grave violation of ECHR principles by attempting to destroy those rights.

Manifestation of a belief is not relevant when deciding whether it is protected.
2021 global mobility trends
Bronte Wagenfeller
FROM CAREERS TO PORTFOLIOS:

THE RISE OF THE INDIVIDUAL

VIRTUAL WORKING:

THE MOVING JOB TO THE EMPLOYEE

HYPER-INCLUSIVE WORKPLACES:

BEYOND D&I

WORKER WELL-BEING:

CONNECT WELLBEING TO PERFORMANCE

SOCIAL

ENVIRONMENTAL

#STAYONTHEGROUND:

SEEKING LOW-CARBON TRAVEL ALTERNATIVES

PURPOSE-DRIVEN GENERATION:

ATTRACTING MILLENNIAL & GEN Z WORKERS

INNOVATION HUBS:

TAPPING INTO EMERGING TALENT HOT SPOTS

TECHNOLOGICAL

DIGITAL WORKFORCE EXPERIENCE:

PERSONALIZED DATA-DRIVEN & TECH FIRST

POLITICAL

IMMIGRATION COMPLEXITY:

ANTI-IMMIGRATION SENTIMENT RISES

Source: Deloitte Human Capital Trends, 2020 & 2021 (including responses from c. 9000 Business and HR leaders); Deloitte Future of Work
Preparing your business for 2022
The Employment Bill

Xabier Reynoso
Employment Bill - what might we expect from it?

- Protected period would run from the moment an employee notifies employer of pregnancy to 6 months after end of maternity leave.
- Paid time off for parents of children who have spent at least a week in neonatal care.
- Day one right to one week’s unpaid leave to care for dependent with long-term care needs.
- Day one right to request a more predictable and stable contract.
- All tips and service charges to be passed on to workers.
- Extending redundancy protection for pregnant employees.
- Leave for neonatal care.
- Leave for employees with caring responsibilities.
- Flexible working as the default.
- Introduction of single labour market authority.
- Employer record keeping obligations on tips and ability for workers to request details of employer tipping records.
- 26 week qualifying service requirement, aimed at those engaged under variable/unpredictable hours.
- A tip must be dealt with no later than the end of the month following the month in which it was paid by the customer.
- Employer record keeping obligations on tips and ability for workers to request details of employer tipping records.
- Consolidates three existing labour market enforcement bodies into a single agency.
- Extensive remit to protect vulnerable workers e.g. as regards holiday pay, sick pay, national minimum wage and national living wage.
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- Consolidates three existing labour market enforcement bodies into a single agency.
- Extensive remit to protect vulnerable workers e.g. as regards holiday pay, sick pay, national minimum wage and national living wage.
- Consultation closed on 1 December 2021.
Duty to prevent sexual harassment
Rachel Kendall
Introduction of a proactive duty to prevent sexual harassment in the workplace:
• Duty to take all reasonable steps to prevent harassment
• Liability before an incident occurs
• EHRC Statutory Code

Extension of time to bring an Equality Act claim in the Tribunal:
• From 3 months to 6 months for all Equality Act Claims

Protection of volunteers and interns:
• Interns are adequately protected by legislation as ‘workers’
• Extension to volunteers would be disproportionate

Reintroduction of protections against third party harassment:
• Liability for harassment by a third party (exact parameters to be confirmed)
Employers’ next steps

01. Considering the EHRC’s 2020 technical guidance on preventing harassment in the workplace

02. Training refreshers

03. Update policies and procedures

04. Consider remote and hybrid workforce

05. Risk assessments and feedback

06. Reviewing third party contracts
Ethnicity pay gap reporting

Olivia Baxendale
Should you adopt ethnicity pay gap reporting?

**Enhance understanding**
The makeup of your organisation and the issues faced by your Black, Asian and minority ethnic workforce

**Transparency and accountability**
Shows workforce that you are genuinely committed to change

**External drivers**
ESG agenda and sign of commitment to D&I to investors, stakeholders, customers and potential employees

**Reputation**
Help develop reputation as a fair and progressive employer – helping to attract and retain talent
Ethnicity pay gap reporting

1. Collect the data
2. Run the calculations
3. Analyse the impact
4. Take action
Trade unions and collective action

Lucy Sorell
Clarified the circumstances in which direct offer can be made to unionised employees

Collective bargaining process must be exhausted

Employer must be able to show that its motive was not to bypass procedure

Employers must ensure that their collective bargaining procedures make it clear when exhausted

Consider amending procedures if necessary – in interests of both parties
Q&A and wrap up
David Williams