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Employment Newsbrief

Welcome

Welcome to the latest edition of Hempsons Solicitors' Employment Newsbrief, a round-up of some of the current hot topics in employment law.

Lucy Miles writes about the recent case of Muller v London Ambulance Service NHS Trust, which emphasises the need for NHS trusts, as large, sophisticated employers with significant administrative resources, to take a particularly cautious approach before dismissing an employee by reason of capability.

Following the publication of the Taylor Review of Modern Working Practices in July 2017, the Government has published the Good Work Plan, which sets out workplace reforms focusing on "fair and decent work", "clarity for employers and workers" and "fairer enforcement". **Tyson Taylor** gives an update on the Good Work Plan and the proposals arising from it.

Paul Spencer explains the risks of airing workplace grievances on Facebook and the consequences that it can have for an employee, following a recent Employment Tribunal case.

Zubeda Tayub looks at the issue of whether an employer should halt its own internal procedures if the police are also investigating the same matter following the Court of Appeal decision in North West Anglia NHS Foundation Trust v Gregg.

Following the recently launched consultation exercise by the Government in relation to the introduction of a £95,000 cap on exit payments made to public sector staff, **Fiona McLellan** gives an in-depth analysis of the draft legislation.

On 6 February 2019, the Government published Tom Kark QC's report of his review of the "Fit and Proper Persons Test" (FPPT). **Bronya Greatrex** comments on the issues, recommendations and what the future holds in this important area for our NHS clients.

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Higher standards expected of **NHS trusts before dismissal for capability**

The recent case of Muller v London Ambulance Service NHS Trust has emphasised the need for NHS trusts, as large, sophisticated employers with significant administrative resources, to take a more cautious approach and exhaust every other option before dismissing an employee by reason of capability. Mr Muller's dismissal was found to be unfair and discriminatory, despite the fact that he had been absent from work for a year and had no predicted return-to-work date at the time he was dismissed.

Facts

Mr Muller was employed by the London Ambulance Service NHS Trust as a paramedic. In March 2016 he sustained injuries to his knee and shoulder by falling out of the back of an ambulance. His knee injury recovered but his shoulder injury did not heal.

Mr Muller was unable to work on the front-line as a paramedic with an injured shoulder and remained off work until he was dismissed by reason of capability in February 2017. The shoulder injury caused Mr Muller to experience disturbed sleep as well as pain and difficulty with lifting and managing stairs. The dismissing manager was unaware that this amounted to a disability under section 6 of the Equality Act 2010 but it was accepted by the Trust during the course of the claim that they should have known, and therefore had constructive knowledge of disability.

Two sickness absence review meetings took place before Mr Muller was referred for a formal Capability Hearing. At the first meeting in May 2016, it was noted that Mr Muller had undergone extensive physiotherapy but with little benefit. This was also documented in a report from Occupational Health three months later, which stated that an ultrasound had not revealed what the problem was so Mr Muller was due to undergo an MRI scan.

The report also stated that he should be able to provide reliable attendance following diagnosis and treatment, although it was not possible to predict a date for this at that time.

At the second sickness absence review meeting in September 2016, Mr Muller explained that he still had no diagnosis and was awaiting a report from a specialist. He was then informed that he would be referred for a formal Capability Hearing, which could result in his dismissal, on the basis that he had no accurate diagnosis and therefore could not give an indication of when or if he would be fit to return to his role.

There was some discussion at this stage about the possibility of temporary redeployment, but Mr Muller was told that this was only possible if he had a definite return to work date within the following four weeks. This was not in line with the Trust's Managing Attendance Policy, which required specialist advice to be sought, temporary redeployment to be trialled for up to three months, and then options for permanent redeployment to be exhausted before dismissal on the grounds of capability was considered.

Occupational Health were extremely supportive of Mr Muller undertaking temporary redeployment, and also stated in October 2016 that they were "certain"

he would be fit to resume his front-line duties, but the timeframe for this would be dependent on his assessment by a new specialist, obtaining a diagnosis and undergoing treatment.

The Trust had a practice of routinely redeploying pregnant paramedics into Clinical Hub placements, which involved providing telephone support rather than undertaking front-line duties. Mr Muller requested temporary redeployment into a Clinical Hub role in line with this practice, but his request was declined on the basis that the vacancy in the Clinical Hub required two days' per month front-line duties (a requirement that was routinely dispensed with for pregnant employees).

Mr Muller saw a shoulder specialist in November 2016 and was diagnosed with a tear in the cartilage around his shoulder joint. That led to a steroid injection, which did not resolve the issue, following which he underwent surgery in July 2017. He was fit to undertake full duties as a paramedic again from November 2017.

However, a formal Capability Hearing took place in February 2017, at which time there was no foreseeable return-to-work date because whilst Mr Muller had received a diagnosis, treatment options were still being considered. It was noted that surgery had been arranged for July 2017, but there was no assurance that it would resolve the problem.

As such, Mr Muller was dismissed on the basis that he had been absent from work for 11 months, there was no return to work date and alternative duties had been considered but not deemed suitable.

Employment Tribunal findings

The Employment Tribunal found that the Trust had not followed its absence management policy and it had failed to make reasonable adjustments by waiving the four week unwritten rule for temporary redeployments and dispensing with the need for Mr Muller to undertake two days' front-line duties per month in the Clinical Hub role (in line with the treatment of pregnant paramedics).

Mr Muller's dismissal amounted to unfavourable treatment because of his absence, which was something "arising from" his disability under section 15 of the Equality Act 2010, and the Trust could not justify his dismissal as a proportionate means of achieving a legitimate aim because there were less discriminatory measures it could have taken (i.e. by implementing reasonable adjustments).

The Employment Tribunal found that no reasonable employer of the same size and with the same administrative resources and policies would have dismissed Mr Muller in the circumstances. It found that he should have been redeployed into another role and that the Trust should have waited longer in the circumstances. Had they done this, he would have been able to keep his job as a paramedic.

Comment

The Employment Tribunal paid significant regard to the fact that the Trust had comprehensive policies and standard practices relating to absence management processes and the redeployment of pregnant staff, which had not been fully complied with in this case. It also commented that an organisation such as an NHS trust with significant resources could not easily demonstrate a seriously detrimental impact from Mr Muller's ongoing absence. It was not impressed by references to Mr Muller's 11 months' absence being "sufficient" to dismiss him because this indicated a backward rather than forward looking approach, which was contrary to the exercise it should have been carrying out.

Although this was a case in the Employment Tribunal (and therefore the decision is not binding on future cases), it serves as a timely reminder to all employers, but particularly to NHS trusts, that capability dismissals will always carry significant risk. This is so even where an employee has been absent for a year and there is no immediate prospect of a return to work. Unless internal policies have been followed to the letter and all other options (including options which would require reasonable adjustments to be made) have been thoroughly explored and exhausted, there will be an inherent risk of the dismissal being unfair and potentially discriminatory, given that many employees with significant periods of long-term absence will be deemed to have a disability.

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Lucy advises clients on all aspects of employment law which arise during the course of an employment relationship and thereafter including recruitment, drafting contracts and handbooks/policies, holiday and holiday pay issues, maternity and other family related leave, sickness absence management, redundancy and restructuring, grievances and disciplinary matters, protected conversations, managing exits and settlement packages.

Lucy has experience of successfully bringing and defending a range of Employment Tribunal proceedings including claims for discrimination, whistleblowing and unfair dismissal. She also frequently resolves disputes successfully without recourse to the Employment Tribunal.

The Good Work Plan – an update

Background

Back in 2016, the Department for Business, Energy and Industrial Strategy (BEIS) commissioned an independent review of modern working practices by Matthew Taylor.

The Taylor Review of Modern Working Practices was published the following year in July 2017 and set out a list of over 50 recommendations which were aimed at improving the working life and employment rights of agency, casual, zero hour and low paid workers.

In response to the Taylor review, the Government has now published the Good Work Plan, which sets out workplace reforms focusing on "fair and decent work", "clarity for employers and workers" and "fairer enforcement".

The Good Work Plan proposals

The Good Work Plan includes a number of commitments for legislative changes, which includes:

- A right for workers to request a more stable and predictable contract
- An increase in the period required to break continuity of service from one week to four weeks
- A commitment to improve the clarity of the employment status test
- Repeal of the 'Swedish derogation' which currently excludes agency workers from the right to equal pay with comparable employees if they have an employment contract which guarantees pay between assignments
- An amendment to the Employment Rights Act 1996 to extend the right to a written statement of terms to workers and expand the information which must be included in these
- Plans to improve enforcement including a process for publishing the names of employers who fail to pay tribunal awards
- Increased financial penalties for employers who have committed an 'aggravated breach' of employment rights (with the maximum penalty to be increased from £5,000 to £20,000).

Clarification on employment status

A key expectation of the Good Work Plan was that it was going to address the contentious issue of employment status. The distinction between being an 'employee', a 'worker' or 'self-employed' has been shown to be unclear in many cases involving gig economy companies like Uber, Deliveroo, and Pimlico Plumbers amongst others.

The Taylor Review recommended that the Government clarify the law on employment status by setting out key principles in primary legislation. The recommendation was that there was to be a presumption of employment. It was also recommended that where there is a dispute about the individual's status, the employer, not the employee, should bear the burden of proving that the individual is not entitled to employment rights.

In the Good Work Plan the Government has committed to introducing legislation in order to clarify the law because "businesses should not be able to avoid their responsibilities by trying to misclassify or mislead their staff".

There are, however, no concrete proposals for the proposed legislative changes. Instead, the Government has commissioned further research "to find out more about those with uncertain employment status". This appears to be kicking the issue into the long-grass, with no resolution in sight in the near future.

Missing proposals

Whilst many of the proposals contained in the Taylor Review will be implemented by the Government, a number of recommendations have been overlooked. These include:

- A protected right to return to work following a lengthy period of sickness absence in the same way that maternity leave is protected
- The right for agency workers to request a permanent contract with the hirer where they have worked there for a year or more
- A higher rate of National Minimum Wage where workers are required to work hours that are not guaranteed
- A standalone right to compensation where an employer does not provide a written statement of terms and conditions.

What next?

Draft legislation looks set to implement some of the above proposals throughout this year. However, it is likely to be 2020 at the earliest before the majority of changes will take effect.

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Tyson acts for NHS trusts and foundation trusts on a wide range of employment tribunal matters, including unfair dismissal, redundancy, discrimination, and whistleblowing claims.

Before joining Hempsons, Tyson worked in Parliament on a number of successful campaigns. These included the funding for world class research into antimicrobial resistance, supporting the provision of specialist paediatric cardiology services across the north of England, and improving the availability of IVF treatment and mental health services in Yorkshire. Tyson also worked to progress a private members' bill to protect animal welfare through Parliament and onto the statute book.

Don't do Facebook

Facebook is not a good place to air workplace grievances as Mr Atherton discovered in his claim of unfair dismissal against his employer, Bensons Vending Limited. It appears staff morale was low after the company reduced its discretionary Christmas bonus due to financial constraints – the bonus becoming a gift of a bottle of alcohol.

A colleague of Mr Atherton posted a picture of Ronald McDonald on Facebook followed by the comment: "the only difference between McDonalds and where I work is McDonalds has only one clown running the show". Mr Atherton joined in the Facebook conversation including making a comment about sticking the bottle where the sun doesn't shine – presumably he was not referring to putting the bottle in the fridge to cool. No-one was specifically named in the Facebook comments. Mr Atherton and his colleague were also outspoken in the workplace and complaints were made to the Managing Director.

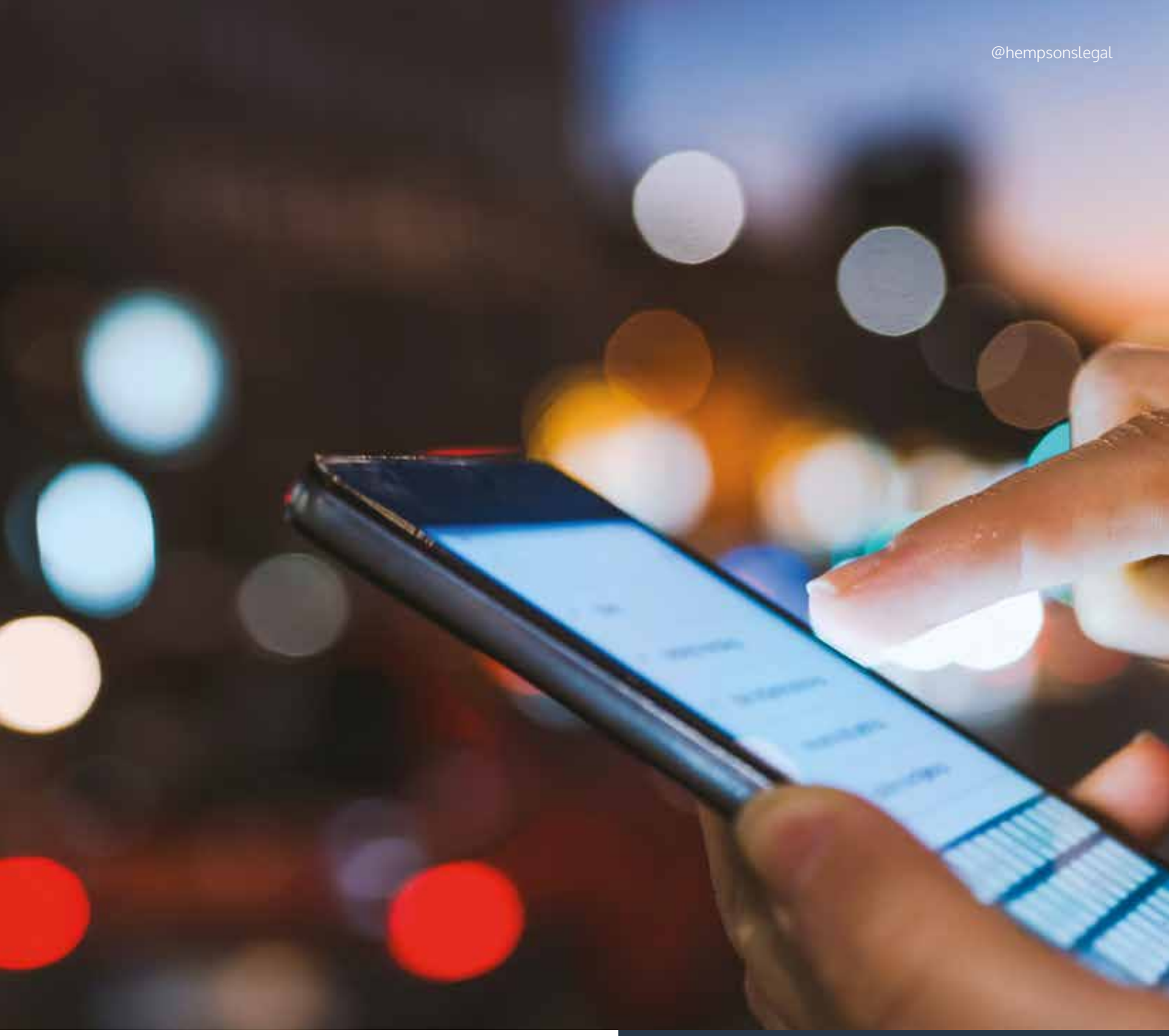
Mr Atherton's colleague was approached and apologised almost immediately and was ultimately disciplined and given a final written warning. Mr Atherton faced an allegation of gross misconduct in that he made a series of Facebook comments which were derogatory about the company's Managing Director. During the disciplinary hearing chaired by the Managing Director, following an adjournment with his trade union representative, Mr Atherton apologised.

Mr Atherton was dismissed without notice or payment in lieu of notice by the Managing Director. His appeal to the Financial Controller was not upheld. He brought a claim of unfair dismissal and also wrongful dismissal due to the failure to pay his notice.

The Tribunal accepted that Mr Atherton's comments were derogatory of the Managing Director giving the impression that the Managing Director was 'Scrooge like' and 'mean spirited'. Those comments could be seen by anyone on Facebook. The Tribunal were however sceptical that the company had been brought into disrepute as it tried to argue. It was the view of the Tribunal that there were grounds to take disciplinary action against Mr Atherton and also went on to say that the decision to dismiss did not fall outside of the band of reasonable responses. The Employment Judge said he was unable to conclude that no reasonable employer in these circumstances would dismiss Mr Atherton, especially having regard to the small nature of the business and that it would have been obvious the Facebook messages referred to the Managing Director.

What about the difference in treatment between Mr Atherton and his colleague who received a final warning? The Employment Judge decided that the company was entitled to take into account the fact the colleague apologised promptly whereas Mr Atherton had two meetings where he did not apologise and only did so towards the end of the disciplinary hearing.

Interestingly, Mr Atherton was successful in his claim of wrongful dismissal because the Employment Judge concluded that his behaviour was not so serious as to demonstrate an intention to no longer to be bound by the terms of the employment contract!



Comment

As this is an Employment Tribunal case, it is illustrative only. In cases such as these, employers will often use the argument that the comments have brought the organisation into disrepute, however, there really does need to be evidence of a loss of reputation. Without evidence, the Tribunal are unlikely to accept this. The case also demonstrates that if a fair procedure is followed, the employee will often struggle to persuade a Tribunal that absolutely no other reasonable employer would have dismissed in the same circumstances – describing an employer as Scrooge like is hardly the worst crime. The difference in the timing of the apologies is a reminder of how an employer is entitled to genuinely take that into account when considering sanctions for misconduct. Finally, for very small employers, it should be noted that the allegedly Scrooge like Managing Director was also the person who dismissed Mr Atherton – Employment Tribunals do recognise that sometimes there are simply not enough managers to have someone entirely independent to hear a disciplinary matter.

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Paul provides support and assistance to his clients; he aims to be part of their HR team. As head of the Manchester employment team he ensures that this is the approach taken by all.

With 20 years' experience of working for NHS clients, Paul can provide practical and pragmatic advice with a full understanding of context and objectives. Paul delivers clear, straightforward advice. This is the case whether it is an employment tribunal claim, a reorganisation, addressing misconduct, bullying or harassment, or simply a client phoning to double check facts.

Disciplinary procedures **and police investigation**

In the case of North West Anglia NHS Foundation Trust v Gregg, the Courts looked at when an employer should halt its own internal procedures if the police are also investigating the same matter.

The facts

Dr Gregg was employed by the North West Anglia NHS Foundation Trust. After the deaths of two patients, Dr Gregg faced internal disciplinary procedures and was excluded from work on full pay. He was then referred to the General Medical Council and a police enquiry began soon after.

Later, the Interim Orders Tribunal of the Medical Practitioners Tribunal Service (a professional disciplinary body) met to consider whether it was necessary for the protection of members of the public to suspend Dr Gregg's registration to practice as a doctor. The IOT decided to temporarily suspend Dr Gregg's registration and withdrew his licence. The Trust then sought to stop his pay and decided to proceed with its internal disciplinary proceedings, while the CPS were also considering whether to press criminal charges against Dr Gregg.

The Trust began its investigation and started to interview staff members as part of that investigation. Dr Gregg was also invited to an interview however he refused to attend and issued a claim in the High Court seeking an injunction to restrain the Trust from continuing with its investigation.

The High Court granted an injunction preventing the Trust from stopping Dr Gregg's pay. The Court also restricted the Trust from continuing its internal investigation into the death of the patients until after the police had completed their investigation, and a decision had been taken by the CPS as to whether or not to charge Dr Gregg in connection with the deaths of the patients.

The Trust appealed to the Court of the Appeal and the Court of Appeal held the following in relation to 1. The suspension of pay; and 2. The Trust's internal investigation into the matter:

Pay

The Trust was in breach of contract in withholding Dr Gregg's pay during the interim suspension imposed by the IOT. The suspension by the IOT did not terminate Dr Gregg's contract with the Trust. The suspension was simply to preserve the position until further information was obtained about the allegations.

In addition, the Court of Appeal found that the decision to withhold pay was not in accordance with the express or implied terms of Dr Gregg's contract or in line with custom and practice. The restriction on Dr Gregg's ability to practice as a doctor was imposed by a third party (i.e. the IOT) against his will. Dr Gregg himself remained ready, willing and able to work and so was entitled to be paid on that basis.

Continuation of the Trust's internal investigation

The Court of Appeal held that the Trust was entitled to continue with its own internal disciplinary proceedings without waiting for the police investigation to conclude. It found that at no point were the Trust's actions calculated to "destroy or seriously damage" its relationship with Dr Gregg and, in this regard, the Trust was not in breach of the implied term of trust and confidence.

Conclusion

An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so. In the present case nothing in the employee's contract of employment suggested this was required and indeed waiting could have prolonged the whole process by months or even years. Where employees are required to be registered by a professional body in order to work and that registration is suspended, an employer will need clear terms in the employment contract to be able to withhold pay during any period of suspension.

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Zubeda has over five years of experience working within employment law in the UK and overseas in Dubai. She also has over a year's experience working within personal injury.

Prior to joining Hempsons, Zubeda worked at DWF specialising in both contentious and non-contentious employment issues. She has experience of conducting her own caseload and advising clients on various areas of employment law.

The cap on public sector exit pay **rears its head again**

The government has recently launched a consultation exercise in relation to the introduction of a £95,000 cap on exit payments made to public sector staff.

Background

The Government previously drafted but did not bring into force powers to cap exit payments in the public sector via the Small Business, Enterprise and Employment Act 2015 (as amended by the Enterprise Act 2016), the consultation exercise sets out its proposed method of implementing that cap including the bodies that will be in scope.

The executive summary in the consultation documentation provides the underlying rationale for the proposals, specifically that exit payments to employees leaving the public sector workforce in 2016/17 cost the tax payer £1.2 billion and the government does not believe that the majority of six figure exit payments, which are far in excess of those available to most workers in the public sector and the wider economy, are proportionate or provide value for money for tax-payers.

The draft Regulations (The Restriction of Public Sector Exit Payments Regulations 2019) set out in the consultation documentation, along with Guidance, are intended to help public sector employers ensure the exit payments they make represent value for money to the funding tax-payer. There is no date set for the implementation of the draft Regulations, the terms of which, it is important to note, could be altered as a consequence of the consultation process.

Who is caught by the cap?

The cap is ultimately intended to apply to the whole of the public sector, however, the government is undertaking a staged process of implementation. The draft Regulations are the first stage of that process and capture the majority of public sector employees. Specifically, the following categories of public sector employers are within the scope of the draft Regulations:

- The UK Civil Service, its executive agencies, non-ministerial departments and non-departmental public bodies
- The NHS in England and Wales
- Academy schools
- Local Government including fire authorities and maintained schools
- Police forces including civilian and uniformed officers.

Where a body or office is not caught by the draft Regulations there would be no legal obligation to apply the cap to an exit payment, however, the government makes it clear in the consultation document that it would expect public sector authorities not currently covered by the draft Regulations to apply commensurate arrangements voluntarily.

What are exit payments?

An exit payment will be subject to the cap if it is made in consequence of the termination of employment or office and whether or not a contract of employment applies.

Regulation 6(1) lists the type of specific payments which fall within the scope of the Regulations and to which the cap will apply, they are:

- Any payment on account of dismissal by reason of redundancy (statutory redundancy pay is not intended to be affected by the cap)
- Any payment made to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect to the cost of a pension scheme of such a reduction not being made
- Any payment made pursuant to an award of compensation under the ACAS arbitration scheme

or a settlement or conciliation agreement
- Any severance payment or ex gratia payment
- Any payment in the form of shares of share options
- Any payment on voluntary exit
- Any payment in lieu of notice due under a contract of employment
- Any payment made to distinguish any liability to pay money under a fixed term contact
- Any other payment made whether under a contract of employment or otherwise in consequence of termination of employment or loss of office.

Excluded payments

Some exit payments are specifically excluded from the scope of the public sector exit payment cap and are set out at Regulation 7, these include the following:

- Any payment made in respect of death in service
- Any payment made in respect of incapacity as a result of accident, injury or illness (not including injury to feelings)
- A service payment made in respect of annual leave due under a contract of employment but not taken
- Any payment made in compliance with an Order of any Court or Tribunal
- A payment in lieu of notice due under a contract of employment that does not exceed one-quarter of the relevant person's salary.

The guidance documentation within the consultation papers confirms that the exit payment cap only applies where there is an extra cost to the employer in relation to that exit. Therefore, payments or elements within payments that result from an individual's accrued right to a pension including additional pension purchased with the individual's own monies are not exit payments for the purposes of the cap.

The guidance document confirms though that pension "strain" payments are caught by the cap. These are payments made by an employer as an additional contribution to a pension scheme in respect of an individual's exit such that the individual receives a greater pension than they would otherwise be entitled to.

It is the Government's expectation that employment contracts, compensation schemes and pension schemes will be amended to reflect the introduction of the cap. However, the draft Regulations do not deal with this expressly.

Multiple exits

The draft Regulations cover multiple exit payments in circumstances where two or more relevant exits for an individual take place on separate days in any period of 28 consecutive days.

Relaxation of the cap

The Government recognises that there will be some circumstances where it is necessary or desirable to relax the cap. However, it should be noted that this safeguard is for use in exceptional situations. Further, the power to relax the cap must be exercised by a Minister of the Crown or someone to whom authority has been delegated.

Separate HM Treasury (HMT) directions set out the circumstances where the power to relax the cap must be exercised in "mandatory cases" and may be exercised in "discretionary cases".

Mandatory cases

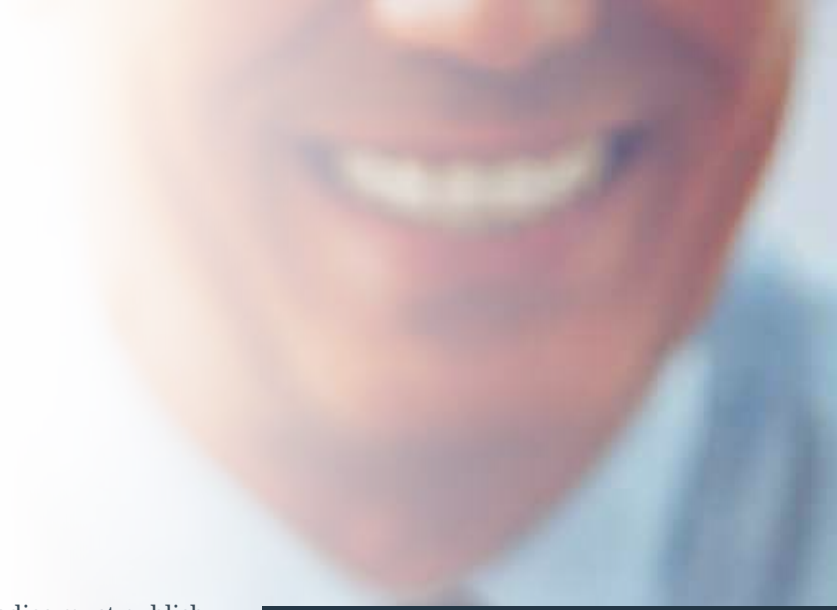
In mandatory cases there is no requirement for a business case to be sent to HMT for approval. The mandatory situations include:

- Where a payment is made as a result of TUPE applying
- Where a payment is made to avoid Employment Tribunal litigation in relation to a complaint that someone has suffered a detriment or been dismissed as a result of whistle blowing
- Where a payment is made to avoid Employment Tribunal litigation in relation to a complaint of discrimination under the Equality Act 2010.

Discretionary cases

The discretionary relaxation of the capping restriction may be exercised at the discretion of the Minister or delegated authority where it is appropriate to exercise that power on the basis of one or more of the following conditions:

- There are compassionate grounds owing to genuine hardship
- It is necessary to exit an individual to give or effect urgent workplace reforms
- An arrangement to exit was entered into before the Regulations came into force, but the exit was delayed until after that day and the delay was not attributable to the employee or office holder concerned.



Non-compliant payments

Any payment that exceeds the cap and is not compliant with the relaxation directions detailed above, would be considered to be a payment beyond the organisation's legal competence and could result in sanctions for the organisation or, if appropriate, sponsoring department by HMT.

Transparency/ record-keeping

Following the introduction of the Regulations, to ensure transparency, public sector employers should keep a record of exit payments made for public accountability purposes although this is not expressly mandated in the draft Regulations.

However, the draft Regulations do require records to be kept in circumstances where the relaxation of the cap provisions are applied. In such situations there needs to be a separate record of the exercise of the power kept for a minimum of three years from the date the power is exercised showing:

- The name of the payee in respect of whom the cap was relaxed
- The amount/type of the qualifying exit payment for which the cap was relaxed
- The day on which the power to relax the cap was exercised
- The reason why the power was exercised (this should refer to the Guidance and be sufficiently detailed to enable HMT to assess it has been appropriately applied).

Public sector bodies must publish information about any decisions to relax the cap and the Government strongly recommends that such information is published in their annual accounts.

There are also individual responsibilities in circumstances where an individual has two or more public sector employments/ offices that are in the scope of the exit payment cap obliging the individual to inform all of the other relevant authorities of the following information:

- That they are entitled to receive an exit payment
- The amount and type of that exit payment
- The date that they left employment or office
- The identity of the relevant authority that made the exit payment.

The draft Regulations raise a number of questions and depending on the responses received to the consultation they could be amended to address areas of uncertainty, so the matters outlined above could change when (it would appear there is a real appetite for the introduction of the legislation so it is a case of when rather than if) the draft Regulations are implemented.

The consultation is open until 3 July 2019 and we will provide further updates once the response to the consultation is published and the Government provides confirmation of the final position.

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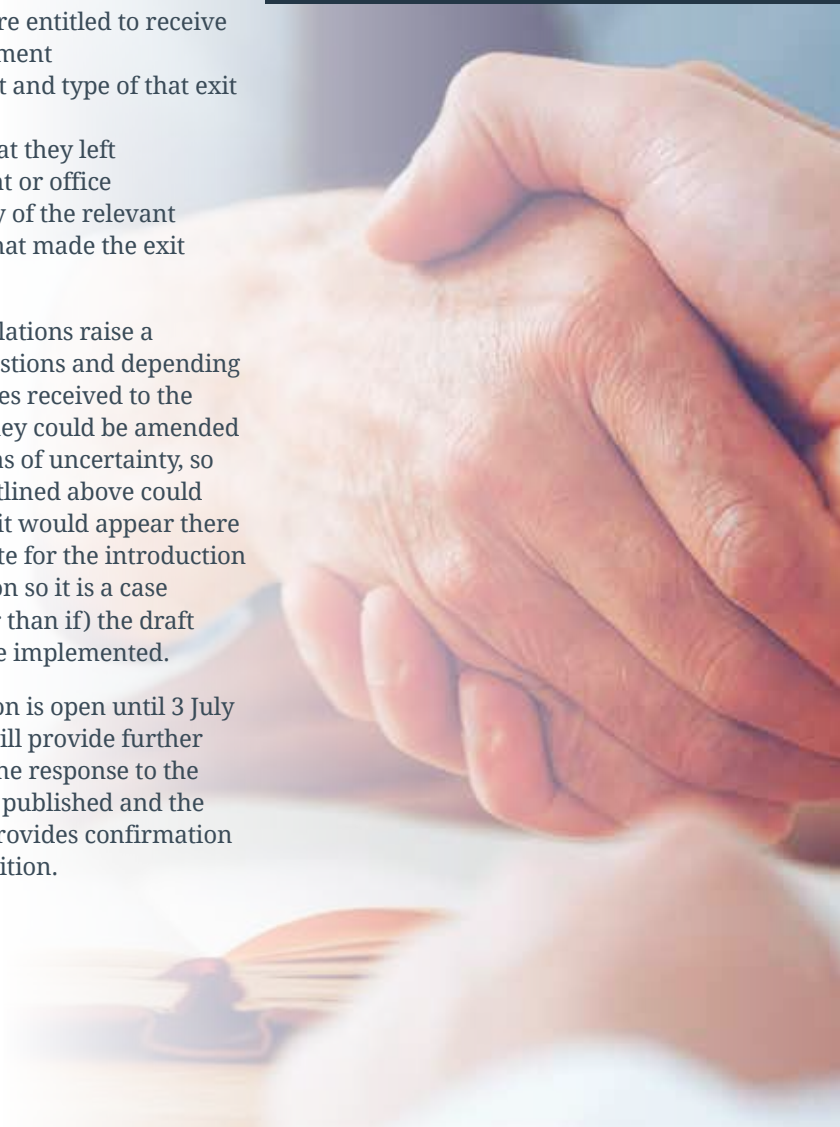
Fiona predominantly advises healthcare sector clients including regulators, often at board/executive level, on all aspects of employment law and in relation to strategic personnel related issues. She has significant experience of advising on complex and sensitive discrimination issues and litigation, which often attract media interest particularly in connection with gender, whistle blowing and disability.



A review of the Fit and Proper Persons Test

On 6 February 2019, the Government published Tom Kark QC's report of his review of the "Fit and Proper Persons Test" (FPPT).

Tom Kark QC was commissioned in July 2018 by the Minister of State for Health (at that time, Stephen Barclay MP) to review and make recommendations in relation to the FPPT. The purpose of the review, as described by Tom Kark himself, was to "focus upon the FPPT, to determine whether or not in its current form it is working, and how it might be adapted to ensure better leadership and management and prevent the employment of directors who are incompetent, misbehave or mismanage".

What is the FPPT?

The FPPT was introduced on 27 November 2014 for NHS trusts and foundation trusts under Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

It applies to directors and "equivalents", although the Care Quality Commission (CQC) guidance states that this is limited to executive, non-executive, interim and associate directors only and is intended to ensure NHS trusts seek the necessary assurances that all executive and non-executive directors (or equivalent post holders) are suitable and fit to undertake the responsibilities of their role.

In summary, the FPPT means that NHS trusts cannot appoint, or have in place, a director unless they:

- Are of "good character" – this is subjective but requires consideration of past criminal convictions and removals from professional registers. These must be considered but are not an absolute barrier to appointment. Regulation 5(3)(a) & Schedule 4, Part 2
- Have the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed. Regulation 5(3)(b)
- Are able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed. Regulation 5(3)(c)
- Have not been responsible for, privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity. Regulation 5(3)(d)
- Are an undischarged bankrupt, have an undischarged sequestration award in respect of their estate, are subject to a bankruptcy restrictions or interim bankruptcy restrictions order, a person to whom a moratorium period under a debt relief order applies, are included on the children's or adults' barred list or are prohibited from holding the relevant office or position by or under any enactment. Regulation 5(3)(e) & Schedule 4, Part 1.

What issues came to light in the review?

Tom Kark concluded that the FPPT essentially "does not ensure directors are fit for the post they hold, and it does not stop the unfit or misbehaved from moving around the system". The review summarises some of the main issues with the current FPPT which have led to a general recognition that the test has not been fully effective:

- Parts of the current test are difficult to understand, including important considerations such as whether a director is competent, experienced and has the requisite qualifications for the role
- The "good character" requirement is subjective and the guidance from the CQC on how to assess whether someone is of good character is broad
- The lack of a competency criteria means that whether a director's competency is reassessed, during the course of their career, will depend entirely on the vigour of the Chair, Chief Executive or HR Director. In contrast, other parts of the test have been applied vigorously in relation to convictions, bankruptcy and DBS checks
- The CQC, in general, regulates organisations and not individuals. This means that it will undertake "Well-Led" reviews of trusts where it will examine the trust's process for assessing whether a director is a fit and

proper person, but it will not look at the quality of the individual nor whether they are in fact a fit and proper person for the role in which they have been employed. The level and quality of the information retained on each director and specifically in relation to the FPPT also varies significantly between each trust

- Trusts have been missing out on a vital opportunity to share important information relating to candidates. There is currently no central database meaning that each trust needs to collate information on the potential director (or equivalent) and conduct the FPPT afresh
- Employment references can be lacking in important information. These references can be especially lacking if there are underlying confidentiality or settlement agreements that mean that the trust is unable to disclose the full background relating to the director's previous employment and departure from the trust
- There are concerns that directors who have committed serious misconduct are able to obtain director level jobs within NHS trusts and other organisations because information relating to these individuals is not being shared properly and there is currently no power to disbar a director for misconduct
- The FPPT is limited in application to providers in England only. This means that directors who fail the test can still move into director level roles in other jurisdictions
- There have been concerns that the FPPT has been misused by trusts who have relied on historic complaints to bolster disciplinary action against a director. In fact, the FPPT can require trusts to examine and consider previous conduct, performance and complaints that happened many years earlier at other trusts/organisations, when they do not necessarily have the information to do so.

Recommendations made by the report

1. All directors (executive, non-executive and interim) should meet specified standards of competence to sit on the board of any health providing organisation. Where necessary, training should be available.
2. A central database of directors should be created holding relevant information about qualifications and history.
3. There should be a mandatory reference requirement for each director.
4. The FPPT should be extended to all Commissioners and other appropriate Arms-Length Bodies (including NHSI and NHSE).
5. There should be the power to disbar directors for serious misconduct.
6. In relation to Regulation 5(3)(d) of the Regulations (relating to serious misconduct or mismanagement), the words "been privy to" should be removed.
7. Further work should be done to examine how the test works in the context of the provision of social care and whether any amendments are needed to make the test effective.

The future

In response to the review, Health and Social Care Secretary Matt Hancock announced that the Government would be accepting two of the seven recommendations (recommendations 1 and 2) made by the Kark review. This includes introducing new minimum competency standards and the establishment of a central database holding information relating to senior NHS managers' qualifications and previous employment history. This database would also hold employment information relating to previous disciplinary and grievance issues. It is important that NHS bodies watch out for the implementation of these recommendations so that their existing policies and procedures can be updated to reflect the changes.

Despite Tom Kark's recommendation that directors who are guilty of misconduct should be disbarred, the Government have delayed making a decision on the introduction of an NHS management regulator. Mr Hancock stated that although he could see the attraction of this proposal it was also important to "encourage more people and people of great calibre into positions of leadership within the NHS. So, getting the balance right so that this strengthens the system and encourages people in" is the focus.

The above recommendations will now be considered as part of a wider workforce review led by NHS Improvement. Hempsons will provide updates on the review process in future publications.

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Bronya advises clients in relation to both contentious and non-contentious aspects of employment law including: representing clients in Employment Tribunal matters, drafting employment documentation, managing employment relationships, family and sickness related leave, pay disputes, equality and diversity matters, redundancy and restructuring, grievances and disciplinary matters and matters arising following the end of the employment relationship.

Bronya has previous experience in professional regulatory work having worked in-house at a large professional regulatory body within the healthcare sector.

Events update

HPMA National Conference & Awards

6 - 7 June 2019
Hilton Deansgate – Manchester

Hempsons will be exhibiting at stand number 9.

Please see programme here: **https://hpma.org.uk/node/2833**

Health Plus Care – Residential and Home Care Show

26-27 June 2019
ExCeL London Homecare Theatre

Martin Cheyne will be running a workshop on 26 June from 4.15 - 4.45pm:

It's all about the money
The National Wage – is it a minimum or a living wage?

Martin Cheyne will be looking at some of the key wages issues in the sector. Sleep-in payments remain controversial and unresolved, yet money is tight, and commissioners cannot afford to fully fund sleeping shifts. As if that wasn't enough, holiday pay and travel time have been continuing to create headaches. How much should we be paying?

https://www.residentialandhomecareshow.co.uk/conference-programme

Hempsons Employment Tribunal Training Event

3 July 2019 - 2 – 5pm

Hempsons London

Hempsons are hosting a free mock Employment Tribunal (ET) training event in conjunction with Devereux Chambers.

The event aims to give delegates helpful practical insight into the ET hearing process, including: the format of a hearing; cross-examination of witnesses' legal submissions and delivery of the Judgment. This will be a lively, informative and interactive event as delegates will be asked to participate in the ET panel's deliberations prior to the delivery of the Judgment; the event will also provide practical help and tips and is a great opportunity to ask questions of the expert advisors.

https://www.hempsons.co.uk/events/

Look out for our employment law update seminars in the Autumn.
To make sure you receive an invite please email **mail@hempsons.co.uk**

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About Hempsons

Hempsons is a leading national law firm specialising in health and social care, practitioners, real estate, charities and social enterprise sectors across the UK. Our highly experienced lawyers provide a number of cost-effective solutions for a range of private and public healthcare organisations, from employment law through to clinical negligence.

We aim to achieve our clients' objectives and provide support down to the last detail whether the issue is big or small, challenging or simple. We work with over 200 NHS organisations including NHS trusts, foundation trusts and commissioning bodies, with services delivered by a team of over 130 specialist healthcare lawyers. A significant number of our employees hold dual qualifications, combining medical, dental or nursing qualifications with their legal credentials.

You can find details of our lawyers and their specialisms on our website.

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