Employment

The Good Work Plan: what next for employment law?

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At the end of 2018, the government announced the Good Work Plan, which develops its response to the Taylor Review. It describes the plan as "*the biggest package of workplace reforms for over 20 years*". This blog considers some of the more eye-catching proposals aimed at tackling "one-sided flexibility" in the working relationship, including the proposals to align the different tests of employment status, abolish the Swedish derogation for agency workers and introduce a new right for workers to request a more stable contract.

The issue of employment status was a critical area of focus in the Taylor Review and has been subject to consultation, as well as considerable judicial scrutiny, in the past year. The Taylor Review proposed that:

- The definition of "worker" should be consistent across legislation.
- The term "worker" should be abandoned in favour of "dependent contractor".
- There should be greater emphasis on the element of control in the working relationship, rather than personal service, to avoid the misuse of substitution clauses by employers.

Notwithstanding the promise of wide-sweeping reform, detail is currently lacking. The government states that it will "*legislate to improve the clarity of the employment status tests, reflecting the reality of modern working relationships*". It is unclear whether the government agrees that greater emphasis should be placed on control and conversely less on personal service. In the light of the nuanced analysis regarding personal service provided by the Court of Appeal in *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51 (decision upheld by the Supreme Court in [2018] UKSC 29), it is arguably more difficult for employers to rely on substitution clauses and the government may seek to codify this position in legislation.

The government also explains that it will seek to reduce any differences in the tests in the employment law and tax systems to an *"absolute minimum"*. It does not provide any indication as to how it will seek to align the three tier of status in employment law with the two-tier test in tax where the intermediate category of "worker" is not incorporated. Such an aim seems fraught with tension. HMRC may want a defined status with a relatively low threshold to capture as many individuals as possible within the charge to income tax currently visited on employees, whereas businesses, as well as some workers, will want to retain flexibility as working practices modernise in response to a more digitised economy. It seems likely the systems will remain disjointed for some time.

Some practitioners will welcome the government's proposal to abolish the "Swedish derogation" currently enshrined in regulation 10 of the Agency Worker Regulations 2010 (SI 2012/93) (AWR 2010), whereby there is presently no right to equal pay for an agency worker who has a (sufficiently) permanent contract of employment with a temporary work agency providing for pay between assignments. This would mean that all agency workers would have a right to equal pay after the 12-week qualifying period has passed. This raises the issue of the extent to which hirers may now seek to shorten the length of assignments. No doubt more attention will be paid to the anti-avoidance provisions in the AWR 2010. The repeal is expected to come into force from 6 April 2020, so recruitment businesses and hirers will need to revisit their pay-between-assignment models with some urgency.

The government has also put forward proposals to address exploitation of "zero-hours" workers. It proposes to introduce a right for all workers to request *"a more predictable and stable contract"* after 26 weeks of service, to which the employer must respond within three months. The enforcement process is not made clear, although it is suggested that the right will be analogous to the right to request flexible working. Consequently, one assumes that a worker may only complain to an employment tribunal if the employer fails to consider the application in a reasonable manner and rely on certain statutory grounds if the application is refused, and that only one request can be made within a 12-month period. This suggests that scrutiny of an employer's decision is likely to be relatively restricted.

The Good Work Plan may provide a clue that the government does not propose to roll back employment rights significantly following Brexit. However, at present it is difficult to see how employment rights, particularly those addressing *"one-sided flexibility"*, will be substantially progressed by way of legislation in the coming months and years.

A previous version of this blog was published on 27 February 2019 by Practical Law Company. This can be viewed here .

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