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Client Alert

Global Human Capital and Compliance

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General Election Manifesto Round-Up and Other Employment Law Developments

In anticipation of next week's General Election, this month's alert examines key employment law pledges made by the political parties in their election manifestos, an extension to parental leave rights and recent legal highlights including dismissal for lying in a job application, and whether overseas employees can claim UK rights.

ELECTION MANIFESTO ROUND-UP

Last month's alert covered the Labour Party's New Deal for Working People, which pledges to significantly reform UK employment laws and introduce an employment bill within Labour's first 100 days in office. Labour's subsequently published manifesto restates this commitment but promises to "fully consult" with the public on how it will put its plans into practice before legislation is passed. The manifesto unveiled a further proposal to extend equal pay legislation to Black, Asian and ethnic minority staff, and people with disabilities. The press had previously suggested there were plans to introduce a Race Equality Act but this had not been included in the 'New Deal.' If Labour wins the General Election, we will host a webinar early in July to explore what these proposals mean for employers in practice.

In terms of the other parties' proposals , the Conservative manifesto is generally quiet on specific employment law pledges but pledges to:

- Overhaul the fit note process so that people are not signed off sick as the 'default', moving responsibility for issuing fit notes away from GPs to specialist work and health professionals;
- Continue to implement the Strikes (Minimum Service Levels) Act 2023 to limit the impact of industrial action on public services;

- Maintain the National Living Wage at two-thirds of median earnings, reduce employee National Insurance to 6% by April 2027 and abolish the main rate for the self-employed altogether; and
- Introduce legislation to clarify that the protected characteristic of 'sex' in the Equality Act means 'biological sex' and that an individual can only have one legally recognised sex.

It is notable that the Conservative manifesto does not include any mention of the previous announcement to limit the length of non-competes to three months.

The Liberal Democrats are proposing a number of significant employment law reforms, including:

- The promotion of employee ownership, with a new right for staff in large listed companies to request shares to be held in trust for the benefit of employees;
- A right to flexible working and the right for every disabled person to work from home unless there are significant business reasons why it is not possible;
- A new 'dependent contractor' employment status in between employment and self-employment, with entitlements to minimum wages, sick pay and holiday. It is unclear how this would differ from current worker status;
- Ensure that apprentices are paid at least National Minimum Wage and establish an independent review to recommend a genuine living wage across all sectors; and
- To extend Statutory Sick Pay by removing the three-day waiting period and the earnings qualification threshold (which is consistent with Labour's New Deal).

The Green Party has also proposed significant pro-worker reforms, pushing for equal employment rights for all workers from day one, a move to a four-day working week and a repeal of recent 'anti-union legislation', with strengthened rights to strike and organise in the workplace.

On the other side of the spectrum, the Reform Party is pledging to replace the Equality Act, with removal of positive action laws and all DE&I rules and to leave the European Convention on Human Rights.

PATERNITY LEAVE FOR BEREAVED PARTNERS

In the last days before the election, a new right has been passed, to make paternity leave a day one right in cases where the mother of a newborn child has died. If both the mother and child die, bereaved partners will still be able to take paternity leave, despite it not being used to care for the child or support the mother. The Act only deals with leave and it is not clear if rights to pay will also be extended. Further detail is to follow, and it is not clear when this change will come into force.

EAT UPHOLDS WAIVER OF FUTURE CLAIMS UNDER A SETTLEMENT AGREEMENT

In a helpful decision for employers, the EAT has upheld an Employment Tribunal decision which struck out a discrimination claim because the employee had previously waved his right to bring future claims under a settlement agreement. In this case, the claimant had been absent due to ill health for a number of years. Following a grievance in relation to a lack of pay rise and holiday pay, the parties entered into a settlement agreement under which the claimant remained employed but moved to a 'disability plan' under which he received specified disability salary payments. In return, the claimant waived the right to bring certain claims, including for disability discrimination, whether or not they

were or could be in the contemplation of the parties at the date of the agreement. Nearly ten years later, the claimant brought a disability discrimination claim on the basis that he had not had a salary review since transferring to the disability plan, after signing the Settlement Agreement.

The EAT dismissed the appeal, holding that the waiver covered future discrimination claims related to the transfer to the disability plan, regardless of whether they were contemplated at the time. The EAT confirmed the approach taken by the Scottish Court of Session[i] in a decision last year which established that future unknown claims can be settled provided they are plainly and unequivocally identified. Employers in England and Wales can now rely on this EAT decision, provided Settlement Agreements clearly set identify the types of claims waived.

TERRITORIAL REACH OF THE UK EMPLOYMENT TRIBUNAL TO OVERSEAS EMPLOYEES

In this case, a former employee of the British Council in Dubai sought to bring employment claims in the UK after being unable to pursue these in the UAE. The claimant lived and worked exclusively in Dubai and the Tribunal found that she was a "local employee through and through" with insignificant connection to British employment law. Despite this finding, the Tribunal held that the claims arising out of the employment in the UAE were within its jurisdiction. This was because, in the Tribunal's eyes, the British Council would claim immunity in the proceedings, and this would be contrary to international law and the right to a fair trial under the European Convention on Human Rights (**ECHR**), leaving the claimant in a "legal lacuna". The "territorial pull" of UAE law had been severed due to diplomatic immunity and the Tribunal considered it was bound to give effect to the Employment Rights Act in a way that was compatible with the claimant's right to a fair trial and allow the claim in her British employer's state court.

The EAT found there was no "proper foundation" for these assumptions and overturned the decision. The fact the employee might not be able to bring a claim in the UAE Courts, because the Council might claim immunity, was not a proper basis for extending British employment protections to a local employee in the UAE. This judgment demonstrates again that there needs to be a sufficiently strong connection with the UK to fall within the protection of UK employment laws and for the English Tribunals to take jurisdiction.

LEAVE POLICY – NO INDIRECT DISCRIMINATION AGAINST FOREIGN NATIONALS

The EAT ruled that a Tribunal adopted incorrect reasoning in ruling that an employer's approach to unauthorised leave during the pandemic indirectly discriminated against non-UK nationals. Although the events of the pandemic are hopefully behind us, the decision provides guidance on considering whether a 'provision, criterion or practice' (PCP) is indirectly discriminatory and could have broader implications for employers exercising discretion under leave policies more generally.

The case concerned a Polish national who had requested three weeks' leave from his job in the UK to visit Poland after his father's death. The claimant overstayed by three weeks after he was unexpectedly quarantined upon arrival in Poland and required additional time to organise his father's funeral before returning to the UK for a further quarantine. The claimant was issued with a final written warning for failing to comply with a policy which required employees to factor in quarantine periods within their leave.

The Tribunal held this policy put non-UK nationals at a particular disadvantage on the basis that they would be more likely to travel overseas to deal with family emergencies or visit relatives. The EAT overturned this finding - and the rare award of aggravated damages - on the basis that the Tribunal focused too heavily on the claimant's personal circumstances and failed to demonstrate the impact on the general group alleged to be disadvantaged by the PCP (other non-UK nationals). Additionally, the Tribunal should have conducted a detailed balancing exercise when

considering if there were more proportionate ways the employer could have fulfilled its business requirements (for example, the cost of using agency workers to cover the absence, and whether this was actually viable).

The matter has been remitted back to the Tribunal to reconsider this point. The EAT did however uphold a claim for harassment on the basis that the line manager's series of disciplinary threats were negatively influenced by his view of the claimant's previous trips to Poland which were "held against" him and were in part based on him being Polish.

POLICE CHIEF SACKED FOR GROSS MISCONDUCT AFTER LYING ON CV

A police chief constable has been dismissed for gross misconduct after an investigation found that he lied about his naval rank, length of service and achievements when applying for the role in 2018. The police chief claimed to have served in the Navy for ten years (when he had only served for two) and had worn a medal which falsely suggested he had served in the Falklands conflict. The matter has received significant media attention and highlighted flaws in the vetting and recruitment process of police officers. It serves as a reminder for employers to ensure that appropriate background checks are undertaken, which can include third party vetting, subject to data privacy compliance. Employers should make any offer conditional on satisfactory results being received. Employment contracts should make clear that the employer has the right to terminate without notice for untrue or incomplete information given during the recruitment process, even if only uncovered after the employee starts work – although an employer is always in a stronger position if checks are completed prior to starting work. If Labour introduce day one unfair dismissal rights, it will be all the more important to complete these checks before employment begins otherwise a full disciplinary procedure may be required to dismiss a short-serving employee for gross misconduct.

[i] Bathgate v Technip Singapore PTE Ltd [2023] CSIH 48.