

## HRizon

November 2020





# EMPLOYMENT

**Welcome to our November HRizon employment newsletter. With just five weeks to go until Brexit occurs, we consider the employment implications for employers and their workers from the EU. We also take a detailed look at the new cap on public sector exit payments, and highlight recent employment law cases and HR news from the last month.**

## In the Court of Appeal

**Can an absence of financial means justify indirect discrimination?** Indirect discrimination occurs when an employer applies a provision, criterion or practice (PCP) that is neutral and applies equally to all workers, but which inadvertently puts a certain group of workers with a protected characteristic at a disadvantage in comparison to other workers who do not share that protected characteristic. An employer has a defence to a claim of indirect discrimination if it can prove that the PCP is objectively justified, as a proportionate means of achieving a legitimate aim. Employers often point to cost considerations when attempting to justify an apparently discriminatory PCP. In 2012, the Court of Appeal [endorsed](#) what became known as the 'cost-plus' approach, meaning that considerations based on cost alone, or on economic or financial factors alone, cannot justify treatment that is discriminatory – there must be something more (the 'plus' in the phrase 'costs plus'). The Court of Appeal has recently revisited this issue when it considered whether an employer could rely on absence of financial means to justify a PCP that put younger workers at a disadvantage. The claim was brought by H, a probation officer employed by the Ministry of Justice (MOJ). Following cuts to public sector funding, the MOJ changed the rate at which probation officers, including H, progressed up the salary scale. As a result, it would take H many more years to reach the top of the pay scale, so he brought an indirect age discrimination claim. The ET held that the MOJ's amended pay policy was indirectly discriminatory, because it favoured probation officers over the age of 50. However, the ET went on to hold that, in light of the funding constraints the MOJ was under, the PCP was objectively

justified. The EAT rejected H's appeal, so he appealed to the Court of Appeal. The Court expressed a dislike of the term 'cost plus', although said that the legal principle itself is sound. An employer's need to 'live within its means', or unaffordability, is a legitimate aim capable of objectively justifying indirect discrimination. The Court held that there is a distinction between something being more expensive, and unaffordable. The Court held that the ET had been entitled to draw a distinction between an absence of financial means and impermissible reliance on costs alone. (*Heskett -v- The Secretary of State for Justice* [2020] EWCA Civ 1487)

## In the High Court

**Are 'workers' entitled to PPE, and to be protected from being subjected to detriments on health and safety grounds?** The High Court recently considered a judicial review application brought by a trade union on behalf of its members. Those members are predominantly 'workers', as opposed to employees, and they mainly work in the so-called 'gig economy' and in sectors such as public transport and taxis. The union sought a declaration that the government had failed to properly implement two EU directives on the provision of personal protective equipment (PPE) and health and safety at work. The directives had been implemented in the UK legislation to afford protection only to 'employees' and the union argued this should have protected the broader category of 'workers'. Between them, the two directives provide: (a) that an employer must provide suitable PPE if the risks of an activity cannot otherwise be avoided; and (b) the right to leave a workplace, or take action, in circumstances of serious and imminent danger (s44 ERA 1996). The High Court granted a declaration that the directives had not been properly implemented. The domestic provisions should have extended to the wider category of 'worker'. Unless the government successfully appeals the decision, it must now introduce legislation to extend the scope of these protections to 'workers'. (*The Independent Workers' Union of Great Britain -v- The Secretary of State for Work & Pensions and others* [2020] EWHC 3050 (Admin))



**An EHRC investigation has found no unlawful acts of equal pay discrimination by the BBC:** In March 2019, the Equality and Human Rights Commission (EHRC) launched a statutory investigation into suspected pay discrimination at the BBC, following high-profile complaints by female presenters. The EHRC recently published [its report](#), in which it concluded that it had found no evidence of unlawful acts of pay discrimination by the BBC, but made some recommendations to improve pay transparency.

**Changes to bank holidays in 2022 to celebrate the Queen's Platinum Jubilee:** In 2022, as part of the celebration of the Queen's 70th anniversary, the government has [announced](#) that the late May bank holiday (which would usually take place on Monday 30 May 2022) will be moved to Thursday 2 June 2022, and an additional bank holiday will take place on Friday 3 June 2022.





# Public sector exit payments cap

**The Restriction of Public Sector Exit Payments Regulations 2020 (the Regulations) came into force on 4 November 2020. The Regulations, which apply to England, impose a cap of £95,000 (the cap) on exit payments in the public sector. Public sector bodies within the scope of the Regulations include the NHS, as well as local authorities, maintained and academy schools, fire authorities, the civil service and the police.**

The Regulations take precedence over existing contractual agreements in addition to earlier regulations and other exit schemes that make more generous provisions, when compared to the Regulations, unless these arrangements are exempt.

## Exit payments (regulation 5)

Exit payments, when made in consequence of termination of employment or office, are any:

- Payment on account of dismissal by reason of redundancy (subject to regulation 7)
- Payment to reduce or eliminate an actuarial reduction to a pension on early retirement or in respect to the cost to a pension scheme of such a reduction not being made
- Payment pursuant to an award of compensation under the Acas Arbitration Scheme or a settlement or conciliation agreement
- Severance payment or ex gratia payment
- Payment in the form of shares or share options
- Payment on voluntary exit
- Payment in lieu of notice due under a contract of employment
- Payment to extinguish any liability to pay money under a fixed-term contract
- Other payment, whether under a contract of employment or otherwise, in consequence of termination of employment or loss of office

## Exempt payments (regulation 6)

Some payments are exempt from the cap (in other words where higher amounts might be paid). These include any payment:

In respect of:

- death in service
  - incapacity as a result of accident, injury or illness
  - annual leave due under a contract of employment but not taken
- In compliance with an order of a court or tribunal
- In lieu of notice due under a contract of employment that does not exceed one quarter of the relevant person's salary

## Prohibition on reducing a statutory redundancy payment or its equivalent (regulation 7)

Regulation 7 sets out prohibition on reducing a statutory redundancy payment, or its equivalent. However, where an individual receives a statutory redundancy payment plus other exit payments, the total of which exceeds the cap, then the other exit payments must be reduced, to zero if necessary, so the total sum does not exceed the cap amount. For example, 'pension strain or pension top-up payments'.

## Multiple exit payments

Where two or more exits take place within 28 days (multiple exit payments) and, as a result, the total of those payments combined would exceed the cap, the Regulations prescribe the sequence in which exit payment will have been paid, for the purpose of applying the cap.

## Relaxation of the cap

The Regulations specify mandatory and discretionary situations when the cap can be relaxed by the decision maker (defined as Ministers of the Crown or the full council of a local authority in England):

- **Mandatory exercise of the power:** The decision maker has the mandatory power to relax the cap following compliance with the [HM Treasury Directions](#) (the Directions) or alternatively, with consent of the Treasury. This does not apply to payments made by a devolved Welsh authority. The Directions state it is mandatory to exercise the power to relax the restriction in relation to payments arising as a result of a TUPE transfer, or employment tribunal claims arising from health and safety, whistleblowing and discrimination (if the decision maker is satisfied on the balance of probabilities that a tribunal would make an award or order of compensation).
- **Discretionary exercise of the power:** The decision maker may exercise the power to relax the cap where they are satisfied that:
  - not exercising the power would cause undue hardship
  - not exercising the power would significantly inhibit workforce reform
  - a written agreement to exit was made before the coming into force of the Regulations

- it was the intention of both parties that the exit would occur before that date
- any delay to the date of exit was not attributable to the employee or office holder as applicable

If it is a local authority, rather than a minister of the crown, that seeks to exercise the above discretion, then Treasury consent is required beforehand.

## Records and reporting

The Regulations set out various record keeping responsibilities:

- **Employer's responsibilities:** Where the cap has been relaxed employers must keep a record of the exercise of the power 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 and type of the qualifying exit payment for which the cap was relaxed;
  - the date on which the power to relax the cap was exercised; and
  - the reason why the power was exercised (this should refer to the [Guidance](#) and be sufficiently detailed to enable HM Treasury to assess if it has been appropriately applied).

Employers must publish the above information (save for the payee details) at the end of the financial year. The government strongly recommends that the information be published in annual accounts.

- **Individual responsibilities:** Where an employee is entitled to receive an exit payment, they must provide the following information in writing to the relevant authorities of which they are an employee, or which are responsible for determining their level of remuneration in respect of a public office they hold:

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

## Ultra vires

Overall, employers are responsible for ensuring any exit payment that it makes does not exceed the public sector exit payment cap (save for the mandatory waivers and/or exercising discretion to waive the cap mentioned above). Any payment that exceeds the cap and is not compliant with the Regulations or Directions is considered a payment beyond the organisation's legal competence (and therefore ultra vires), which may result in sanctions on the organisation or, if appropriate, on the sponsoring department by HM Treasury.

## Practical implications

For public sector bodies, especially those involved in reorganisation, or change management programmes, the cap is likely to have significant implications. Further, the fact that compensation ordered by a tribunal or court is exempt from the cap, may make it much more difficult to settle large claims.

Emma Ahmed, Legal Director (PSL), Commercial Employment, Liverpool (adapted from this article written by Lee-Anne Crossman)



# Brexit: employment implications

**With just five weeks left to prepare for Brexit, we consider the key implications for employers, including the deadline to apply for pre-settled or settled status, how to conduct right-to-work checks from 1 January 2021 and the new points-based immigration system.**

## Brexit: where are we up to?

The United Kingdom (UK) left the European Union (EU) on 31 January 2020. At that point, the UK entered into an eleven-month transition period to allow time to negotiate a new trade relationship with the EU. The transition period ends at midnight on 31 December 2020 and the deadline to apply for an extension to the transition period has passed.

## What rules apply during the transition period?

During the transition period, the UK has remained in the EU single market, its customs union and has continued to pay into the EU budget. In practical terms, this means:

- British citizens can continue to live, work, study and retire to the EU27
- EU27 nationals can continue to live, work, study and retire to the UK
- The freedom of movement of goods, people, services and capital over borders continues

- The UK continues to follow EU rules, but has no say in making them

This means that, although the UK is no longer a member of the EU, very little has changed during the transition period; it has been largely 'business as usual'.

## When does the transition period end?

The 1 January 2021 is the first day outside the transition period. On the 1 January, the UK will either be:

- trading with the EU on new terms (having reached a deal); or
- will have left the transition period without a deal (a so called 'no-deal' Brexit), which means trading with the EU on World Trade Organization (WTO) terms.

## What are the immigration implications of Brexit for EU27 nationals?

To continue to live and work in the UK after 31 December 2020, nationals of the following countries must [apply for either 'settled status' or 'pre-settled status'](#) by the 30 June 2021 deadline:

- the EU27 (except Ireland)
- Iceland
- Liechtenstein
- Norway
- Switzerland

Those nationals do not need to apply if they have:

- Indefinite leave to enter the UK
- Indefinite leave to remain in the UK
- British or Irish citizenship (including 'dual citizenship')

Failure to acquire either 'settled status' or 'pre-settled status' before the 30 June 2021 deadline, will render individuals illegal immigrants and they will be subject to removal from the UK. However, in certain limited circumstances, it will be possible for [close family members of individuals with pre-settled or settled status](#) to join them legally in the UK after 31 December 2020.

## Settled status – for those with five years' continuous residence in the UK:

EU citizens who have been resident in the UK lawfully for five continuous years by 31 December 2020 will be able to [apply for 'settled status'](#) to stay indefinitely under the EU Settlement Scheme. The deadline for applying is 30 June 2021.

To be eligible, they must have lived in the UK for at least six months in each twelve-month period, for at least five years in a row. However, there are some [exceptions](#) to this rule eg one period of up to twelve-months for an important reason (for example, childbirth, serious illness, study, vocational training or an overseas work posting)

Settled status means that the individuals will be able to:

- Work in the UK
- Use the NHS for free
- Enrol in education or continue studying
- Access public funds such as benefits and pensions (subject to eligibility)
- Travel in and out of the UK

## Pre-settled status – for those without five years' continuous residence in the UK:

Those EU citizens who have been resident in the UK for fewer than five years by 31 December 2020 will be entitled to [apply for 'pre-settled status'](#), until they acquire the necessary five years' continuous residence to obtain 'settled status'. The deadline for applying is 30 June 2021.

Pre-settled status means that the individuals will be able to:

- Work in the UK
- Use the NHS for free
- Enrol in education or continue studying
- Access public funds such as benefits and pensions (subject to eligibility)
- Travel in and out of the UK

## What about right-to-work checks?

Employers need to check a job applicant's right to work in the same way as now until 30 June 2021. Job applicants can prove their right to work in the following ways:

- EU27, EEA or Swiss citizens can use their passport or national identity card
- Non-EU27, EEA or Swiss citizen family members can use an immigration status document listed in the [right-to-work checks employer guide](#)

- EU27, EEA and Swiss citizens and their family members can use [the online right-to-work checking service](#)
- Irish citizens will continue to prove their right to work in the UK as they do now

If an applicant uses the online checking service, this will generate a 'share code' and their prospective employer can use the [employers' online service](#) to check their right to work using this 'share code'.

Employers have a duty not to discriminate against EU27, EEA or Swiss citizens. A prospective employer cannot require those individuals to prove their status under the EU Settlement Scheme until after 30 June 2021.

## What is the new immigration system from 1 January 2021?

A [new immigration system](#) will apply to people arriving in the UK from 1 January 2021 and from this date EU27 citizens moving to the UK to work will need to get a visa in advance (unless, in limited circumstances, they are [joining a close family member with settled or pre-settled status](#)). EU27 citizens applying for a [skilled worker visa](#) will need to show they have a job offer from an approved employer sponsor to be able to apply.

Emma Ahmed, Legal Director (PSL), Commercial Employment, Liverpool



# Meet the team



## Charlotte Hart

Senior Associate, Employment & Schools,  
Liverpool

### Name your three top movies of all time?

It is too hard to pick just three! My all time favourite film is When Harry Met Sally – it is an absolute rom com classic. Then I would probably say Cast Away (even though I can't stand the part where he loses Wilson!), Dirty Dancing, The King's Speech, Mean Girls and Moana are also up there.

### Where is your favourite place in the world to visit?

It obviously has to be Disneyland Florida. I don't care what anybody says – it is just the best! I used to go all the time with my family when I was little and I genuinely don't believe that anyone can be sad there.

### What advice would you offer your teenage self?

Care less about what people think of you and don't make decisions based on what others think is best, but rather what you want. However, I would also like reassure my teenage self that those hormonal spots will go.

### Which five people (alive or dead) would you invite to a dinner party at your house?

David Attenborough, Taylor Swift, Sir Isaac Newton (because I am told that I am related to him and I therefore want to confirm this), Chrissy Teigen and Sam Cooke. However, I would also love to invite my mum and dad when they were younger because I am so intrigued as to what they were like in person when they were my age.

### Who is your favourite superhero?

Wonderwoman – who doesn't love a strong, powerful, independent woman. However, I would be lying if I said I didn't have a little soft spot for Captain America.

If you would like to know more about us, or any other services we provide please visit our website or contact:



**Jeff Middleton**  
Partner (Manchester)  
+44 (0)161 817 7260  
jeff.middleton@hilldickinson.com



**Kerstie Skeaping**  
Partner (Liverpool)  
+44 (0)151 600 8498  
kerstie.skeaping@hilldickinson.com



**James Williams**  
Partner (London)  
+44 (0)20 7280 9245  
james.williams@hilldickinson.com



**Amy Millson**  
Legal Director (Leeds)  
+44 (0)113 487 7969  
amy.millson@hilldickinson.com



**Luke Green**  
Partner and head of education/schools (Liverpool)  
+44 (0)151 600 8791  
luke.green@hilldickinson.com



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