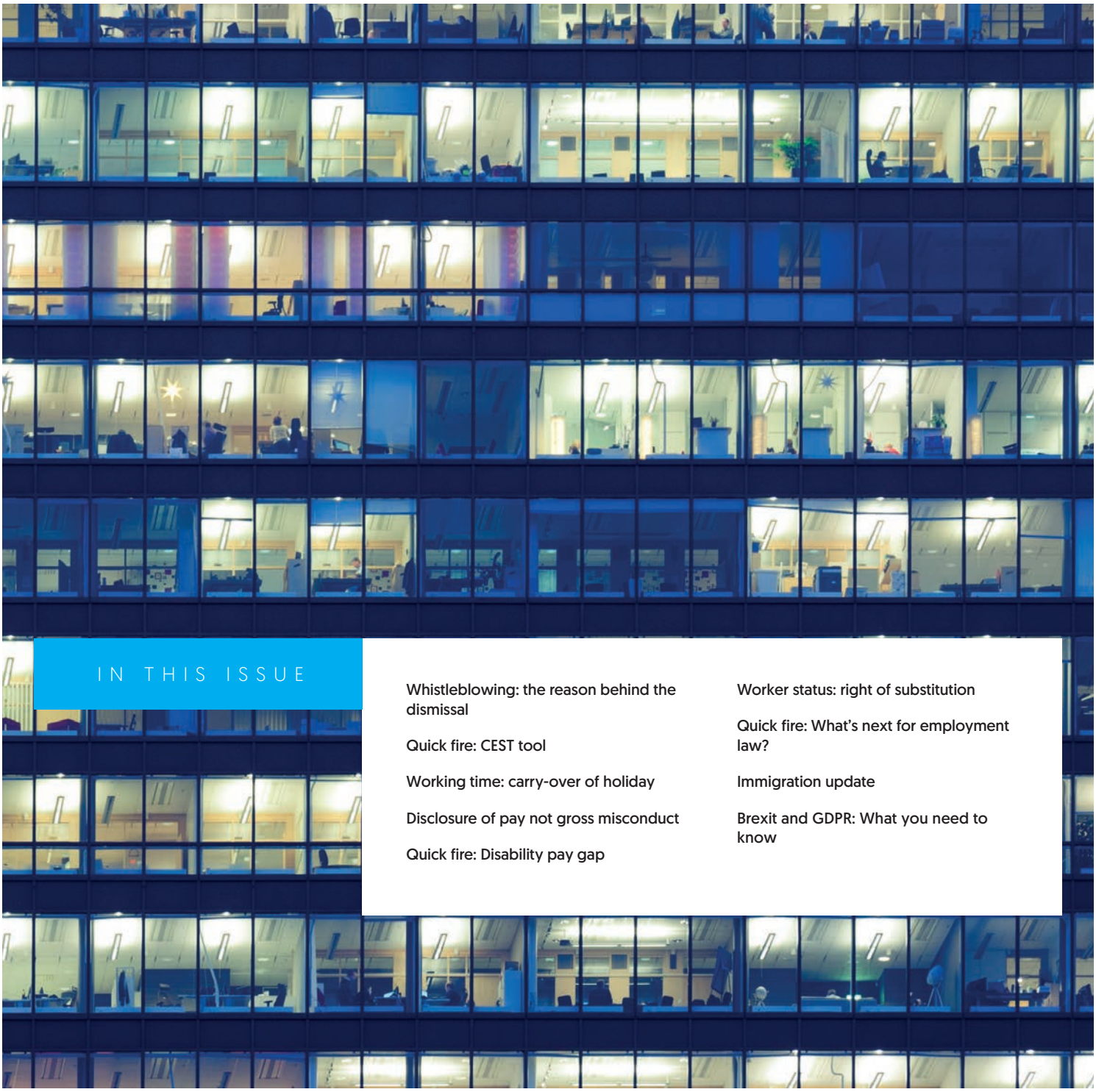
Birketts

WELCOME TO THE DECEMBER 2019

Employment and Immigration Law Update



IN THIS ISSUE

Welcome to the December 2019 edition of Employment and Immigration Law Update, our monthly newsletter for HR professionals.

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We are very proud to announce that we have been awarded Firm of the Year (outside London) for Human Resources by the Legal 500. Read more.

In this month's issue: an important Supreme Court decision on when a dismissal is automatically unfair for whistleblowing, a decision of the European Court of Justice on the carrying forward of holiday following sickness absence and EAT decisions on worker status and whether the disclosure of a senior colleague's salary information amounted to gross misconduct. We also provide our usual round-up of news items as well as an immigration update.

Don't forget to book your place at one of our free *Early Birds* seminars in February/March, which will be focussing on the topic of reasonable adjustments for disabled employees. For more details see www.birketts.co.uk/events. We look forward to seeing you there.

As always, we would love to hear any feedback you have on this month's newsletter.

We wish you a very happy Christmas and a prosperous 2020.

Don't forget to complete the free 2020 Best Employers Eastern Region employee survey, measuring employee engagement, company culture and values. Participating organisations receive a tailored report summarising the findings of the survey, an action plan for further development and automatic entry for a series of prestigious awards. To discover more about Best Employers Eastern Region 2020 visit the dedicated web pages.

IN THIS ISSUE

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Whistleblowing: the reason behind the dismissal

The Supreme Court has handed down its decision in a case looking at the circumstances when a dismissal is automatically unfair due to an individual making a protected disclosure.

Royal Mail Group Ltd v Jhuti [2019] UKSC 55

Facts

The claimant in the case, J, had made a protected disclosure to her line manager relating to an alleged breach of the employer's rules and regulatory requirements. After making the disclosure, she was subjected to an onerous performance management procedure by her line manager. Following a period of sick leave, J was eventually dismissed for poor performance by another manager, who was not fully aware of the background or of the protected disclosure.

J brought claims for having been subjected to detriments and for automatic unfair dismissal, both on the grounds that she had made a protected disclosure. An employment tribunal rejected her claim for unfair dismissal on the basis that the manager who had made the decision to dismiss was unaware that she had made a protected disclosure, therefore the disclosure could not have been the reason for the dismissal. This decision was overturned by the Employment Appeal Tribunal, but the Court of Appeal agreed with the original tribunal's decision that the focus had to be on the knowledge, or state of mind, of the person who actually took the decision to dismiss (see our previous summary of the Court of Appeal's decision). J appealed to the Supreme Court.

> *"The claimant... had made a protected disclosure to her line manager relating to an alleged breach of the employer's rules and regulatory requirements.*

Supreme Court decision

The Supreme Court has upheld the appeal, finding that J's dismissal was automatically unfair due to making a protected disclosure.

The Court said that it is generally only necessary to look at the reason for dismissal given by the decision-maker, but if the real reason for the dismissal (in this case, the protected disclosure) is hidden from the decision-maker behind an invented reason, it is the court's duty to look behind the invention. If the hidden reason has been determined by someone in the hierarchy above the employee, that reason can be attributed to the employer as being the true reason for the dismissal, rather than the invented reason.

...tribunals will be entitled to look behind the decision-maker's stated reason for the dismissal...

Consequences

This decision will have wider implications beyond whistleblowing, as the principles it establishes will apply equally to dismissals falling within the category of 'ordinary' unfair dismissals. It means that tribunals will be entitled to look behind the decision-maker's stated reason for the dismissal, in circumstances where that reason may have been used to disguise the true reason for the dismissal. However, the Court also recognised that the facts of this case were 'extreme', and therefore instances of a dismissal for a reason deliberately constructed by an individual's line manager would not be common in practice.

The CEST tool asks a series of questions in order to determine an individual's employment status for tax and National Insurance Contribution purposes...

QUICK FIRE

CEST Tool

The HMRC 'Check Employment Status for Tax' (CEST) tool has recently been updated, alongside new and updated CEST guidance.

The CEST tool asks a series of questions in order to determine an individual's employment status for tax and National Insurance Contribution purposes (not for determining employment rights). A revised version of CEST has been long-promised by HMRC, in light of recent tax-status decisions and criticism over the accuracy of the results provided by the CEST tool. It is also designed to assist employers in anticipation of the new off-payroll rules applicable to private sector employers (known as IR35), due to take effect from 6 April 2020.

If the CEST tool is used correctly and the information provided is accurate, HMRC has stated that it will stand by the answer it produces. If the identity of the worker is not known at the time of completing the test, HMRC recommends re-running the test once the worker's identity is known.

It remains to be seen whether the amended CEST tool is an improvement on the previous version, but the additional guidance on using the tool is to be welcomed.

Working time: carry-over of holiday

The European Court of Justice (ECJ) has considered whether member states can limit the carry-over of holiday entitlement in excess of the statutory minimum under the Working Time Directive.

Terveys- ja sosiaalialan neuvottelujarjesto (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Tyontekijaliitto AKT ry v Satamaoperaattorit ry (Joined cases C-609/17 and C-610/17)

> *...the Directive does not preclude rules in national laws or collective agreements preventing the carry-over of holiday entitlement...*

Facts

This decision concerns two separate claims brought under Finnish law. They both relate to claimants who had taken a period of sickness absence and who wanted to carry forward holiday entitlement that they had been unable to take due to their sickness absence. The Finnish Labour Court referred the cases to the ECJ to determine whether the carry-over of holiday due to sickness absence applied only to the statutory minimum holiday entitlement provided by the Directive, or whether it also applied in respect of additional leave provided under national rules or collective agreements.

ECJ decision

The ECJ has decided that the Directive does not preclude rules in national laws or collective agreements preventing the carry-over of holiday entitlement in excess of the four-week minimum entitlement under the Directive. Where Member States provide additional holiday, this is governed by national law rather than the Directive. It is therefore open to Member States to determine appropriate conditions for the granting and exercising of additional holiday entitlement, including in the event of sickness absence.

> *It is... open to Member States to determine appropriate conditions for the granting and exercising of additional holiday entitlement...*

The ECJ also held that the right to annual leave under the Charter of Fundamental Rights of the European Union does not apply in respect of domestic legislation relating to holiday entitlement.

Consequences

A previous decision of the Employment Appeal Tribunal (*Sood Enterprises Ltd v Healy, UKEATS/0015/12*) had reached the same conclusion in relation to the additional 1.6 weeks of holiday provided under the Working Time Regulations 1998. The EAT held in that case that the Directive did not require the carry-over of the 1.6 weeks' additional leave in cases where a worker was unable to take the leave due to sickness absence, unless a relevant agreement provided for such carry-over. This decision from the ECJ is welcome confirmation that this is the correct approach.

Disclosure of pay not gross misconduct

The Employment Appeal Tribunal (EAT) has confirmed that a disclosure of a senior employee's pay details was not gross misconduct.

Jagex Ltd v McCambridge UKEAT/0041/19

Facts

"...disclosure of the salary details did not breach the contractual confidentiality provisions..."

The claimant in this case had found a document on a photocopier that included details of one of the senior executive's salary. He mentioned it to a colleague, and it subsequently became the topic of more widespread gossip within the business. The claimant was one of three staff who were disciplined for disclosing the salary information, although he was the only one dismissed for gross misconduct. An employment tribunal upheld his claim for unfair dismissal, finding that disclosure of the salary details did not breach the contractual confidentiality provisions and did not amount to gross misconduct. The dismissal was both procedurally and substantively unfair. The tribunal declined to award either a Polkey reduction, to reflect the likelihood that the claimant would still have been dismissed had a fair procedure been followed, or any deduction for contributory fault. The company appealed to the EAT.

EAT decision

The EAT dismissed the respondent's appeal against the finding of unfair dismissal. It agreed with the tribunal's finding that the disclosure of the salary details did not amount to gross misconduct. The EAT held that for salary details to be covered by a contractual confidentiality clause, it needs to be expressly specified within the clause; it is not information which is automatically deemed to be confidential.

The EAT upheld the tribunal's decision not to make any Polkey reduction, but it did uphold the employer's appeal against the tribunal's decision not to make any deduction for contributory fault. Conduct does not have to amount to gross misconduct in order for it to be taken into account when deciding on contributory fault; the tribunal had applied too high a threshold. It should have considered whether the claimant's conduct was blameworthy or culpable in order to determine whether a deduction was appropriate. The case was remitted for the employment tribunal to consider making a deduction for contributory conduct.

It should not be assumed that salary details will automatically be covered by the implied duty of confidentiality...

Consequences

This case provides a reminder to employers to consider carefully what information they consider to be confidential. It should not be assumed that salary details will automatically be covered by the implied duty of confidentiality during the employment relationship. If employers want to ensure that such information is kept confidential, it would be advisable to make express provision for this in the employment contract.

The difference in pay can be partly explained by differences in qualifications and occupation...

QUICK FIRE

Disability pay gap

The Office for National Statistics (ONS) has published a new report, Disability pay gaps in the UK: 2018, which examines the gap in pay between disabled and non-disabled workers in the UK.

The report is based on pay data from 2018, and shows that median pay was consistently higher for non-disabled employees: £12.11 an hour compared to £10.63 an hour for disabled employees, a pay gap of 12.2%. The disability pay gap was wider for men than for women, and geographically the widest pay gap was in London, 15.3% compared to just 8.3% in Scotland. Disabled employees with a mental impairment had the largest pay gap of 18.7%, compared with 9.7% for those with a physical impairment.

According to the report, nearly one in five of the UK population of working age was disabled in 2018 (18.9%), with just half of those in employment compared with over 80% of non-disabled people. The difference in pay can be partly explained by differences in qualifications and occupation, with disabled employees more likely to be employed in lower-skilled and lower-paid occupations.

Pledges to tackle the disadvantages suffered by disabled people in the workplace were made by both the Conservative and Labour parties prior to the general election, but we will have to wait to see whether any such proposals are taken forward.

A key factor in keeping disabled employees in the workplace is the existing duty to make reasonable adjustments, which is the subject of our forthcoming Early Birds seminars. Sign up now for your free place.

Worker status: right of substitution

The Employment Appeal Tribunal (EAT) has considered whether a delivery courier had correctly been categorised as a 'worker' despite the existence of a contractual right of substitution.

Stuart Delivery Ltd v Augustine UKEAT /0219/18

Facts

This case concerns a courier who provided delivery services through the company's app. Couriers engaged by the company provide both 'ad hoc' deliveries when they choose to accept a job via the app, as well as 'slot' deliveries during particular time brackets, which they sign up for in advance and ensures the company has couriers available at times of high demand. Those who signed up for a slot were guaranteed a minimum rate of pay per hour but had to remain in the relevant geographical zone and could only refuse one delivery during the slot. A courier could elect to release a slot he or she had already signed up for and make it available to other couriers to accept, but that courier remained liable for completing it if no-one else accepted it and faced sanctions for failing to do so.

"

... the claimant had an obligation of personal performance under the contract and was therefore properly categorised as a worker.

The claimant brought a number of employment tribunal claims against the company, including for unauthorised deductions and holiday pay. The tribunal first had to determine whether the claimant was a 'worker' for the purposes of these claims. It held that the process for releasing a delivery slot did not amount to an unfettered right of substitution, which would otherwise allow for another person to carry out the deliveries. This meant that the claimant had an obligation of personal performance under the contract and was therefore properly categorised as a worker. The company appealed against the tribunal's decision

EAT decision

The EAT has dismissed the appeal and upheld the finding that the claimant was a worker. On the facts of the case, it agreed that the tribunal had been entitled to find that there was no right of substitution, or at least the right was a limited one. The claimant had no control over who (if anyone) would accept a released slot, and the company had the ability to withhold consent to any substitute courier since it controlled who was accepted into its pool.

...tribunals will take a sceptical view of any right of substitution included within contractual documentation...

Consequences

This decision illustrates how tribunals will take a sceptical view of any right of substitution included within contractual documentation between the parties, and will look very carefully at how the right actually works in practice. Businesses hoping to rely on the inclusion of a contractual right of substitution as evidence that an individual does not meet the requirements for 'worker' status will need to be able to demonstrate that the right of substitution is not subject to the consent of someone who has the absolute and unqualified discretion to withhold consent.

With a majority Conservative Government now in place, here's a reminder of what we have in store according to the promises made in their election manifesto...

QUICK FIRE

What's next for employment law?

Last month we provided a summary of the main political parties' proposals relating to employment law. With a majority Conservative Government now in place, here's a reminder of what we have in store according to the promises made in their election manifesto:

- increase the National Living Wage to £10.50 by 2024 and extend it to every worker over the age of 21
- implementing the government's Good Work Plan on worker rights, including proposals to address one-sided flexibility in worker contracts, requiring employers to pass on tips and service charges to workers and introducing a single enforcement body for employment rights
- consult on making flexible working available by default unless employers have good reasons not to allow it
- allowing parents to take extended leave for neonatal care and looking at ways to make it easier for fathers to take paternity leave
- extending the entitlement to leave for unpaid carers; and
- creating a new National Skills Fund worth £3 billion to provide matching funding to individuals and SMEs for high-quality education and training.

We currently have no confirmed timescales for these proposed reforms.

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Immigration update

Boris has his majority, so what next?

The outcome of the General Election was an overwhelming victory for the Conservative party. Boris Johnson now has a majority of 80 MPs, which should allow him to push through the legislation of his choice.

Brexit

The new Parliament is expected to have its first debate and vote on a new draft Withdrawal Agreement Bill on Friday 20 December 2019. It is anticipated that this will be passed into UK law with little change, in time for the UK to ratify the Withdrawal Agreement before we are due to leave the EU at 11:00pm on Friday 31 January 2020. However it should be noted that the EU also needs to ratify the Withdrawal Agreement before it can come into force.

> *Under the terms of the Withdrawal Agreement, there will be a "transition period" to 31 December 2020. During this time free movement will continue.*

Under the terms of the Withdrawal Agreement, there will be a "transition period" to 31 December 2020. During this time free movement will continue. This means EU nationals will continue to have the right to come and live and work in the UK and British nationals will have reciprocal rights to move to the EU, until the end of 2020.

> *EU nationals arriving in the UK during the transition period will have the right to apply for pre-settled status under the EU Settlement Scheme (EUSS).*

EU nationals arriving in the UK during the transition period will have the right to apply for pre-settled status under the EU Settlement Scheme (EUSS). In due course they should become eligible for settled status, meaning they can apply to remain in the UK indefinitely.

Assuming the agreement is ratified, the deadline for applications to the EUSS will be 30 June 2021, both for those in the UK before Brexit day and those arriving during the transition period.

The Government previously advised that there would not be any changes to right to work check requirements until January 2021. It would seem sensible, given the later deadline for applications to the EUSS, to delay any change until July 2021, but that would need to be confirmed.

...from 1 January 2021, EU nationals wishing to come to the UK will be treated in the same way as non-EU nationals.

The transition period was designed to allow the UK to formally leave the EU, whilst continuing the status quo until a future trade deal is agreed. However, the delay to Brexit means that there will be less than a year to conclude a new trade deal. Any extension to negotiations would need to be arranged in the summer. Mr Johnson is adamant that it is possible to reach a trade deal in time and he will not ask for an extension. However, those in Brussels are more cynical. It remains to be seen if a deal will be reached and if so what the terms are, in particular whether the EU seeks to obtain any concessions around visas for EU nationals. If a new trade deal is not agreed we will revert to WTO terms, which do not contain any particular provisions regarding immigration.

The Government's intention is that from 1 January 2021, EU nationals wishing to come to the UK will be treated in the same way as non-EU nationals.

New Immigration System

The Tory manifesto included a pledge to implement an "Australian-style points based system" from 2021 but, to date, no details have officially been published. However it has been revealed that a press release with more information was sent to selected journalists ahead of polling day in the General Election.

The press release refers to a new system, which allocates people to three separate categories...

The press release refers to a new system, which allocates people to three separate categories.

1. "Exceptional talent/contribution". This seems to cover the current Tier 1 visas for investors, sponsored entrepreneurs and exceptional talent or promise. No job offer will be required. Migrants in this category will be able to bring dependants who will be permitted to work. There will be a potential fast-track route to settlement after three years, rather than five years. There will be no cap on numbers for exceptional talent and the pool of UK research institutes and universities able to endorse candidates will be extended.
2. "Skilled workers". This appears to be replacing the current Tier 2 visas for skilled workers. There is a promise to streamline and speed up the sponsorship process. The Migration Advisory Committee (MAC) will be asked to advise annually on whether caps or incentives are required based on whether there are shortages or excesses of migration via this category. This category will include the NHS visa previously announced by the Conservatives. This will be for qualified nurses, doctors and allied health professionals, with no cap on numbers.
3. "Sector-specific rules-based". Once free movement ends, there will be no general route for low or unskilled workers. However, if the MAC identifies a specific labour market shortage then the Home Secretary will be able to set up capped schemes, such as the Seasonal Agricultural Workers scheme. There is likely to also be a scheme for short term visas for touring and work assignments. The rules will vary by scheme, but typically none of the schemes will lead to settlement.

Once free movement ends, there will be no general route for low or unskilled workers.

The MAC will be required to produce an annual public report advising the Home Secretary on how to lower overall immigration, whilst meeting the needs of the UK economy and improving the UK's productivity.

The press release envisages a new, extended role for the MAC. The MAC will be required to produce an annual public report advising the Home Secretary on how to lower overall immigration, whilst meeting the needs of the UK economy and improving the UK's productivity.

The MAC will also be required to monitor the needs of the labour market on an ongoing basis and will be given more resources for this purpose. The Home Secretary will continue to appoint the committee, including the Chairman and will have full discretion over the new system.

The press release also highlights plans to digitise the visa system. It claims this will lead to improved enforcement of visa conditions. In particular there would be a regular exchange of information between the Home Office and HMRC. It is confirmed that all migrants will be required to pay the health surcharge, until they achieve settled status.

Notably the press release does not address the issue of family migration.

It is somewhat ironic that a party which complained it could not control net migration due to unlimited numbers allowed to move from the EU, is now saying there will be no limit on the number of exceptional talent or NHS visas.

Notably the press release does not address the issue of family migration.

The press release envisages a formal exchange programme with the Australian and Canadian governments, to allow them to send experts who will share best practice. An "expert implementation group" will also be appointed.

Much has been made of the desire to implement "an Australian-style" points based system. It can only be hoped that the sharing of best practice will help the government to appreciate that the points-based element is only one small part of the Australian immigration system and when designing a new system for the UK, if it is to work, then it should be about more than just points and the categories identified above.

Settled status - administrative review

As we have discussed in previous updates, the EU Settlement Scheme (EUSS) opened in March this year. Nearly all 3.4 million EU nationals living in the UK will be required to apply to the scheme to establish their right to continue to live in the UK after the UK has left the EU next year. There have now been over two million applications made.

Once an application has been submitted, the Home Office determines whether an EU national has been living in the UK for five years or more, in which case settled status is awarded, or if less than five years, pre-settled status is granted, with the option to apply again for settled status once five years have been completed. Where an individual disagrees with the outcome of their application, they are entitled to submit an application for Administrative Review. This means that a different caseworker within UK Visas and Immigration will review the original decision.

"...89.5% of admin reviews regarding EUSS decisions have been successful...

A Freedom of Information Request by the Public Law Project (PLP) has revealed that 89.5% of admin reviews regarding EUSS decisions have been successful and the original decision overturned.

451 administrative reviews were requested up to 12 September 2019. Of the total 325 administrative reviews that had been decided by that date, 291 resulted in a decision of pre-settled status being overturned and settled status granted. To put this into perspective, only 3.4% of admin reviews in other immigration categories are usually successful, so this is a particularly high rate of decisions being successfully challenged.

"We urge EU citizens not to accept pre-settled status if they feel they are entitled to settled status.

Some decisions have been overturned because of mistakes made by caseworkers, although the Home Office says the majority are made because an applicant has provided new information to demonstrate that although they were granted pre-settled status, they have in fact been in the UK for five years or more and therefore qualify for settled status.

There are advantages to having settled, rather than pre-settled status. We urge EU citizens not to accept pre-settled status if they feel they are entitled to settled status and to challenge incorrect decisions where possible.

The PLP, who obtained the report, says the data could show a successful process in operation, demonstrating that checks and balances are working, but as PLP research director Joe Tomlinson comments, it "could also indicate that the automated data checks and initial decision-makers are getting things wrong more frequently." Tomlinson added that it is also a concern because "a tribunal appeal right for EUSS decisions is still yet to

If you require any assistance with an application under the EUSS please contact a member of the Immigration Team.

be legislated for and judicial review is expensive, inaccessible, and limited to narrow legality claims, so administrative review is the primary mode of redress" available for applicants to the scheme.

The Home Office said the overall number of administrative reviews "is very low compared to the 2.4 million applications and 1.9 million granted status by the end of October 2019".

However the PLP said that whatever the reason, the Home Office needs to get every decision right and may have to improve its communications to ensure EU citizens apply with correct information.

If you require any assistance with an application under the EUSS please contact a member of the Immigration Team.

EUSS update

....following a peak in September and October, the number of applications calmed down again in November...

The Government continues to encourage applications to the EU Settled Status Scheme. However, following a peak in September and October, the number of applications calmed down again in November, with 142,300 applications being made last month.

As at 30 November 2019 the total number of applications received was nearly 2.6 million (2,592,800). As at that date 2,230,900 applications had been concluded. Of these, 59% were granted settled status, 41% were granted pre-settled status, and five applications were refused on suitability grounds.

Tier 2 Restricted Certificates of Sponsorship

Availability of RCoS remains good...

We are constantly reviewing the number of Tier 2 Restricted Certificates of Sponsorship (RCoS) requested each month, against the monthly quota. Availability of RCoS remains good, with all eligible requests in November being successful. Whilst we can never guarantee that an RCoS will be awarded, employers looking to hire Tier 2 migrants from overseas in the New Year can take comfort in the fact that the quota is not currently causing any problems.

Net migration statistics

...EU net migration has fallen since 2016, due to a gradual increase in EU citizens leaving as well as a decrease in those coming to the UK...

The Office for National Statistics has released its quarterly report on migration statistics.

They found that "long-term net migration, immigration and emigration have remained broadly stable since the end of 2016." However EU net migration has fallen since 2016, due to a gradual increase in EU citizens leaving as well as a decrease in those coming to the UK, whilst non-EU immigration has increased slightly.

There has been a decrease in immigration for work, mainly due to fewer EU citizens (particularly from the EU8) coming to look for work. Meanwhile there has been an increase in immigration for study, particular from non-EU countries, with Tier 4 visas to study at university now at an all-time high.

...there has been an increase in immigration for study...

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team. Law covered as at 18 December 2019.

Brexit and GDPR: what you need to know

Understand and identify the steps relevant to your organisation with our checklist

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Many organisations have yet to update their GDPR procedures for Brexit. Whilst the justifications for this are many and varied, one consistent message we are hearing is that organisations simply do not know what is required of them. This is perhaps unsurprising given that, as with so many aspects of data protection compliance, there is no one size fits all solution. The situation is, of course, not helped by the ongoing uncertainty as to whether and when the UK will actually exit the EU and the terms of the deal, if any, under which it will leave.

Free guidance

In an effort to bring some clarity to the situation, Birketts has published a free guide, 'Brexit and GDPR: What you need to know and do.' The guide comprises a summary of the headline issues and terms that organisations planning for Brexit need to be aware of, together with a practical checklist enabling organisations to identify what compliance steps they will need to take.

Advice in brief

1. Many organisations will need will need to update their data protection compliance measures for Brexit.
2. It is important that you familiarise yourself with the issues that Brexit poses for GDPR compliance now. These are summarised in the *Headline Issues* section of our guide. It will take you less than 10 minutes to read.
3. Use the *Checklist* section of our guide to identify what changes you need to make to prepare for Brexit.
4. If the UK exits the EU without a deal in place, you will need to have implemented the changes by exit day.
5. If the UK exits the EU with a deal in place, you will have a little more time to make changes and the specific changes required may vary slightly. Look out for Birketts updated guidance.

Click here to download Brexit and GDPR: what you need to know and do. For individual legal advice please email Kitty Rosser or call directly on 01603 756 559