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AUSTRALIA

- **Latest Case Law**

Employers must take care when Paying Annualised Salaries to Award Covered Employees

In *Simone Jade Stewart v Next Residential Pty Ltd* [2016] WAIRC 00756, the employer paid an annualised salary of $78,000 to Ms Stewart, whose position was covered by the *Clerks-Private Sector Award 2010 ("**Award**")*. This salary was well in excess of the corresponding minimum rate of pay for Ms Stewart's classification level within the Award. The employer issued a contract to Ms Stewart, which relevantly included the following provision: *"Your salary is inclusive of any award provisions/entitlements that may be payable under an award"*. Ms Stewart nonetheless commenced legal action against Next Residential Pty Ltd for payment of overtime rates she claims were payable for work performed during the course of her employment.

Next Residential Pty Ltd argued no additional overtime rates were payable to Ms Stewart on account of her above-Award annual salary, and the remuneration terms expressed in her contract. The Court ultimately found in favour of Ms Stewart, thereby allowing her to pursue an application for recovery of approximately of $29,000 in unpaid overtime.

The Court's decision hinged on the wording of clause 17.1 of the *Clerks-Private Sector Award 2010*, which reads as follows (emphasis added):

> *(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:*
> *(i) clause 16-Minimum weekly wages;*
> *(ii) clause 19-Allowances;*
> *(iii) clauses 27 and 28-Overtime and penalty rates; and*
> *(iv) clause 29.3-Annual leave loading.*
> *b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable* ***and which of the provisions of this award will be satisfied by payment of the annual salary****.*

The Court found the wording of Ms Stewart's contract did not comply with the strict requirements imposed by clause 17.1 of the Award. Specifically, Next Residential's failure to:

> a) specifically identify the applicable Modern Award, and
> b) specifically identify which of the Award's provisions were satisfied by Ms Stewart's annual salary meant the employer could not establish Ms Stewart had received her monetary Award entitlements, even though Ms Stewart's overall salary exceeded her minimum Award entitlement.

Ms Stewart's case highlights the risks an employer can face when offering fixed annual salaries to award covered employees. Employers are encouraged to obtain expert legal advice when offering employment and preparing contracts for employees potentially covered under a Modern Award.

- **Other Observations**

Fair Work Commission Announces Changes to Penalty Rates

On Thursday 23 February 2017, The Fair Work Commission ("**Commission"**) announced important changes to Sunday and public holiday penalty rates payable to employees working in specific industries in Australia. These changes will require amendments to be made to a number of Modern Awards, and will result in a slight reduction in the penalty rates payable for affected employees working on Sundays and public holidays only. The penalty rate changes announced by the Commission apply only to employees covered by the following six Modern Awards:

- Fast Food Industry Award 2010;
- General Retail Industry Award 2010;
- Hospitality Industry (General) Award 2010;
- Pharmacy Industry Award 2010;
- Registered and Licensed Clubs Award 2010; and
- Restaurant Industry Award 2010.

The Commission's decision means the total rate payable to affected employees on Sundays and public holidays will be as follows:

	Sunday Penalty Rate				**Public Holiday Penalty Rate**			
	Full-Time / Part-Time		**Casual**		**Full-Time/Part-Time**		**Casual**	
	Current Rate	**New Rate**	**Current Rate**	**New Rate**	**Current Rate**	**New Rate**	**Current Rate**	**New Rate**
Hospitality Industry (General) Award	175%	150%	No change	No change	250%	225%	275%	250%
Fast Food Industry Award*	150%	125%	175%	150%	250%	225%	275%	250%
General Retail Industry Award	200%	150%	200%	175%	250%	225%	275/250%	250%
Pharmacy Industry Award**	200%	150%	200%	175%	250%	225%	275%	250%
Restaurant Industry Award	No change	No change	No change	No change	250%	225%	No change	No change
Registered and Licensed Clubs Award	No change	No change	No change	No change	No change	No change	No change	No change

* Change applies to Level 1 employees only.

** Change applies only to work performed between 7am and 9pm.

The changes announced to public holiday penalty rates will take effect from 1 July 2017. The changes to Sunday penalty rates are likely to be phased-in over a number of years, and the Commission has invited stakeholders to make further submissions in this regard.

Regrettably, many employers remain confused regarding their obligations to pay their workers penalty rates for work performed on Sundays and public holidays. This announcement is likely to cause those employers further confusion. The Commission itself noted there is widespread employer non-compliance with Modern Awards in both the hospitality and retail industries. Accordingly, we recommend employers obtain expert legal advice to ensure they are meeting all of their obligations.

Important Changes to Annual Leave for Modern Award-Covered Employees

Effective from July last year, the Fair Work Commission ("**Commission**") made a number of important changes to annual leave for employees covered by a Modern Award. As a result of these changes, most Modern Award-covered employees can now:

- cash-out a portion of their accrued annual leave; and
- be directed by their employer to take annual leave when their accrued balance has become '*excessive'*.

Importantly, the Commission has imposed a number of very strict rules which must always be followed whenever annual leave is being cashed-out or an employee is being directed to take '*excessive'* leave.

Cashing-Out Annual Leave

Many employees seek permission to '*cash-out'* a portion of their annual leave. However, until mid-2016, very few Modern Awards allowed the cashing out of annual leave. The Commission has amended the majority of the 122 Modern Awards currently in operation, and the amended Awards now permit annual leave to be cashed-out subject to the following four strict rules:

1. The employee must have a remaining balance of at least four weeks' annual leave once the cashing-out has been processed.

2. A maximum of two weeks of annual leave can be cashed-out in any 12-month period.

3. Both the employer and the employee must agree for annual leave to be cashed-out, and this agreement must be recorded in writing and kept on the employee's file.

4. The amount paid to the employee must be the same as the employee would have received had they taken the leave. For example, if annual leave loading would have been payable if the leave was taken, this must be added to the amount paid out to the employee.

Directing an Employee to Take Excessive Annual Leave

Also effective July last year, long-term employees may accrue sizeable annual leave balances, which create a significant liability for employers and may also have serious health and safety-related implications for the employees.

The changes made by the Commission mean employees covered by most Modern Awards can now be directed by their employer to take annual leave once their balance has become '*excessive'*. *An employee's leave balance will be considered 'excessive' if*

- they are not a shiftworker and they have eight or more weeks of accrued annual leave; or
- they are a shiftworker and they have ten or more weeks of accrued annual leave.

Once an employee's balance meets this definition, they may be directed to take annual leave subject to the following six strict rules:

1. The employer must attempt to 'confer' with their employee regarding the taking of annual leave. If mutual-agreement to take annual leave cannot be reached – or if the employee refuses to confer – the employer may then issue a direction compelling the employee to take annual leave. This may be referred to as a *'directed annual leave period'.*

2. The directed annual leave period must begin:

a) no earlier than 8 weeks; and

b) no later than 1 year

from the date the direction is issued to the employee.

3. The directed annual leave period must be at least one-week long.

4. The employee must have at least six weeks of annual leave remaining after they take the directed annual leave period.

5. The employer's direction must be consistent with any leave arrangements which have already been agreed between the employer and employee.

6. An employee who is directed to take annual leave may still apply for annual leave despite the employer's direction. In this situation, the employer is required to disregard the previous direction when deciding whether to approve the employee's new leave request.

Other Changes

The Commission has also:

- made changes to the recovery of annual leave 'debts' owed by an employee when their employment ends, and
- amended most Modern Awards to permit employees to unilaterally take excessive annual leave if a direction to take that leave has not been issued by their employer. This provision becomes effective for most Modern Award-covered employees on 29 July this year.

Given the complexity of these issues, we strongly recommend employers obtain expert legal advice *before* cashing-out annual leave or issuing a direction for leave to be taken.

BELGIUM

- **Latest Case Law**

Refusing a working place-change, reason for a dismissal for serious cause?

A company in restructuring concluded a collective bargaining agreement, according to which, the working place of some employees was modified: they have to go to work in another business seat of the company located 89 km away from the initial place of work. One of the employees concerned refused such a change and continued to present at the former working place. After several warnings and a meeting with the employee, the employer decided to dismiss the employee for serious cause, without any notice or indemnity in lieu. The Labour Court of Appeal of Brussels ruled in favor of the employer. The Court judged that the dismissal for serious cause was justified as the change in working place was agreed upon through a collective bargaining agreement, by which all employees of the company are bound. Furthermore, the employment contract of the employee concerned contained a "mobility clause", which explicitly foresaw that the employee could be employed in any other business seat of the company in Belgium. By refusing the working place-change, the employee committed an act of insubordination, which - in the opinion of the Labour Court of Appeal, justified a dismissal for serious cause.

- **Impending Changes of Legislation**

New employment law reforms

On 15 March 2017, a new bill was published in the Belgian Official Gazette, which reforms Belgian employment law on some important points. The purpose of this reform is to increase the competitiveness of companies and to improve the work/life balance of the employees. The most important changes are the introduction of 1) "the voluntary performance of 100 overtime hours by the employee" and 2) "occasional telework".

As regards the first point, employees can now agree to voluntarily perform 100 overtime hours, without the obligation for the employer to grant compensatory rest to the employees for these overtime hours. The normal overtime salary-rules remain applicable to these overtime hours. In the future however, it will become possible for employees not to choose a payout of these overtime hours, but to save them on a "career saving account", which will allow employees to take extra holidays later in their career. However, before companies can use this possibility, collective bargaining agreements must be concluded at inter-professional, sectoral or company level.

As regards the second point, a new framework for occasional telework was introduced in addition to the existing rules on structural telework. Under occasional telework one must understand the telework, which is not performed on a regular and organized basis. The employee must be able to invoke a 'force majeure' (e.g. car breakdown) or 'personal reasons' (e.g. the visit of a technician at home).

Belgium: Reform of the legislation regarding the medical examination of employees

A Royal Decree was published which reforms the legislation regarding the medical examination of employees. In various situations, an employee must undergo a medical examination with a view to ensure that the job is without risk for his/her health. One of the changes is that medical examinations have to take place during the working hours and that the time spent is paid as working hours (moreover, the travel costs are paid by the employer). Every convocation for a medical examination outside working hours, is null and will, as result, render the decision of the industrial doctor null.

CANADA

- **Latest Case Law**

Ontario Court of Appeal Rules on Employment Termination Clause

In the recent decision of *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, after just over 8 years of employment, the employee was advised that her employment would be terminated on a without cause basis. The employee had signed an employment contract the day after she commenced employment with the employer, though she had previously received a copy of the contract to review. The employment contract purported to limit the employee's entitlements on termination as follows:

> *[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this*

> *paragraph… The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the Employment Standards Act, 2000.*

The employee brought an action for summary judgment, alleging that her entire employment contract was unenforceable or, in the alternative, that the termination clause in particular was unenforceable. This motion was dismissed by the motion judge, who held that the contract and the termination clause were enforceable. The motion judge also found that, in the event that he was incorrect on the enforceability of the contract, the employee's entitlement to reasonable notice at common law would be equal to nine months of her salary and benefits.

On appeal, the Ontario Court of Appeal considered whether the employment contract was unenforceable as a whole, and whether the termination clause in particular contravened the *ESA* because it had the effect of excluding the employer's obligation to make benefit contributions during the statutory notice period and/or because it did not satisfy its obligation to pay statutory severance pay.

First, the Court found that the contract was enforceable notwithstanding that it had only been signed after she started working. This was because the employee had actually seen a copy of the contract before she commenced working.

Second, the Court found that the termination clause was unenforceable because it violated the *ESA* in two ways. First, the Court found that the language of the termination clause effectively excluded the employer's statutory obligation to continue making benefit contributions during the statutory notice period. Second, the Court found that two of the three options through which the employer could discharge its obligations under the termination clause – namely the provision of only working notice or a combination of working notice and pay in lieu thereof – could deprive the employee of her entitlement to statutory severance pay. Consequently, the Court found that the employment contract did not meet the minimum standards under the *ESA* and the employee was therefore entitled to reasonable notice of employment termination at common law as assessed by the motions judge.

This case highlights the importance of ensuring that termination clauses in employment contracts are clearly drafted and clearly express the employer's intent to comply with employment standards legislation.

- **Impending Changes of Legislation**

British Columbia member's bill aims to ban mandatory wearing of high heels in restaurants and bars.

British Columbia's *Workers Compensation Act*, RSBC 1996, ch 492, and the related Occupational Health and Safety Regulation, set out requirements in respect of workplace safety. Employers that operate in British Columbia and are provincially regulated are generally required to abide by these requirements, which include footwear requirements. The *Workers Compensation Act* and its regulations are administered by the Workers' Compensation Board.

On or about March 8, 2017, British Columbia's Green Party leader, Andrew Weaver, introduced Bill M237 in the Legislative Assembly. Bill M 237 proposes to amend section 111 of the *Workplace Compensation Act*, which sets out the powers of the Board. Specifically, the amendment would require the Board to establish standards and requirements for the protection of the health and safety of workers which, where possible, must not vary based on workers' gender, gender expression, or gender identity. While the wording of the amendment suggests that gender neutrality could become a more general consideration in the exercise of the Board's powers, the amendment is being touted as a means

to prohibit employers from requiring different footwear to be worn depending on an employee's gender, gender expression or gender identity.

Bill M 237 received first reading in the Legislative Assembly of British Columbia on March 8, 2017. While Bill M 237 is not a government-sponsored bill, British Columbia Premier Christy Clark has publicly backed the intent of the bill, and has indicated that the British Columbia government will take action to stop the practice of requiring women to wear high heels on the job. At this time it is not clear whether the British Columbia government will simply back Bill M 237, or whether it will choose to bring in separate legislation to similar effect.

If implemented, changes brought in by Bill M 237would affect provincially regulated employers that operate in British Columbia and that are subject to the *Workers Compensation Act*. These employers should carefully monitor the progress of this bill, and also be prepared for possible changes to footwear standards or for the introduction of a government bill similar effect.

- **Other Observations**

Ontario Introduces Three Year Anti-Racism Strategic Plan

On March 7, 2017, the Government of Ontario released a three-year anti-racism strategic plan (the "Strategic Plan"). The Strategic Plan seeks to break down barriers for racialized people across Ontario, including Black, Indigenous and other racialized communities. While no related legislation has yet been introduced, the Strategic Plan notes that the Government of Ontario plans to introduce anti-racism legislation in the Spring of 2017 to "provide a framework for government and organizations to identify and combat systemic racism."

CHINA

- **Latest Case Law**

China: Employers in Shanghai may have legal risk to designate the hospital where employees should obtain sick leave certificates

In a recent case decided by the Shanghai No.1 Intermediate Court, Ms. Zhao applied for sick leave several times, after obtaining the sick leave certificates from the Shanghai Mental Health Center. From May 16, 2015, the company stopped paying her sick leave salary and requested Ms. Zhao to have a reexamination at Huashan Hospital. Ms. Zhao filed a complaint with the local labor bureau and finally the case went to court. The judge opined that the employer is entitled to question the sick leave certificate submitted by the employee, but the sick employee is also entitled to choose an appropriate hospital according to the seriousness of illness and the distance of the hospital. Therefore, the employer has no ground to request the employee submit the sick leave certificate issued by the designated hospital. In view of the above, if employers intend to request employees to have a reexamination at the designated hospital, it should pay the sick leave salary at the same time of reexamination, designate a hospital which suits the employee's illness and is near to the employee's residence, and bear the cost of reexamination in order to mitigate the legal risk.

- **Impending Changes of Legislation**

If the employer does not take effective measures to prevent and stop sexual harassment, the employer may need to pay economic compensation to the female employees when they resign

Recently, Jiangsu Province released the Draft of the Special Provisions on Labor Protection of Female Employees (Hereinafter referred to as the "**Draft**") to collect public opinions. The Draft pays close attention to sexual harassment and requires that employers should take measures to prevent and stop sexual harassment against female employees, including formulating company regulations, providing relevant training, and providing an anti-sexual harassment working environment, etc. The Draft specifically provides that if the employer does not take effective measures to prevent and stop sexual harassment, which results in the unilateral termination by the female employee, the employer shall pay economic compensation to the female employee. This Draft seems to be a signal that local governments are starting to pay more attention to the sexual harassment issue and may release more regulations to protect female employees from sexual harassment in the future.

FRANCE

- **Latest Case Law**

Reimbursement of fees for the health and safety committee

The legal costs incurred by the safety and health committee, in connection with the employer's challenge of an expert opinion of that committee, shall, unless the committee has abused this right, be borne by the employer. When the employer challenges this expertise in court, the judge may determine the amount of legal fees and expenses incurred by the committee in the light of the due diligence. The judge, in exercising his sovereign power of assessment, may thus limit the amount of the fees that the employer will have to reimburse to the committee.

- **Impending Changes of Legislation**

Obligation of duty of care for parent and ordering companies

The new vigilance system adopted in France concerns French companies employing at least 5,000 employees (with their subsidiaries) and foreign companies established in France employing at least 10,000 employees (with their subsidiaries). The law requires them to draw up a prevention plan with reasonable vigilance measures in order to identify risks and prevent serious harm in the following areas: human rights and fundamental freedoms, health and safety of persons, and the environment.

The parent company or ordering company must identify the risks arising from its own activities and those of the companies it controls, as well as the activities of the subcontractors or suppliers with which it maintains an established commercial relationship. Furthermore, it must provide for measures to prevent these risks and organize procedures for monitoring the proper execution of measures taken and alert in the event of poor performance. Heavy financial penalties are provided for in case of failure to comply with these rules.

- **Other observations**

The Court of Justice of the European Union has held that it is possible to restrict or even ban the wearing of the veil in companies

The matter was referred to the Court of Justice of the European Union by the Belgian and French supreme courts, following the dismissal of two employees who refused to remove their veils. The Court of Justice of the European Union ruled that a company that wants to "display an image of neutrality to its customers" may enact an internal rule prohibiting religious-but also political and philosophical-

symbols. This prohibition is valid if it is justified by a legitimate goal. The goal of displaying an image of the company's neutrality towards its customers is legitimate, especially when only workers who come into contact with customers are involved.

In the absence of such an internal rule, the European Court of Justice has held that the employer's will to take account of the wishes of the client not to have his services provided by an employee wearing an Islamic headscarf, cannot be considered as an essential and decisive professional requirement within the meaning of the Directive. The prohibition in this case is not legitimate.

GERMANY

- **Latest Case Law**

Remuneration for the time needed by an employee to change into work clothing

A company producing food ordered its employees to wear certain clothing during work for hygienic reasons. The clothes had to be put on and taken off at the company's establishment, in a separate changing room. An employee claimed remuneration for the time needed to change into and out of the work clothing and for the walking time between the workplace and the changing room.

The German Federal Labour Court ruled in favour of the employee. In case it is mandatory for the employees to wear certain clothes during work and these clothes must be put on and taken off at the employer's establishment, the changing time is part of the employee's working time. This also includes the walking time between the workplace and the changing room.

To determine the amount of remuneration due, it must be determined how much time is required for the change of clothes and the walk from the changing room to the workplace. Generally, the employee must demonstrate that the time he/she claims payment for is necessary for the change of clothes. However, the court may also estimate the time based on the facts of the case. In the present case, the court estimated that 27 minutes per workday were necessary for the change of clothes and the walk between the changing room and the workplace.

Compensation for discrimination due to severe disability

In the present case, the claimant is employed by the employer with a working time of 27.5 hours. He is severely disabled, in terms of German law. In 2013, the employer concluded agreements regarding an increase of the working time with almost all part-time workers who were interested in such increase. The claimant was not considered, even though he had applied for an increase of his working time several times.

The employee went to court claiming an increase of his working time and a compensation for the remuneration he did not receive, due to not being considered when the working time of the other part-time workers was increased. The employee claimed he was discriminated against due to his disability.

The State Labour Court of Hessen ruled in favour of the employee regarding the claim for compensation. The court held that it was possible that the employer's conduct regarding the increase of the working time was based on the employee's disability, which indicated a discrimination in terms of the General Equal Treatment Act.

The employer appealed this judgement in front of the Federal Labour Court. The Federal Labour Court overturned the judgement on the grounds that the possibility that the employer's conduct was based on the employee's disability is not sufficient for assuming a discrimination and awarding compensation. Only when the employee's disability was most probably the cause he was not considered for the increase of the working time, is it justified to assume a discrimination. The employer would then have the possibility to rebut such assumption.

The case will now again be dealt with by the State Labour Court of Hessen. The court will have to review whether the employee's disability was not only possibly, but most probably the cause for why he was not considered regarding the increase of the working time.

- **Impending Changes of Legislation**

Amendments to the Maternity Protcetion Act (MuSchG)

The German government intends to introduce changes to the Maternity Protection Act (MuSchG). Pursuant to the current proposal, students and trainees shall be entitled to maternity leave in the future. Mothers of disabled children shall have an extended maternity leave period of 12 (instead of 8) weeks after the date of birth. Women suffering a miscarriage after the 12th week of pregnancy shall be protected against termination for the next four months.

On the other hand, statutory restrictions regarding the working time of pregnant employees shall be partly lifted, e.g. regarding work on Sundays or public holidays and work after 8 p.m.

The anticipated date of effect for the amendments is not yet certain.

THE NETHERLANDS

- **Latest Case Law**

An employer may be expected to guide its employee through the process of an improvement plan and formulate clear, concrete and measurable goals

The employee has been employed with the employer since 1 March 2007. The employer requests the court to terminate the employment agreement of the employee, because of poor performance. The employer argues that the employee fails at the inter-human level as well as regards to the substance. Although many meetings took place, the employee did not improve his performance. Furthermore, the employer argues, that the employee failed to draft an improvement plan, the mediation procedure failed and the transfer to a different department was not successful.

According to the Court, the employer mainly described the process in its request, but failed to describe what the poor performance of the employee is based on. The employer pointed out to the employee that an improvement plan should be drafted, but the initiative to draft the plan was completely placed upon as the responsibility of the employee.

An employer may be expected to guide its employee through the process of an improvement plan and formulate clear, concrete and measurable goals. Where possible, the employer should offer (external) coaching and assistance (e.g. training). The employer emphasized too much and for too long that the initiative should be taken by the employee, whilst the employer knew that the employee did not

recognize the employer's criticism. Moreover, the Court ruled that there was also no ground to terminate the employment agreement, because of an impaired working relationship, because the employer caused and worsened the impairment. The Court rejected the employer's claim to terminate the employment agreement.

SPAIN

- **Latest Case Law**

Video surveillance systems allow disciplinary dismissals without notifying the employee

A new Supreme Court ruling on video surveillance systems has ruled that such systems allow dismissals on disciplinary grounds, even if the employee has not been informed that the images recorded could be used for disciplinary purposes.

Until now, the employer must inform the employees about the video surveillance system installation. Otherwise, the proof will not be accepted by the Court, as the employee has to be informed about it.

In two recent cases in which the company had informed the employees about the installation of the system and the location of every camera, but not about the possibility of using such images for disciplinary purposes, the Superior Court rejected the appeal of the company and declared the dismissals as unfair, due to the lack of information.

However, the Supreme Court has ruled that it is enough to inform the employees about the installation of the system and the location of cameras, and that it is unnecessary to inform the employees about the possibility of using such images for disciplinary purposes.

According to the Supreme Court, the doctrine and the case-law, the security measure (a video surveillance system in these cases) has to meet the principle of proportionality which means:

• Suitability judgment: The measure is likely to achieve the proposed objective.

• Necessity judgment: The measure is necessary, in the sense that there is no other more moderate measure for the achievement of the purpose.

• Proportionality judgment in strict sense: The measure is balanced, because what derives from it is more beneficial than damages on other goods or values in conflict.

UK

- **Latest Case Law**

Employment status -self-employed plumber succeeds in persuading court he's a worker.

The plumber, Mr Smith worked for Pimlico Plumbers under an agreement that stated that he was a self-employed operative and he considered himself to be self-employed for income tax purposes. After working exclusively for Pimlico Plumbers from August 2005 to May 2011, the arrangement was terminated after he suffered a heart attack.

Mr Smith brought a number of claims in the employment tribunal, including claims related to his dismissal that employees are entitled to bring and claims for unpaid holiday pay, unlawful deductions from wages and disability discrimination claims that can be brought by workers. The employment tribunal had to determine Mr Smith's employment status. They took into consideration the fact that the main purpose of the arrangement Mr Smith had with Pimlico Plumbers was for Mr Smith to personally provide work for them, with no unfettered right to substitute or delegate the work to another contractor; and that in relation to his hours of work, he was required to agree the hours he would work with Pimlico Plumbers, with a minimum number of hours required per week.

The employment tribunal looked at the reality of the situation and found that Mr Smith was obliged to provide work personally for Pimlico Plumbers and, accordingly, Pimlico Plumbers could not be considered to be a "client" of Mr Smith's own business (which would have meant Mr Smith was neither a worker nor an employee). Instead, the employment tribunal found that whilst Mr Smith was not employee, he was a worker. Pimlico Plumbers appealed to the Employment Appeal Tribunal, which upheld the employment judge's decision, so they appealed further to the Court of Appeal. The Court of Appeal decided that the employment judge had correctly identified the key factors for determining Mr Smith's status. It highlighted the fact that Mr Smith lacked any express right of substitution or delegation, so that there was an obligation for Mr Smith to personally perform the services under the agreement; and the agreement determined the minimum number of hours to be worked and placed considerable restrictions on Mr Smith. This degree of control was not consistent with Mr Smith being a self-employed contractor, as Pimlico Plumbers were claiming.

The case serves as a reminder that there are a number of criteria, which have been developed by the courts to determine employment status and although this case emphasises the importance of looking at the reality of the relationship, it still remains of the utmost importance that the relationship is properly documented. Previous cases have shown that this will not be decisive in determining status, but it can tip the balance if the situation is marginal.

Data Protection - obligations when responding to a 'Data Subject Access Request'

In the first of two cases about the extent to which recipients of data subject access requests must comply and respond appropriately, the Court of Appeal considered the role of 'legal professional privilege' (protecting the confidentiality of communication between a lawyer and client for the purposes of taking legal advice) as an exemption for complying with a Data Subject Access Request, finding that relying on privilege under UK law will be acceptable but that no reliance could be placed on the laws of privilege of another nation. Further, although those in receipt of a request for personal data can assert that it would involve disproportionate effort to respond, the Court of Appeal confirmed that it must involve something more than an assertion that it is too difficult to search through voluminous papers. Finally, the Court of Appeal confirmed that the fact that the request had been made in the context of litigation did not mean that the obligation to respond to the request was lifted.

A subsequent Court of Appeal decision held that there is no obligation to "leave no stone unturned" when searching for personal data. In other words, although on the one hand a blanket refusal to comply with a DSAR could not be justified, on the other, as long as a reasonable and proportionate search has been made, a more extensive search would not be required even if it would have revealed more personal data.

The subsequent Court of Appeal case also confirmed that the motive for making a DSAR should not be taken into account when deciding whether to comply with the DSAR. However, it may be taken into account when deciding whether enough has been done to comply with a request. Other factors that may be taken into account are: whether there was a more appropriate route to obtaining the data (e.g. by disclosure in legal proceedings); whether the DSAR was an abuse of rights (e.g. made during legal

proceedings for the purpose of putting additional pressure on the other party); whether the request was for documents rather than personal data; and the potential benefit to the individual.

- **Impending Changes of Legislation**

Brexit Bill - Royal Assent expected soon

The Prime Minister previously announced that existing workers' rights will continue to be guaranteed in law as long as she remains Prime Minister. She also said that a Great Repeal Bill will be brought in to end the authority of EU law by repealing the legislation which took Britain into the European Community in 1973. In addition, at the time the UK leaves the EU, existing EU law will be made into British law so that the same rules and laws will apply after Brexit as they did before. There will then be an opportunity for any aspect of that EU law to be scrutinised, and to be changed or removed, by Parliament. The status of CJEU decisions post-Brexit is unclear but the two areas of employment law that we consider are most likely to be affected by Brexit are:

1. TUPE there may be changes to rules on penalties for failure to inform and consult and it may become easier to harmonise terms post-transfer and

2. Agency Worker Regulations these regulations are complex and unpopular and are likely to be a target for reform.

- **Other Observations**

UK: The Government's Spring Budget

The Government's Spring budget included fewer changes of note to Employment Lawyers than last year. Much of the budget was focused on the effects of the 'gig economy' and the rash of cases dealing with employment status, which has served to highlight the disparity between rights and taxes imposed on employees, workers and self-employed contractors. The Government announced changes that affect the self-employed including: a reduction in tax free dividend allowance from £5,000 down to £2,000 – which will have a significant impact on the self-employed, who tend to pay themselves through dividends. After announcing that Class 4 NICs (for the self-employed) would increase from 9% to 10% in 2018, with a further 1% increase in 2019, the Government changed its mind and has confirmed that this increase will not now be implemented. There may well be more changes once a Government commissioned review into employment practices in the modern economy has been finalised. This is expected in the summer. In addition, the Government announced £5m of funding returnships that is assistance for those who have been out of the workforce doing childcare etc. to return to work; and also announced that it would launch a consultation in the summer on the disparity between the rights of employed and self-employed.

USA

- **Other Observations**

President Trump's New Pick to Head Department of Labor: Opinions as National Labor Relations Board Member

R. Alexander Acosta, President Donald Trump's nominee as the next Secretary of Labor, served on the National Labor Relations Board from December 17, 2002, to August 21, 2003. He was confirmed by the United States Senate on November 22, 2002, having been nominated by President George W. Bush.

Acosta, a Republican, served with fellow Board members Wilma Liebman (Democrat), Peter Schaumber (Republican), Dennis Walsh (Democrat), and Chairman Robert Battista (Republican). During his term, Acosta participated in the issuance of more than 120 opinions.

It is difficult to determine Acosta's precise views on labor law topics. Probably because he was part of a Republican majority controlled Board, he dissented in only one of the opinions in which he participated, a case in which the Board decided a union had unlawfully operated its hiring hall; Acosta believed that a more extensive remedy was warranted. He concurred in only five decisions, the most significant of which is described below. Acosta appears to have taken a middle-of-the-road approach to labor relations during his time on the Board, finding for and against labor unions and employers. This is consistent with the views of former NLRB Chair Liebman, who served with Acosta. In a recent interview with *Law360*, she described him as "not knee-jerk anti-worker or anti-union." She continued, "He was interested in looking at the law and how [to] apply it."

The Board's record while Acosta was a member is almost devoid of significant cases. Only one can be described as groundbreaking. In *Alexandria Clinic*, 339 NLRB 1262 (2003), the NLRB decided that an employer did not violate the National Labor Relations Act when it terminated several employees who had gone out on strike. In that case, the union had given a strike notice to the employer-hospital setting the date and time for a strike. Thereafter, the union delayed the strike for four hours. The employer terminated the striking employees, and the Board found the terminations were lawful. Interpreting Section 8(g) of the Act, the Board decided that, once a 10-day notice is given to an employer, it may be extended only by the written agreement of both parties. Acosta concurred for the purpose of making clear that the language of Section 8(g) allows an extension of the 10-day period only by mutual agreement of the parties.

Although not groundbreaking, two other decisions are worth noting. In *USF Red Star, Inc.,* 339 NLRB 389 (2003), among other things, the employer gave warnings to employees who had worn a button on which was written "Overnite Contract in '99 Shut Overnight Management Down or 100,000 Teamsters will." Surprisingly, the Board panel, which consisted of two Republican members, including Acosta, found the employer's giving of the warnings violated the NLRA. In the other case, 1199, *National Health & Human Services Employees Union, SEIU, AFL-CIO*, 339 NLRB 1059 (2003), the Board decided that the union violated the NLRA when an organizer engaged in a series of open confrontations with managers, supervisors, and security guards employed by the employer-hospital. Agreeing with the administrative law judge, the NLRB found that the organizer's actions violated the NLRA because "employees may be restrained or coerced in their protected activities by union misconduct directed not against them but again supervisors, managers and security guards. Union misconduct of this character coerces employees who witness it or learn of it because they may reasonably conclude that if they do not support the union's goals, like coercion will be inflicted upon them."

In a law review article, "Rebuilding the Board: An Argument for Structural Change, Over Policy Prescriptions, at the NLRB," Acosta advocated for more NLRB rulemaking because of what he calls the NLRB's "caselaw oscillation" and "flip-flops," most notably on the issue of non-union employees' right to representation at an investigatory interview from which discipline might result (*Weingarten* rights*). FIU Law Review*, Volume 5, Number 2 (Spring 2010).

Finally, and perhaps most important as a window into his views on immigration, is Acosta's one concurring opinion. In *Double D Construction Group, Inc.,* 339 NLRB 303 (2003), the discharge of an undocumented worker was determined by the administrative law judge to be lawful, but was remanded by the NLRB. The ALJ had discredited the worker's testimony on the ground that he knowingly had used a false Social Security number to obtain employment. Acosta concurred in the remand, cautioning that the judge's reasoning was overly broad because it would deny undocumented workers their NLRA Section 8 protections. He wrote that, discrediting the testimony of any undocumented worker who used

a false Social Security number to gain employment would make it "exceedingly difficult" for the NLRB's General Counsel to establish that a discharge or other unfair labor practice directed against an undocumented worker was unlawful.

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