



XpertHR Podcast

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Ellie Gelder:

Hi and welcome to this week's XpertHR podcast. October is almost here, which is the month when traditionally various employment law changes come into force. There's also a whole host of other changes on the horizon from October onwards, so we're going to be giving you a full update on what you need to be aware of and what you need to be telling your board is on the HR agenda.

I'm joined now by Laurie Anstis, Employment Lawyer and Director at Boyes Turner. Laurie is Chair of the Law Society Employment Law Committee, part-time Employment Judge and a regular contributor to XpertHR and he's going to be running us through the reforms in more or less chronological order.

So Laurie, let's kick off with the first change coming into force.
[0:00:51.1]

Laurie Anstis:

Well the first change we have coming up are changes to the National Minimum Wage. The rate for apprentices is going to be £3.40 an hour. For workers aged 16-17 it's going up to £4 an hour. For workers aged 18-21 it's going up to £5.55. And for workers aged 21-24 it's going to £6.95. These changes will come into effect on 1st October and represent a 3-4% increase on the previous rates.

Now this isn't the so-called National Living Wage, which applies only to workers aged 25 and over, and is currently £7.20 an hour. That's expected to rise quite steeply in April 2017, given the government's stated objective of £9 an hour by 2020.

Ellie Gelder:

So what would you say to an employer who thinks that they don't need to worry too much about the National Minimum Wage because they're confident that their pay rates are already well above the National Minimum Wage rate? [0:01:45.7]

Laurie Anstis:

In the past, many employers may well not have found it necessary to pay too much attention to the National Minimum Wage, simply assuming that their pay rates were well above the minimum wage rates. But we're seeing frequent changes in the rates of the National Minimum Wage and we're now seeing a lot of reputable employers getting caught out. The government continues to publish quarterly figures showing the names of employers who have been found to pay below the National Minimum Wage or National Living Wage, and this does seem to be a particular enforcement priority at the moment, particularly given the publicity about employers such as Sports Direct.

Ellie Gelder: And just on that point, Laurie, you make about employers calculating their pay rates, what about workers doing piece-work, so where they're paid by the task or piece of work they do, rather than the time spent doing it? [0:02:32.5]

Laurie Anstis: There are some quite complicated provisions on how the Minimum Wage works, where you're working by the task or doing piece-work. There was a recent case brought against the mid-counties Co-Op by people who were delivering newspapers where it was found that they'd effectively underestimated the time that that would take and therefore underpaid the National Minimum Wage, and I think we will see more cases along those lines. I know there's a number lined up in the employment tribunal brought by carers, that will look at things like how travel time ought to be dealt with, and also what happens where the person is more or less providing 24-hour care but where part of that is supposed to be sleeping or where you're not actively caring for somebody for the full 24 hours a day.

Ellie Gelder: So are there any sectors in particular that are more likely to encounter issues with the National Minimum Wage? [0:03:21.0]

Laurie Anstis: Well the National Minimum Wage and the National Living Wage are very often an issue in the leisure and hospitality sector, and employers in that field will want to keep an eye on the government's proposals on tips and gratuities. The government has been consulting on how they can make sure that a fair share of tips and gratuities are received by the workers, and also how to ensure that there's transparency in how tips and gratuities are treated. There are no firm proposals for dealing with this at the moment but I expect developments on this before the end of the year.

Ellie Gelder: Thanks, Laurie. So what can we expect looking beyond October? [0:03:54.2]

Laurie Anstis: Well there are a range of changes that the government have said will come into force in autumn 2016. Phrasing it that way gives the government quite a lot of room for manoeuvre, since no one can quite tell exactly when that's supposed to be, and it's worth saying that many politicians, government departments and civil servants are going to be preoccupied with work on Brexit, so there may well be delays in the expected implementation of some of these changes.

Ellie Gelder: So what's first on the list for autumn 2016, then? [0:04:20.5]

Laurie Anstis: Well first of all there's the new requirements for customer-facing roles in the public sector to speak fluent English or Welsh. This only applies to public sector organisations. It's not yet enforced but the government have prepared a Code of Practice on how they expect it to operate.

Ellie Gelder: Yes, and I understand that Code of Practice provides principles and examples that public authorities can consider when complying with these obligations. Moving on then to our next major development, which concerns various changes to employment tribunals. For those of you who missed our podcast last week, which rounded up the state of employment tribunals today, Laurie, can you just briefly tell us what the changes are? [0:04:58.4]

Laurie Anstis: Yes. We've been told to expect in the autumn that HM Courts and Tribunals Service will make employment tribunal judgements available online and there's been talk of this for years but only now an official announcement that it will happen. And in theory employment tribunal judgements have always been public documents but so far they've only been accessible by visiting tribunal offices in Bury St Edmunds or Glasgow in person, and having employment tribunal decisions available online will be a significant change. There is some nervousness about how this will actually work and the effect it may have. So for instance, no employer's going to want a particularly damaging employment tribunal decision to be available online to the public and that may well add to pressure to settle cases if there's a risk of the decision going against the employer.

And similarly, some employees are going to be worried about future employers doing searches against their name on this database and refusing to employ them on the basis that they've previously brought an employment tribunal claim. These changes are certainly likely to lead to increased argument in tribunal about anonymising or restricting publication of judgments.

Ellie Gelder: Just touching on that point, Laurie, about employees worrying about future employers refusing to take them on because they've previously brought a tribunal claim, there is obviously protection for those individuals, isn't there? [0:06:13.6]

Laurie Anstis: Yes. In discrimination and some other cases there's protection against what's called victimisation. That is an employer taking action against you because you previously brought a claim. But proving this can be difficult, especially as you won't know that the future employer has made one of these online checks.

Ellie Gelder: So will this new online access apply to existing judgements or only to new ones that are issued after the new system is set up? [0:06:37.1]

Laurie Anstis: Well at least for now we've been told that it's only going to be for new judgments, not old ones. HM Courts and Tribunals Service say that they haven't decided whether old decisions will be included in this new online database. I don't think they will, simply because of the cost that will be involved in scanning and uploading those old decisions.

And staying for now with employment tribunals, there's been talk of what's called 'early neutral evaluation' coming to employment tribunals. That's a process by which a judge gives an outline opinion on the case at a very early stage. Soon after the claim and defence have been filed a judge might have a short hearing to point out what he or she sees as being the strengths and weaknesses of the claim or defence, and it's thought that having this kind of early hearing might help both sides to reach an early settlement. It won't be used in all cases. There would be quite a few safeguards around it to prevent, for instance, that same judge later going on to hear the full hearing of the case. There's been talk that the scheme would come into operation later this year but I haven't heard much about it recently so it may be that it's been delayed.

Ellie Gelder: And one of the biggest issues for employment law over the last couple of years has been the effect of employment tribunal fees on the number of employment tribunal claims that are brought. Are you expecting any developments on that? [0:07:50.5]

Laurie Anstis: The Ministry of Justice has pledged to review the operation of employment tribunal fees and I understand there's been an internal report on minister's desks for at least the last six months or so, but there are continual delays in publishing it. It seems likely that the report will say that employment tribunal fees in their present form have limited access to justice.

A few weeks ago a minister actually referred to it as a report on *changes* to employment tribunal fees, which is the first time I've heard it called that. It seems inevitable that the report will recommend some changes to the current system of employment tribunal fees, but the government will be keen to make sure that any changes to the fee system don't end up leaving a big hole in the Ministry of Justice's budget. I expect there will be changes but I don't expect employment tribunal fees will be abolished, that is at least in England and Wales. The position is different in Scotland, where the Scottish government have committed to abolish employment tribunal fees.

Ellie Gelder: And there's an on-going legal challenge against the introduction of employment tribunal fees, isn't there? [0:08:47.4]

Laurie Anstis: Yes. Many listeners will have heard of the judicial review proceedings brought by the trade union UNISON. So far this challenge has been unsuccessful in the High Court and the Court of Appeal. The Supreme Court was due to hear this case in early December but I understand this might now be delayed until 2017.

Ellie Gelder: And Laurie, I know you've been involved in some of the proposals making the employment tribunal into an Employment and Equality Court. So could you just say where that stands at the moment? [0:09:14.1]

Laurie Anstis: HM Courts and Tribunals Service is the division of the Ministry of Justice that runs the courts and tribunals in England and Wales, and they're in the midst of a major reform programme designed to restructure the overall courts and tribunals system. Traditionally the employment tribunal has fallen under the tribunal, rather than court system, but it's rather an awkward fit within the tribunal system. Most other tribunals are about people's disputes with various public bodies, such as social security, tax, or immigration appeals. Employment tribunals have always been about disputes between individuals and other individuals or organisations, and that's more like what the civil courts deal with. The position of the employment tribunals is a particular problem now that they have such a reduced workload, which leaves them without the kind of critical mass necessary for them to stand on their own.

Now prompted by some suggestions from the former President of the Employment Tribunals, a law committee that I'm part of put together a report proposing that the employment tribunals should become part of

a new Employment and Equalities Court within the court system and dealing with all employment- and equality-related claims.

The Employment Lawyers Association have endorsed this idea, as have several senior judges, and there seems to be a growing consensus that this is the right way for employment tribunals to go. So in a few years' time we may have an Employment and Equalities Court, rather than employment tribunals.

I should say that all of this applies only to England and Wales. There are separate proposals in Scotland for the employment tribunal to become a full part of the tribunal system, rather than the courts, although those proposals are strongly opposed by Scottish employment judges and many Scottish employment lawyers.

Ellie Gelder: So will that mean that formal court procedures will then apply to employment claims? [0:10:58.1]

Laurie Anstis: Probably not. There will be a difference in views on that but we hope that any new system will also preserve the current flexibility of the employment tribunals.

Ellie Gelder: Moving away from employment tribunal reforms now, you mentioned that there were changes expected in the public sector. You've already mentioned the new language requirements. Are there any other changes expected for public sector employers? [0:11:18.7]

Laurie Anstis: Yes, there are a number of changes around public sector exit payments, and these are quite confusing because they're likely to come in bit by bit, rather than all at the same time.

It's expected that the first of these changes will be an overall limit of £95,000 for individual and public sector exit payments, and that will come into force later this year.

Ellie Gelder: Just staying on the subject of public sector exit payments and jumping ahead to next year, can you tell us what other changes are coming in? [0:11:45.1]

Laurie Anstis: Yes. As well as that £95,000 cap, there will be changes made, and we expect during 2017 on the calculation of exit payments and also requiring repayment of exit payments if the individual finds another job within the public sector within twelve months of receiving an exit payment.

Ellie Gelder: Moving on, are there any important tribunal or court decisions that are expected in the next few months? [0:12:08.8]

Laurie Anstis: There are three that I'm particularly looking out for. Many listeners will have heard of *Lock v British Gas*, which is one of the most important of the new holiday pay cases. We're expecting a decision from the Court of Appeal on that case shortly.

Ellie Gelder: And the second case you'll be looking out for? [0:12:24.7]

Laurie Anstis: Well there's a case that goes by the name of *Chesterton*, which the Court of Appeal will be hearing, and which is likely to deal with the requirement that any whistleblowing disclosures should be in the

public interest. That change was brought in a year or two ago and that case will actually be considering how that's supposed to work within the whistleblowing provisions.

Ellie Gelder: Okay, and what's the third case you think we should be looking out for? [0:12:47.3]

Laurie Anstis: Well many listeners will know that there was recently an employment tribunal claim about the rights of drivers for Uber, and that's seen as something of a test case for the so-called 'gig economy' and the new world of self-employment that's emerging. It's very likely that whatever the outcome it will be appealed, and decisions made by the employment tribunal, which is the lowest level of the system, don't generally establish important points of principle. But it'll be interesting to see what comes of that decision, particularly as politicians seem to be interested in whether there's any need for further regulation of such arrangements.

Ellie Gelder: Can you just expand on that? [0:13:20.2]

Laurie Anstis: Well there does seem to be an emerging movement from both the left and right wing of politics that current rules on employment status don't fit well within the new business models operated by the likes of Uber and Sports Direct. There's certainly a case to be made for a wholesale review of how people gain employment rights and whether there should be changes in the law to account for these new ways of working.

Ellie Gelder: And there have recently been some cases in the European Court of Justice, haven't there, on religious dress in the workplace. Can you just comment on those? [0:13:49.0]

Laurie Anstis: Yes. There are two cases currently in the European Court of Justice about employers' restrictions on religious dress, in these cases a hijab in the workplace, and many listeners will know that the European Court of Justice has different procedures to the UK courts. The European Court of Justice has official lawyers called 'advocates general', who prepare what is effectively their official advice to the court on the correct interpretation of the law. The difficulty is that in these two cases, two different advocates general have given completely different opinions on what the correct interpretation of EU religious discrimination law is, in one case taking a strict view that a prohibition on the hijab is direct discrimination on the basis of religion and belief, and so against the law, and in another case suggesting that it really doesn't have much to do with religious discrimination at all.

The traditional approach in the UK has been somewhere between the two, that it is religious discrimination but that it's indirect religious discrimination, which means it's okay provided there's a good reason for it. The European Court of Justice isn't bound to follow these opinions, so we await a final ruling to set out the legal principles that should apply.

Ellie Gelder: So some big decisions coming up there that are going to be relevant to employers. Looking ahead to next year now, I know there's been a lot of talk about changes to strike ballots and limiting the ability to take

industrial action. Can you just tell us what's the latest on that?
[0:15:09.5]

Laurie Anstis: Well all of this comes from the Trade Union Act, which was passed by parliament before the summer recess, but there's a lot of work to be done before its provisions are fully implemented, which is likely to happen over the next year or so.

Ellie Gelder: Okay, so can you just briefly sum up the changes that are going to be brought in? [0:15:25.2]

Laurie Anstis: There are two major changes on industrial action. The first is that in order for a ballot on industrial action to be valid, there must not only be a majority vote in favour but the turnout must be at least 50% of all their eligible members. So if you have 1,000 members eligible to vote, at least 500 would need to vote for the ballot to be valid. You'd also need a majority of those voting, so the minimum number of people who would have to vote in favour of the industrial action in order for it to be valid would be 251. That's a bare majority out of the minimum turnout.

Ellie Gelder: And the second major change? [0:15:58.0]

Laurie Anstis: Well on top of that, in what are called 'important public services' – and that's health services, education for people aged under 17 and transport services – there'd be a requirement that at least 40% of those entitled to vote would need to vote in favour of industrial action. So in the example I gave earlier, the minimum number of people to vote in favour of industrial action would be 400, rather than 251.

Ellie Gelder: And are there any other changes we need to be aware of? [0:16:26.0]

Laurie Anstis: Trade union ballots currently have to be carried out by old-fashioned postal voting but the government's promised to investigate electronic balloting as an alternative. And there are also a number of changes to the rules on notification of ballots and the information to be given about the intended industrial action. There are also changes to the rules on picketing, what's called 'check-off' (which is the deduction of trade union subscriptions through payroll) and facility time (which is paid time off for trade union purposes). There's no set date for those changes to be implemented but they can be expected to be implemented over the course of the next year.

Ellie Gelder: Moving swiftly on then, can you explain what's happening to apprenticeships? [0:17:04.7]

Laurie Anstis: There's some complicated changes to apprenticeships coming, and they're expected to come into force in April 2017. There's going to be an apprenticeship levy on employers with payrolls totalling £3 million or more a year, which will enable them to pay for the apprenticeship training they want, and this will be topped up by a government grant of 10%. If you work with apprentices or have a payroll of more than £3 million, you'll need to keep an eye out for this.

Ellie Gelder: Now I know a lot of our listeners have responsibility for payroll and benefits and they'll be interested in any proposed changes to tax on

employment income. Have there been any proposals in that area?
[0:17:41.0]

Laurie Anstis: Yes, there are a couple of things we expect to change over the next two years. The first thing is that HMRC are planning to restrict some salary sacrifice arrangements, and what they're aiming at here is salary sacrifice where the salary is replaced by a benefit in kind. So something like trading in part of your salary and in return receiving a mobile phone from work. They see this as simply being a form of tax avoidance, and I'm expecting regulations to prevent this during 2017. This won't affect the most common forms of salary sacrifice, such as salary sacrifice into a pension scheme, for a cycle scheme or for childcare vouchers.

Ellie Gelder: And what's the next thing that's going to affect those working in payroll? [0:18:20.0]

Laurie Anstis: The other thing – and this is expected to come into force in April 2018 – will be changes to taxation on termination payments. Now those rules have remained much the same since I first started working in employment law twenty years ago, so this will be a big change.

Ellie Gelder: What's going to happen? [0:18:35.6]

Laurie Anstis: There's quite a lot of detail in the changes, especially around National Insurance contributions. There would still be a £30,000 tax exemption for termination payments but the main change is that payments in lieu of notice will be fully taxable, regardless of whether there's a payment in lieu of notice clause in the contract or not. Apparently a payment in lieu of notice will be tax-free up to the £30,000 limit if it isn't provided for in the contract.

There is some benefit to this in making things more certain. There can be confusion in some cases about whether a payment in lieu of notice is in a contract or not, particularly where there are arguments about the payment in lieu of notice being custom and practice, but it will mean that in many cases the after-tax value of a termination payment will be less for the employee.

Ellie Gelder: And staying with the question of pay, what's the latest on the gender pay gap reporting regulations? [0:19:24.0]

Laurie Anstis: As many listeners will be aware, the government have produced draft regulations requiring larger employers – and that's those with 250 or more employees – to publish annual statistics in a particular form on pay, broken down as between men and women. Those regulations are expected to come into force in April 2017 with the result that the first reports under these regulations will have to be produced in 2018.

Originally this was only to apply to businesses and some charities but according to the government's latest consultation document, the government intends that the gender pay gap provisions will apply to public sector organisations as well.

Ellie Gelder: And is there anything we can expect in relation to family-friendly leave? [0:20:05.3]

Laurie Anstis: The government has pledged to introduce grandparent's leave and also to look at simplifying the rules around shared parental leave, which are currently one of the most complicated areas of employment law. If there are any changes, it's expected that they'll take place in 2018. This is a worthy objective but shared parental leave is already very complicated and I think it might be too much to expect the government to simultaneously introduce new rights to leave, while at the same time simplifying the situation. I wonder if in fact this will ever be done or whether it will just be regarded as being too complicated.

Ellie Gelder: And can you say something about the plans for changes to data protection law? [0:20:41.4]

Laurie Anstis: The EU has passed a new general data protection regulation, which will be effective from May 2018. There's a lot to that regulation, including an increase in the maximum penalties for data protection breaches to 4% of global turnover, which for large organisations will be enormous. Given the timescales involved, this is something that might well be affected by Brexit and we await further plans from the government on this. If the UK did leave the EU and was no longer bound by EU data protection rules, there would have to be some sort of agreement with the EU in order for personal data to be transferred from EU countries to the UK.

Ellie Gelder: So we've covered a lot of changes there, Laurie. Is there anything else those in HR need to be aware of? [0:21:23.8]

Laurie Anstis: I'd like to mention some areas where there's no definite proposals but which do seem to be attracting the attention of politicians and civil servants and where we may see some proposals developed over the next few years.

The first is post-termination restrictions, which are sometimes called restrictive covenants. This is an area the government is looking at. They're relatively common for salespeople or those engaged in research and development, and they aim to prevent people working in competing businesses or selling to their old customers for a period of time after their employment ends.

The government has suggested that it sees such restrictions as a bar to innovation and they recently finished a call for evidence on the use or abuse of such clauses. It remains to be seen whether they will come forward with any proposals for reform.

After that we've got the rights of pregnant workers and the rights of pregnant workers and those on maternity leave are often a cause for concern, and we know that since the introduction of employment tribunal fees it's become more difficult for pregnant employees or those on maternity leave to enforce their rights. And the Women and Equalities Committee in parliament recently published some radical proposals for strengthening the rights of pregnant employees and those on maternity leave, including formal restrictions on dismissing people during pregnancy or maternity leave. I doubt the government would go that far but strengthening the rights of pregnancy employees and those on maternity leave is likely to continue to be a

major political issue and one on which many politicians will feel that something must be done.

Ellie Gelder: And we can't leave it there without mentioning Brexit. [0:22:51.8]

Laurie Anstis: Absolutely not. I know you've covered this elsewhere so I won't say much about it but in the long-term, if the UK does leave the European Union, that could have a very significant effect on current employment law. The government has said that they don't envisage any reduction in employment rights as a result of Brexit, but it seems inevitable that there will be some changes, and the difficulty at the moment is that no one quite knows how this would work or what those changes would be.

Ellie Gelder: So I think it's fair to say, then, that there's a lot on the HR agenda in the coming months and years. Thanks very much, Laurie, for taking us through all those developments.

Laurie Anstis: Thank you, Ellie. It's been a pleasure.

Ellie Gelder: We'll obviously keep the site updated as and when the changes come into effect. For now, you can keep on top of legal developments by going to our "Legal timetable" tool or alternatively each section of the "Employment Law Manual" has a subsection on future developments, so a good starting point if you want some further detail.

That brings us to the end of this week's XpertHR podcast, which you've been listening to with me, Ellie Gelder. We'll be back next Friday, but until then it's goodbye from us.