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Public Sector Exit Payments and Employment Law Update[1]

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1. This paper is in two parts: The first part will set out recent developments in a few selected areas of Employment Law. The second will focus on proposals in respect of public sector exit payments and will look at the Government's recently published response to consultation on this topic.

Employment Law Update

2. A full update on all aspects of employment law would take several days to cover. In the short time available today, I shall focus on just three areas, all of which will have particular significance for local authorities as employers. These are:

    a. Discrimination;
    b. Employment Tribunal practice and procedure; and
    c. Gender Pay Gap Reporting.

Discrimination

Protected Characteristics

Religion and Belief

3. It is not an easy task to determine the kinds of beliefs that could amount to a "philosophical belief" within the meaning *of Equality Act 2010*, s. 10(2). In *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, the question was whether a belief in the "proper and efficient use of public money" fitted the bill. The question remains undecided. It has gone back the Employment Tribunal for consideration along with some guidance from the EAT on how to apply the criteria in *Grainger plc v Nicholson* [2010] IRLR 4 EAT. The criteria (derived from ECHR caselaw) are:
    a. the belief must be genuinely held;
    b. it must be a belief and not an opinion or viewpoint based on the present state of information available;

[1] My thanks to my colleagues Edd Capewell and Sean Jones QC whose previous papers I have drawn on in preparing this paper.

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c. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
d. it must attain a certain level of cogency, seriousness, cohesion and importance; and
e. it had to be worthy of respect in a democratic society, not to be incompatible with human dignity and not to conflict with the fundamental rights of others.

4. The EAT suggests that the requirement that the belief must be such as to amount to a "substantial" aspect of human life means one which is more than merely trivial. The requirement for coherence requires no more than that the belief be intelligible and capable of being understood. A belief that "operates merely in the workplace" may be too narrowly focused to count.

Race and Nationality – Does immigration status count?

5. This question was considered by the Supreme Court in *Taiwo v Olaigbe* [2016] UKSC 31. In that case, a Nigerian migrant domestic worker employed in London was subject to exploitation and mistreatment by her employer. There were various breaches of employment law including being required to work continuously without rest periods, failing to pay national minimum wage and making unlawful deductions from wages. There was more serious mistreatment in the form of starvation and physical and mental abuse described as "*systematic and callous exploitation*". The claimant managed to escape and brought a complaint before the Employment Tribunal. Her claims under the *National Minimum Wage Act 1998*, *Employment Rights Act 1996* and the *Working Time Regulations 1998* were all upheld. However, her claim under the *Equality Act 2010* for discrimination on the grounds of race failed. The Tribunal found that the claimant's treatment was not because she was Nigerian or black but because her migrant status had made her vulnerable to exploitation. Thus, although she was awarded about £35,000 in respect of her monetary claims, she was not awarded anything to compensate her for the humiliation, fear and severe distress that the mistreatment caused her.

6. The issue before the Supreme Court was whether mistreatment on the grounds of migrant status could give rise to a claim of race discrimination. It was held that it could

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not. Immigration status was not a protected characteristic under the 2010 Act. As Baroness Hale (giving the sole opinion) stated:

"26 …The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status. As [Counsel] pointed out, on behalf of Mr and Mrs Akwiwu, it had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way."

7. Recognising that Employment Law protection was deficient in this regard, Baroness Hale had this to say about the Modern Slavery Act 2015:

"34 It follows that these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these, along with the other remedies which it does have power to grant."

8. There has been no indication thus far that Parliament will take up Baroness Hale's invitation. I shall return to the Modern Slavery Act below.

Direct Discrimination

9. Direct discrimination is of course concerned with "*less* favourable treatment". A comparison is, therefore, necessarily implicit. Choosing the right comparator is important. Section *23(1)*, EA 2010 requires that the circumstances of the comparator should not be materially different: "On a comparison of cases for the purposes of section 13 [direct discrimination] … there must be no material difference between the circumstances relating to each case."

10. In ***Donkor v Royal Bank of Scotland*** [2016] IRLR 268, the EAT considered a redundancy exercise. The plan was that those at risk of termination would be offered voluntary redundancy. Those over 50 would be entitled to take early retirement. The Claimant was over 50 and wanted to be offered voluntary redundancy. However, once the cost of the early retirement benefits was calculated it became clear that almost the entirety of the redundancy budget would be swallowed up by paying for the early

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retirement benefits of the Claimant and a colleague. As a consequence, the Claimant was not offered VR.

11. The Claimant compared his position with that of a younger colleague who was offered VR. The ET thought that comparison was inappropriate. The fact that the Claimant could take early retirement but the colleague could not was said to be a material difference in their circumstances. The EAT, however, concluded that the supposed difference was, in effect, their ages as the ability to take early retirement was entirely dependent on age – the protected characteristic was a "but for" cause of the supposed distinguishing factor. The EAT gave similarly short shrift to an argument that any less favourable treatment was because of costs implications, legal risks and differences in approval process rather than age, since all of those factors also arose from his entitlement to early retirement and thus his age.

12. In **Wasteney v East London NHS Trust** [2016] IRLR 388, an employee was disciplined for trying to convert a Muslim colleague to Christianity. Did that constitute a case of direct discrimination? The EAT found that it did not. The Claimant was not disciplined for legitimately manifesting her religious belief. Instead she was disciplined for subjecting a subordinate to "unwanted and unwelcome conduct, going substantially beyond 'religious discussion', without regard to her own influential position".

Indirect Discrimination

13. Indirect discrimination continues to be a source of confusion. The Court of Appeal has recently made the confusion worse with two decisions that are not easy to reconcile: ***Naeem v Secretary of State for Justice*** [2016] ICR 289 and ***Essop v Home Office (UK Border Agency)*** [2015] ICR 1063.

14. ***Essop*** concerned a "core skills assessment" that civil servants must take if they want promotion. Statistics demonstrated that older minority ethnic candidates were less likely to pass. The claimants were older minority ethnic candidates and had not passed. There were two issues: The first was that no-one knew why older minority ethnic candidates did less well. Did that matter? Do you have to establish why the disadvantage arises or is it enough to show that it does? The Court of Appeal decided that it did matter. One presumes that the intention was to allow for the possibility that there might be a coincidental statistical correlation. The statistics suggested, however,

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that there was only a 0.1% probability that the success rates for older and minority ethnic candidates would be as low as they were by chance. Although the causal connection had to be established, the statistics demonstrated it.

15. The second problem was whether the individual claimants could establish that they were at the "same disadvantage" as the group. The Court of Appeal was worried about "coat-tailing". Could a candidate who failed for some other reason (perhaps because they had arrived late for the assessment), simply say "the disadvantage is failure and I failed". That was the position argued for. Nothing in the Act required candidates to establish what the reason for their disadvantage was. There was no "reason why" question to be answered. The Court of Appeal concluded, however, that the reason was implicit. That raised a daunting difficulty for the Claimants. Given that no-one was able to spell out what precisely was causing the group disadvantage, how could the individuals show that the same unknown cause had affected them? The Court of Appeal gave them some assistance: Statistics might again come to the rescue. They could be used to reverse the burden of proof, passing the obligation to demonstrate that there was no discrimination to the employer.

16. Mr ***Naeem*** is an Imam and a prison chaplain. Until 2002, only Christians were directly employed to work as chaplains. He began to work in a chaplaincy in 2001 on a sessional basis. In 2002, the policy changed and, in 2004, Mr Naeem became an employee. He started at the bottom of the pay scale. Satisfactory performance allowed progress up the scale each year. Non-Christian chaplains were clustered at the bottom of the scale. The top end of the scale was dominated by Christians.

17. Mr Naeem's case was that in the context created by the pre-2002 policy, a pay system tied to length of service was a PCP that put non-Christian chaplains at a particular disadvantage. The policy had been explicitly formulated in terms of religion. Non-Christians were not allowed onto the ladder until 2002 and the reason they were on average to be found on a lower rung was related to their religion. The Court of Appeal disagreed. Mere causal connection between protected characteristic and disadvantage was insufficient. It was permissible to look at why the policy had existed. It was based on perceived demand and not discriminatory motivation. The effect is, perhaps, to turn indirect discrimination into a species of direct discrimination where judicial focus moves from effect to intention.

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18. The Supreme Court has granted permission to appeal in both cases. There is a real opportunity now for the Supreme Court to clarify the law in this difficult area.

19. Meanwhile, another case demonstrating the difficulty in applying the principles of indirect discrimination is **Pendleton v Derbyshire County Council** [2016] IRLR 580. There, a teacher was sacked because she refused to leave her husband after he had been convicted of making indecent images of children and imprisoned. She considered her marriage vows to be sacrosanct and an expression of her Anglican faith and that as a result she was unable to comply with the employer's requirement that those who chose not to end a relationship with a person convicted of such an offence would be dismissed. This requirement or PCP was applied to all employees equally. The ET concluded that that meant that there was no indirect discrimination. However, the EAT held that to be a fundamental error because the starting point in respect of any indirect discrimination claim is that the PCP is applied equally to all. The real question is whether there is disparate effect. In this case there was a particular disadvantage suffered by Mrs Pendleton. Her religious belief in the sanctity of marriage made it harder for those who shared the teacher's belief to leave their partner than would be the case for others who did not share that belief.

20. Note also that the *Immigration Act 2016* (96 sections and 15 schedules) contains one 'employment law' reform which is of relevance. Section 77(1) provides that "*A public authority must ensure that each person who works for the public authority in a customer-facing role speaks fluent English.*" Lest it be thought that this is discriminatory, section 82 provides that for public authorities that exercise functions in Wales "*references to English are to be read as references to English or Welsh*".

Post-Employment Discrimination

21. Post-employment discrimination is prohibited by *s. 108, EA 2010,* which provides that "a person (A) must not discriminate against another (B) if..the discrimination arises out of and is closely connected to a relationship which used to exist between them …"

22. In ***Butterworth v Police and Crime Commissioner's Office for Greater Manchester and another*** [2016] IRLR 280, the Claimant had worked for the Greater Manchester Police Authority, before leaving employment pursuant to the terms of a settlement agreement. The Authority's functions were subsequently transferred to the

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PCCO. The Claimant alleged that the PCCO and the Commissioner victimised her. The Respondents argued that statute transferring functions had not transferred any liability the Authority may have had in relation to the Claimant's contract because she was not employed immediately before the transfer. They also argued that *s. 108* did not bite because there had never been any relationship between the Claimant and the PCCO. The Claimant contended that *s. 108* had to be given a broad and purposive approach and should cover discrimination that was closely related to former relationships with predecessors. Langstaff P disagreed. The words "*between them*" had to be given some force. There was no jurisdiction to hear the claim.

Tribunal practice and procedure

Early Conciliation

23. Tribunal practice and procedure is not the most exciting topic, but it is important. Time limits are the source of much satellite litigation (and claims on professional indemnity insurance policies). The position has been complicated somewhat by the introduction of the Early Conciliation provisions which have now given rise to a number of appellate decisions.

24. Section 18A ETA 1996 provides:

> *"(1) Before a person ('the prospective claimant') presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner, about that matter."*

25. Many Respondents to ET proceedings have seized upon this and the related early conciliation regulations to try and knock claims out at the first stage. In general, the Courts have been very unreceptive to these attempts. A number of different scenarios have arisen. ***Science Warehouse Ltd v Mills*** [2016] ICR 252 concerned the addition of new causes of action, ***Mist v Derby Community Health Services NHS Trust*** [2016] ICR 543 concerned the precise names of Respondents, ***Drake*** concerned group companies.

26. In ***Science Warehouse*** the Claimant brought claims of maternity discrimination against the Respondent. She subsequently applied to add a claim of victimisation based on matters pleaded in the employer's defence. The Respondent argued that the

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amendment could not be allowed because the Claimant had not complied with section 18A in respect of the proposed new claim. The ET rejected this argument, holding that the power to permit amendments could be exercised irrespective of compliance with the early conciliation rules. On appeal, the EAT agreed. HHJ Eady QC said Parliament had chosen to use the broader terminology of "any matter" rather than "claim".

27. In ***Mist*** the Claimant brought a number of claims, including a TUPE claim, against an NHS Foundation Trust. She subsequently decided to bring a claim against the Community Trust, obtained a further early conciliation certificate and made an application to the ET to add a further Respondent. On appeal, the Trust took the point that the names on the early conciliation certificate and on the ET1 were different and that constituted a failure to comply with the rules, barring the claim.

28. The EAT had no truck with this argument. The requirement to name a prospective Respondent was not for the precise or full legal title, but simply enough information to enable the conciliation officer to make contact with the prospective Respondent. Any error was plainly minor in nature and the ET had been entitled to take the early conciliation certificate as being conclusive proof of compliance with the requirements of section 18A.

29. ***Drake International Systems Ltd v Blue Arrow Ltd*** [2016] ICR 445 concerns group companies. The Claimant brought a TUPE claim and named the parent company because, it said, it could not identify which companies had employed transferring employees. It reserved the right to add further Respondents by way of amendment. The Respondent took the point that it was not a transferor and that the Claimant could not bring a claim against any of the subsidiaries because it was out of time in light of the requirement to institute early conciliation against prospective Respondents in section 18A ETA 1996.

30. The ET allowed the Claimant to amend, dismissed the Respondent and substituted the subsidiaries in its stead. On appeal, the EAT upheld the ET decision. Langstaff J, like HHJ Eady QC in **Science Warehouse**, held that the word "matter" in section 18A was a deliberate choice over the word "claim" and might involve an event or events, different times and dates, and different people. All might be sufficiently linked to come within the scope of "the matter". He said that the case was typical of many where the employer was part of a group of companies and its precise identity might not be clear

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to employees. The link between D and its subsidiaries was close, as indicated by the fact that they were all represented by the same legal team. B had had a chance to seek conciliation in respect of "the matter" in regard to which the claim was ultimately brought. The Respondent's *"appeal to the need for the claimant to proceed by asking for early conciliation has on the current facts the ring about it of an empty formality which does no service to justice."*

Time Limits and Extensions of Time

31. The time limit of 3 months for unfair dismissal claims is routinely strictly enforced. ***Governing Body of Sheredes School v Davies,*** UKEAT/0196/16, 13 September 2016, is a recent example which could be said to have produced a somewhat harsh result for the claimant. The claimant had instructed solicitors following his claim. The time limit for presenting the claim expired on 25 October 2015. On 8 October, the firm told the claimant that he should instruct new solicitors. Shortly thereafter, the firm was closed down following an intervention by the SRA. The claimant instructed new solicitors on 5 November and his claim was presented to the Tribunal on 10 November, more than two weeks out of time. The ET allowed the claim to proceed finding that the SRA intervention amounted to a "special reason" rendering it not reasonably practicable for the claim to be presented on time. The EAT disagreed. It held that the fault lay with the initial advisers in that they should have advised the claimant on 8 October that the time limit was fast approaching. The ET had erred in failing to consider what advice the firm should have given and instead focused on the wrong matter. Had the ET focused on the correct matters, the only possible conclusion that it could have reached was that it was reasonably practicable to present the claim on time.

32. ***Miller and others v Ministry of Justice*** UKEAT 0003 and 0004/15/LA, 15 March 2016 arose out of the long-running judicial pensions litigation. It concerned the extension of time provision in the *Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000*. The wording is not quite the same as section 123 of the *Equality Act 2010* but the effect is the same: the tribunal cannot entertain a claim brought outside the 3 month time limit unless in all the circumstances it considers it just and equitable to do so.

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33. In the EAT Elisabeth Laing J reviewed and listed the principles emerging from case law:

(1) There is a "wide discretion" to decide whether or not to extend time: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24;

(2) Time limits are to be observed strictly in ETs. There is no presumption that time will be extended. Instead, the exercise of that discretion is the exception rather than the rule (*Robertson*, paragraph 25);

(3) If an ET directs itself correctly in law, the EAT can only interfere if the decision was perverse in the sense that no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence;

(4) It is for the ET to identify the relevant factors and decide how they should be balanced: ***DCA v Jones*** [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "*customarily*" relevant in such cases (ibid, paragraph 44);

(5) The ET "may" find helpful the checklist of factors in section 33 of the *Limitation Act 1980*: ***British Coal Corporation v Keeble*** [1997] IRLR 336 EAT. This is not a requirement, however, and an ET will only err in law if it omits something which is significant on the facts of the case: ***Afolabi v Southwark London Borough Council*** [2003] ICR 800; [2003] EWCA Civ 15, paragraph 33.

34. Returning to point (4), the EAT made some important observations about prejudice, The judge explained out that there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise be defeated by a limitation defence, and also the forensic prejudice which a Respondent may suffer if the limitation period is extended by a long time from such things as fading memories, loss of documents and losing touch with witnesses. The EAT held that both types of prejudice are relevant. It was said in *DCA v Jones* (paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of the discretion. The judge considered it obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time,

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and may well be decisive, but also that the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts.

35. ***Carroll v Mayor's Office for Policing and Crime*** [2015] ICR 835 concerns extensions of time in the EAT. Rule 3(1) of the EAT Rules, an appeal to the EAT is instituted by serving on the Tribunal a notice of appeal, a copy of any claim and response in the ET proceedings before the employment tribunal or an explanation as to why either is not included and a copy of the written judgment and reasons. By rule 3(3) the basic time limit is 42 days from the date on which the written reasons were sent to the parties. Under rule 37 a party who seeks to appeal late must apply for an extension. Under rule 20 the application is initially considered on paper by the Registrar. Any party aggrieved by that decision may appeal to a judge under rule 21.

36. In ***Carroll*** the claimant and a colleague were dismissed and brought claims for unfair dismissal. They were separately represented. In August 2014 the tribunal sent written reasons to the colleague's representatives, but not to Mr Carroll or his representatives. After various chasing letters and calls they received the reasons the following January. Mr Carroll lodged an appeal but did not lodge a copy of the pleadings in his colleague's claim until a week later. The registrar concluded that the appeal was out of time by 5 ½ months. She refused to extend time, holding that there was no exceptional reason why the appeal could not have been presented within the time limit.

37. The EAT on appeal decided, first, that time runs from when the reasons are sent by the ET even if they are sent to the wrong address, applying ***Sian v Abbey National plc*** [2004] ICR 55. Second, it was held that the appeal when first lodged was not properly instituted because of the absence of the pleadings in the colleague's case or any explanation for their absence. Third, an extension was refused because Mr Carroll could not adequately explain the time taken to inquire about the missing written reasons and because, even after the reasons were received, it took a further 6 weeks to lodge the appeal. The EAT noted that whether an appellant had a remedy against his legal advisers in separate proceedings was of very marginal if any significance.

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38. This shows the importance of complying with technical requirements, and also the nature of the jurisdiction to extend time. The EAT in ***Carroll*** listed the following principles applicable to extensions of time:

    a. The public interest and the interests of the parties are best served by there being certainty as to, and finality of, legal proceedings;
    b. Generally speaking no distinction is to be drawn between the unrepresented litigant and those who enjoy representation;
    c. The EAT is stricter in the approach to time limits where there has already been a hearing of an issue than where there has not;
    d. Adherence to the 42-day time limit is fundamental and compliance with it essential. It will only be relaxed in rare and exceptional cases, for there is no excuse, even in the case of an unrepresented party, for ignorance of the time limits;
    e. Nor is it likely there will be any acceptable excuse for failure within the time limit to assemble and submit the stipulated suite of documents or explain their absence;
    f. Any application for an extension is an indulgence and is unlikely to be granted because of ignorance of the need to comply with time limits or of the need to submit the stipulated documents;
    g. Before extending time the EAT must be satisfied that it has received a full, honest and acceptable explanation of the reasons for the delay;
    h. The EAT will have regard to the length of delay, although the crucial issue is the excuse for delay, and any evidence of procedural abuse or intentional default is likely to result in the indulgence being refused;
    i. An excuse may not be sufficient unless it explains why a notice of appeal and the requisite accompanying documents were not lodged during the whole of the period for appealing because those who submit or attempt to submit appeals towards or at the end of the 42 day period run the risk that something may go wrong;
    j. This does not mean the ability to lodge the correct documents at any time during the 42 days will necessarily be fatal to granting the indulgence. The questions to be asked are (i) what is the explanation for the default? (ii) does it provide a good excuse for the default? (iii) are there circumstances which justify the exceptional step of granting an extension of time?

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k. Prejudice may be a factor to be considered along with other factors;

l. The merit of the proposed appeal may be relevant. However they are usually of little weight and they should not be investigated in detail. I agree with that. But if it is plain that the appeal has no prospect of success, that should be taken into account;

m. If a legal adviser has been at fault that might be a consideration to be considered along with others.

Protected Conversations

39. ***Faithorn Farrell Timms LLP v Bailey*** UKEAT/0025/16 is the first case on the new type of privilege invented by section 111A ERA 1996 (that which attaches to 'protected conversations'). Could the privilege under section 111A be waived in the same way that without prejudice privilege can be waived?

40. Before the ET, the Claimant had complained of constructive unfair dismissal and indirect sex discrimination arising, in part, from the Respondent's conduct towards her during a period of discussions she had initiated for the agreed termination of her employment. Her grievance and ET1 had referred to the parties' discussions in this regard on an open basis. In responding to the grievance and in its ET3, the Respondent had not objected but had itself also referred to the material in question. Subsequently, in preparing for the Full Merits Hearing of the Claimant's claims, the Respondent objected to her reliance on what it said was privileged material, alternatively material rendered inadmissible by virtue of section 111A ERA.

41. The EAT held that the ET had correctly applied the law on without prejudice waiver and correctly found that the Respondent had waived privilege by referring to the privileged material in its ET3. More interesting, however, were the EAT's conclusions in relation to section 111A. In summary these were:

a. That section 111A had to be read on its own terms and should not be conflated with common law without prejudice privilege. The case law on without prejudice was not relevant to the construction of section 111A: *"its construction is to be informed by the language Parliament chose to use, not the language of the case law that underpins without prejudice privilege"*;

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b. *"section 111A is not to be restricted to the content of the discussions in issue but extends to the fact of those discussions, even if this would not be the case under without prejudice privilege… section 111A need not be limited to the direct discussions between the main protagonists; it may extend to evidence of those discussions more widely";*

c. Section 111A permits no waiver. The judge thought that although this was "counterintuitive" it was apparent from the language of section 111A and was strengthened by the general injunction against contracting out in section 203 ERA.

Gender pay gap reporting

42. This will affect those businesses or organisations with 250 or more relevant employees. It was originally thought that it would not apply in the public sector at all, but the Government has made clear that it will be introduced to cover the public sector as well. A brief consultation on this specific topic commenced on 18 August 2016 and closed on 30 September 2016[2]. This makes it clear that the same reporting regime as for the private sector is to be introduced for large public sector employers. The rationale for including the public sector is clear:

"The government believes it is only right that public sector employers should lead the way in promoting gender equality in the workforce. Although the pay gap across the public sector as a whole is 18.5% compared to 25.3% in the private sector, this is clearly still too high and we need further concerted efforts to identify and tackle the causes of any gender pay differences. The new regulations will mean better transparency for 3.8 million employees who work in public sector organisations in England with 250 employees or more."

43. The reporting requirement will be mandatory for those public bodies with 250 or more employees. The current expectation is that the relevant regulations will be published in early 2017, with affected public bodies expected to capture their first set of GPG data in April 2017. For now, the draft regulations which the government published as part of the consultation document in February 2016 are all that we have. They are the *Equality Act 2010 (Gender Pay Gap Information) Regulations 2016*. The key provisions are as follows:

[2] https://consult.education.gov.uk/equality-framwork-team/gender-pay-gap-reporting-public-sector/supporting_documents/24.08.2016%20Public%20sector%20GPG%20consultation_accessible%20FIN.pdf

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a. Regulation 1 defines the mean and median. As you all know, the mean average is obtained by adding up all the wages of the relevant employees and dividing by the number of relevant employees, and the median average is obtained by putting all of the wages figures of the relevant employees into ascending or descending order, and picking out the middle value in the series. A relevant employee is one who works in Great Britain under a contract of employment governed by UK legislation, and a relevant employer has 250 or more relevant employees. The relevant date, where the wages reference period starts, is 30 April 2017, and its anniversaries.

b. Regulation 2 defines pay, and its provisions are consistent with the Office for National Statistics' practice on the Annual Survey of Hours and Earnings. Pay includes basic pay, paid leave, maternity pay, sick pay, area allowances, shift premium pay, bonus pay and other pay. Other pay includes car allowances, on call and standby allowances, and clothing, first aider or fire warden allowances. Pay excludes overtime, expenses, the value of salary sacrifice schemes, benefits in kind, redundancy, arrears and tax credits. A gross figure for pay is used.

c. Under regulation 3, employers are required to publish the difference in mean pay between men and women, the difference in median pay, the difference in mean bonus pay, the proportion of each sex receiving bonus pay, and the numbers of men and women in quartile pay bands. Publication must be within a year of 30 April 2017 and then every 12 months.

d. Regulation 4 sets out how to calculate the mean gender pay gap. It must be done across the whole workforce, which one might consider to be at the blunt end of the spectrum of equal pay audits, compared with the sophistication and subtlety recommended by the EHRC. The Government says that this sort of equal pay audit will be useful because women are often over-represented at the low earning extreme and men are often over-represented at the high earning extreme in the workforce.

e. The calculation of the median gender pay gap is explained in regulation 5. Again, it is an audit across the whole of the workforce. The Government says that this will provide the best representation of the middle earner and the typical difference. According to the Government, the median average has the advantage of being unaffected by the presence of a few very high earning males in the workforce.

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f. Regulation 6 contains the calculation method for the mean gender pay gap in bonus. The employer also has to publish the proportion of male and female relevant employees who received bonus pay as a percentage of all relevant male and female employees.

g. The quartile bands are described in regulation 7. Each quartile will contain one quarter of the salary data, which will have been placed in ascending or descending order. The Government says that employers will be able to examine the numbers of men and women in each quarter by looking at their overall pay distribution, and then consider where women are concentrated and if there are any blockages to progression. It seems that many larger employers may find this exercise crude and even facile, because they are already well aware of a range of work and social factors which seem to inhibit women from reaching the higher-paid roles in their organisations.

h. A written statement of accuracy of the gender pay gap report is required by regulation 8.

i. Under regulation 9, the gender pay gap report must be published on the employer's website in English, in a manner accessible to all employees and the public. It must be displayed for at least three years and also uploaded to a Government website. You will note that there are no sanctions for non-compliance.

j. Regulation 10 provides that the Government must review the regulations and publish its conclusions, including the objectives of the regulations and whether they have been achieved, and whether the objectives could be achieved with less regulation. The first report, however, is not due until October 2021.

Public sector exit payments.

44. Three consultations relating to this topic have now been concluded:

45. First there was consultation in 2014 on the **Recovery of Public Sector Exit Payments**[3]. There was concern that the taxpayer was funding large sums in redundancies of highly paid public sector employees only for those employees quickly

[3] https://www.gov.uk/government/consultations/recovery-of-public-sector-exit-payments

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returned to other public sector roles. Section 154 of the *Small Business, Enterprise and Employment Act 2015* (165 sections and 11 schedules) ("**the 2015 Act**") empowers the Secretary of State to make regulations "*requiring the repayment of some or all of any qualifying exit payment in qualifying circumstances*". The UK government's response to the consultation was published in October 2014 and it subsequently published in draft *The Repayment of Public Sector Exit Payments Regulations 2015.* These were originally expected to come into force in April 2016, but are unlikely to do so before 2017. The key points are these:

a. The Regulations apply to all exit payments except accrued annual leave, bonuses and PILON: regs 3 and 5;
b. Regulation 7 excepts employees who, in the period of 12 months prior to the end of their employment or office, earned less than £100,000 or an equivalent pro rata amount;
c. Regulations 13-15 contain a complex repayment mechanism. In short, if the recipient of an exit payment commences work (employment or self-employment) with another relevant public body within one year then they are obliged to repay part of their exit payment in accordance with a formula which takes account of how long has elapsed since the old employment ended, the tax and NI paid, the remuneration and hours of the new employment;
d. Regulations 16-17 provide that where an exit payment which may become subject to repayment is made, the authority making the payment must inform the payee that they may be liable to repay part of it in the circumstances set out in the regulations;
e. Where the repayment obligation is triggered, regulation 18 provides that *"the exit payee shall enter into such arrangements with the new and old employers as are necessary to repay to the old employer the amount of the exit payment that is due to be repaid"*;
f. Regulation 25 provides that if the payee does not repay the relevant amount then the new employer "*must consider*" whether to dismiss them or bring to an end the contract for services;
g. Part 6 provides that the provisions of the regulations may be waived by, so far as here relevant, the Secretary of State for Communities and Local Government who may delegate the power in turn to the Welsh Ministers or a local authority.

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46. Next was a consultation on a **Public Sector Exit Payment Cap**[4]. This was with a view to ending all six-figure exit payments for public sector workers. This consultation closed in August 2015 and the Government's response was published in September 2015. The response to the consultation said that the policy proposal will work in the following way:

a. There will be a cap on the total cost of exit payments available to individuals leaving employment to £95,000
b. The cap would apply to all types of arrangement for determining exit payments.
c. The cap will cover payments made in relation to leaving employment, including:
    i. Voluntary and compulsory exits
    ii. Other voluntary exits with compensation packages
    iii. Ex gratia payments and special severance payments
    iv. Other benefits granted as part of the exit process that are not payments in relation to employment
    v. Employer costs of providing early unreduced access to pension
    vi. Payments or compensation in lieu of notice and payments relating to the cashing up of outstanding entitlements

d. Where a number of payments are made they will be aggregated together to be measured against the cap.

e. It is proposed the following will not be in scope:
    i. Compensation payments in respect of death or injury attributable to the employment, serious ill health and ill health retirement and certain fitness-related requirements.
    ii. Payments made following litigation for breach of contract or unfair dismissal.

47. The draft regulations, *The Public Sector Exit Payments Regulations 2016* provide for a list of payments similar to, but not exactly the same as, the one in the government's consultation response. The mechanism is simply to impose a duty on a public sector body and to remove what would otherwise be a contractual entitlement from an individual. Draft regulation 4 provides:

> (1) Where this regulation applies—

[4] https://www.gov.uk/government/consultations/further-consultation-on-limiting-public-sector-exit-payments

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(a) a prescribed public sector authority may not make a payment to the exit payee of an amount that would result in the aggregate exit payment to the exit payee exceeding the exit payment threshold;

(b) an exit payee's entitlement to an exit payment is not enforceable other than to the extent that the payment is permitted by regulation 4(1)(a);

(2) Subject to regulations 5 and 9, this regulation applies where an exit payment to an exit payee would mean that the exit payee's aggregate exit payment would exceed the exit payment threshold.

48. Draft regulation 6 provides that if £95k will be lower than a statutory redundancy payment then the difference can be paid.

49. Importantly, there is a power in the primary legislation (section 153C(1) of the 2015 Act, inserted by the Enterprise Act) for the cap to be 'relaxed'. Draft regulations 10-12 provide:

The power under section 153C(1) of the Act is exercisable—
(1) by the Welsh Ministers, in relation to payments made by a relevant Welsh authority;
(2) by the full council of a local authority, in relation to payments made by that local authority.
[(3) any further delegation of the power to relax the restriction to be included here]

The power under section 153C(1) of the Act must be exercised in accordance with any directions issued by the Treasury on how that power is to be exercised

Where a person exercises the power to relax the restrictions on payment of exit payments under these Regulations, they shall—
(a) Keep a record of the exercise of that power and the reasons for it for at least 36 months; and
(b) Publish, as part of annual accounts or in a list published at the start of the following financial year, a list of all the times in the preceding twelve months that they have exercised that power and the reasons for it.

50. It is currently expected that the draft regulations (or some version of them) will come into force in 2017.

51. Finally, there was a broader consultation on **Reforms to Public Sector Exit Payments**[5]. The purpose of this was to consult on cross-public sector action on exit

[5] https://www.gov.uk/government/consultations/further-consultation-on-limiting-public-sector-exit-payments

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payment terms to reduce the cost of redundancy payments and ensure greater consistency between workforces. This consultation closed in May 2016 and the Government's response was published last week (26 September 2016). Key points arising are as follows:

a. It is considered appropriate to reform exit payment arrangements across the public sector;
b. Applying upper limits to calculate exit terms would make public sector exit terms fairer;
c. The most appropriate way of taking forward these reforms was for the departments responsible for the different public sector workforces to seek to reach agreement on packages of reforms appropriate to those workforces in accordance with an overall framework set by central government. These packages are expected to be produced by the end of 2016;
d. There will be a maximum tariff for calculating exit payments of three weeks' pay per year of service;
e. The maximum payment will be 15 months' salary;
f. Exit payments will not be payable in respect of salaries above £80,000;
g. There will be no overarching transitional protection related to the age of individuals, proximity to retirement age or similar factors;
h. However, government will consider the case for protection for those with exits formally agreed on terms that applied before the new compensation arrangements come into effect.
i. The government expects that the discussions and negotiations with unions and other workforce representatives to be concluded and agreement reached and changes made to compensation arrangements within nine months (!), i.e. by June 2017. Should it not be possible to achieve meaningful reform for one or more workforces, the government will consider options for primary legislation to take forward reform.

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