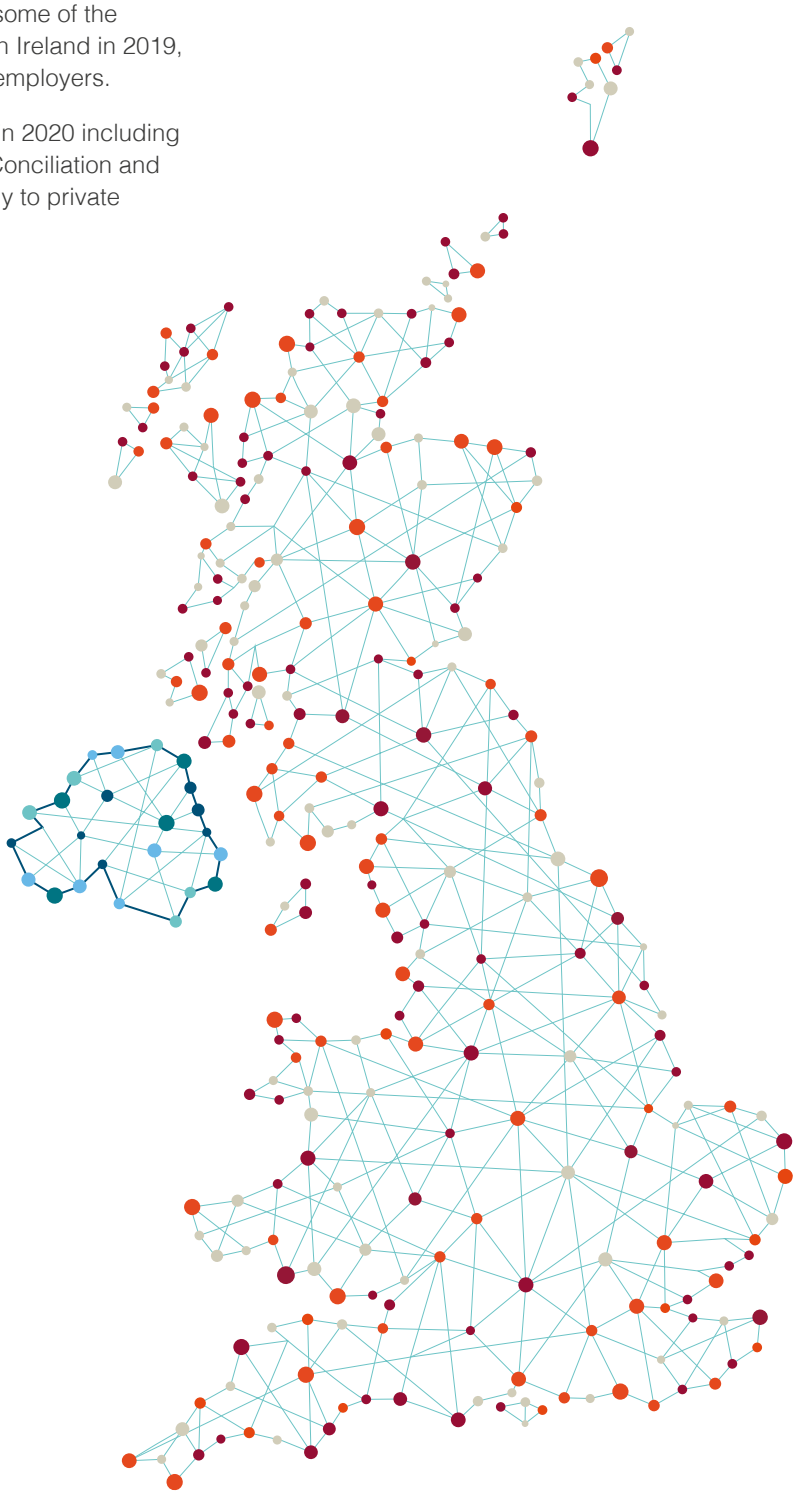
NI Employment quarterly update |

First Quarter 2020

Welcome to the first of TLT's Northern Ireland (NI) focused employment law updates. This supplements TLT's periodical employment law bulletin which covers important developments and key decisions coming out of Great Britain and Europe. Our quarterly NI update will share news and insights arising from local case decisions as well as looking ahead to legal developments which could impact on NI businesses, and sharing details of upcoming events and training that may be of interest.

In this first update, we look back on some of the interesting cases decided in Northern Ireland in 2019, and highlight our key takeaways for employers.

We also take a look at what's ahead in 2020 including the introduction of mandatory Early Conciliation and the new rules on IR35 which will apply to private companies from April 2020.



Disability Discrimination

Case: British Telecommunications Plc vs Meier

BT appealed the Industrial Tribunal's November 2018 decision that "BT was liable for disability discrimination by reason of its failure to make reasonable adjustments" for the Claimant's disability (autism spectrum disorder). The Northern Ireland Court of Appeal ruled that reasonable adjustments would have removed the disadvantage suffered and dismissed the appeal.

Background

The Claimant applied for a position via a BT graduate recruitment programme. He holds a 2:1 in computer science, has a high IQ of 139 and is diagnosed with Asperger's Syndrome, dyslexia and dyspraxia. The Claimant's mother submitted his CV and included information about his disability and stated that he was seeking to avail of the BT Disability Scheme.

As a member of the Disability Confident Scheme (DCS), BT is expected to actively look to attract and recruit disabled persons and provide a fully inclusive and accessible recruitment process. A DCS employer should plan for and make reasonable adjustments to the assessment process.

For its graduate posts BT ran a situational strength test (SST) and passing the test was necessary to be considered for the next stage of the recruitment process, However, in line with its commitments as a DCS member, BT guaranteed an interview to disabled persons who met the minimum criteria for a job.

BT's practice was that the recruitment team was not made aware of the contents of the monitoring form which contained information about the Claimant's disability, and therefore no steps were taken to consider that information, nor were any plans made for reasonable adjustments to the assessment process.

The nature of the Claimant's disability made completing the SST challenging. He failed to achieve the pass mark and BT informed him that they would not be taking his application forward.

A series of communications followed between BT and the Claimant's mother in which she drew their attention to a relevant decision of the Employment Appeals Tribunal (EAT) which found that a requirement to undertake a multiple choice test as part of a recruitment process had placed applicants with autism at a disadvantage.

In the original decision of the Industrial Tribunal, BT were found liable for disability discrimination as they had knowledge of the Claimant's disability but failed to make reasonable adjustments,

BT failed to consider reasonable adjustments to allow the applicant to proceed to the next stage of interview and appeared to refuse to consider bypassing the test, essentially going against its 'disability confident' ethos and interview guarantee.

BT had argued that it had been for the Claimant to provide BT with details of what reasonable adjustments were required and that their HR were not aware of the information provided by him in his application until after the test had been completed.

BT appealed the decision of the Industrial Tribunal arguing that the duty to make reasonable adjustments was not triggered as they did not have the requisite knowledge of the Claimant's disability at the time he completed the test. Furthermore, BT said that on becoming aware they tried to engage with the Claimant to make a reasonable adjustment.

The Court of Appeal (COA), however, held that there was indeed requisite knowledge of the Claimant's disability as the information had been included in the completed monitoring form. Noting the positive duty on employers to making reasonable adjustments, the COA noted that emails showed BT was still failing to face up its commitment to allow the applicant to proceed to interview and also expected the applicant to propose adjustments without recognising its legal duty to consider what reasonable adjustments would be appropriate.

Our insight

This case is an important reminder of the positive duty on employers to consider what reasonable adjustments may be necessary where disabled applicants or employees suffer a disadvantage as a result of a particular provision, criterion or practice operated by an employer, In this case, it was the situational test which formed part of a recruitment process. However, in the context of recruitment, there are many other adjustments which may have to be considered including:

- additional time to complete assessments;
- allowing written tests to be completed on a computer;
- use of an interpreter or buddy in cases of applicants with hearing impairment or with speech difficulties;
- changes to the location of the interview or the time of it; and
- providing short breaks during an interview/assessment.

In addition, whilst it is only right that monitoring information is carefully collected, stored and not shared unnecessarily across an organisation, including during a recruitment process, the steps taken to protect the information should not lead to the information being ignored. It is important that teams communicate relevant information, such as information in respect of disability, between them and, in the context of recruitment and selection, that information about a disability is considered throughout the entire recruitment process.

‘It is important that teams communicate relevant information, such as information in respect of disability, between them and, in the context of recruitment and selection, that information about a disability is considered throughout the entire recruitment process.’

Sex Discrimination

Case: Gordon Downey v Chief Constable of the Police Service of Northern Ireland

The Claimant, a serving PSNI officer, brought a claim before the Industrial Tribunal alleging direct and indirect sex discrimination and victimisation. The Tribunal ruled that his claims of direct and indirect sex discrimination were well founded, while the claim of victimisation was dismissed. The Tribunal awarded the Claimant £8,500 for injury to feelings. The total award with interest was £10,052.15.

Background

The Claimant was assigned to the PSNI's Armed Response Unit (ARU). In January 2018 the PSNI introduced a revised policy setting out minimum standards for dress and appearance (the CAPES policy). It also identified equipment to be worn in compliance with health and safety legislation. As part of this, a new policy on facial hair was issued.

The CAPES policy stated that officers for whom there was a routine possibility of respiratory exposure to occupational hazards, may be required to use Respiratory Protection Equipment (RPE) at short notice and were therefore required to be clean shaven whilst on duty. The policy was deemed to apply to the Claimant's role in the ARU.

The Claimant shaved his beard in anticipation of the CAPES policy being introduced. However, he kept a moustache, as he did not believe this would interfere with RPE, which up until that point he had never been required to use. A test to ensure the RPE worked as intended confirmed that the Claimant's moustache did not interfere with the seal or valves of the respirator. Despite this, he was informed that if he did not fully shave he would be transferred out of the ARU. He refused and was informed that he would be transferred out of ARU.

As a result of his treatment, he brought claims of direct sex discrimination, indirect sex discrimination and victimisation, arguing that female officers deployed in the ARU were not subject to the same requirements, despite having long hair not secured above the collar that was in breach of the CAPES policy.

The Tribunal accepted the female comparators advanced by the Claimant and found that the direct and indirect sex discrimination claims were well founded. The CAPES policy was indirectly discriminatory against men and the PSNI had failed to persuade the Tribunal that a total ban on facial hair was justified at the time.

Our insight

Even though the Claimant and the identified comparators in this case were in breach of different sections of the CAPES policy, the relevant circumstances of females as compared to males were not materially different as argued by the PSNI. Failure to shave and failure to secure hair constituted a breach of the same policy and both requirements were based on health and safety concerns. When considering enforcement action against individual's in breach of the policy, the Respondent's focus was on male officers' facial hair – clear evidence of gender bias.

Employers should ensure generally that they are applying policies consistently and fairly, and that any provision, criterion or practice (PCP) within it can be justified as a proportionate means of achieving a legitimate aim. This will be of critical importance to any challenge to a particular policy or policy provision which appears to have a disparate impact on a particular group of people than others. Employers should consider use of Equality Impact Assessments in advance of implementing such a policy.

Flexible working/Return to work after Maternity Leave

Case: Angela Kerr v Dental World 1 Limited

The Claimant made a claim to the Industrial Tribunal for sex discrimination, failure to comply with the regulations around right to return after additional maternity leave and failure to comply with employer duties regarding a flexible working request.

Background

The Claimant was employed full-time as a receptionist in one of the employer's dental practices, having previously also been a dental nurse there. While on maternity leave she made a written flexible working application to return part-time. During a meeting with the employer's practice manager her request was refused.

In breach of the statutory procedures set out in The Flexible Working (Procedural Requirements) Regulations (Northern Ireland) 2003, the Claimant was not notified of her right to be accompanied at the meeting, and was not provided with a written notification of the refusal, the grounds for the refusal or any details of an appeal process.

She was offered the alternative to work two days at two different practices, one as a receptionist, and the other as a dental nurse. She was also informed she would not be able to return to her role in the practice she had worked in prior to maternity leave as she was in a relationship with a dentist there.

The employee raised a grievance relating both to the refusal of her part-time working request and also regarding the relocation given she had previously worked in the practice without issue.

The grievance went unanswered. Eventually she was threatened with disciplinary proceedings if she did not comply with the relocation and the issues went unresolved at another meeting.

The Tribunal found that the employer had breached the flexible working regulations, maternity and parental leave regulations and Ms Kerr had been discriminated against.

Our insight

It should be noted that this case was undefended, by virtue of the employer's failure to comply with an order of the Tribunal in relation to discovery of documents.

However, it is a timely reminder of the importance of following the statutory procedures for handling flexible working requests. Employees can make a standalone complaint to the Tribunal under Regulation 6 of the Flexible Working (Eligibility, Complaints and Remedies) Regulations (Northern Ireland) 2003 if they believe there has been a breach by their employer of the statutory flexible working procedures. Although in reality, such claims are often submitted alongside other claims such as sex discrimination and unfair dismissal. In respect of any breaches of the statutory procedure, the Tribunal has a general power to award such compensation as is just and equitable, up to a maximum of 8 weeks' pay.

In this case, alongside an award for injury to feelings and compensation for loss flowing from unlawful discrimination, the Tribunal awarded the maximum 8 weeks' pay (£2,720) specifically awarded for failure to comply with duties around the flexible working request.

It also raises the importance of consistency in the application of policies with part of the issue in this case being that the Claimant's personal relationship with the dentist, which had been cited as the reason for the Claimant being re-located, had not been considered to be a conflict prior to the Claimant taking her maternity leave. This was crucial to the Claimant establishing that she had suffered a detriment as a result of having taken maternity leave.

Unfair Dismissal

Case: Laura Gruzdaite v McGrane Nurseries Ltd

The Claimant brought a claim of pregnancy related dismissal following her dismissal by the employer who claimed it was because she was a seasonal employee.

Background

The Claimant was employed by a commercial nursery providing plants, flowers and vegetables. The work was seasonal in nature with spikes for occasions like Valentine's Day, Mother's Day etc.

She was employed from January to October 2018 and her contract of employment did not contain clear start or end dates, dates of the working season, job title or salary and was not signed by the employer.

The Claimant informed one of her managers of her pregnancy, and provided him with a copy of the antenatal appointment letter. When the Claimant did not subsequently attend work by reason of being at her first antenatal appointment, she was called to a meeting to explain her absence. She alleges her employer had been "less than friendly" towards her after she had notified them of her pregnancy.

During her attendance at a further antenatal appointment in October 2018, her employer held a meeting at which a number of seasonal workers were told their employment would terminate. Due to an antenatal appointment the Claimant did not attend this meeting but on return to work the following day both she and her husband, who was also employed as a seasonal worker, were given one weeks' notice and informed the season was coming to an end.

The Claimant alleged that during this meeting her employer said she would require further days off to attend ante-natal appointments and that she had already skipped work to attend these, and would need more "days off" because of her pregnancy.

Despite informing the Claimant and her husband that the season had come to an end, it became apparent that their employer had retained a number of seasonal workers who were carrying out the same type of work as the Claimant had previously undertaken.

The Tribunal found that the claimant was negatively treated following announcement of her pregnancy and was unreasonably questioned about her antenatal appointments. It also found the reason for dismissal was related to her pregnancy and was not satisfied by the explanation put forward by the employer. In their decision, the Tribunal commented that the evidence given on behalf of the employer was unconvincing, with conflicting information provided on the reasons for holding meetings, and the purported length of a season. They found that the decision to terminate the Claimant's contract was "tainted by discrimination" and was not as a result of her being a seasonal employee.

The Claimant was awarded a total of £28,000 in damages, made up of injury to feelings, loss of earnings and statutory maternity pay.

Our insight

This case serves to highlight once again the legislative protections that apply to pregnant employees, and the significant cost and damage to reputation that getting it wrong can cause. This case was widely reported in the media. Employers should ensure that pregnancy does not influence decisions in respect of an employee's employment.

In addition, the question of whether the employee was seasonal or permanent was just one element of the issues determined in this case. The Tribunal was critical of the lack of information which one would expect to see in a contract for seasonal workers and found that the contract provided had been a blank one with no clear date when the season was to end for her. This emphasises the important of ensuring that contractual documents are accurate and complete.

What's coming in 2020?

Brexit

Much like previous years, 2019 passed with continued uncertainty surrounding the UK's planned departure from the EU and plans for 2020. With the Conservative Party securing a clear majority in December's election, it remains to be seen what changes will be implemented. Despite this uncertainty, employers in Northern Ireland can take comfort that however Brexit is implemented, it is likely that little will change in the short term when it comes to existing employment law.

Depending on the terms of the exit from the EU, the Assembly (if and when restored) will have greater control over domestic legislation and it is entirely possible that we will see changes to existing employment laws in Northern Ireland that have long been unpopular with businesses. In order to remove the effect of existing EU directives domestic legislation would need to be repealed however, so any major changes are likely to be a longer-term effort.

TLT will continue to monitor the position closely and report on the key developments as they happen in 2020.

https://www.tltsolicitors.com/insights-and-events/insight/what-does-a-conservative-majority-mean-for-immigration-in-the-uk/

Early Conciliation

Early Conciliation comes into effect in Northern Ireland from 27 January 2020. Under this compulsory scheme the details of an Employment Tribunal claim must be passed to the Labour Relations Agency (LRA) before the claim can be lodged with the Tribunal. This means that claimants will be required to engage with a conciliation process before commencing a claim, and will be unable to issue proceedings in the Industrial Tribunal or Fair Employment Tribunal without providing evidence of having gone through the EC process by way of an EC certificate number.

This is a system that has already been operating in other parts of the UK for several years.

Save for only a few cases, most cases must be lodged in the Tribunal within 3 months. However, Early Conciliation will effectively stop the clock for up to one month to allow for a process of conciliation between the parties.

Although it means that employers will need to be alive to possible claims for a longer period of time they will now have advance notice of formal proceedings and utilise the time to find a resolution before claims get off the ground.

If a complaint is settled through the LRA during EC the resolution becomes legally binding and no further tribunal claim can then be brought. However, if the EC process does not bring about a satisfactory outcome, the LRA will issue a certificate, the clock will begin to run again and the Claimant will be free to proceed with lodgement of their Tribunal claim.

It remains to be seen if the introduction of the scheme in NI will do anything to reduce the number of claims proceeding through to Tribunal but in the context of an increasing focus on alternative dispute resolution as a means to resolving disputes, this is a welcome development in NI. See a link to our article below for details on how the EC process operates.

https://www.tltsolicitors.com/insights-and-events/insight/extra-time-for-ni-tribunal-claims-on-the-horizon/

Holiday Pay - Supreme Court likely to hear PSNI appeal in 2020

The long-running saga of holiday pay is expected to continue in 2020 when the Supreme Court decides whether or not to allow a legal challenge by the Chief Constable of the PSNI over unpaid holiday pay.

In June we commented on the Court of Appeal's (COA) decision in Chief Constable of the Police Service of Northern Ireland and another v Agnew and others [2019] NICA 32 to uphold the previous decision of the Industrial Tribunal that holiday back pay claims were valid meaning the PSNI owed individuals an estimated £40m with potential for claims to stretch back 20 years as the two year back stop on the ability to claim holiday back pay does not currently extend to Northern Ireland. Crucially, the COA upheld the findings of the Industrial Tribunal that a gap of 3 or more months did not amount to a break in the series of deductions, thereby undermining the findings of the EAT in 2014 in Bear Scotland v Fulton, In the absence of a 2 years backstop in respect of claims for holiday pay, the potential financial liability for NI employers in the public and private sectors is staggering.

The Chief Constable Simon Byre had sought to challenge the Court of Appeal's decision, however leave to appeal was refused in September 2019, because the Court considered the issues were best addressed directly by the Supreme Court

Until recently, Tribunals may have had a degree of sympathy for the fact that employers had wrongly believed they were calculating holiday pay correctly. However, given the significant amount of high profile judicial direction and commentary on this subject in recent years, employers can no longer afford to hide behind a lack of knowledge. Employers should, therefore, be taking proactive steps to address their holiday pay calculations and seek advice if they are unclear on what they should be including.

The outcome of an appeal here would be significant, not just because of the number of historical holiday pay claims it may impact upon of which many are currently being held in abeyance pending further developments in the Agnew case, but also as a Supreme Court ruling would be binding across the UK, not just in Northern Ireland.

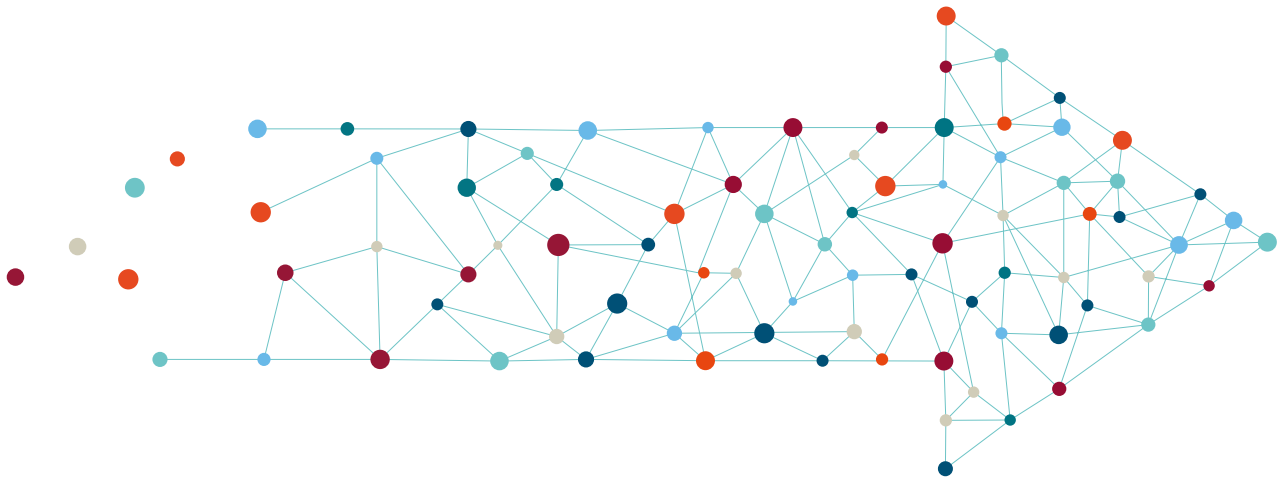
In deciding whether or not to allow the latest appeal, the Supreme Court will consider if the case is one of general public importance. We will be closely following developments. See a link to our article below for background on the case to date.

https://www.tltsolicitors.com/insights-and-events/insight/ni-employers-remain-liable-for-higher-holiday-pay-costs/

IR35/Off-payroll working rules

From April 2020, changes to the rules governing off-payroll working through an intermediary (IR35), previously introduced for the public sector, will be extended to large and medium size businesses in the private sector.

Employers should be mindful of the new rules, especially if they engage contractors via an intermediary such as a personal services company, but also for direct engagements and agency arrangements.



What is changing?

Where a business contracts with a personal service company, the new rules place the burden of deciding employment status of a contractor on the end-user. Businesses will need to assess whether, but for the existence of the intermediary, an employment relationship (for tax purposes) exists between the contractor and the business.

The upshot of this assessment is that if a business engages directly with an intermediary and all of the conditions of the legislation apply then the business will be obliged to account for income tax and national insurance (both employee and employer) on any payments made to the intermediary. Consider also that the employer national insurance may represent a significant cost for the business, particularly where contractors receive significant fees.

Where the business doesn't engage with the intermediary directly and all of the conditions of the legislation apply, the liability to account for tax will be on the party that actually makes the payment to the intermediary (for example an agency). However, the Government is consulting on where the ultimate liability to account for tax should rest where a labour supplier/fee-payer does not comply with its obligations, with some suggestion that this could be on the client business in certain circumstances.

What should businesses do now?

- Audit the current labour population including agency contractors
- Identify alternative labour supply methods and possible cost implications
- Assess risk areas such as labour shortage and contractors with key strategic importance or expertise.
- Review supplier and contractor contractors to ensure they are fit for purpose in advance of April 2020.

TLT's Employee Handbook series for Legal Island

TLT regularly contributes to Legal Island's Employment Law Hub through our 'Essential Elements of the Employee Handbook' series which looks at important and practical points for HR practitioners and in-house counsel as well as highlighting the key legal principles and common issues that can arise.

Throughout 2019, the monthly series provided top tips for introducing new policies or refreshing existing policies.

Building on the success of the series, Leeanne Armstrong, Legal Director in our Employment team recently presented a session on the Essential Elements of the Employee Handbook to delegates at the Annual Review of Employment Law.

If you have any questions about your organisation's existing policies and procedures or require advice on the creation of new workplace policies, please get in touch.

'As the UK prepares to leave the European Union, it will be important for businesses in Northern Ireland to continue to have access to highly skilled staff from the EU and beyond.'

Introducing TLT Business Immigration

As the UK prepares to leave the European Union, it will be important for businesses in Northern Ireland to continue to have access to highly skilled staff from the EU and beyond. While the exact arrangements for Brexit are unclear, what is certain is that currently Non-EEA nationals who wish to work in the UK have to be sponsored by their employer in order to obtain a visa and EU/EEA/Swiss nationals will be subject to a new immigration system from January 2021 onwards.

While Brexit, understandably, remains high on the agenda for NI employers, immigration advice for businesses is not limited to the relationship with the EU. At TLT we regularly advise local businesses in relation to a wide range of immigration issues that arise before, during and after the employment relationship.

As well as advising businesses on the implications of Brexit for the EU workforce, the requirements of the EU settlement scheme and practical steps that can be taken regarding EU workers' rights, TLT's expertise includes:

- Advising employers in relation to possible discrimination risks in recruitment practices
- Right to work checks and compliance with Home Office requirements
- Providing advice and practical assistance on the various steps needed to sponsor non-EEA nationals to work in the UK
- Advising employers on right to work issues relation to Tier 4 (General) non-EEA students

Key contacts

Leeanne Armstrong
Legal Director

T 0333 006 1545
leeanne.armstrong@TLTsolicitors.com

Rob Tubman
Solicitor

T 0333 006 1593
rob.tubman@TLTsolicitors.com

tltsolicitors.com/contact

Belfast | Bristol | Edinburgh | Glasgow | London | Manchester | Piraeus