muckle LLP

2017 Employment Christmas Newsletter

KEEP CALM AND CARRY ON

In previous years....

We have taken inspiration for our Christmas newsletters from sources as varied as Charles Dickens' "Christmas Carol" to Christmas cocktails and Christmas party compilation albums. This year we thought that, especially given the UK, Europe and World political situation, we would base our newsletter on another Christmas tradition, the Queen's Christmas Message.

Her Majesty the Queen's Message, which is always broadcast at 3pm on Christmas Day as most of us are sitting around the lunch table or starting to feel the after effects, is 10 minutes long and picks up on strands of UK and World events in the previous year. The Queen's Christmas Message always has a theme, be it the Community or the Commonwealth and for us this year our chosen theme is "Keep Calm and Carry on" – So pour yourself a Drambuie (or other tipple of your choice), sit yourself down next to your 20 foot Christmas tree, help yourself to just one more Belgian chocolate and relax.

‘Keep Calm and Carry On’…

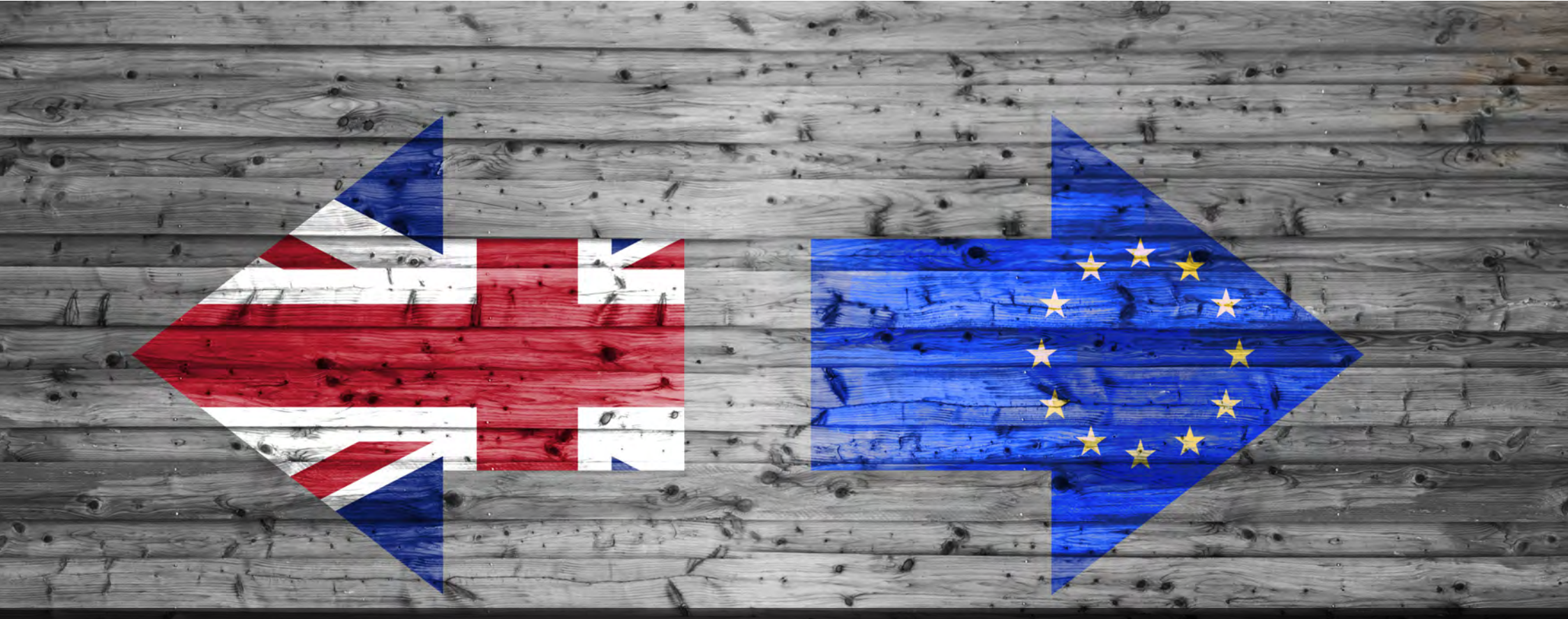
This poster that we are all by now very familiar with, both in its original guise, but also in many other copied forms (“Keep calm and eat cupcakes”, “Keep calm and have another Prosecco” etc.) was dreamt up by the Ministry of Information on the eve of the Second World War in 1939. It was one of 3 posters ready for issue in the event of an invasion and as a consequence was never used.

The idea of a Government department set up with the sole intention of issuing propaganda, controlling news output and peoples’ opinions may seem strange to us in our multi-media world, but it echoes what one Western leader appears to be trying to do via his Twitter feed! In 5 simple words though, the poster conveys a message which we can all understand quickly and identify with – the need to take stock of what is going on around us, to take a deep breath and to get on with what we need to do - to do the basics right.

As employment lawyers, that is perhaps the best advice we can give (with the added benefit that it is free!) for the coming years.

Brexit...

It continues to grab the news headlines, but we remain committed to our original view (that we set out as long ago as 13 June 2016), that UK employment law will not change overnight on Friday 29 March 2019. Indeed, in July 2017 the Department for Exiting the European Union confirmed in its statement 'Exiting the EU with Certainty' (?) that, as far as possible, the same employment laws will apply on the day after exit as on the day before. The intention is that no major changes are made to legislation beyond what is necessary to ensure the law continues to work properly.



In the long term future, it remains to be seen whether the UK Courts and legislature will continue to be guided by what happens in Europe and to what extent decisions of the European Court will need to be followed as part of any trading relationship after any transition period. We remain of the view that any divergence will not be to fundamental rights such as discrimination, working hours and health and safety laws. Instead it may be to the more technical pieces of legislation that we lawyers scratch our heads over, but do not affect many businesses on a daily basis (e.g. the more technical parts of TUPE and the Agency Workers Regulations). At least in the short term, the UK is likely to continue to mimic EU case law and legislation that corrects or closes loopholes in existing law, though in future this will need to be done by national legislation as the principle of European precedence will no longer apply.

In terms of immigration law, there is increasingly the need for clarity, so that employers and employees alike can plan for the future. The agreement that phase 1 of the negotiations to leave has been achieved on 8 December, confirmed those EU citizens in the UK will be able to apply for "settled status". For EU workers needed after any transnational period, the position is less clear and it just does not appear to us that without substantial costs and a huge increase in manpower, a points based system for job applicants is likely to be workable.

Employment Tribunals...

This Summer saw the quashing of employment tribunal fees. The well-publicized Unison challenge to employment tribunal fees (which were introduced in 2013) finally resulted in the Supreme Court declaring the fees regime unlawful. The courts and tribunal service has not yet published official tribunal statistics for the period since this change. Therefore, we do not yet have true visibility of the full extent of the effect of the Unison decision and this is unlikely to be felt until 2018. Whilst cases are undoubtedly on the increase, for a variety of reasons, we do not believe that they will ever get back to pre-2013 levels.

It is generally accepted that a number of factors (not just fees) contributed to a general reduction in tribunal claims prior to 2013, which the introduction of fees then dramatically increased. For instance, the 2 years' length of service requirement before an employee can bring an unfair dismissal claim, the limit to the value of unfair dismissal claims as a remedy compared to contractual rights for many senior employees and the implementation of the ACAS pre-claim conciliation process. Employers have also become far better at managing processes and getting employees to the stage where a settlement agreement is entered into. Tribunal rules and practices have changed and judges will now give their views on the relative strength of each party's case at an early stage if requested or at the beginning of any hearing especially if it is likely to be long.

Anecdotally, we have heard of increases of workload both at the employment tribunal and ACAS, with ACAS in the North East on a recruitment drive. However, we understand that a large proportion of additional claims being filed are unpaid wages only claims – smaller claims which the fees regime had significantly impacted on. For obvious reasons individuals were dissuaded for submitting wages claims given that the fees incurred in doing so could exceed the value of the claim. Since the Summer we have seen several spurious or "try on" cases which we believe would not have been brought under the fees regime – this Autumn we also had one claimant who walked away from a claim two days before the hearing when it became apparent a settlement offer would not be forthcoming, it is unlikely this would have happened if 8 weeks before the hearing he had been required to pay the £950 hearing fee. Despite this, it is our view that we will not return to having an employment tribunal bursting at the seams - the proposed consolidation of the Courts and Tribunals buildings and resources, through mergers of regions and services, is a reflection of this.

KEEP CALM AND THINK EMPLOYMENT TRIBUNALS

Where we feel that we are likely to see tribunal activity is an increasing number of discrimination claims, given increases in injury to feelings awards. In the North East and Cumbria, this is likely to be the case particularly in relation to long term ill-health dismissals and the crossover between unfair dismissal and disability discrimination claims, which mean that an "arising from" disability discrimination finding is likely if the dismissal is held to be unfair. Particular care is therefore needed in this area.

General Data Protection Regulations (GDPR

It is amazing to see how the General Data Protection Regulations **(GDPR)** have grabbed everyone's attention and the scare-mongering that is coming from certain quarters (including lawyers) about the provisions and the risks for employers.

GDPR is a Europe-wide piece of legislation, which will apply extra-territorially (ie. around the World and is therefore of relevance even after Brexit) to anyone who deals with data in relation to European citizens. The legislation has direct effect and therefore needs no UK legislation to enact it – when it comes into force on 25 May 2018.

The GDPR will replace our current legislation in this area – the Data Protection Act 1998 and when you think back to what the World was like in 1998 (the Christmas Number 1 was The Spice Girls with "Goodbye"- No, we don't remember it either!), you can imagine how overdue an update to the protections is for all of us. In 1998 the World was, on the face of it, far simpler:

- Few of us had mobile phones or email addresses, home computers or use of the Web was in its infancy – "social networking" did not exist and Facebook was a mere twinkle in 14 year old Mark Zuckerberg's eye;
- If we had an accident it wasn't always necessarily somebody else's fault;
- If our plane was delayed, we grumbled about it, slept on a hard airport floor and made do with an over-priced warm San Miguel and a stale bocadillo de jamon.

The GDPR is overdue in its implementation and will hopefully help protect huge areas of our daily lives from the intrusion that we face and the consequences of large corporations misusing or misplacing data such as our bank account details. The vast potential penalties have and will continue to grab the headlines. However, in terms of recruitment and HR the key is not to continue to rely on the notion of consent and to understand why you collect, keep and use data for the purposes of the employment relationship. The 25 May 2018 deadline is apt for the good spring clean of data that has built up over the last 20 years which is needed. As part of that process, a new data protection principle from the GDPR legislation is the need for data controllers and processors to be accountable to data subjects, therefore some immediate jobs for the New Year should include:

- Mapping your employee data, working from the start to finish of the employment relationship;
- Using that data to compile a clear retention policy for the data that is held/created;
- Planning for how you will deal with any subject access request – which will be easier and is likely to be more widespread in future and knowing what needs to be done in the event of any data breach; and
- Ensuring you understand how data is managed and dealt with by out-sourced providers (such as payroll, externally supported HR software etc.) and the contracts that you have in place with them.

What is clear to us is that on all media channels, we will start to see between now and May an increase in awareness on all aspects of data protection rights, so being clear with employees about what data they will need to provide you, why that is and what will be done with it is the key message.

Pay is continuing to be a key consideration for all employers.

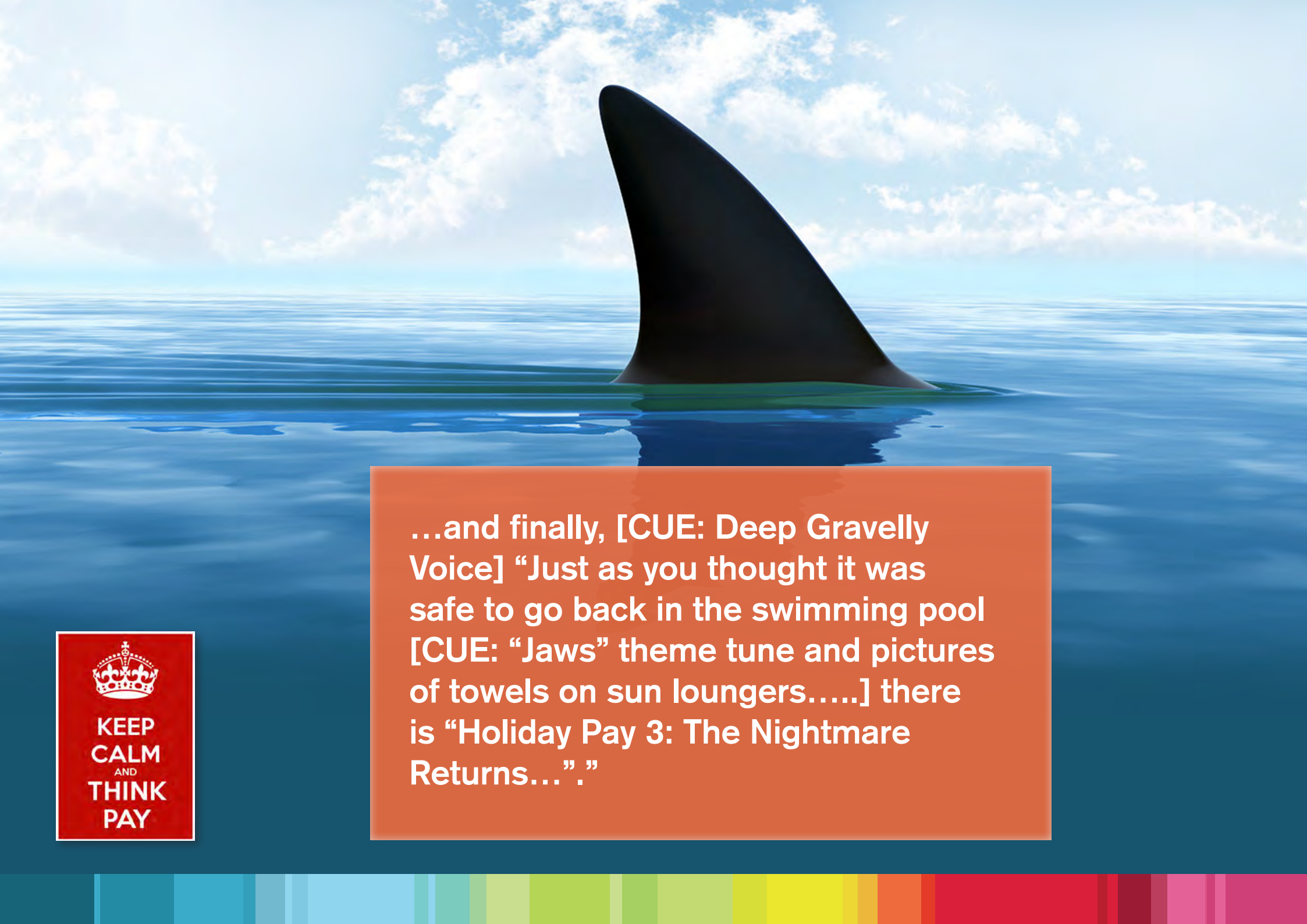
Pay is continuing to be a key consideration for all employers. It has already this year and will continue to grab media headlines in a variety of areas:

- Equal pay/gender pay gap reporting;
- National Minimum/Living Wage compliance; and
- Holiday pay

In terms of gender pay gap reporting, which will require all employers with 250 or more employees to publish prescribed information and upload it to a Government portal by 5 April 2018, this will undoubtedly gather momentum in the public awareness over the Spring. Even for employers with less than 250 staff, we have been advising for a couple of years that employers spend time to establish their pay strategy and limit the risk of any equal pay claims. The gender pay gap reporting legislation is a reasonably blunt tool to force large employers, who had previously been given a chance to voluntarily report but had not done so, to lead by example and to force the equal pay agenda forward. It is over 40 years' since the equal pay legislation was introduced and pace has been slow over that time to close the gap - apart from where it has been forced by major class actions predominantly affecting public sector employers. Our view is that the pace of levelling pay will quicken over coming years and being ready and prepared for that is as important for all employers as GDPR readiness.

National Minimum Wage

We have seen a number of cases affecting interpretation of what amounts to working time for the purposes of the NMW legislation. If you pay your employees at or near the NMW level, then you need to consider the effects of any deductions you make from their pay (eg. for uniforms etc.) and whether their working time is properly represented. We have seen increasing focus on this area from HMRC in both NMW and general PAYE audits. The "naming and shaming" provisions where HMRC release every 6 months lists of employers failing to pay the NMW to the media, the large penalties and the historic rectification payments, mean that this legislation is now starting to have teeth.



…and finally, [CUE: Deep Gravelly Voice] “Just as you thought it was safe to go back in the swimming pool [CUE: “Jaws” theme tune and pictures of towels on sun loungers…..] there is “Holiday Pay 3: The Nightmare Returns…”.”

So you thought that holiday pay was completely settled?

Think again!

We have recently received the Court of Justice of the European Union (CJEU) judgment in the UK case King v Sash Windows. This case focuses on the right to carry over holiday entitlement. However, specifically the facts relate to an individual whose employment status was denied by the employer. As the employer treated Mr King as self-employed, it did not grant him any paid holiday for 13 years. This is not a case about the underpayment of holiday, rather it is about the failure to pay any holiday and how long that calculation can go back.

Importantly, the CJEU has determined that where an employer refuses to grant any paid holiday, the three month time limit for recovery of the holiday pay runs from the date of termination of the engagement (not the last payment made in breach, as is currently considered to be the position in the UK). However, the normal time limits around carry over (such as the 15 month carry over limit set in Plumb v Duncan Print and the 'use it or lose it' principle in the Working Time Regulations 1998) will not apply. On principles of fairness, the CJEU felt that Mr King never got the opportunity to take or request any holiday. Effectively this means that the claim he had for back dated holiday pay could go all the way back to when he started or 1996, when the original legislation implementing holiday entitlement in the EU came into force. Albeit, that claim will only relate to the 4 weeks' EU holiday pay and not the total 5.6 weeks' of UK holiday.

This decision will strike fear in the hearts of 'gig economy' businesses, that deny worker status and may now face hefty bills for backdated holiday. The employment status cases involving Uber and a range of other similar business are ongoing. The Pimlico Plumbers employment status case will go before the Supreme Court in February 2018 and we can expect lots of media coverage of both the case and the outcome at that time.

However, the King decision may not just affect platform economy employers and may in fact extend the holiday pay uncertainty for all employers. This is because, some commentators have taken the view that this case may re-open the debate on back-dated holiday pay more generally - revisiting the principle set out by the EAT in Bear Scotland v Fulton that there must be a 'series of deductions' before a worker can recoup backdated holiday pay. However, the facts in King related to where a worker has not been granted any holiday, rather than been underpaid for his holiday. The CJEU seemed to focus on the fairness of this approach and, therefore, the judgment may potentially be limited to the facts, but it is a further area of uncertainty that we will all have to grapple with.

Reviewing again, the extent of any holiday pay exposure should be a New Year's Resolution!

And that brings us back to our core message, “Keep Calm and Carry On”. For us, the norm is now that the only certainty is uncertainty. As employers we can only worry about the things that we can control and the focus must remain on doing the basics well. It is not about reacting to media hype but understanding the basic rights and how your business needs to operate within them which is increasingly of key importance. 2018 will bring its challenges - we’ll soon see lawyers replace the managing incidents at the Christmas Party articles with managing attendance during the Harry and Meghan Wedding and/or England’s matches during the World Cup! That’s what we all love about HR – no two days are ever the same!

KEEP CALM AND CARRY ON

If you have any questions about the subjects covered, please contact:

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We would like as a team to wish you and your families a peaceful, happy and most of all calm Christmas and New Year!
We look forward to seeing you all in 2018!