CLIFFORD CHANCE

Employment News in Brief
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UK: Employment Update

Consultation on the Modern Workplace

The Government has launched a consultation on its vision for a modern workplace. In order to achieve a flexible, modernised workplace four areas of change are proposed: a new flexible parental leave regime to replace the existing maternity and paternity regime, an extended flexible working request regime, clarification on when statutory holiday can be carried forward in cases of ill-health, maternity, paternity and adoption leave, the introduction of an employment tribunal power to require employers to conduct equal pay audits.

Flexible parental leave regime

The Government proposes that the existing maternity, paternity and parental leave regime will be replaced by a new flexible parental leave regime in April 2015. In summary the new system of parental leave will operate as follows:

- 18 weeks' ordinary maternity leave during which statutory maternity pay will be paid;
- 2 weeks' paid paternity leave as at present;
- 4 weeks' parental leave available exclusively for mothers;
- 4 weeks' parental leave available exclusively for fathers;
- 34 weeks' parental leave available to either parent as they decide;
- Parental leave pay at the applicable statutory rate, or 90% of pay (if lower) will be available for 21 weeks';
- By agreement with the employer parental leave need not be taken in a single block but can be taken flexibly, e.g. in separate blocks or by allowing the employee to work part time for an interim period;
- The current right to take unpaid parental leave will increase from 13 to 18 weeks' leave per parent and the requirement that the employee has 26 weeks' service before being eligible will be removed;
- Fathers will be given the right to take time off to attend antenatal appointments.

Holiday

The Government is proposing a number of changes to the current rights to paid leave under the Working Time Regulations (WTR). These changes are driven by the fact that the WTR are at present incompatible with a number of European Court of Justice (ECJ) decisions in relation to the interaction of sick leave and maternity and paternity leave with the right to paid holiday.

This inconsistency has resulted in considerable uncertainty for employers on how to deal with employees who have been absent for an entire holiday year in terms of whether to allow the employee to carry forward holiday to subsequent holiday years, how much holiday has accrued and what, if any, payments should be made in respect of such holiday on termination.

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At present the WTR give workers the right to four weeks' paid leave in accordance with the Working Time Directive (Reg. 13 leave). In addition the WTR give workers the right to an additional 1.6 weeks' paid leave (Reg. 13A leave), this is over and above the minimum entitlement required by the Directive. The WTR requires a worker to take all leave in the holiday year in which it accrues, if it is not taken it is forfeit as there is no right to carry the holiday forward into a subsequent holiday year.

Changes to statutory holiday entitlement

The Government proposals to amend the WTR include the following:

- Where an employee has been unable to take holiday due to sickness absence he will be entitled to reschedule the holiday later in the holiday year or carry it forward to the following holiday year. The right to reschedule is however limited to the four weeks of Reg. 13 holiday. The employer will however be able to insist on the holiday being taken in the relevant holiday year where that is possible rather than being carried forward. The 1.6 weeks of Reg. 13A holiday will continue to be forfeit if not taken in the relevant holiday year.
- Where an employee falls ill during a period that had been scheduled as holiday then the employee will be able to reschedule the holiday later in the holiday year or carry it forward to the following holiday year. The right to reschedule is however limited to the four weeks of Reg. 13 holiday. The employer will however be able to insist on the holiday being taken in the relevant holiday year where that is possible rather than being carried forward. The 1.6 weeks of Reg. 13A holiday will continue to be forfeit if not taken in the relevant holiday year.
- On termination of employment a worker's entitlement to be paid in lieu of accrued but untaken holiday will include any Reg. 13 holiday that has been carried forward.
- Having regard to the 1.6 weeks' holiday entitlement under Reg. 13A employers will be able to: (i) 'buy out' the holiday by agreement with the worker, and (ii) require a worker to carry forward the holiday to a subsequent holiday year in cases of overriding business need.
- Where an employee has been unable to take any of his/her 5.6 weeks 'annual leave due to absence on maternity, paternity, parental and adoption leave the untaken leave can be carried over. Employers will however be able to take into account business needs when the holiday is rescheduled. The same will apply to holiday accrued during the new flexible parental leave.

Equal pay audits

The Government proposes that employment tribunals should have the power to order an employer to carry out an equal pay audit where the employer has been unsuccessful in defending sex discrimination or equal pay proceedings in relation to non-contractual and contractual pay respectively. The tribunal may decline to make an equal pay audit order where it considers that it would not be productive to do so, for example if the employer has recently conducted one.

[Consultation on Modern Workplaces]

Ex employer is liable for negligent comments in email

Employers who provide a reference in relation to a former employee owe the employee a duty to take reasonable care in the preparation of the reference. An employer will be liable to pay the ex-employee compensation for negligence if it fails to do so and the employee suffers economic loss. Eagerness to minimise the scope for such negligence claims has lead to the prevalence of the use of "name, rank and serial number" references that provide no more than an employee's dates of employment and position.

A recent, ground breaking High Court decision illustrates that employers may be faced with compensation claims not only in relation to references but also in relation to negligent comments made about former employees in a non reference context.

M worked for S for several years. When he left S to take up employment elsewhere, he received an excellent reference, which dealt with his skills set, role, relationship with other staff and management style. He was highly recommended to his new employer, B. M worked for B for a number years, left briefly to pursue a post elsewhere and then returned to work for B in a new role which involved, in part, working for S and being located on its premises. Some three weeks after M rejoined B's payroll, B received an email from S's HR manager which, in essence, stated that S had experienced serious concerns for its students in relation to M and would therefore not permit M to come onto its premises. In addition, the email stated that M had had serious staff relationship problems during his employment with S and that it was understood that similar issues had arisen in relation to M's earlier employment with B. The High Court held that these statements in the email were untrue and unsupported by any document, any evidence on M's personnel file or elsewhere or by the evidence of colleagues who managed and worked alongside M during his employment with S. The HR manager who wrote the email had not been employed by S when M worked for them.

As a direct result of receiving the email B summarily dismissed M. As M had less than one year's service, B was not exposed to an unfair dismissal claim in spite of its completely unfair dismissal procedure.

The HR director, who sent the email, accepted that the email could impact on M's employment. Given that the email was purportedly communicating information in relation to M's relationship with S, the High Court concluded that there was a sufficient proximity between M and his former employer, S, for S to owe a duty of care not to make a negligent misstatement, even though six years had passed since M's employment with S.

M had lost his job as a result of the negligent misstatement in S's email and therefore suffered financial loss. S was accordingly liable to pay M compensation.

This decision illustrates that a duty of care can exist in relation to information supplied in relation to former employees both in the context of the provision of a reference and in a broader context. Where information is supplied, care should be taken to ensure that it can be substantiated via personnel files or other documentary sources and is verified internally by individuals who have personal knowledge of the matters referred to.

[McKie v Swindon College]

Sex discrimination: preferential redundancy scoring of maternity leavers is impermissable

The preferential redundancy scoring of a maternity leaver in a redundancy selection exercise amounted to sex discrimination against a male colleague.

Embarking on a redundancy exercise when some of the employees 'at risk' are on maternity leave can give rise to some tricky logistical issues. One difficulty is how to score a maternity leaver where the selection criteria may include reference to performance measures that relate to the whole period that the employee was absent on maternity leave. If a maternity leaver is disadvantaged by their absence in the redundancy exercise this will provide the platform for a sex discrimination claim, in relation to which compensation is unlimited. Can an employer give the maternity leaver the benefit of the doubt and simply give her the maximum score permissible to avoid the risk of such a claim?

Whilst it is tempting for employers to adopt such an approach or simply to exclude the maternity leaver from the selection pool altogether, a recent decision of the Employment Appeal Tribunal (EAT) demonstrates that this is inadvisable.

C was an associate at Eversheds when it embarked on a redundancy selection exercise. The selection criteria applied included *"lock-up"* on a particular date. C's lock-up score was 0.5. R was an associate in the same department as C and was absent on maternity leave during the redundancy selection exercise. She was not at work on the lock-up assessment date and therefore no lock-up figure was available for her. Eversheds took the view that the fairest approach was to give R the benefit of the doubt and allocate her the maximum score of 2 because to give her a different score would be unfair because she was not at work to influence it.

The effect of this scoring was that C's total redundancy score was 27 and R's score was 27.5. C was therefore made redundant instead of R. R's lock-up score immediately prior to her departure on maternity leave would have given her a score of 0.5. C claimed that this preferential scoring amounted to sex discrimination.

The EAT has ruled that Evershed's adjustment of the redundancy scoring to address the problem caused by R's maternity absence went beyond what was reasonably necessary to protect her. The more favourable treatment of R had resulted in C being discriminated against on the grounds of his sex. The EAT considered that Eversheds could have done other things in relation to R's score, for example, it could have taken a snapshot on the last date that R was at work and scored both C and R on that date.

In this case the employer's concern to limit the scope for an unfair dismissal or discrimination claim by a maternity leaver was an expensive mistake as the Employment Tribunal awarded C three years' loss of income. When a redundancy selection pool includes maternity leavers, careful thought should be given to the selection criteria to be applied and how these can be modified to prevent a maternity leaver from being either disadvantaged or unduly advantaged when compared with the other candidates in the pool.

[Eversheds Legal Services Limited v De Belin]

No requirement to advise on whether a compromise agreement contitutes a good deal or not

When an employer embarks on a collective redundancy exercise and wants the certainty of a "litigation-free" future it is common to offer an enhanced redundancy payment conditional upon a compromise agreement being concluded. If a significant number of compromise agreements are to be concluded, it is generally more practical for an employer to agree a standard form compromise agreement with an approved panel of solicitors who will act for the employees, rather than dealing with a multitude of individually appointed lawyers with the potential for an infinite number of variations to the original compromise agreement.

The enforceability of compromise agreements concluded in this manner recently came under scrutiny in the context of an employer's attempt to settle thousands of equal pay claims. The employer contacted six solicitors firms to act for the employees and provided the firms with a standard form compromise agreement. The panel of six law firms then arranged a group presentation to explain the terms of the compromise agreement to the employees and each employee also had an individual meeting. All of the employees in question then signed a compromise agreement.

However, subsequently some employees brought equal pay claims. They argued that the compromise agreements were invalid and therefore did not prevent them bringing their claims because they had not been advised on the "term and effect" of the agreement and they had been given no advice in relation to the merits of the settlement offer; they also questioned the independence of the solicitors.

In order for a compromise agreement to be valid, a number of statutory requirements must be satisfied: (a) the agreement must be in writing, (b) the employee must have received advice from an independent adviser as to the terms and effect of the compromise agreement and (c) the agreement must relate to the particular complaint.

The EAT held that the compromise agreements were valid and barred the employees from bringing their claims; a compromise agreement only required the independent legal advisers to provide advice on the "terms and effect" of the agreement and not on whether or not what is on offer is a good deal.

In addition, the EAT considered that the six firms of solicitors were acting for the employees and not for the employer. The fact that the employer had agreed with the panel of firms how matters were to be approached, paid their legal fees and presented the compromise agreement on a 'take it or leave it' basis did not mean the law firms were not acting in the employees' interests. Changes had been negotiated to the compromise agreements, there was no financial incentive for the solicitors to get employees signed up as the fee was the same whether or not the employee concluded a compromise agreement and the employer was not permitted to attend the group presentations.

This decision endorses the approach of employers using a small group of solicitors for the purposes of compromising out large groups of employees using a standard form compromise agreement, provided that there are some safeguards in place to ensure that the independence of the solicitors is preserved.

[McWilliam and others v Glasgow City Council]

Employment contract was terminated when the employer made a payment in lieu of notice

In a case where the date the employment contract ended dictated the level of bonus payment that the employee was entitled to, the Court of Appeal has clarified that the contract terminated when the employer made a payment in lieu of notice (PILON) into its employee's bank account; not when the employee received notice of the payment.

At a meeting on 29 November 2007, G was told by the Bank who employed him that he was summarily dismissed. The Bank's handbook provided that the Bank could terminate an employee's contract at any time with immediate effect, by making a PILON. The Bank did not, however, make a PILON payment until 18 December 2007. Even then, it failed to notify G in writing that a PILON payment had been made until 4 January 2008.

At common law, if one party to an employment contract acts in repudiatory breach that does not automatically bring the contract to an end, the 'wronged' party has the right to elect to continue the contract or to accept the repudiation and bring the contract to an end.

G argued that although his dismissal at the November meeting was a repudiatory breach by the Bank, who could only dismiss on notice or by making a PILON, he had elected to affirm the contract. The contract accordingly did not end until he was notified in January that the PILON had been made. The High Court held that the Bank should have notified G that they had paid the PILON and thus terminated the contract and therefore G's employment contract was not terminated until 4 January when he was notified that the PILON had been made.

However the Court of Appeal did not agree. There was nothing in the Bank's handbook which required written notice that the PILON had been paid, therefore the employment contract was terminated on 18 December 2007 when the payment was made in accordance with the Bank's contractual right to do so.

Although the nature of this case was unusual because the date the contract terminated dictated whether G qualified for a bonus or not, it demonstrates that employers should:

- ensure that any contractual payment in lieu of notice provision is sufficiently flexible that written notice is not required;
- make any PILON payment promptly after summarily dismissing an employee.

[Societe Generale, London Branch v Geys]

When does notice start to run?

The Employment Appeal Tribunal (EAT) has provided useful clarification of the rules on when written notice of dismissal starts to run for the purposes of calculating a person's effective date of termination (EDT) and the time limit for bringing an unfair dismissal claim.

On 3 November 2008 W received as an email attachment a letter giving him 3 months' notice of termination. He was then paid until 2 February 2009, which the employer contended was the effective date of termination (EDT). W then lodged an unfair dismissal claim on 2 May 2009. The employer argued it was one day out of time, as the three month limitation period from the 2 February 2009 EDT expired on 1 May.

The following guidance can be gleaned from the EAT's decision on when the notice of termination starts to run:

- There is no distinction between oral and written notice for the purposes of calculating when notice starts.
- Notice can only have immediate effect if the employee's contract provides that it should do so. If there is no express term or agreement that notice is to start immediately, then notice starts to run on the day after the notice is received.
- Where oral or written notice is given during the working day, unless the contract provides otherwise, the notice takes effect the following day because otherwise the employee would only be receiving a fraction of a day's notice.
- For the purposes of calculating a notice period, "month" means "calendar month" unless the contract states otherwise.

Taking into account the above the EAT held that the notice period started to run on 4 November, the day after it was received otherwise W would have received only a partial day's notice on the day the email arrived. His claim was therefore in time.

Where employers wish to ensure that an employee's notice period commences on the day that the employee receives it an express provision in their employment contract must be included. Where there is no such provision employers must take care to calculate the correct termination date for payroll purposes to avoid any unlawful deduction of wages claims, albeit that the amounts may not be significant.

[Dr T Wang v University of Keele]