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Newsletter November 2011

UK: Employment Update

Welcome to the November 2011 edition of Employment News in Brief. In this edition we consider a new case on what sick leavers must do in order to be able to carry accrued holiday forward to subsequent holiday years. This briefing also examines whether agency worker claims can be compromised, when rejecting a job offer can impact on unfair dismissal compensation and new government proposals on reforming the employment tribunal system, raising unfair dismissal qualifying limits, compulsory no fault dismissals, protected conversations and reforming collective redundancy consultation periods and the law in relation to transfers of undertakings.

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Holiday entitlement during sick leave: more confusion

European case law has established that where an employee is absent on ill-health grounds he or she may still exercise their right to take holiday. If this right is exercised they are entitled to receive their normal rate of pay in relation to the holiday, even if the period of ill-health absence is itself unpaid because statutory or occupational sick pay schemes have been exhausted. The ECJ has also ruled an employee cannot be obliged to take holiday during sick leave and if the ill health results in the individual not taking their holiday during the relevant holiday year, he or she may carry the holiday entitlement forward to subsequent holiday years.

Our domestic legislation, the Working Time Regulations, provides that an employee is required to take holiday in the holiday year to which it relates or the holiday will be forfeit. In practice, however, a number of Employment Tribunals have ruled that the forfeiture provisions do not apply if the reason why the holiday was not taken was ill-health absence.

The Regulations actually require an employee to give the employer notice of their intention to take holiday in order for the right to paid holiday to crystallise. Is this also the case for sick leavers?

The President of the EAT has considered whether an employee absent on sick leave is required to give his employer notice that he wishes to exercise the right to paid holiday in the relevant holiday year in order to be able to carry that holiday forward to subsequent holiday years in order to take it, or, if the employment subsequently terminates to be paid in lieu of the accrued but untaken holiday.

The EAT held that the sick leaver must give notice of their wish to take holiday in the relevant holiday year failing which the holiday would be forfeit.

Accordingly, on this analysis, if an employee's employment comes to an end and he or she has been absent on sick leave spanning a number of holiday years, the employee will only be entitled to be paid in lieu of accrued but untaken holiday in

relation to the holiday year of termination unless he or she gave the employer notice in each of the relevant holiday years that they wished to exercise their right to take holiday.

This decision is in stark contrast to another recent decision of the EAT which found that an employee who does not make a request for annual leave before the holiday year ends does not forfeit that entitlement to holiday leave and can carry the leave over to subsequent holiday years.

Employers are now faced with conflicting judicial approaches on the question of whether a sick leaver can carry holiday forward and be paid in lieu of it on termination of employment. It is understood that the Court of Appeal is due to rule on this issue shortly.

[Fraser v Southwest London St George's Mental Health Trust]

Compromising claims under the Agency Workers Regulations

The Agency Worker Regulations 2010 (AWR) came into effect on 1 October 2011 and established a number of rights for qualifying temporary agency workers. In broad terms, agency workers now enjoy day one rights to access collective facilities of the hirer with whom they are placed and to be given access to information about vacancies by the hirer. After 12 weeks' continuous work for the hirer the agency worker will be entitled to equality of treatment in relation to basic employment terms and conditions including pay. Where any of these AWR rights are breached, proceedings may be brought in the Employment Tribunal against the temporary work agency and/or the hirer.

The AWR envisages that any claims in relation to AWR rights can be settled, however, due to what seems to be a drafting oversight it appears that claims under the AWR may only be compromised by means of a COT3 agreement reached under the auspices of ACAS. Unfortunately this means that at present AWR claims may not be settled by means of a statutory compromise agreement which is the common mechanism by which employers settle other forms of statutory employment claims such as unfair dismissal.

Employment Tribunals: the shape of things to come

Earlier this year the Government launched a consultation in relation to workplace reform. The Government has now published its formal response to that consultation, confirming many of the proposals that have been hinted at in recent months.

With a view to expediting Employment Tribunal cases and reducing costs the following changes will be made with effect from 1 April 2012:

- Employment Judges will be able to sit alone to hear unfair dismissal claims. At present, an Employment Judge may sit alone to determine claims in relation to unlawful deduction of wages, holiday and redundancy pay and interim relief applications.
- Employment Judges will have new powers to order a party calling a witness to cover that witness' costs in certain circumstances. Witnesses and parties will no longer be able to claim expenses from the Tribunal Service.
- Witness statements will be taken as read in the absence of an order to the contrary. It is anticipated that this will reduce the time spent hearing evidence at the Tribunal.
- The maximum amount of a deposit order will be increased from £500 to £1000 in cases where it is considered that a case has a little reasonable prospect of success.
- The limit on a costs order will be increased from £10,000 to £20,000.

The Government is expected to produce more guidance on these changes before next April when they come into effect.

In the future, fees will also have to be paid in order to pursue a claim in the Tribunal. Further consultation will be carried out in relation to two options: the first option is that an initial fee will be required to lodge a claim (possibly £250) and a further

fee paid to proceed to a hearing. The alternative option proposes that a higher fee will be payable by claimants seeking an award above £30,000.

Other changes that the Government proposes to implement include:

- A new Employment Tribunal power to impose a financial penalty on the employer where a claim is upheld against it. The penalty would be payable to the exchequer rather than the claimant (who would continue to be entitled to compensation for the relevant claim). The financial penalty will not be automatic. Where it considers that the employer's behaviour in committing the breach had aggravating features the Tribunal will have the discretion to impose a penalty as follows:
  - The financial penalty will be based on the total amount of award made by the Tribunal;
  - It will be half the amount of the total award so that the level of financial penalty is proportionate to the award;
  - There will be a minimum threshold of £100;
  - There will be a ceiling of £5,000;
  - Where a non-financial award has been made by the Tribunal for a breach, the Tribunal would ascribe a monetary value and an appropriate financial penalty made.
  - The penalty will be reduced by 50% if it is made within 21 days.
- The introduction of a new compulsory procedure to achieve early conciliation of claims via ACAS. It is anticipated that such changes will not be implemented until at least 2014 as there is a significant amount of detail which must be developed in order to achieve a regime that is effective.

Avoiding the Employment Tribunal

As part of its proposed reforms to the employment law system the Government is looking at ways for employers to avoid the ACAS/employment tribunal system altogether. The following initiatives are intended to achieve this:

- The introduction of a number of measures to simplify and promote the use of compromise agreements;
- Encouraging the greater use of workplace mediation;
- Creating an alternative scheme for the determination of low value straightforward claims such as holiday pay claims;
- The introduction of the concept of the 'protected conversation';
- Closing the whistleblowing loophole.

Compromise Agreements

The Government proposes to legislate to clarify that discrimination claims can be settled via a compromise agreement. In addition it will consult on further legislative amendments that will allow employers to compromise existing and future claims without having to include a long list of causes of action. Compromise agreements will be known as 'settlement agreements' going forward.

The Government also hopes to produce a standard text for compromise agreements so that employers do not have to take legal advice and might then compromise claims where they would not otherwise have done so.

Mediation

In order to encourage greater use of mediation the Government is to explore how larger businesses can share their experience of mediation with small and medium sized businesses. It is also going to pilot the creation of regional mediation networks.

Alternative forum for low value claims

The Government is considering whether a scheme can be introduced as an alternative to the Employment Tribunal for the non-judicial determination of low value claims. The initial proposal is that claims would be determined on the papers only. This would result in costs savings for the parties and the Government only as a result of not having to attend a hearing and provide witness evidence.

Protected Conversations

The Government is to consult on the introduction of a system of 'protected conversations' that would allow employers and employees to initiate a conversation about an employment issue (such as retirement plans or poor performance) as a way of resolving the issue without the conversation being used as a platform to bring Employment Tribunal proceedings.

It remains to be seen how the protected conversation concept will operate in practice but for many employers it is likely to be a welcome suggestion.

Closing the whistleblowing loophole

At present an employee can 'blow the whistle' about an actual or potential breach of their own employment contract and will benefit from the protection of the Public Interest Disclosure Act. This legislation was intended to protect employees who blow the whistle in relation to issues of public (not personal) interest. The Government proposes to close this loophole.

The end of unfair dismissal as we know it?

At the end of October details emerged of a report prepared by Adrian Beecroft for the Prime Minister. The report recommended a number of changes including the introduction of the concept of a *"compulsory no-fault dismissal"* in circumstances where a job needs doing but it is not being done well enough. In such cases, there would be no right to claim unfair dismissal the individual would simply be entitled to their contractual notice entitlement and a payment equal to the statutory redundancy formula. The report proposed that the individual would have the right to request (but not demand) the opportunity to improve performance.

The Government has now announced that it will seek views on the introduction of this no fault dismissal concept for micro business only, that is businesses with fewer than 10 employees.

The Government has clarified that otherwise it is not withdrawing the longstanding right to claim unfair dismissal; however, the qualifying period of service required to bring a 'vanilla' unfair dismissal claim will increase from one to two years in April 2012.

The BIS announcement in relation to the above Government reforms may be found here.

Failure to mitigate by unreasonably refusing a new role

An employee who is unfairly dismissed or subject to unlawful discrimination can claim compensation for loss arising as a consequence of the dismissal or discrimination. The employee is however under an obligation to attempt to mitigate that loss by seeking alternative employment and where an Employment Tribunal considers that there has been a failure to do so it can reduce the level of compensation it would otherwise have awarded.

The EAT has recently held that the unreasonable refusal of the former employer's offer of alternative employment can amount to a failure to mitigate. In the case in question the former employee, D, had found it difficult to combine her parental responsibilities as a single parent with her employment responsibilities. She was treated unsympathetically and subjected to disciplinary procedures leading to a formal warning. She then gave one year's notice to terminate her employment and successfully brought proceedings for indirect sex discrimination and race discrimination.

D's employer wrote to her during her notice period offering her alternative employment in a location that would significantly alleviate the childcare issues that D had encountered previously; the letter set out in some detail the childcare facilities that would be available and advised D that the two formal warnings on her file would be removed. D refused the offer.

The Employment Tribunal awarded no compensation for loss of earnings on the basis that D had failed to mitigate her loss. She had unreasonably refused an offer which would have addressed her childcare difficulties. She did however receive £15,000 injury to feelings compensation.

This decision was upheld by the EAT which acknowledged that whether a refusal is unreasonable depends on all the circumstances in which the offer was made and refused, the attitude of the employer and the way in which the claimant had been treated. If there has been a course of directly discriminatory conduct which has caused such upset that it is not fair to expect the employee to make a wholly rational analysis of an offer of re-engagement from the former employer a refusal will not be unreasonable.

The circumstances in which an employee's employment comes to an end will not always be such that a subsequent offer of employment is a practical or realistic option. In appropriate circumstances however employers can reduce their exposure to compensation by making a formal offer of re-employment or re-engagement.

Such an offer should be made formally; in this case it was held that the claimant's first rejection of the offer of alternative employment had been reasonable because the offer had only been made via a series of email exchanges and there was a real uncertainty about the role being offered.

[Debique v Ministry of Defence]

Call for evidence on collective redundancy consultation and TUPE

As part of its wholesale review of employment law the Government has also launched two calls for evidence. The first is in relation to the effectiveness of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The call raises a number of questions that focus on:

- the clarity of TUPE in general;
- the application of TUPE to service provision changes;
- the harmonisation of terms and conditions;
- the application of TUPE to insolvency scenarios;
- whether additional guidance is needed in relation to economical, technical or organisational reasons for dismissing;
- the interaction of TUPE and other employment legislation, for example, collective redundancy consultation obligations.

The call for evidence can be found here.

The second call for evidence is in relation to the collective redundancy consultation rules and looks at a number of issues including whether the 90 day redundancy consultation period should be reduced in redundancy exercises where 100+ employees will be dismissed.

The redundancy consultation call for evidence can be found here.

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