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Newsletter February 2013

UK: Employment Update

This edition of the UK Employment Update sets out the new statutory rates in relation to unfair dismissal compensation, redundancy, maternity and sick pay, the 2013 employment law reform timetable and the Government's recent proposals on reforming TUPE, pre-claim conciliation and the new settlement agreement regime.

We also look at an important Supreme Court decision on the operation of PILON clauses. Finally we consider the forthcoming changes to the collective redundancy consultation period.

New unfair dismissal and redundancy pay limits

	2013	2012
Maximum amount of a week's pay*	£450	£430
Maximum statutory redundancy/basic award	£13,500	£12,900
Maximum unfair dismissal compensation award	£74,200	£72,300
Maximum combined compensation for unfair dismissal	£87,700	£85,200

*For the purposes of calculating a statutory redundancy award or unfair dismissal basic award.

The new rates will apply where the dismissal takes effect on/after 1 February 2013. The old rates will apply in relation to dismissals that have taken effect prior to that date but which are litigated after February 2013.

The Government has also announced that unfair dismissal compensation will be capped at the lower rate of either 12 months' salary or the applicable statutory cap in summer 2013.

Key issues

New rates of statutory maternity, paternity and adoption pay

	From April 2013	April 2012
Standard rate/maternity/paternity/adoption pay	£136.78	£135.45
Statutory sick pay	$86.70	£85.85

Timetable of 2013 Employment Law Reforms

March 2013	■ Unpaid parental leave increases from 13 to 18 weeks ■ Agency workers returning from parental leave will have right to request a contract variation ■ Repeal of Equality Act third party harassment provisions

	■ Repeal of discrimination questionnaire procedure
April 2013	■ Introduction of 45 day consultation period for collective redundancies of 100 or more employees ■ New Employment Tribunal Rules of Procedure come into force ■ Removal of whistleblowing loophole – disclosures in relation to a breach of an employee's own contract will not be protected unless the disclosure can reasonably be said to be in the public interest ■ New ICO Code of Practice on subject access requests
Summer 2013	■ Introduction of fees in the Employment Tribunal ■ New cap on unfair dismissal compensation: lower of 12 months' salary or statutory cap ■ Settlement agreement discussion regime to come into effect (see below) ■ ACAS Code and Guidance on settlement discussions to be introduced

PILON: Employee must be notified that clause is being invoked

Many employment contracts contain pay in lieu of notice (PILON) clauses that give the employer the option to terminate immediately upon payment of a sum in lieu of notice. This gives an employer the flexibility to bring employment to an immediate end where it is desirable to remove the employee from contact with customers, clients, confidential information and colleagues whilst at the same time preserving the ability to enforce any restrictive covenants. Summary termination without the contractual right to do so will result in an employer being unable to enforce any restrictive covenants in the employment contract even if the employee is paid a sum in lieu of his notice entitlement.

The Supreme Court has now ruled on whether an employment contract can be brought to an end simply by making a payment in lieu of notice or whether the employee has to receive formal notice that the PILON clause is being invoked. In the case in question the date that the employment contract came to an end dictated the size of bonus that G would be entitled to with a difference of £5 million being in issue.

At a meeting on 29 November 2007, G was told by the Bank that employed him that he was summarily dismissed. No reference was made to the fact that the Bank was purporting to exercise the PILON clause in his contract. The Bank did not make a PILON payment until 18 December 2007. However it only notified G in writing that a PILON payment had been made under his contract on 4 January 2008.

G argued that although his dismissal at the November meeting was a repudiatory breach by the Bank, as it could only dismiss on notice or by making a PILON, he had not accepted that breach and had elected to affirm his employment contract. Accordingly, he argued that the contract did not end until he was notified in January that the PILON had been made.

The Supreme Court held that where an employment contract is repudiated by the employer it does not automatically come to an end. The employee must elect to accept the repudiation. As G did not elect to bring the contract to an end it continued until lawfully terminated under the PILON clause.

The Supreme Court held that payment of the sum due under the PILON clause did not terminate the contract as G was not given notice that the PILON clause was being operated at the same time. It held that there is an implied term in the employment contract that there must be clear and unambiguous notification to the employee that the PILON clause is being exercised to bring the contract to an end, following the payment itself.

In many cases employers may give the employee notice that a PILON clause is being operated to bring the contract to an end with the PILON payment itself being made afterwards, often with the next payroll. This decision suggests that the PILON payment must be made prior to, or at the same time, the PILON notice is given in the absence of an express contractual term to the contrary, failing which the contract will not terminate until the PILON payment is made.

Employers should consider whether their contractual PILON provisions require revision to address the timing and content of notice and payment. In addition, those giving notice ensure that it is made clear to the employee that the PILON clause is being invoked, and that the PILON payment is made promptly in accordance with the terms of the employment contract.

[Société Générale v Geys]

Collective redundancy consultation period to be reduced

The government has announced that with effect from 6 April 2013 where an employer is proposing to dismiss 100 or more employees the collective redundancy consultation period will be reduced from 90 to **45 days**.

There will be no change to the protective award that can be made in the event there is a failure to consult in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992, with the maximum protective award remaining at 90 days' pay. Employers should be mindful that 90 days' pay is the starting point for an award that is intended to be punitive rather than compensatory.

The expiry of a fixed term contract will not have to be included in any collective redundancy consultation exercise provided the contract has a clear termination point; for example, the completion of a particular task or reaching a specified time.

ACAS is to produce non-statutory guidance on collective redundancy consultation that will address amongst other things: when consultation should start; who and what it should cover; who should be consulted; and when consultation can be considered to be complete.

The ACAS guidance will also address the issue of what amounts to an "establishment". This is important, and at times unclear. It is important because the trigger for whether or not the consultation period should be 30 or 45 days is the proposal to dismiss 20+/100+ employees at a single 'establishment'.

TUPE Reforms

The Government has launched a consultation on the following proposals aimed at simplifying the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'):

- *Service provision changes* - removing most service provision changes from within the scope of TUPE;
- *Employee liability information* - repealing the requirements to provide Employee Liability Information, but making it clear that the transferor should disclose information to the transferee where it is necessary for them to perform their duties regarding information and consultation;
- *Amending contracts* - tracking the wording of the Acquired Rights Directive and ECJ case law more closely permitting changes to be made where they could have been made if there had not been a transfer and variations to be agreed if the reason for the change is an economic, technical or organisational reason. Note that any changes agreed with the employees will continue to be void if the purpose is to harmonise terms and conditions;
- *Unfair dismissal* - reflecting more closely the wording of the Acquired Rights Directive and ECJ case law;
- *Substantial changes to working conditions* – limiting the scope for claiming unfair dismissal as a consequence of substantial changes;
- *Economic, Technical or Organisational (ETO) reasons for dismissal* – providing that an ETO reason can cover changes in the location of the workforce. At present if a transferee intends to carry on the business in a different location to the transferor but with the same size of workforce then any dismissal arising as a consequence of the relocation would be considered automatically unfair because the dismissal arises in connection with transfer and is not for an ETO reason because there is no reduction in the size of workforce;
- *Duty to inform and consult representatives* - consultations by the transferee on collective redundancies with staff that are due to transfer will count for the purpose of collective redundancy consultation obligations. At present a transferee must either wait until the transfer before it carries out its collective consultation obligation or consult before the transfer and take the risk that the consultation will not count towards its legal obligation because at the time of the consultation it was not the employer of the staff in question;
- *Direct consultation with employees* - micro businesses are to be allowed to inform and consult employees directly about the transfers in cases where there is neither a recognised union nor existing representatives;
- *Terms and conditions derived from collective agreements* - the Government is considering whether such terms should only be guaranteed for a one year period from the transfer; and
- *Transferee's ETO reason* - the Government is considering reversing the current position so that a transferor who dismisses staff before a transfer can rely on the transferee's ETO reason to avoid the dismissals being classified as automatically unfair.

The consultation closes on 11 April 2013.

[TUPE: Consultation on proposed changes to the Regulations]

Settlement Agreements

The Government has announced that it will proceed in the summer of 2013 with its new settlement agreement regime. Under this regime, where an offer of settlement to terminate the employment relationship is made but no formal dispute has yet arisen between employer and employee the discussion will be inadmissible in evidence in any subsequent unfair dismissal proceedings provided that the employer has not behaved improperly.

ACAS will produce a statutory code to which Tribunals will have to have regard, but failure to follow it will not render an employer liable to proceedings. The code will contain template letters for use by the employer in relation to the settlement discussion procedure. It will not, however, be compulsory to use these letters. The code will define what amounts to 'improper behaviour' that would permit the settlement discussion to be admitted in evidence before the Tribunal and what a 'reasonable period of time' should be for an employee to consider a settlement offer.

ACAS will also produce supplemental guidance. This will provide examples of improper behaviour, how the rule on inadmissibility will apply and what information will become admissible if an individual asserts that there was improper behaviour during part of the settlement discussion process. It will also include a model settlement agreement and good practice guidance on how to offer and negotiate a settlement agreement in a fair and appropriate way. Both the ACAS Code and the Guidance will be consulted on in due course.

The Government will not introduce a settlement tariff for settlement agreements but will instead include in the Guidance factors that the parties may consider when negotiating the financial settlement.

[Ending the employment relationship: Government response to consultation]

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Early conciliation of Tribunal claims

The Government has also issued a consultation on how its new 'Early Conciliation' procedure will operate in practice. The intention is that all claimants will be offered the opportunity for early conciliation of their dispute via ACAS. There will, however, be no obligation on either prospective claimant or respondent to undertake conciliation if they are not inclined to do so.

Broadly speaking, a prospective claimant will not be able to issue Tribunal proceedings until ACAS issues an early conciliation (EC) certificate. The EC certificate number will have to be included on the claim form otherwise the Tribunal will dismiss the claim. If the parties do wish to attempt conciliation ACAS will have a month in which to attempt the conciliation during which time the time limit for bringing the claim will be suspended. If the parties agree, and ACAS considers that there is a reasonable prospect of conciliation being achieved, then the conciliation period may be extended by up to two weeks.

An EC certificate will be issued at the expiry of the one month (or extended) conciliation period or at an earlier stage if the ACAS officer concludes that settlement is not possible, for example if either the prospective claimant or respondent indicate that they are not interested in conciliation or ACAS cannot contact the claimant after reasonable efforts have been made. Once the EC certificate is issued the clock starts again in relation to the limitation period for bringing the claim.

It is anticipated that the early conciliation procedure will be introduced in April 2014.

[Early conciliation: a consultation on proposals for implementation]