CLIFFORD
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Briefing Note – October 2017

UK: EMPLOYMENT UPDATE

Welcome to this month's update which explores recent developments in relation to the calculation of a week's pay and the potentially costly impact on compensation awarded in the event of failure to consult in the context of a TUPE transfer or collective redundancy exercise, the new compensation bands for injury to feelings awards and the progress of last year's proposals to reform the tax treatment of termination payments. We also report on an EAT decision on the effect of TUPE in a cross-border outsourcing exercise.

Key issues

- Discrimination compensation: injury to feelings 'Vento' bands finalised
- Protective awards: the cost of failure has just gone up
- TUPE: cross border transfer – no entitlement to beneficial variation of contract
- Tax treatment of termination payments: update

Discrimination compensation: injury to feelings 'Vento' bands finalised

The finalised bands for injury to compensation awards in discrimination cases ('**Vento bands**') have been published following the judicial consultation over the summer (see our August Update here). These new bands will apply to cases that were lodged on/after 11 September 2017.

- A lower band of £800 to £8,400.
- A middle band of £8,400 to £25,200.
- An upper band of £25,200 to £42,000.
- In exceptional cases, awards over £42,000 may be made.

These bands will be reviewed (and, if considered appropriate, amended) in March 2018 and thereafter annually.

In relation to claims brought before 11 September 2017, employment tribunals can adjust the previous Vento bands to take into account inflation and the 10% personal injury uplift that was mandated by the Court of Appeal in the case of *Simmons v Castle*.

Protective awards: the cost of failure has just gone up

As most readers will be aware, the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('**TUPE**') and the Trade Union Labour Relations (Consolidation) Act 1992 ('**TULRCA**'), each, impose information and consultation obligations on employers in certain specified circumstances involving the transfer of undertakings and collective redundancy exercises (respectively).

In the event of breach of these consultation obligations, the employment tribunal can make a protective award in relation to each affected employee of up to 13 weeks'/90 days' pay. There is no cap on the amount of a week's pay and no period of qualifying service is required on the part of the employee. Protective awards are intended to be punitive, not compensatory and in cases where there has been no consultation the starting point for the tribunal should usually be 13 weeks'/90 days' pay unless it is persuaded that there are mitigating circumstances that would warrant a lower award.

The amount of a day's pay is calculated by reference to a formula set out in the Employment Rights Act 1996. The Employment Appeal Tribunal ('**EAT**') has recently considered this calculation and ruled that the employer's pension contributions should be taken into account; contrary to the approach that has been adopted to date. Future protective awards must therefore be calculated with this in mind, pushing up the costs of failing to consult about a TUPE transfer or a collective redundancy exercise. Where the employer has a large auto enrolled workforce or employees with generous pension arrangements, this additional factor in the calculation of a week's pay could significantly increase the size of a protective award.

[University of Sunderland v Drossou]

TUPE: cross border transfer – no entitlement to beneficial variation of contract

Approximately ten years ago the EAT held that, in principle, TUPE could apply where a business or part of a business is moved offshore. There appear to have been no reported cases examining this principle since, albeit that in practice many employers have off-shored businesses in the interim.

A recent EAT case has examined whether in such an off-shoring scenario the transferee is obliged by TUPE to allow a UK based employee to transfer offshore with the business on his existing contract of employment.

Briefly, the facts were as follows: X transferred its accounting team from the UK to Z, a group company in the Philippines. X and Z accepted that it was a TUPE transfer. The overall requirements for work to be done by the accounting team had not diminished, the number of roles remained the same and the work had to be done to the same standard in the new location. However, the requirements for employees to do the accounting work in the UK had ceased or diminished or were expected to do so.

As part of the TUPE consultation process, the employees were each given a choice: they could object to the transfer. If they did, their employment would not transfer to Z; X would make them redundant on more generous terms than the law required. Alternatively, if they did not object, they could and would transfer to X under TUPE but if they did so, they would still be made redundant because Z would have no requirement to carry out the accounting work in the UK after the transfer (i.e. it was treated as a geographical redundancy). Under this option the employees would only receive statutory minimum redundancy pay.

C stated that he wished to relocate to the Philippines on UK terms and conditions. Z dismissed him for redundancy, stating that C was employed to work in the UK and that it was prepared to transfer him to the Philippines only on local terms and conditions.

The EAT overturned the tribunal's decision that C was not redundant because there had been a variation of C's contract, by which he was entitled to work in the Philippines on UK terms and conditions. The EAT held there had been no variation of contract; TUPE only required Z, as transferee, to employ C in the UK and to pay his salary; it did not require Z to employ him in Manila on the same salary absent a variation of the contract. There had been no variation because there had been no meeting of minds about C's proposal to relocate.

As to whether C was unfairly dismissed, the EAT held that the focus should be on the reason for termination of employment not the reason why Z did not agree to employ C in Manila. The EAT observed obiter that it considered that Z had a strong case for saying that C's dismissal was for an economic or organisational reason entailing changes in the workforce and that it amounted to redundancy. The case was remitted to the tribunal to consider whether there was a fair reason for dismissal and whether the procedure was fair. In the EAT's view, the reason why Z did not find C alternative employment elsewhere was relevant to the fairness of the dismissal not the reason for termination.

In most cases, if a business is moved offshore the employees assigned to that business will be geographically redundant absent broad relocation clauses in their employment contracts. Of course, whether the redundancy is then fair will depend on the consultation process including the offers or otherwise of suitable alternative employment. But it is clear that TUPE does not impose an obligation to offer alternative employment in the new location on the existing terms of the geographically redundant job.

[Xerox Business Services Philippines Inc Ltd v Zeb]

Tax treatment of termination payments: update

Last year the Government outlined a number of proposed changes to the tax treatment of termination payments; including changes to foreign service relief. At present, the foreign service exemption provides tax relief on all or part of a termination payment where the departing employee has had periods of service overseas. This relief is available regardless of the tax residence of the departing employee. Measures in the current Finance Bill will alter the current regime so that only employees who are not resident in the UK for the tax year of termination will be eligible for foreign service tax relief on the termination payment. It is anticipated that this new regime will apply to terminations that take effect on/after 6 April 2018.

The Finance Bill also includes provisions addressing the proposal that employers' national insurance contributions ('**NIC's**') will be payable on termination payments over £30,000.

It is thought that the other proposed changes to the tax treatment of termination payments, including the proposals that all payments in lieu of notice, will be subject to income tax, and, employer and employee NIC's, will also come into effect in April 2018. However, following the initial consultation exercise during which it became clear that substantial revision would be required, it is not known when the relevant implementing legislation will be published

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