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Briefing Note – May 2018

# UK: EMPLOYMENT UPDATE

In this month's Briefing we explore a diverse range of topics: proposals for a new whistleblowing directive, whether employers must match enhanced shared parental leave and maternity pay to avoid direct and indirect discrimination claims and when contractual notice takes effect if the employment contract is does not address this point.

**Key issues**

- Proposed Whistleblowing Directive
- Lack of parity between maternity and shared parental leave pay: what is the risk of a discrimination claim?
- If the contract is silent when does notice take effect?

## Proposed Whistleblowing Directive

At the end of April, the European Commission published a draft Directive aimed at protecting 'whistleblowers' who report breaches of a wide range of EU laws, including those relating to financial services, environmental protection, consumer protection, product and transport safety, data protection and privacy, as well as competition law and corporate tax (including VAT) rules.

The proposed Directive requires member states to ensure that legal entities in the public and private sector establish internal channels and procedures for reporting. In addition, member states have to establish external reporting channels to competent authorities.

Member states will have to ensure that 'whistleblowers' who acquire information on specified breaches in a work-related context are protected from retaliation, including dismissal and demotion.

***How does the proposed Directive differ to the UK whistleblowing regime?***

The UK has a well-developed legislative regime for protecting whistleblowers in the employment context; this may well have provided the blue print for much of the proposed Directive. There are, however, some potentially significant differences.

One key difference is the scope of individuals entitled to protection. Our domestic legislation protects 'workers' (this includes employees). Although 'worker' has a wide definition, it is questionable whether it encompasses non-executive directors; in many cases it may not capture self-employed contractors or volunteers. The protected group of individuals covered by the proposed Directive is much broader, capturing shareholders, non-executive directors, volunteers, unpaid trainees, job applicants, workers and any person

working under the supervision and direction of contractors, sub-contractors and suppliers.

***Timeframe and application to the UK***

The proposed Directive will be adopted using the ordinary EU legislative procedure; as such, if any aspect of the Directive is controversial then the proposed implementation date of 15 May 2021, is likely to be subject to slippage.

Whether there is slippage or not, the implementation date is likely to be post 'Brexit'; what this means in practice is debateable. Much will depend on the nature of the Brexit deal achieved as to whether our domestic legislation on whistleblowing is amended to bring it in line with the final Directive, in terms of, amongst other things, individuals within scope, the type of disclosures that are protected and penalties for malicious whistleblowing.

It should also be noted that even if the UK does not amend its domestic legislation in the way that other Member States legislate, to implement the Directive may mean that UK based companies, that are part of a multi-national group with a European presence, may have to revise their whistleblowing procedures.

The proposed Directive text can be found: here.

## Lack of parity between maternity and shared parental leave pay: what is the risk of a discrimination claim?

Last year an employment tribunal (ET) upheld a claim of direct sex discrimination in relation to an employer's failure to pay enhanced Shared Parental Leave (SPL) pay. The employer, R, operated an enhanced statutory maternity pay (SMP) scheme for 14 weeks of maternity leave but did not enhance SPL pay during the equivalent period. A second ET rejected claims of both indirect and direct sex discrimination in circumstances where the employer operated an enhanced maternity pay scheme but only paid statutory rates of SPL pay.

Neither decision was binding, however, employers were left in a state of relative uncertainty as to the likelihood of a successful discrimination claim if their SPL pay schemes did not mirror any enhanced maternity pay arrangements.

For a claim of direct sex discrimination to succeed, the tribunal must be satisfied that the claimant has been treated less favourably than a comparator whose circumstances are not materially different. The Employment Appeal Tribunal (EAT) has now overturned the finding of direct sex discrimination on the basis that it was wrong to find that a maternity leaver was an appropriate comparator for an employee on shared parental leave. It held that at least the 14 weeks of maternity leave mandated by the Pregnant Workers Directive is a period of special protection designed to protect the biological condition of the mother and the relationship between mother and child. SPL has a different purpose - to enable the parent to care for the child. The material circumstances of the father on SPL and the mother on maternity leave were therefore different.

It also concluded that any enhanced pay received during such maternity leave comes within the Equality Act 2010 exception that permits special treatment of women in connection with pregnancy and childbirth; accordingly, no sex discrimination claim could be brought in relation to non-payment of SPL Pay.

It should be noted that the claim focussed on whether the father on SPL should be entitled to the same rate of SPL pay as the enhanced maternity pay that the mother received during 14 weeks of maternity leave. The EAT noted

that after the 26 weeks of ordinary maternity leave the purpose of maternity leave may change from the biological recovery from childbirth and special bonding between mother and child. At that point it might be possible to draw a valid comparison between a father on SPL and a mother on (additional) maternity leave.

This does leave the door open to arguments that the purpose of additional maternity leave (and possibly even weeks 14 to 26 of ordinary maternity leave) and SPL is the same (i.e. to care for the child); the mother is therefore an appropriate comparator and the special treatment exception should not apply to enhanced maternity pay referable to such a period. Accordingly, it would amount to direct sex discrimination not to pay enhanced SPL pay to a male employee taking SPL during such a period if the maternity leaver is receiving enhanced pay. This could lead to a "ratchet effect" as female employees taking SPL would almost certainly argue that they must be treated equally with male employees taking SPL and be paid occupational SPL pay as well. It remains to be seen whether the courts and tribunals will be persuaded by such arguments.

If a claim of sex discrimination succeeds, the worst case scenario for employers in most cases is, broadly speaking, that an order of compensation will be made against them equivalent to the difference in the SPL and maternity leave pay plus a small amount for injury to feelings. However, if the employer acts inappropriately in the context of any grievance or claim brought by an employee about the inequality of treatment, this could result in a larger injury to feelings award, or, a separate award for victimisation.

Although employers can take comfort from this decision that failure to implement an enhanced SPL pay scheme to match enhanced maternity pay arrangements that operate during the first 14 weeks of OML will not amount to direct sex discrimination the question of whether it could provide the platform for an indirect sex discrimination claim has not yet been resolved.

In a second case before the EAT, it allowed an appeal against an ET decision that it did not amount to indirect sex discrimination to pay statutory SPL pay when mothers received full pay during 18 weeks of OML on the grounds that the ET had applied the wrong legal test.

In order for an indirect sex discrimination claim to succeed there must be a neutral "provision, criterion or practice" (PCP) which puts persons of the claimant's gender at a particular disadvantage when compared to persons of the opposite sex and the employer cannot demonstrate that the PCP is a proportionate means of achieving a legitimate aim.

In this case, the PCP was paying only statutory SPL pay. The EAT held that the pool for testing whether that PCP put men at a particular disadvantage was those employees with a present/future intention of taking leave to care for a newborn child. The disparate impact relied upon was the fact that fathers had no choice but to take SPL and be paid at the statutory rate, whereas female employees had the option of taking maternity leave at full pay in lieu of SPL.

For the time being, until clarification is provided by the appellate courts, there is a potential risk that an indirect sex discrimination claim could succeed if an employer pays enhanced maternity pay and only statutory SPL pay. Of course, each case will be fact specific including the employer's reasons for operating such an arrangement which could provide it with an objective justification defence.

Employers who do not want to revise existing SPL pay arrangements until judicial clarity has been provided should deal with any individual claims and grievances on a case by case basis, seeking legal advice where appropriate to manage the process and document any agreements reached. Thought

should also be given to the underlying reasons/aim for a disparity of approach to SPL and maternity leave pay.

*[Capita Customer Management Limited v Ali; Hextall v Leicestershire Police]*

## If the contract is silent when does notice take effect?

The Supreme Court has now clarified the question of when notice of termination will take effect if the employment contract is silent on the issue.

In the case in question, H's contract did not contain an express term addressing when notice under the contract was deemed to take effect. The date on which notice took effect was significant; if it fell on or after the employee's 50th birthday she would be eligible for a significant pension payment.

The issue before the court was when does the notice period begin to run? Is it when the letter would have been delivered in the ordinary course of post? Or when it was in fact delivered to the employee's address? Or when the letter comes to the attention of the employee and he/she has either read it or had a reasonable opportunity of doing so?

The majority of the Supreme Court held that where the contract is silent on when notice takes effect, the notice will only start to run when the letter comes to the attention of the employee and they have either read it or had a reasonable opportunity of doing so. Notice will not take effect merely by registered delivery of the notice to the employee's house or in the ordinary course of the post.

As the Supreme Court pointed out, there is nothing to prevent an employment contract containing express provisions, both as to how notice may or must be given and when it takes effect. In practical terms, to avoid any dispute about when notice takes effect (and particularly where this could be significant in terms of eligibility for bonuses or pension) an employer should:

- ensure that there is a suitable term in the employment contract clarifying when notice is considered to take effect;
- when serving notice, use a method of delivery that requires the employee to receive the notice personally;
- use only an email/residential address that the employee has expressly indicated can be used for correspondence; and
- ensure service of notice is not left to the very last minute where the date of notice is critical in terms of eligibility for any benefit or other entitlement, such as a bonus or pension.

*[Newcastle Upon Tyne NHS Foundation Trust v Haywood]*



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