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Employment News in Brief
April 2011

UK: Employment Update

Employment law implications of the Budget

Unusually the recent Budget, The Plan for Growth, contained quite a lot of detail about the Government's employment legislation plans (or rather lack of them). Set out below is a summary of the Government's proposals:

- There will be a three year moratorium exempting micro businesses (i.e. businesses with fewer than 10 employees) and genuine start up businesses from new domestic regulations. This will affect all regulation due to start from 1 April 2011. There may be some exemptions from this general moratorium.
- Micro businesses and start ups will have the option of complying with relevant legislation on a voluntary basis should they so wish.
- As previously announced the right to request time off to train will not be extended to employers of less than 250 with effect from April 2011.
- The dual/combined discrimination provisions of the Equality Act 2010 which would allow an employee to claim direct discrimination on the basis of two protected characteristics, e.g. race and age, will not be brought forward.
- As announced very recently the right to request flexible working will not now be extended to parents of children under 18 from 6 April 2011.
- The Equality Act 2010 currently provides that an employer will be liable if an employee is subject to harassment from third parties, such as contractors or clients, if:

  (i) harassment has occurred on at least two occasions;

  (ii) the employer is aware that harassment has taken place; and

  (iii) the employer has not taken reasonably practicable steps to prevent it happening again.

A consultation will be commenced on the repeal of these third party harassment provisions.

- The Government plans to resist EU Commission proposals to extend maternity leave to 20 weeks on full pay.
- The Government will also resist any costly amendments to the Information and Consultation of Employees Directive that is currently under review.
- The Government will urge the EU Commission to strengthen the small and medium sized enterprises test so that micro businesses are exempt from EU legislation.
- When businesses are bidding for public tenders the Government will encourage public bodies to disclose TUPE related liabilities at an early stage

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in the commissioning process. In addition it has already announced the withdrawal of the two tier code of practice which requires contractors performing services outsourced from local authorities to employ new recruits on terms and conditions that are no less favourable than those of the employees that TUPE transferred from the local authority. The Government is also consulting on the fair deal pension provisions which requires a broadly comparable pension to be provided to staff who TUPE over from the public sector.

- After a period of consultation the current tax and national insurance relief for late night taxi fares from work will be abolished in 2012.

As ever, to coin a popular legal phrase, 'the devil is in the detail'; at this stage it is unclear whether the moratorium on new regulation will mean that micro businesses and start ups are not subject to the repeal of the default retirement age or whether they will be exempt from the positive discrimination provisions of the Equality Act that will apply to employers from 6 April.

Having regard to the proposed abolition of tax relief for occasional taxi fares incurred when an employee is asked to work late, this will give rise to some debates about whether an employer is acting in accordance with the implied term of trust and confidence if it asks an employee to work until a time when public transport ceases to be available, or is not regarded as safe and the employee is then faced with the choice of additional personal expenditure (tax liability) to stay safe or of risking their personal safety travelling on public transport alone.

The Budget

The fairness of a final written warning can impact on the fairness of a dismissal

Two recent decisions of the Employment Appeal Tribunal (EAT) highlight the fact that flaws in a disciplinary process that result in a written warning (final or otherwise) can be taken into account by an employment tribunal when assessing the fairness of a subsequent dismissal which has taken the warning into account and tipped the balance in favour of dismissal.

Like many employers, N operated an absence procedure. This had four stages, each stage being triggered by a certain level of absence. The procedure required a member of N's personnel department to attend each meeting held under the absence procedure.

S had a number of absences which culminated in stage three of the absence procedure being invoked. A meeting was held with S as a consequence of which he was issued with a warning. This warning was in fact issued by mistake as a number of absences were taken into account when they should not have been. Neither N or S realised that there had been a mistake. Subsequently S was absent again which lead to the final stage of the procedure and S was dismissed. If S had not received the warning at stage three he would not have been dismissed under the absence procedure.

S brought unfair dismissal proceedings in relation to his dismissal and this was when he realised that he had been given the warning by mistake. The employment tribunal accepted that N had been mistaken when it believed that S had hit the point of the absence procedure where he should be dismissed. The Tribunal did not consider that an employer should be routinely required to re-open earlier disciplinary proceedings when deciding whether to dismiss an employee. N held a genuine, but mistaken, belief about the appropriate level of sanction and therefore the dismissal was fair.

The EAT however did not agree. Reviewing the case law, it held that in some cases an Employment Tribunal should consider the circumstances in which the final warning was given, including the employer's own procedures when deciding whether it was appropriate for the employer to give the warning. In normal circumstances, both those operating and those subject to disciplinary procedures are entitled to conclude that those procedures have a significant degree of finality, particularly where an appeal is offered but not taken up. Provided that a warning has not been issued for an oblique motive or has not been manifestly inappropriately issued, the employer and the Tribunal are entitled to regard the warning as valid for the purposes of any dismissal arising from subsequent misconduct. Of course the decision to dismiss must be a reasonable one when taking into account the warning and the subsequent misconduct.

The EAT held that on the facts, although N's procedures had clearly required a member of personnel to attend the absence procedure meetings, no one had attended the meeting which resulted in the warning. Given the size and resources of N, it should have ensured the proper application of the absence procedure at all stages. It was therefore manifestly inappropriate to give a warning without the safeguard of those procedures and S's subsequent dismissal was therefore unfair.

Employers need to be careful when applying their internal disciplinary procedures in relation to any conduct or capability issue because an inappropriate procedure or penalty could render a subsequent dismissal unfair. If the employee appeals a decision the opportunity should be taken to check that the internal procedure has been adhered to.

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[Sarharkar v Northern Foods Grocery Group t/a Fox's biscuits; Davies v Sandwell MBC]

ECJ guidance on deciding which jurisdiction's mandatory employment laws apply to an employee

Many employment contracts will expressly state the governing law of the contract; the governing law is usually stated to be that of the country in which the employment is carried out. One common exception is, however, where the employee participates in bonus or share scheme arrangements operated by an international parent of the employing company when the governing law of the bonus arrangements will often be that of the country in which the parent is located.

It can sometimes be overlooked that the choice of law clause cannot deprive the employee of any mandatory rules of law that would have applied in the absence of an express choice of law. This is because the Rome I Regulation (which superseded the Rome Convention) provides employees with this protection.

So what law would apply to the contract in the absence of an express choice? This was recently considered by the European Court of Justice (ECJ) having regard to the test set out in the Rome Convention. Rome I sets out substantially the same test.

The Rome Convention provided that in the absence of a choice of law, the employment contact is governed by the law of the country in which the employee habitually carries out his work under the contract unless it appears from the circumstances as a whole that the contract is more closely connected with another country in which case the law of that other country applies. If, however, the employee does not habitually carry out his work in one place, the law of the country in which the place of business through which the employee was engaged will apply except where it appears from the circumstances as a whole that the contract is more closely connected with another country in which case the law of that other country governs the contract.

The ECJ was asked to consider whether this test means that where an employee performs his contract in a number of countries but systematically returns to one of them, that country must be regarded as the country in which the employee habitually carries out his work.

K was employed by G, a subsidiary of a company incorporated under Danish law. K's employment contract was signed in Luxembourg and governed by Luxembourg law. K was engaged as an international driver and G's lorries were registered in Luxembourg but stationed in Germany. G did not, however, have a registered office in Germany.

When K was made redundant, he brought unfair dismissal proceedings in Germany arguing that German legislation prohibited the dismissal of members of works councils of which he was one. However the German courts declined jurisdiction.

Subsequently, K brought unfair dismissal proceedings in Luxembourg. He argued that although his employment contract had a Luxembourg choice of law clause the mandatory German law rules in relation to the dismissal of a works council member applied to his dispute because the contract would have been governed by German law in the absence of choice by the parties.

The Luxembourg courts held that the dispute was subject exclusively to Luxembourg law and applied Luxembourg law to the dispute.

The ECJ held that relevant factors for national courts to consider when assessing an employee's place of habitual work are; the place from which the employee carries out his tasks, receives instructions, organises his work, keeps his tools, where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.

The ECJ considered that the habitual place of work is the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, the place where he carries out the majority of his activities.

When the case returns to the Luxembourg courts, if they decide that German law would have applied to the contract in the absence of a choice of law, K will be able to take the benefit of more generous mandatory German employment law provisions. Luxembourg law will apply in all other respects.

[Koelzsch v Etat du Grand-Duché de Luxembourg]

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Changes to the extra statutory concession on the payment of legal fees in connection with termination

At present Extra Statutory Concession (ESC) A81 exempts from a charge to tax the legal fees paid by a former employer directly to a former employee's solicitor under a specific term of a settlement agreement provided the fees are incurred only in connection with the termination of employment.

It is common practice for the terms of compromise agreements and COT3's to provide that the former employee's legal fees incurred in relation to the settlement will be met by the employer.

The Government is codifying this ESC via the Enactment of Extra-Statutory Concessions Order 2011. This Order slightly alters the wording of the current ESC, referring only to compromise agreements under the Employment Rights Act 1996. Unfortunately the Government overlooked the fact that discriminatory dismissals under the Equality Act are validly settled by what is now known as a 'qualifying compromise contract' or via a COT3 agreement achieved under the auspices of ACAS.

This omission has been drawn to the attention of HMRC who have advised us that ESC A81 may continue to be used for compromise agreements under the Equality Act 2010 until a valid amendment to the legislation is in place. HMRC aim to implement the amending legislation at the earliest opportunity.

HMRC is reviewing the position in relation to legal fees paid in accordance with the terms of a COT3 agreement. It has stated that if it concludes that the concerns expressed about the omission of COT3's from the codified ESC are valid, it will introduce amending legislation to bring them within its ambit.

It is unclear at this stage whether ESC A81 can continue to be relied upon in relation to fees paid under COT3 agreements and further clarification is being sought from HMRC on this point.

[Enactment of Extra-Statutory Concessions Order 2011]

Abitration clauses cannot prevent claims being brought in the employment tribunal

The High Court recently considered whether an employee could be prevented from pursuing unfair dismissal and sex and pregnancy discrimination claims before the employment tribunal because she had signed an agreement that provided that, in the event of any disputes arising between her and the LLP that she was a member of, (and which employed her), the dispute had to be resolved by binding arbitration if prior attempts at internal resolution and mediation were unsuccessful. The agreement provided that such arbitration would be the final resolution of the matter under dispute.

The High Court held that the provision in the agreement which provided for binding arbitration and prevented an individual from pursuing her unfair dismissal and discrimination rights in the Employment Tribunal was rendered void by the Employment Rights Act 1996 and the Equality Act 2010. It was only possible to contract out of the employment rights conferred by each piece of legislation and the right to enforce them in specified limited circumstances such as via compromise agreement or COT3 agreement but not via a general compulsory arbitration clause.

Whilst the inclusion of an arbitration clause in a service agreement or bonus agreement will not prevent an employee pursuing statutory employment claims before an employment tribunal, such a clause is of value if a dispute of a contractual nature, e.g. the amount of a bonus payable, falls to be determined. Arbitration can result in a quicker, cheaper and less public resolution than litigation before the courts.

[Clyde & Co LLPv KB Van Winkelhof]

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