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Employment News in Brief
July 2011

UK: Employment Update

Beware ex-gratia payments: employers may not be relieved of their notice pay obligations

A recent Employment Appeal Tribunal (EAT) decision demonstrates the importance of carefully labelling any payments made to a departing employee to avoid being exposed to breach of contract claims. It is common practice for employers to call payments made to employees who are dismissed without being required to work out their notice, *"ex gratia payments"* when what they are being paid is essentially a payment in lieu of notice. Mis-labelling such a payment can result in an employer being liable to pay an additional sum in respect of the employee's contractual notice entitlement.

O worked in a senior position for PUK. Her employment contract provided for three months' notice. When PUK dismissed O by reason of redundancy its dismissal letter advised her that she would receive the following redundancy package in excess of her statutory entitlement:

- an ex gratia payment equivalent to three months' salary;
- a statutory redundancy payment; and
- holiday pay.

This package was paid to O however she then brought a claim for breach of contract in relation to PUK's failure to pay her three months' notice pay.

The EAT held that under the terms of the letter it was clear that PUK was making an *"ex gratia payment"*, that is to say a payment made freely and without obligation; it was not making a payment that the company was legally obliged to make in relation to the contractual notice entitlement. The EAT considered that the wording of the letter was quite clear but if there had been any ambiguity in the meaning of the letter, it would have construed it against PUK as the author of the letter.

O was accordingly entitled to receive compensation for three months' notice pay in addition to the *"ex gratia"* sum that she had been paid by PUK.

To avoid departing employees obtaining a financial windfall because of inadvertent mislabelling of termination payments:

- each component part of any termination payments made to an employee should be clearly identified in the relevant documentation (termination letter, payslip or compromise agreement etc).
- no payment should be described as 'ex gratia' if it is intended to satisfy a contractual obligation, for example in relation to any contractual bonus, notice entitlement, overtime or redundancy payment.

[*Publicis Consultants UK Limited v F O'Farrell*]

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Employment Tribunal recommendations in discrimination cases can be wide ranging

The Equality Act 2010 permits an employment tribunal that upholds a claim of discrimination on any of the protected grounds (sex, race, disability, age etc.) to make recommendations that the employer take specified steps in order to avoid or reduce the affect of any of its conduct which was under the Tribunal's scrutiny. The beneficiary of the recommendation(s) may be the claimant, or, the employer's staff more generally. The Tribunal may of course also order the employer to pay financial compensation in respect of the discrimination.

This power to make a recommendation is on the face of it quite broad, but it receives little publicity in practice.

In a recent case the claimant succeeded with an age discrimination claim. Her employer, L, was ordered to pay significant compensation. The Employment Tribunal also made the following three recommendations:

- that the Tribunal's judgment be circulated to L's governing board and be read and digested by each member of the senior management team;

- that L secure the services of a qualified HR professional to conduct a review of L's equality, disciplinary, grievance and recruitment policies and procedures and amend or redraft them as necessary to ensure compliance with UK employment law; and

- that L undertake a programme of formal equality and diversity training addressing recruitment and selection procedures, beginning at the board of governors and highest management levels and then cascading down through the entire organisation, such training to be completed within a six month period.

L challenged the Tribunal's ability to make such recommendations. However, the EAT ruled that the tribunal had been permitted to make these recommendations. There had been evidence that L completely lacked any understanding about equality rights under English law and had failed to handle grievance and recruitment procedures appropriately. The recommendations addressed these issues.

The EAT also considered that a formal equality and diversity training programme would not take very long to organise and that it was appropriate to start with the upper echelons of an organisation and cascade it down.

If an employer fails to comply with a Tribunal's recommendations in relation to the claimant in the proceedings the claimant can return to the Tribunal and ask for compensation.

If an employer fails to comply with recommendations targeted at the employer's staff more generally the position is less clear cut. The employer cannot, at present, be ordered to pay compensation. However it should be noted that consideration is being given to this possibility in the near future. There is, however, a risk that, should the employer be involved in subsequent employment tribunal proceedings, the Tribunal may draw an adverse inference in relation to non compliance with recommendations depending on the subject matter of the subsequent proceedings.

In this case the Tribunal recommended that its decision should be made known to the employer's board of governors; it is not inconceivable that a Tribunal could recommend that its judgment is appended to a company's annual report which would invariably attract significant adverse publicity. Employers can minimise the risk of a successful discrimination claim and any Tribunal recommendations by ensuring that equal opportunities policies and training are up to date and that staff are regularly reminded of their obligations.

[*Lycee Francais Charles de Gaulle v Delambre*]

No absolute entitlement to legal representation in disciplinary proceedings

As a matter of law employees are entitled to be accompanied to disciplinary meetings by a colleague or an appropriate trade union representative. In practice, employers are often asked if an employee may be accompanied to a disciplinary meeting by a friend, family member or a legal representative. In the absence of a formal policy or contractual right permitting an employee to be accompanied to a disciplinary meeting by friends, family or legal representatives what is an employee's entitlement in this respect?

The Supreme Court has recently considered the question of whether the right to a fair hearing under the European Convention on Human Rights means an employee is entitled to legal representation during the course of disciplinary proceedings.

C worked as a school assistant and was subject to disciplinary proceedings in relation to allegations about an inappropriate relationship with a minor. C's request to bring a legal representative to the disciplinary hearing was declined. Following the hearing C was dismissed and the school was obliged under relevant legislation to report the

circumstances of C's dismissal to the Secretary of State. A decision then had to be taken by the Independent Safeguarding Authority (ISA) on whether C should be added to the list of individuals prohibited from working with children (the children's barred list).

C argued that the school's disciplinary proceedings would have such a powerful influence on the ISA proceedings which could have grave consequences for his professional career if he was placed on the children's barred list, that his human right to a fair hearing meant he was entitled to legal representation at both the school's disciplinary hearing and at the ISA proceedings.

The Supreme Court held that where the outcome of disciplinary proceedings will dictate the outcome of a separate set of proceedings in which an individual's right to practice his profession will be decided then the right to a fair trial and legal representation will apply to the disciplinary proceedings. In addition, the right to a fair hearing and legal representation will also apply to disciplinary proceedings that will have a major influence on the result of the separate proceedings in which the individual's right to practice their profession will be determined. This is because in both situations the civil right of the employee to practice their profession is greatly affected by what occurs in the disciplinary proceedings.

However, applying this test to the facts of C's case, the majority of the Supreme Court did not consider that the disciplinary proceedings would dictate the outcome of the ISA proceedings deciding whether C should be placed on the children's barred list. The ISA was required to carry out an independent assessment and not rely on the findings of the school's disciplinary hearing. C was accordingly not entitled to legal representation in the school's disciplinary hearing.

If a public sector employer's internal disciplinary proceedings may have a career limiting outcome, for example, where the employer is the NHS and there is no real alternative employer, then arguably as the employer is a public body and therefore subject to the European Convention on Human Rights, an employee will be entitled to legal representation in the disciplinary hearing.

As far as a private sector employer's disciplinary proceedings are concerned, in the absence of an express contractual right there are strong grounds for maintaining that an employee has no right to legal representation: first, a private sector employer is not directly bound by the European Convention on Human Rights; second, although the outcome of the disciplinary proceedings may be severely career damaging there are theoretically alternative employers available in the marketplace, so the employee will not be invariably deprived of the ability to practice his profession.

[*R v The Governors of X School*]

Collective redundancy consultation – a ballot to elect employee representatives may not always be required

An employer's collective redundancy consultation obligations are triggered when it envisages dismissing 20 or more employees within a 90 day period. In such circumstances, the employer is required to consult with appropriate representatives of the affected employee. For these purposes, affected employees are the trade union representatives of any trade union recognised in relation to the affected employees. If, however, there is no recognised trade union then the appropriate representatives will be employee representatives who have been appointed or elected by the affected employees for some other purpose but who have the authority to represent the employees in relation to the collective redundancy consultation exercise, for example, a pre-existing employee works council. If, there is no recognised trade union or pre-existing body of employee representatives, usually an election will have to be conducted in order to elect employee representatives.

The legislation imposes certain requirements in relation to the election of such employee representatives. A recent EAT decision, examined the question of whether an employer needs to go through the rigmarole of a formal ballot where the number of employee representative candidates matches the number of available places. In a commonsense decision, the EAT held that it is not necessary in such circumstances to go through the formal process of a ballot.

This pragmatic approach should also be adopted in other contexts where employers would normally need to conduct a ballot for the election of employee representatives, for example, in the context of a TUPE information and consultation exercise, if the number of candidates match the number of representatives required. Where the process is triggered for establishing a European Works Council, a Special Negotiating Body (SNB) has to be established and the members of the SNB usually have to be elected via a ballot. A similar process applies in the context of a European Limited Liability Company where members of the SNB also have to be elected via a ballot process. Again no formal ballot would be required in either situation where the number of SNB candidates matches the number of available places.

[*Phillips v Xtera Communications Limited*]

Carry forward of long-term sick leavers holiday may be limited to 18 months

A series of European Court of Justice (ECJ) decisions have clarified that long-term sick leavers have the right to exercise their right to take holiday when absent on long-term sick leave should they so wish. If, however, they do not wish to take their holiday during their sick leave they cannot be required to do so and should be entitled to carry forward their holiday to subsequent holiday years if they are unable to take their holiday due to their ill-health absence. These cases were based on the ECJ's interpretation of the Working Time Directive, which the Working Time Regulations 1998 seek to implement.

The Working Time Regulations currently provide that holiday must be taken in the holiday year to which the holiday relates i.e. an employee must use it or lose it; there are no exceptions in relation to holiday that is untaken due to sick leave absence or maternity leave absence. This has led to uncertainty for employers and employees alike and there is at least one first instance Tribunal decision in which the Tribunal has added to the wording of the Working Time Regulations in order to enable an employee who had been unable to take holiday due to absence on ill-health grounds to carry forward that holiday to a subsequent year.

The Government is consulting on amendments to the Regulations that would allow maternity leavers and sick leavers to carry forward untaken holiday into a subsequent holiday year. The Government, however, is proposing that only 4 of the 5.6 weeks' holiday may be carried forward. The consultation does not address how long this holiday may be carried forward. Can it only be carried forward to the subsequent holiday year or can it be carried forward for several years? The latter being of particular interest to employers who have employees who have been absent on long-term sick leave for several holiday years.

A recent opinion of the Advocate-General (AG) may provide a steer on the ECJ's view of whether imposing a limit on the period of carry forward is permissible under the Working Time Directive.

The AG considered a case where S, who worked in Germany, was absent on long-term sick leave for over six years. S's employment terminated and he claimed a payment in lieu of the annual sick leave he had accrued during a three year period. His employer argued that under the collective agreement that applied to S his accrued holiday rights had expired and he could not claim a payment in lieu. A reference was made to the ECJ on whether the collective agreement that limited the accrual of untaken holiday, was compatible with the Working Time Directive.

The AG took the view that the earlier ECJ case law on the carry-over of sick leaver's holiday, had not had to decide whether the carried over holiday should be available indefinitely.

The AG considered this question and in her opinion found that the Working Time Directive did not require the indefinite accumulation of accrued holiday of sick leavers. The AG considered that an 18 month period would be a sufficient period for sick leave to be carried forward for workers absent on long-term ill-health grounds. This was, however, regarded by the AG to be a minimum period and it was ultimately open to Member States to provide for a longer carry forward period.

The AG's opinion is not binding on the ECJ, although in many cases it is followed. It remains to be seen whether the Government will have regard to the AG's opinion when revising the Working Time Regulations to provide greater clarity for employers faced with managing accrued holiday of long-term sick leavers.

[*KHS AG v Schulte*]

Board gender diversity: recent developments

In the last 14 months there have been a number of initiatives on both a domestic and European front in relation to enhancing board gender diversity. Most recently European MEPs voted on 6 July that legislation should be implemented if Europe's largest listed companies do not have a board that is made up of 30% women by 2015, and 40% of women by 2020.

On a domestic level, board diversity has been addressed in a number of quarters. In February 2011 the Davies Report was published and whilst this did not call for gender quotas on the boards of listed companies, it did recommend that the Chairmen of FTSE companies should establish the percentage of women they aim to have on their board in 2013 and 2015. The Report encouraged an aspiration of 25% of female appointees by 2015.

The Davies Report asked FTSE 350 Chairmen to announce their aspirational goals by September 2011. In a speech to the ABI in June, Vince Cable urged Chairmen to publish their aims by this September deadline. He commented that the Government aims to see what results can be achieved via a voluntary approach before considering legislation to address this.

Following another of the Davies Report recommendations, the Financial Reporting Council is consulting on whether the UK Corporate Governance Code should be amended to require boards to publish their policy on gender diversity together with information about their progress on implementation.

At a European level the April 2011 EC green paper on Corporate Governance for listed companies asked whether listed companies should be required to:

(i) disclose whether they have a diversity policy and, if so, to describe its objective and content and regularly report on progress; and

(ii) ensure a better gender balance on boards and, if so, what steps are needed to achieve this.

The year before in June 2010 the EC Green Paper on Corporate Governance for financial institutions stated that at board level there was a lack of diversity and balance in terms of gender, social, cultural and educational backgrounds. This theme also emerged in a recent draft of the Capital Requirement Directive 4 (CRD4), which provided that the management board should be made up of at least one third women. Some commentators have suggested that this provision may be watered down, however, in light of the recent MEP vote and other European initiatives such as the 'Women on the Board Pledge for Europe' issued by the Justice Commissioner in March 2012, this requirement may stay.

As the push for board gender diversity gathers momentum, financial institutions, listed companies and recruitment businesses that work alongside them need to actively consider:

- Whether to establish a formal policy on board diversity and gender composition.
- Whether such policies or aspirations are to be publicised in annual reports or elsewhere.
- Whether details of the gender composition of the workforce from the Board down should be published.
- Whether search and nomination processes are sufficiently broad and robust to expand the pool of talent from which candidates are drawn.
- Whether internal work life balance policies can be improved in order to enhance the retention of senior female staff.
- Whether internal policies on promoting gender diversity are compatible with current legislation prohibiting discrimination on the grounds of sex.