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UK Employment Update

Board Diversity: UK Corporate Governance Code to be amended

The momentum for achieving greater board diversity is gathering pace. In February, the Davies' Report: Women on Boards made a number of recommendations with a view to improving the gender make-up of boards. One of the proposals was that the UK Corporate Governance Code (the Code) should be amended to require the Annual Report to include details of the process used in relation to board appointments, and that listed companies should establish a policy on boardroom diversity and disclose annually the progress achieved.

In response, the Financial Reporting Council (FRC) launched a consultation on amendments to the Code. It has now published its feedback which outlines the changes that will be made to two areas of the Code that will apply to financial years beginning on or after 1 October 2012.

Listed companies will be required to include a separate section in their Annual Report to describe the work of the Nomination Committee including a description of the board's policy on diversity, including gender. The Report should also disclose any measurable objectives that the company has set for implementing the policy and progress made on achieving the objectives. Companies will not, however, be required to have in place specific objectives.

The second area of change relates to the evaluation of the board. The Code will require that evaluation of the board must consider the balance of skills, experience, independence and knowledge of the company on the board and the board's diversity, including gender.

The FRC feedback statement may be found here.

Disclosure of the gender make-up of the workforce

The implementation of changes to the Code (outlined above) have been timed to coincide with the anticipated introduction of Regulations requiring listed companies to disclose information about the percentage of women at different levels of their organisation.

The Department for Business Innovation and Skills (BIS) published a consultation on the future of Narrative Reporting for UK companies. The consultation paper proposes a new reporting framework under which companies will be required to produce a Strategic Report and an Annual Directors' Statement.

The nature of a company's disclosure requirements will vary according to whether it is a small, medium or large size company or a quoted company. The most significant changes will affect quoted companies including the proposed requirement that quoted companies should report the proportion of women on their board and the proportion of female employees in those parts of the organisation for which gender information is available with an explanation of the approximate proportion of the global workforce to which the gender figures relate.

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In addition, it is proposed that a brief description of the jurisdictions or regions where gender information is unavailable or onerous to obtain should be included in the Strategic Report.

It is anticipated that new Regulations implementing these proposals will come into effect on 1 October 2012.

Workplace reform

In January the Government launched a consultation on resolving workplace disputes. A number of proposals were raised including the possibility of increasing the qualifying period of employment before an individual could claim unfair dismissal and the introduction of fees for pursuing a claim in the Employment Tribunal. BIS has, following comments during the Conservative party conference, issued a press release confirming that the qualifying period of service for unfair dismissal will increase to two years with effect from 6 April 2012. In addition, BIS has confirmed that fees will be introduced for pursuing Employment Tribunal claims.

It is anticipated that a further consultation document will be issued in November that should clarify in more detail how these new proposals will operate. For example, at present it is unclear whether there will be any transitional provisions in relation to the qualifying period of service to pursue an unfair dismissal claim.

Having regard to the issue of fees for pursuing Tribunal claims, the suggestion at present is that the level of fee will range from £100 to £250 to be paid at the time the claim is lodged and that a further fee of £1,000 will be payable when the claim is listed for a hearing. Fees will be forfeit if an individual's claim fails.

The rationale behind the increase in the qualifying period of service for bringing an unfair dismissal claim appears to be that this will incentivise employers to recruit more without the fear of facing unfair dismissal claims. Statistically, it is unclear whether fear of Tribunal proceedings does inhibit recruitment. What may result, however, is an increase in unfair dismissal clams where no qualifying period of service is required, for example, where an individual asserts that they have been dismissed for having *"blown the whistle"* or for asserting a protected statutory right.

The BIS press release may be found here.

Discrimination individual and corporate respondents are liable

It is not uncommon for a claimant to bring, for tactical reasons, a discrimination claim against his or her employer and the individuals at the employer who it is alleged carried out the discrimination in question. In the past, when Tribunals have found in favour of a claimant it has been common for the Tribunal to apportion the compensation payable as between the individual respondents and the corporate respondent, typically with the majority of the compensation being payable by the corporate respondent. In a recent Employment Appeal Tribunal (EAT) decision the question of separating out compensation in this way was scrutinised in a case where there were two corporate respondents to the discrimination claim. In that case the EAT held that the two corporate respondents had to be jointly and severally liable for the entire compensation amount and it was up to the individual claimant to decide against whom to enforce the compensation order. The EAT indicated that the same approach ought to be adopted where there was a claim brought against an individual and a corporate respondent but did not rule definitively on this issue.

The EAT has recently revisited this issue in the context of a religious discrimination claim brought against the claimant's employer and two individual respondents who were directors on the board of the employer. The EAT upheld the Tribunal's decision that the compensation for injury to feelings and aggravated damages should be awarded against the individual and corporate respondents jointly.

In that case, the EAT held that the two board members (one of whom was chairman of the board) acted as agents of the employer; it was clear from the articles of the company that the board including the chairman and board member, had the power to manage the business of the employer. In their capacity as directors, the two directors had been the prime movers in the discrimination campaign against the claimant. As agents their discriminatory acts rendered the employer liable for discrimination (even though the employer had not, of course, authorised the discriminatory acts themselves).

This decision illustrates that board members who act in a discriminatory manner may themselves be individually liable for acts of discrimination as well as the corporate entity of whom they are agents. An individual may therefore pursue a claim both against individual board members and the company and a Tribunal will, if it upholds such a claim, award compensation on a joint and several basis. The claimant can then elect to pursue the individual respondents for the compensation and, in circumstances where the corporate respondent may be in financial difficulty (as was the case here), this may well be the most practical and financially advantageous path to choose.

[Bungay and another v Saini]

TUPE: post transfer contractual variation was not void

Employers who inherit a workforce as a result of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applying, for example, after a business sale, often wish to harmonise the terms and conditions of the incoming workforce with those of its existing workforce. Such a harmonisation is, however, extremely difficult to achieve as TUPE provides that any variation of the contract is void if the reason for the variation is the transfer or a reason connected with the transfer unless it is for an economic, technical or organisational (ETO) reason entailing changes in the workforce. In practice, this means that harmonisation can be extremely difficult to achieve, even several years after the transfer has occurred. An ETO reason requires a change in the duties performed by the workforce or a reduction in the numbers of the workforce and therefore this exception rarely applies.

In a recent EAT decision, changes to the contractual rate of pay occurred some two years after the employees' contracts of employment transferred under TUPE. The employees in question were part-time teachers but their rate of pay was higher proportionality than their colleagues in an equivalent full-time role. HR scrutinised the rates of pay of the incoming workforce and spotted this discrepancy in the rates of pay. HR believed that the teachers had been overpaid in error. As a result, the school concluded agreements with the teachers that their rates of pay would be reduced in phases. The teachers argued that the variation to their pay was void because the reason for it was the TUPE transfer.

The EAT assessed what had caused HR to reduce the rate of pay and concluded that it was HR's view that the teachers had been overpaid by reason of mistake, and that the reduction was not aimed at harmonising terms and conditions following the transfer. The discrepancy in pay had been identified after the transfer, but the transfer was not the reason for the reduction in pay.

Where a workforce is inherited by virtue of a TUPE transfer, careful consideration must be given to any changes to terms and conditions to avoid any argument that changes are void potentially giving the employees the right to claim either a breach of contract and possibly constructive dismissal. There is no specific period of time following a transfer after which it will be *"safe"* to achieve changes to terms and conditions by way of a harmonisation exercise. This case, however, illustrates that it may be possible to identify a reason for a change that is not connected with the transfer, for example, a remuneration package is out of kilter with market practice or has arisen as a consequence of an error. The fact that such a discrepancy may only become apparent following a transfer does not deprive an employer of the ability to seek a mutual variation to a contract or to give notice of termination and re-engage on other terms where a mutual variation cannot be achieved. Caution should be exercised when seeking to vary terms on the grounds that they are not in line with market standard, if the market standard to which they are being compared are the terms and conditions of the transferee's own workforce as such a change may be regarded as a straightforward harmonisation exercise.

[Smith v Trustees of Brooklands College]