CLIFFORD
CHANCE

Newsletter June 2012

UK: Employment Update

This June Update explores the myriad of proposed employment law reforms that, amongst other matters, address unfair dismissal compensation, compensated no fault dismissals and the abolition of discrimination questionnaires. Finally we also look at a case on the right to suspend without pay.

Compensated no fault dismissals

The Beecroft Report on Employment Law that was commissioned by BIS has now been published after many months of speculation and selective leaks. One of its recommendations is that the concept of the compensated *"no fault dismissal"* should be introduced for all businesses. This would permit an employer to dismiss an employee whose performance is unsatisfactory provided that a brief consultation occurs, the employee is given notice and paid a compensation payment equivalent to the applicable statutory redundancy entitlement (currently subject to a maximum of £12,900). The right to claim unfair dismissal would not apply in such circumstances. The underlying intention is that it will make it easier for employers to remove underperforming employees without having to undergo a potentially lengthy capability performance process. In turn, it will provide a job vacancy for a more competent individual to obtain employment.

Key issues

- Compensated no fault dismissals
- Red tape challenge: proposals to revise equality rights
- Enterprise and Regulatory Reform Bill
- Dishonesty suspension: right to pay remains

This proposal has attracted much press attention and appears to be a point of controversy within Government. After receiving the report, but prior to its recent publication, the Government launched a call for evidence on the introduction of compensated no fault dismissals for micro businesses only. This closes on 8 June 2012. The current indications are that if the no fault dismissal concept is implemented it will only be available for small employers with fewer than 10 employees.

Red tape challenge: proposals to revise equality rights

The Government has launched two consultations aimed at reducing red tape for employers in the context of the Equality Act 2010.

Third Party Harassment

The Equality Act currently makes an employer liable for harassment of its employees by third parties, such as clients or contractors over whom the employer does not have direct control. Third party harassment liability arises if the employee has been harassed on at least two occasions and the employer is aware that the harassment has taken place but has failed to take reasonably practicable steps to prevent the harassment happening again.

The Government consultation proposes repealing this aspect of the Equality Act on the grounds that there is no real or perceived need for it and that alternative legal routes exist for employees if they consider they have been subject to repeated harassment by a third party.

If the third party harassment provisions are repealed the Government expects that employees who are harassed by third parties will be able to fall back on a range of existing legal remedies including a claim against the employer for breach of its common law duty to take reasonable care of the safety of its employees and a claim of constructive dismissal based on an employer's failure to comply with its common law duty of care or its statutory health and safety obligations.

Tribunal Recommendations

The Government is also consulting about the removal of two other Equality Act provisions; first the provision that permits an Employment Tribunal to make recommendations to an employer where it loses a discrimination claim. The Tribunal may, at present, make recommendations that go beyond the individual who has brought the claim; for example, in principle, a Tribunal may recommend that its findings are appended to a company's annual report and accounts or, for example, it can recommend the transfer or promotion of staff. Although a Tribunal's recommendation cannot be enforced if the employer does not comply with it and is subsequently involved in other discrimination proceedings the Tribunal can take into account the employer's previous failure to comply with its recommendations.

Discrimination Questionnaires

The second proposed repeal relates to the discrimination questionnaire procedure. This permits an individual who believes that they have been the subject of unlawful discrimination to serve a discrimination questionnaire in order to decide whether they have a claim. Where proceedings have not commenced, a potential claimant can serve a discrimination questionnaire on an employer within three months of the act complained of. Where proceedings have already commenced the questionnaire may be submitted within 28 days of the claim being presented. The response to a questionnaire can be taken into account in evidence in the Tribunal proceedings. In addition, the Tribunal is entitled to draw an adverse inference from a failure, without reasonable excuse, by an employer to reply to the questionnaire within eight weeks and/or if an evasive or equivocal reply is provided.

In practice the use of a questionnaire is sometimes deployed as a litigation tactic as it can be extremely time consuming (and expensive) for employers to respond to them.

The consultation expresses the view that the time taken for employers to complete discrimination questionnaires together with the obligation to respond within eight weeks is burdensome and expensive and does not achieve the intended effect of encouraging settlement of claims outside the Tribunal system.

The consultations close on 7 August 2012. At this stage, if the proposals are implemented it is unclear when they will come into effect.

The two consultation papers may be accessed here.

Enterprise and Regulatory Reform Bill

In its drive to reduce the burden and costs of employment law for business, the Enterprise and Regulatory Reform Bill includes a number of provisions intended to achieve this:

- mandatory ACAS conciliation before proceedings are initiated;
- the use of *"legal officers"* to determine certain claims instead of the Tribunal where the parties consent to this in writing;
- a power for the Secretary of State to adjust unfair dismissal compensation limits;
- a new power for the Tribunal to impose a financial penalty on a losing employer in addition to any award of compensation;
- redefining the concept of a protected public interest disclosure; and
- renaming compromise agreements to settlement agreements.

Pre-claim Conciliation Process

With the aim of reducing the number of claims presented to the Employment Tribunal, the Bill requires a prospective claimant to lodge a form with ACAS in order that ACAS can attempt to achieve a conciliation between the parties and avoid Tribunal proceedings. There will be a prescribed conciliation period during which the ACAS officer will attempt to promote a settlement. If the conciliation officer reaches the view that the settlement is not possible or settlement is not reached during the prescribed period, a certificate to that effect will be issued to the individual. No claim may be presented to the

Employment Tribunal without a certificate. The time limits for presenting claims to the Employment Tribunal will be adjusted in order to accommodate this compulsory conciliation period.

At this stage, details of the form that a prospective claimant will have to complete for the purposes of this ACAS conciliation are unclear but it is unlikely to be as comprehensive as a Tribunal claim form. It is also unknown how long the prescribed conciliation period will be and whether it will differ according to the nature of the claim.

Unfair Dismissal Compensation

The Bill gives the Secretary of State the power to cap unfair dismissal compensation limits. A number of options are possible; the maximum amount may be:

- a specified amount between one and three times median annual earnings (the current median of £26,200); or
- not less than a year's pay for the claimant. (It is unknown whether there will be any cap on the amount of a week's pay for these purposes); or
- the lower of the above two amounts.

The Bill also provides that different amounts may be specified for employers of *"different descriptions"*. Whether this is a reference to employers of different sizes, different industry sectors or something else is unclear.

Financial Penalties

In cases where an employer is unsuccessful in defending proceedings, the Employment Tribunals will have a new power to award a financial penalty where it considers there are aggravating features. If the Tribunal makes an order of compensation against the employer and it considers that the circumstances are appropriate to impose a financial penalty then the penalty will be 50% of the amount awarded subject to a minimum of £100 and a maximum of £5000.

Adopting an approach similar to parking fines, employers will be entitled to a 50% discount if the financial penalty is paid within 21 days.

"Aggravating features" are not defined in the Bill and it remains to be seen whether this concept will be defined by case law or some further legislation.

Claims that are presented to the Tribunal within six months of the Bill being passed will not be subject to this financial penalty regime.

Whistleblowing

At present, it is not uncommon for public interest disclosure (*"whistleblowing"*) claims to be brought based on the individual having asserted that his or her contract of employment was breached, for example, an allegation that a contractual bonus was not paid in accordance with the terms of the contract. Such disclosures are arguably not in the public interest but in the individual's personal interests nevertheless case law indicates that individuals are protected from detrimental treatment and/or dismissal as a result of having made such a *"disclosure"*. The Government proposes to close this loop hole by redefining what amounts to a *"qualifying disclosure"* and limiting this to disclosures that are in the public interest only.

Following the April increase in the unfair dismissal qualifying period of service from 1 to 2 years, it was widely believed that this would result in an increase in unfair dismissal 'whistleblowing' claims. Closing this loophole will almost certainly lead to a reduction in whistleblowing claims; there may, however, be some debate on when a disclosure is made in the public interest. If an employee makes a disclosure in relation to concerns that a promotion decision was discriminatory or payment of a bonus was discriminatory, it may well be of personal interest to the individual employee but arguably it is also in the public interest that a company does not breach its legal obligations not to discriminate.

[*Enterprise and Regulatory Reform Bill*]

Dishonesty suspension: right to pay remains

An employer can only suspend an employee and withhold pay if it retains an express contractual right to do so. In the absence of such an express contractual right the employee may bring a claim for unlawful deduction of wages if suspended without pay, regardless of the reason for suspension.

This was recently illustrated in a case brought by K against his employer who suspended him after receiving information from the police that he was suspected of having misappropriated up to £200 million from a third party. This alleged dishonesty clearly had serious financial and reputation consequences for K's employer.

The Employment Appeal Tribunal (EAT) upheld K's complaint of unlawful deduction from wages as the employer had no express contractual right to withhold pay in such circumstances. K had been ready, willing and able to work but for the fact that he was suspended from work. Accordingly, in the absence of an express right to suspend without pay K was entitled to receive his pay as if he was at work. The EAT accepted that it was galling for an employer to be obliged to pay an employee during a period of suspension when it believed that the employee was guilty of extremely serious misconduct, however, the law was clear on this point.

The EAT suggested that an alternative remedy might be available to an employer in such circumstances. If the nature of the employee's misconduct was such that it provided the basis for Court proceedings against the employee then any sum that was due to the employee by way of unlawful deduction of wages compensation would have to be set off against any sum found due to the employer from the employee in the Court proceedings. Clearly this is an extreme way of avoiding paying an employee and an employer would be better advised to ensure that there is an express contractual right to suspend without pay in appropriate circumstances.

[Kent County Council v Knowles]

Contacts

Chris Goodwill
Partner

Imogen Clark
Partner

Mike Crossan
Partner

Alistair Woodland
Partner

Tania Stevenson
Senior Professional Support Lawyer

T: +44 (0) 20 7006 1000
F: +44 (0) 20 7006 5555

To email one of the above please use:
firstname.lastname@cliffordchance.com