UK: Employment Update

This month we highlight three legislative changes in relation to zero hours contracts, gender pay gap reporting and penalties for not notifying collective redundancy proposals. In addition, we consider key aspects of the new code of practice on whistleblowing and the latest judicial developments in relation to commission and holiday pay calculations.

Key issues

Collective redundancy consultation notification failure: potentially unlimited fines

When an employer is embarking on a collective redundancy consultation exercise (i.e. it is proposing to dismiss 20 or more employees within a 90 day period) it must notify the Secretary of State. This is done by filing form HR1 with the Redundancy Payments Service (RPS) before consultation with employee representatives starts. As part of the redundancy consultation a copy of the HR1 should be provided to the representatives.

Prior to 12 March 2015 failure to file an HR1 with the RPS could give rise to a fine on summary conviction of up to £5,000. In practice, however, fines for failure to file an HR1 did not appear to be very common.

The consequences of failing to file an HR1 are now, however, potentially much more expensive. With effect from 12 March 2015 the maximum fine that the Magistrates' Court can impose is no longer capped at £5,000; unlimited fines may now be imposed. This new sentencing power only applies to fines for offences committed on or after 12 March 2015. Employers now have a greater financial incentive to file an HR1.

[The Legal Aid, Sentencing and Punishment of Offenders Act 2012]

Zero hours contracts: ban on exclusivity clauses

The Small Business, Enterprise and Employment Act 2015 has now received Royal Assent although many of its provisions will not come into force until regulations are laid before Parliament. It only contains a small number of employment law related provisions, one of which is a ban on the use of exclusivity clauses in zero hours contracts. In conjunction with this the Government has published the draft Zero Hours Workers (Exclusivity Terms) Regulations 2015 setting out how this ban will operate in practice.

In summary these Regulations:

- include the right for zero hours workers not to suffer a detriment on the grounds that the worker has done work or performed services under another contract or arrangement;
- give workers the right to make a complaint to an Employment Tribunal if they are subjected to a detriment. Such complaints will have to be made within three months of the act complained of;
- give the worker the right to receive compensation if a detriment complaint is upheld by the Tribunal;

- give Tribunals the right to impose civil penalties on employers if the worker's rights have been breached and there are aggravating features;

- extend the prohibition on exclusivity clauses beyond zero hours contracts to deal with potential avoidance in all contracts of employment or workers' contracts under which the individual is not guaranteed a certain level of weekly income. The level has not yet been specified. If, however, the hourly rate of pay is at least £20, then the prohibition will not apply to the contract in question; and

- extend the right not to suffer a detriment on the grounds that the worker has done work or performed services under another contract or arrangement to workers earning below a specified income threshold even if they are not technically working under a zero hours contract.

The Government also proposes to encourage business representatives and unions to develop industry led, sector specific codes of practice on the fair use of zero hours contracts.

[Zero hours employment contracts: Government response to the "banning exclusivity clauses; tackling avoidance" consultation – March 2015.]

Mandatory gender pay gap information

The Small Business Enterprise and Employment Act 2015 (the "Act") includes a provision specifying that the powers in the Equality Act 2010 should be used to implement regulations that require employers with 250 or more employees to publish information showing whether there are differences in the pay of men and women in their workforce.

The devil will of course be in the detail and it remains to be seen what obligations the regulations will impose in terms of:

- what information has to be published;
- when it has to be published; and
- the form and manner in which it has to be published.

A sanction of a fine not exceeding level five on the standard scale, which is now potentially unlimited, can be imposed in the event of non-compliance.

The regulations will have to be made within 12 months of the provisions of the Act coming into force. The timeframe will become clearer after the elections.

Whistleblowing: new code of practice and guidance

The Government has issued new guidance for employers and a code of practice on whistleblowing. There is no legal obligation on employers to have a whistleblowing policy and the new code of practice is not itself a statutory code to which Tribunals must have regard in the context of a whistleblowing detriment/dismissal claim.

The Government's whistleblowing Guidance addresses:

- What is whistleblowing.
- What an employer's responsibilities are in relation to whistleblowing.
- What should be communicated by way of policy and procedure to workers.
- What is a protected disclosure and what is merely a grievance.
- What a whistleblowing policy should include.
- How a policy should be promoted to the workforce and made easily accessible.
- How to deal with whistleblowing disclosures.

The new whistleblowing code of practice sets out 13 items of best practice for employers. These include:

- Having a whistleblowing policy or appropriate written procedure.
- Ensuring that such policies are accessible.
- Raising awareness of the policy through all available means.
- Providing training to workers on how disclosure should be raised and how they will be acted upon.
- Providing training to managers on how to deal with disclosures.
- Providing information that clarifies that settlement agreements do not prevent workers from making protected disclosures.
- Clarifying who can be approached by a worker who wants to make a disclosure.
- Providing appropriate feedback to workers who have blown the whistle including an indication of timings for any actions or next steps.

[Whistleblowing: Guidance for Employers and Code of Practice]

Holiday pay and commission: latest developments

In May 2014 the European Court of Justice held that holiday pay should include a sum in relation to contractual commission; otherwise, a worker could be disincentivised from taking holiday if his income in the period following leave was reduced by virtue of the fact that there is no opportunity to earn commission whilst on holiday.

The case in question was then returned to the Employment Tribunal to determine whether the Working Time Regulations 1998 (WTR) could be construed in accordance with this decision.

The Leicester Employment Tribunal has now held that wording can be added to the WTR so that commission can be taken into account for the purposes of calculating holiday pay for the basic European holiday entitlement of four weeks, not the additional 'British' holiday entitlement of 1.6 weeks. A separate question that will be addressed by the Tribunal at another time is what the correct reference period is for calculating the holiday pay entitlement.

The decision is first instance only and therefore not binding: however, it is indicative of the approach Tribunals are likely to take. It drew heavily on the analysis of the Employment Appeal Tribunal in the 'Bear Scotland' case which explores the extent to which non-guaranteed overtime pay (and personal allowances) should be factored into holiday pay. See our Holiday Pay Briefing here.

One outstanding, but important, issue on which employers would benefit from judicial or statutory guidance is the calculation reference period. The nature of some businesses is such that there will be seasonal peaks and troughs with consequential peaks and troughs in overtime pay, and possibly commission and bonuses. The timing of holiday could therefore lead to artificially inflated rates of holiday pay if the calculation reference period is the 12 weeks prior to the holiday being taken rather than an annual averaging calculation.

[Lock v British Gas Trading Ltd]

April Employment Law Calendar

- 5 April → Shared parental leave regime came into effect.
  - → Adoption leave – 26 week service qualifying requirement removed.
  - → 18 weeks' unpaid parental leave entitlement now available up to child's 18th birthday.
  - → Statutory maternity pay increased to £139.58/week.
- 6 April → Maximum unfair dismissal compensatory award increased to £78,335 (or 12 months' pay if lower).
  - → Statutory sick pay increased to £88.45.
- 30 April→ ECJ decision expected on when collective redundancy consultation obligations are triggered.

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