UK: Employment Update

Welcome to the May Employment Update. This month we review a diverse range of decisions, addressing amongst other things: an employer's obligations in relation: to maternity leave and notice pay and employee's financial loss; when a company is vicariously liable for individuals it does not employ, what factors a court will take into account when assessing the contractual status of handbook provisions and whether 'anti-oral' variation clauses are worth the paper they are written on.

Interaction of payments in lieu of notice and statutory maternity pay

An employee who is made redundant during the currency of her statutory maternity leave continues to be entitled to receive statutory maternity pay (SMP) from her employer for the duration of the SMP pay period (i.e. up to 39 weeks). Is the employee also entitled to receive pay in lieu of notice?

The First Tier Tax Tribunal (FTT) has recently considered the inter-relationship between a Payment In Lieu Of Notice (PILON) and an employer's obligation to pay SMP. In the case in question, L appears to have TUPE transferred from T to C when she was on maternity leave; she was then made redundant. She asserted that C was liable to pay her SMP and raised this issue with HMRC. C had accepted its liability to pay L holiday pay, redundancy pay and a PILON. HMRC ruled that the liability to pay SMP also transferred from T to C.

In its correspondence, HMRC stated that the PILON payment was *"earnings and therefore could be treated as SMP thereby reducing the liability to pay SMP".* L appealed this decision to the FTT.

Key issues

- Interaction of pay in lieu of notice and statutory maternity pay
- Can you be vicariously liable for someone you don't employ?
- Contractual status of staff handbook provisions.
- Anti-oral variation clauses: are they worth the paper they are written on?
- No implied term to protect employees from financial loss

The Social Security Contributions and Benefits Act 1992 (SSCBA) contains express provisions addressing the *"relationship of statutory maternity pay with benefits and other payments".* These provide that any contractual remuneration paid by an employer in respect of a week in the maternity pay period shall go towards discharging any liability of that employer to pay maternity pay. In addition, any maternity pay can go towards discharging the employer's liability to pay contractual remuneration in respect of the week in which it is paid.

The FTT held that, on the facts, the PILON paid to L was paid under the terms of her contract rather than being paid as compensation for breach of the terms of her contract, and therefore it amounted to *"contractual remuneration"* for the purposes of the SSCBA. As such, this contractual remuneration reduced the employer's liability to pay SMP; the PILON payment could be set off against the SMP due to L.

As the FTT had found that the PILON paid was a contractual payment, it considered that it was not appropriate for it to consider the inter-relationship between a non-contractual PILON payment and SMP and left that to be

considered in a future case. There is, therefore, scope for arguing that if a PILON payment is made in circumstances where an employer does not have the contractual right to do so, it should not be treated as contractual remuneration but as a damages payment in respect of the contractual notice entitlement. As such it cannot therefore be used to reduce the employer's liability to pay SMP.

So what is a maternity leaver's notice pay entitlement? A maternity leaver is entitled to the benefit of all non-remuneration terms and conditions including her notice entitlement. Is she entitled to be paid during the notice period?

The amount payable to an employee by way of notice during maternity leave will depend upon the employer's contractual notice obligation. The Employment Rights Acts 1996 (ERA) provides for the full salary to be paid to an employee who is given, or gives notice, during her maternity leave but only if the notice **does not exceed** the statutory minimum by one week or more. If, however, the contractual notice entitlement is longer than the statutory entitlement by more than one week, then an employee who is given notice during her maternity leave, will not be entitled to receive notice pay; she will however be entitled to the normal statutory or contractual maternity pay that would otherwise have applied. Statutory notice entitlement for these purposes is one week per year of service up to a maximum of 12 weeks' notice.

Where a maternity leaver is entitled to receive notice pay, the ERA provisions mirror the social security rules and provide that any payment actually made by the employer in respect of the statutory notice period (e.g. statutory or contractual maternity pay) will go towards discharging the employer's statutory liability for notice pay.

[Ladiverova v Chokdee Limited]

Can you be vicariously liable for someone you don't employ?

The Supreme Court has provided some useful clarification on when employers can be held liable for the actions of those who are not technically their employees. R worked as a catering manager at HM Prison Swansea. One of the prisoners under her supervision, I, accidentally dropped a sack of rice, injuring her. R brought a claim against the Ministry of Justice, MoJ, on the basis that they were vicariously liable for I's negligence. The County Court dismissed the claim on the grounds that the relationship between the MoJ and I was not akin to that between an employer and employee. The Court of Appeal reversed that decision.

The Supreme Court held that a relationship other than one of employment is capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the defendant's business and for its benefit (rather than being entirely attributable to the conduct of a recognisably independent business or a third party), and where the commission of the wrongful act is a risk created by the defendant assigning those activities to that individual.

On the facts, the prisoners working in the kitchens under the direct supervision of prison staff were integrated into the operation of the prison, the activities assigned to them formed an integral part of the activities of the prison. In addition, the Prison Service had placed the prisoners in a position where there was a risk that they may commit negligent acts in carrying out assigned activities.

This decision makes it clear that where individuals are working within an organisation, perhaps as agency workers, volunteers or interns (whether or not they are paid) and the company is deriving benefit from the individual's activities in the furtherance of the organisation's own interests, the organisation can be held liable for tortious acts of the individual. The absence of control over the individual and payment of compensation does not remove the risk of vicarious liability. The judgment also confirms that the organisation's interests need not be of a commercial nature – they could be charitable or they could be the interests of complying with a statutory duty in the case of a public authority or hospital.

The risk of vicarious liability arising is likely to be lower in cases where individuals are interns for relatively short periods of time, receive no pay and the activities they perform do not do not contribute in a material or meaningful manner to benefit the commercial enterprise.

Companies would therefore be advised to ensure that appropriate training and supervision is provided to interns, volunteers and so on and in addition that their insurance arrangements cover the risk of vicarious liability arising as a result of such 'non' employees' conduct.

[*Cox v Ministry of Justice*]

Contractual status of staff handbook provisions

The Court of Appeal has recently examined whether provisions in a staff handbook in relation to sick leave were legally enforceable contractual terms that had been incorporated into individual employees' contracts, or were merely notes of guidance and good practice but with no legal force. The contractual status of the handbook provisions was relevant because the Department of Transport (DT) had introduced a new attendance management policy, so if the handbook provisions were contractual then the unilateral imposition of the new attendance policy was not contractually binding on its employees.

The Court held that whether a staff handbook provision is incorporated into individual employment contracts or not, will always turn upon the precise terms of the particular documents in each case. It acknowledged, however, that the case law provided some guidance on how to construe such terms; including the following:

- It is the contractual intention of the parties that has to be ascertained and to the extent that is to be found in a written document, the document should be construed on ordinary contractual principles.
- The fact that another document is not of itself contractual does not prevent it from being incorporated into the contract.
- The importance of the provision to the contractual working relationship.
- Whether the provision is workable.
- The level of detail included in the provision.
- The certainty of what the provision requires.

The Court acknowledged that whilst it might be a generally desirable feature of industrial management to handle sickness absence matters through non-contractual policies, that would not prevent a particular provision from being incorporated into the employment contract. It held that the attendance management section of the handbook was sufficiently clear and precise to be incorporated into individual contracts. The fact that the handbook also contained other sickness management policies and procedures that were matters of guidance and good practice did not matter.

The case report suggested that the evolution of DT's employee handbook was somewhat shambolic with large sections of it being cross referred to but in practice being missing which made matters more complicated.

Employers should ensure that their handbooks are clear which provisions are contractual and which are not. Alternatively employers wishing to avoid confusion altogether may want to consider confining all contractual terms to the written contract of employment and using a completely non-contractual handbook. Finally it is also essential that as and when handbooks are updated, all cross-referenced documents are updated or removed as necessary.

[Department for Transport v Sparks and others]

Are anti oral variation clauses worth the paper they are written on?

It is not an uncommon feature of service agreements to include a boiler plate provision to the effect that any variation to the agreement will only be effective if it is in writing (not including email) and is signed by both parties. Such clauses are often referred to as 'anti oral variation' clauses. Are such clauses worth the paper they are written on?

The Court of Appeal recently considered the effectiveness of such anti-oral variation clauses in the context of a commercial agreement. The Court considered two conflicting Court of Appeal decisions on the effectiveness of such clauses: one decision held that such clauses could not prevent the parties from subsequently amending their agreement orally or by conduct. In the other decision, the same judge in a differently constituted Court of Appeal held that an agreement with such a clause could only be amended by a written document complying with the terms of the variation clause.

The Court did not have to rule on the effectiveness of anti-oral variation clauses but considered that in light of these conflicting judgments it would be helpful to provide it considered view on the subject albeit that it had to be treated as obiter. The court acknowledged that such clauses have practical benefit and promote certainty as between the parties. In spite of this, the Court unanimously took the view that a contract containing a clause that any variation of it can only be in writing can be varied by an oral agreement or the parties' conduct.

Although the Court of Appeal's opinion was strictly obiter and therefore not binding, in practice it is likely that courts will apply the same rationale. So does that mean that anti-oral variation agreements are not worth the paper they are written on?

In practice it is still advisable to include such clauses. The Court acknowledged that there is still value in such clauses. There may be a difficult evidential burden on a party to persuade a court that a contract has been varied by an informal oral communication and/or a course of conduct and this difficulty may be greater if the parties had previously agreed that a variation could only be achieved in a specific manner; i.e. in writing and signed by authorised representatives.

[*Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd*]

No implied term to protect employees from financial loss

The Court of Appeal has once again reiterated that it is not a general feature of an employment contract that a term will be implied that the employer will protect its employees from economic loss.

The claimants worked in roles that exposed them to platinum salts. Platinum exposure can give rise to platinum sensitivity which in turn can cause employees to develop platinum allergy which, unlike platinum sensitivity, has various discernible symptoms that will affect the victim's daily life. As a consequence, Johnson Matthey (JM) paid employees in such roles a relatively high wage. In addition the applicable collective bargaining agreement provided that employees should be tested for platinum sensitivity. In the event that an employee tested positive, the agreement provided that JM would to redeploy the employee and failing that the employee would be dismissed with an ex-gratia payment.

The claimants were dismissed in accordance with this arrangement and brought a number of claims against JM including a claim for breach of contract. This claim was brought on the basis that a term should be implied into their employment contracts to the effect that JM should also protect their employees from financial damages.

The court refused to accept that such a term was a general feature of employment contracts or was a term that should be implied in this particular commercial context. This alternative argument was given short shrift as the court considered that JM had already provided for a level of financial protection by virtue of the higher wages and the payment of the ex-gratia termination payment to employees who were dismissed because they could not be redeployed.

[*Greenway and others v Johnson Matthey plc*]

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