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Newsletter December 2016

UK: Employment Update

Welcome to this end of year Employment Update in which we consider recent developments in relation to the right to take rest breaks, the need to give careful thought to statutory maternity pay liability when drafting settlement agreements and how to respond to subject access requests where a third party's data will be revealed. This briefing also contemplates future developments in relation to employee representation on boards, tax treatment of termination payments and changes to salary sacrifice schemes, as set out in the Autumn Statement.

Daily rest breaks: employees can claim compensation if working arrangements effectively prevent them

The Working Time Regulations 1998 (WTR) provide that if a worker's daily hours exceed six hours he is entitled to a rest break. The Employment Appeal Tribunal (EAT) has considered whether a claim for compensation can be brought in circumstances where no rest break was taken but the employee had not expressly asked for one.

The EAT reviewed conflicting case law on the point and reached the conclusion that the WTR do not require a worker to ask for a break before a claim can be brought. The WTR do not require workers to ask for a break; unlike the right to take holiday where a worker must ask if they wish to take holiday.

The EAT held that the employer has an obligation to afford workers an entitlement to a rest break and that entitlement will be refused if working arrangements are put in place that effectively prevent the break being taken; for example, an express instruction to work through the entire shift.

But what of the situation where an employee simply fails to take a break for their own reasons, for example, they wish to leave promptly to attend an evening class or they do not feel able to complete their workload if they take a break, what are the employer's obligations here? The EAT considered that whilst an employer must take active steps to enable the worker to take a rest break it cannot force the worker to take the break. Therefore, provided the workers are able to take a break, the employer's obligations are satisfied even if the break is not taken.

One issue in this case was whether the employer had satisfied its obligation to grant a rest break where the working day did incorporate a half hour lunch break but where the workers were simply too busy to take it; did this amount to a failure to allow the worker to exercise his entitlement to a rest break? Clearly it will be a question of fact whether the volume of work is such that in reality the employee cannot complete it if a break is taken and employers need to consider carefully whether their working arrangement do in reality facilitate the opportunity to take a break. This aspect of the case was remitted to the Employment Tribunal to be considered so, unfortunately, no EAT guidance on this point was given.

So do employers face expensive latent claims from employees claiming that their workloads are so excessive that in practice they have not been able to take rest breaks for years?

Employers can take comfort from the fact that such claims cannot be brought as unlawful deduction of wages claims. Employees cannot

Key issues

therefore argue that each occasion on which a break was denied amounted to part of a series of deductions with a three month time limit for bringing the claims running from the last in the series. Instead a separate claim must be brought in relation to each occasion it is alleged a break was denied and this must be brought within three months of the denial. Therefore an employer's exposure in relation to past practices is likely to be relatively limited. That said, going forward, an informed and organised workforce could organise themselves to bring claims within the appropriate timeframe requiring the employer to respond to each and every one.

[Grange v Abellio London Ltd]

Settlement agreements and statutory maternity pay

A recent decision of the First Tier Tax Tribunal (FTT) illustrates: (i) how the fortuitously timed payment of a bonus can artificially inflate the rate of the first six weeks of enhanced statutory maternity pay (SMP); and (ii) that the terms of a settlement agreement need to be carefully drafted in relation to any SMP entitlement of the departing employee. The employer in the case in question learned this to its cost, giving rise to an unexpected liability of just under £42,000 of SMP.

The employee in question (S) was expected to go on maternity leave with an expected week of childbirth (EWC) of 28 January 2015. She was paid bonus of around £44,000 on 15 October 2014 but then, as a special Christmas present, was made redundant on Boxing Day that year. She claimed unfair dismissal and pregnancy discrimination but the claim was compromised by a COT3 agreement. This provided that the employer would pay £60,000 as compensation in full and final settlement of all or any claims the employee had or may have relating to her contract of employment and its termination; reference was made to *"any claim under statutes concerned with equality legislation",* no mention was made of SMP or the legislation governing the SMP regime. The agreement stated that the parties did not consider that the settlement payment was subject to national insurance.

After the conclusion of the COT3, the employer was rather surprised to receive a decision notice from HMRC that S was entitled to SMP of £41,627. It appealed this decision to the FTT on the grounds that the company's bonus scheme was discretionary and should not have been included in the SMP computation and, in any event, the SMP had been taken into account in the payment made under the COT3 settlement agreement.

The first six weeks of SMP are paid at an enhanced rate of 90% of the woman's normal weekly earnings for the period of eight weeks preceding the 14th week before the EWC. "*Earnings*" for these purposes are defined as any remuneration or profit derived from a woman's employment. The FTT therefore held that irregular or one-off payments in the requisite period, including bonuses, count as "*Earnings*" as long as they are derived from the woman's employment.

It considered that the bonus paid to S had been derived from her employment. Therefore, it was correct to include it when calculating the six weeks of enhanced SMP.

Social security legislation provides that a woman has an absolute right to receive SMP. It cannot be contracted out of and any agreement which purports to exclude the right to SMP is void to that extent.

The FTT held that although the settlement agreement purported to be in full and final settlement of all of S's claims in relation to her former employment, this provision could not exclude her entitlement to SMP. In any event, it was clear from the breakdown of the settlement payment that it did not include S's entitlement to SMP, and neither were any NIC contributions made which are required to be made on payments of SMP. The fact that the ACAS officer may not have advised the parties correctly in relation to the impact of the COT3 on SMP could not affect HMRC's correct application of the law. Accordingly, the FTT held that the employer had not satisfied its obligation to pay S her entitlement to SMP.

If a qualifying pregnant employee is dismissed or resigns she will be eligible to receive SMP even if she has not yet commenced her maternity leave if her termination date is in the period from the 15th week before the EWC. Therefore, if a settlement agreement is concluded in relation to the termination, careful consideration must be given to how to satisfy the liability to pay SMP and document it appropriately to avoid a double pay out.

[Campus Living Villages UK Ltd v Sexton]

Workers on boards: maybe not?

In her late November speech to the TUC, Theresa May expanded on her stated intention to have some form of worker representation on boards. The speech suggested that the scope for significant worker representation on boards in the future is limited. It was confirmed that there was no intention to impose a binary board structure of the type used in Germany or to require the creation of works councils or the direct appointment of workers or trade union representatives to the board. To the disappointment of some, the new emphasis is on ensuring that employees' views on business decisions are heard rather than giving them a seat at the boardroom table.

Following this teaser, the Government published its Corporate Governance Reform Green Paper this week; this explores a range of options for strengthening the voice of employee (and other) stakeholders at boardroom level in large companies. The following options are mooted and it is envisaged that they could be used individually or in combination:

- Creating a stakeholder advisory panel for directors to hear directly from their key stakeholders (including employees);

- Designating existing non-executive directors to ensure that the voice of the employees is being heard at board level;

- Appointing individual stakeholder representatives to company boards. It is made clear that the Government is not proposing to mandate the direct appointment of employees or other interested parties to company boards; and

- Strengthening reporting requirements related to stakeholder engagement.

Views are also sought on which companies should be brought into any new employee stakeholder regime; this may be dictated by employee numbers or some other size threshold.

At this stage, it is also up for grabs whether a legislative, code-based or voluntary approach will be adopted to implement any new regime.

Responses to the Green Paper must be provided by 17 February 2017; whichever of the proposed Green Paper options for strengthening the voice of employees at board level is eventually adopted (if any) the reality is that any new legislative or voluntary regime to implement them is not imminent.

The Green Paper can be found here: https://www.gov.uk/government/news/government-launches-review-of-corporate-governance

Autumn Statement: employment developments

Employment related points to note from the Autumn statement include the following:

- The National Living Wage payable to employees over the age of 25 will increase to £7.50 in April 2017;

- Salary sacrifice arrangements - following consultation, the tax and employer national insurance advantages of salary sacrifice schemes will be removed from April 2017, except for arrangements relating to pensions (including advice), childcare, cycle to work and ultra-low emission cars. Arrangements in place before April 2017 will be protected until April 2018, and arrangements for cars, accommodation and school fees will be protected until April 2021. Arrangements where employees can exchange salary for additional holiday will not be affected by these changes;

- Tax treatment of termination payments - from April 2018 termination payments over £30,000, which are subject to income tax, will also be subject to employer National Insurance Contributions (NICs). The Government has taken on board concerns raised that its proposal to tax as earnings any element of a termination payment that was attributable to 'expected bonus income' would lead to complexity and uncertainty. It has therefore stated that tax will only be applied to the equivalent of an employee's basic pay if their notice is not worked. However the government will monitor the position and may revise the regime if it perceives that there is manipulation. The first £30,000 of a termination payment will remain exempt from income tax and employer and employee NICs; and

- Employee Shareholder Status (ESS) – Employee-shareholders currently enjoy an exemption from capital gains tax (CGT) on shares received from their employer up to the value of £50,000, a minimum of £2,000 in shares has to be provided. This CGT advantage is however in exchange for giving up the rights to claim unfair dismissal and to receive statutory redundancy payments. These tax advantages will be abolished for ESS arrangements entered into on, or after, 1 December 2016. The Government has also stated that the ESS status itself will be closed to new arrangements at the next legislative opportunity.

Subject access requests as fishing expeditions – can third party data be disclosed?

It is fairly common for employers to receive subject access requests (SARs) under the Data Protection Act 1998 (DPA) from current/former employees, not as a means of ensuring that their personal data is correct but as a fishing expedition to assess whether there is any material in support of a potential claim; essentially advanced disclosure but without any of the rules attached to materials provided as part of a disclosure exercise.

Sometimes it is not possible to comply with a SAR without disclosing information relating to another individual; for example, where there is a report that relates to both the data subject and other members of staff.

The High Court recently considered what a data controller should do if it can't comply with the SAR without disclosing information relating to another individual. Was it appropriate for a data controller to provide a report to the data subject if it contained the personal data of the data subject and another individual (DB) who the data subject wished to sue by relying on the contents of the report?

When the data controller notified DB of the SAR he indicated that he did not consent to the report's disclosure on the grounds that it was his personal data and the subject access request was being used as a vehicle for pre-litigation disclosure. In spite of this, the data controller decided to provide the report in response to the SAR. DB challenged this.

The DPA provides that where the data controller cannot comply with a SAR without disclosing information relating to another individual who can be identified from that information, it is not obliged to comply with a request unless the other individual has consented to the disclosure, or, it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

In the Court's opinion, this requires the data controller to carry out a balancing exercise when assessing whether it is reasonable to disclose the information. The respective privacy rights of data subjects must be considered and refusal of consent is an important factor. In the absence of consent; the starting point is against disclosure. The Court considered that if it appears that the sole or dominant purpose is to obtain a document for the purpose of a claim by the data subject that is a weighty factor in favour of refusal on the basis that the more appropriate forum is the court procedure under the Civil Procedure Rules (CPR) because disclosure under the CPR provides the necessary protections in terms of what can be done with the information that is disclosed. DB was concerned that if the report was supplied by way of a response to the SAR, it could then be published online with no restraint. By contrast, if it was disclosed under the CPR regime, it could only be used for the purpose of litigation.

The High Court concluded the report should not be provided in response to the SAR.

Employers in receipt of a SAR have 40 days to respond (this will reduce to 30 days when the new General Data Protection Regulation comes into force in May 2018). If the search for personal data produces items that contain third party data the employer should consider whether redaction would prevent the individual from being identified. If not, thought should be given to whether it would be appropriate to obtain the individual's consent to disclose the information. If consent is not given, or has not been sought, the employer then needs to carry out a balancing exercise to assess whether disclosure is reasonable. The threat or existence of litigation is one factor that should be taken into account.

[DB v General Medical Council]

Employment Tribunal judgments going online

At present, Employment Tribunal judgments can only be obtained in hard copy upon payment of a small fee. The names of the parties or case number must be known, there is no mechanism for searching against a particular judge or topic. It has now been confirmed that, in either late 2016 or early 2017, new judgments will be made available online and the search facilities will allow users to undertake free text searches. It is highly probable that the press will make good use of this to source materials.

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