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Briefing note April 2017

UK: Employment Update

Welcome to the April Employment Update. This month we look at the Race in the Workplace Recommendations and the proposed diversity reforms set out in this week's House of Commons Report on Corporate Governance. Also under consideration in this briefing are cases on when notice to terminate an employment contract takes effect and whether it is necessary to identify the contractual status of a bonus scheme when providing employee liability information in the context of TUPE transfer.

Race in the workplace recommendations: a taste of legislation to come?

The final version of the McGregor-Smith Review on 'Race in the Workplace' and the Government's response was published in February. The report sets out a roadmap aimed at enabling business leaders to move towards a more racially diverse work force. There are a number of limbs including the following:

Data

Organisations must gather and monitor the data by:

- Setting, then publishing, aspirational targets;
- Publishing data to show how they are progressing;
- Doing more to encourage employees to disclose their ethnicity.

Accountability

Senior executives must take accountability by:

- Ensuring executive sponsorship for key targets;
- Embedding diversity as a Key Performance Indicator;
- Participating in reverse mentoring schemes to share experience and improve opportunities;
- Being open about how they have achieved success, in particular Chairs, CEOs and CFOs in their annual reports.

Raising awareness

All employers must raise awareness of diversity issues by:

- Ensuring unconscious bias training is undertaken by all employees;
- Tailoring unconscious bias training to reflect roles – e.g. workshops for executives;
- Establishing inclusive networks;
- Providing mentoring and sponsorship.

Recruitment

HR directors must critically examine recruitment processes by:

- Rejecting non-diverse shortlists;
- Challenging educational selection bias;
- Drafting job specifications in a more inclusive way;
- Introducing diversity to interview panels;
- Creating work experience opportunities for everyone, not just the chosen few.

Key issues

The sixth limb of the roadmap makes recommendations in relation to the support that can be provided by the Government. One recommendation is that the Government should legislate to make publishing a breakdown of employee data by race and pay band mandatory for companies employing more than 50. This recommendation has subsequently been endorsed in the House of Commons Report on Corporate Governance (see further below).

In its response, the Government stated that it will not at this stage legislate to require the publication of pay data by race but, instead, expects that investors can ask for diversity information to be included in companies' strategic reports or disclosed at AGMs.

The Government is placing the emphasis on employers to consider the Review's recommendations and take appropriate steps. The Government will, however, review developments over the next year and take any necessary action.

At the end of March, the Business Minister wrote to all FTSE 350 companies urging them to take up the report's recommendations. There is an implicit suggestion that if the voluntary route is unsuccessful a mandatory route will follow; i.e. legislation. The new Gender Pay Reporting regime that comes into effect this month followed a fairly unsuccessful attempt to persuade companies to report on a voluntary basis; a precedent has therefore been set.

The Race in the Workplace Review can be found here.

The Government response can be found here.

Board diversity and worker representation recommendations

This week the House of Commons Business, Energy and Industrial Strategy Committee published its Report on Corporate Governance. Amongst the issues addressed in this report were board diversity and worker representation on boards. The Report included the following recommendations:

- The Government should set a target that from May 2020 at least half of all new appointments to senior and executive level positions in the FTSE 350 companies and all listed companies should be women.
- If this target is not reached, the company's annual report should explain why and set out the steps being taken to rectify the gender inequality.
- The FRC UK Corporate Governance Code (the "Code") should embed the promotion of ethnic diversity of boards. At the very least, whenever there is a reference to gender in the Code there should also be a reference to ethnicity so that the issue of ethnic diversity on boards is given as much prominence as gender diversity.
- The Government should legislate to ensure that all FTSE 100 companies publish their workforce data, broken down by ethnicity and by pay band.
- Companies should recruit executive and non-executive directors from the widest possible net of candidates including from the workforce; indeed companies are actively encouraged to appoint workers on boards but it is not suggested that they should be compelled to do so.
- Employees appointed to the board would not be there as representatives of the workforce, but as a full board member providing strategic evaluation and challenge as every board member should.
- The Code should require annual reports to include information on board and workforce diversity covering gender, ethnicity, social mobility and diversity of perspective. The report should include a narrative addressing steps taken to date and ongoing steps to enhance the diversity of the executive pipeline.
- The Code should require the procedure for appointing new board members to be by open advertising and by external search consultancy with detailed explanations provided if these requirements are not met.

It remains to be seen whether the Government and/or FRC will act on any of these recommendations, and if so, when.

The Corporate Governance Report can be found here.

When does notice take effect: contractual clarity is recommended

A recent decision of the Court of Appeal illustrates how useful it is to ensure that a service agreement is clear on when notice of termination takes effect. In the case in question, the date on which notice took effect was significant; if it fell on or after the

employee's 50th birthday she would be eligible for a pension payment.

On the facts of the case the employee, H, was on sick leave when the employer decided to dismiss her by reason of redundancy. The employer took a 'belt and braces' approach to serving H with notice; sending her a letter by post, a second letter by registered post and a letter by email to her husband's email address, all on the 20th of April. At that time H was away in Egypt on holiday which had been pre booked at work. H read the registered post letter on the 27th April the morning she returned from the holiday. Her husband read the email at that time too.

H's contract did not contain an express term addressing when notice under the contract was deemed to take effect. Accordingly, the issue before the High Court, and then the Court of Appeal, was when did the notice take effect? Was it enough for the employer simply to have posted the letter, or, did the letter have to arrive at H's house, or, did the letter actually have to be read in order for the notice to take effect?

The majority of the Court of Appeal held that where the contract is silent on when notice takes effect notice will not take effect merely by delivery. It was not enough for the registered letter to have arrived at H's house. The two judges reached the same conclusion but with slightly different reasoning; one judge considered that the letter of dismissal actually had to be communicated to an employee before it took effect. The second judge, however, considered that it was enough for the employee to receive the letter containing the notice albeit that she did not need to read it for the notice to take effect.

In relation to the notice letter sent by email to the husband's email address the Court considered that it could not be regarded as giving notice to H. Although H had on one previous occasion corresponded with the employer via the husband's email address, that could not be regarded as a course of conduct; it was a one off event. As one of the judges observed, if H had sent a letter to her employer on the headed note paper of the hotel she was staying at in Egypt that would not be taken as an indication that correspondence should be sent to her there and neither should a one off email from her husband's email address.

It is evident from the differing approaches adopted by the High Court and the Court of Appeal judges that the issue of when notice takes effect (where the contact is silent on the point) is less than straight forward. However, in practical terms an employer can protect itself from confusion and uncertainty in a number of ways:

- ensuring that there is a suitable term in the employment contract that clarifies when notice is considered to take effect;
- when serving notice, using a method of delivery that requires the employee to receive the notice personally;
- using only an email/residential address that the employee has expressly indicated can be used for correspondence; and
- by ensuring that it does not leave serving notice to the very last minute where the date of notice is critical in terms of eligibility for any benefit or other entitlement, such as a bonus or pension.

[Newcastle Upon Tyne NHS Foundation Trust v Haywood]

TUPE: no liability for providing incorrect bonus data

In the event of a TUPE transfer, a transferor is required to supply to the transferee certain 'employee liability information' not less than 28 days before the transfer in question. Amongst the information deemed to comprise employee liability information are the particulars that an employer must provide by way of what is referred to as the "Section 1 statement" of terms and conditions. "Section 1 statements" must set out the rate and method of calculating the employee's remuneration.

B took over a contract from S in circumstances that amounted to a service provision change to which TUPE applied. Prior to the transfer, S supplied B with its employee liability information. When it provided this information it stated that a non contractual bonus was in place. B contended that this was incorrect, that the bonus scheme was in fact contractual and S was therefore in breach of its employee liability obligations under TUPE.

The Employment Appeal Tribunal (EAT) held that the particulars that an employer has to provide in relation to remuneration in a "Section 1 statement" are not limited to contractual terms and conditions and neither was there an obligation on the employer to state whether matters are contractual or not. The fact that the employer had to specify the method by which remuneration had to be calculated did not mean that the employer had to state whether any aspect of the remuneration was contractual. It therefore followed that as part of the employee liability information a transferor was not obliged to state whether remuneration, including a bonus, was contractual or not. S was not in breach.

A transferee will often be in a position where it can ask the transferor to warrant any information provided in relation to the transferring employees and/or secure indemnities. However, as in this case, in the context of service provision changes there may be no direct contractual relationship between incoming and outgoing service providers so the transferee will be dependent on the employee liability information being accurate. Follow up enquiries can of course be raised with the transferor, however, there is no obligation on it to respond. A transferee may well wish to price into its services agreement any potential liabilities arising from the transfer, however, in practice such risks may only be identified after receipt of the employee liability information which may be too late.

[Born London Ltd v Spire Production Services Ltd]

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