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Briefing Note – January 2018

UK: EMPLOYMENT UPDATE

Welcome to the first Employment News in Brief of 2018 in which we sweep up some of the last minute consultations and decisions of 2017 in relation to gender pay gap reporting and whistleblowing and take a brief look at what the year may have in store.

Key issues

- Gender Pay Gap Reporting: EHRC Enforcement proposals
- Whistleblowing: disclosure made out of self interest and unacceptable conduct defeat unfair dismissal claim
- 2018: what can we expect?

Gender Pay Gap Reporting: EHRC Enforcement proposals

Under the Gender Pay Gap (GPG) reporting regime, private sector employers in Great Britain with 250 or more employees are required to publish specified gender pay gap data on or before 4 April 2018 based on a pay snapshot date of 5 April 2017. In spite of the ACAS Guidance on the GPG reporting regime suggesting that employers should publish their reports "*as soon after the snapshot date as is reasonable for them*" it was reported that by Friday 29th December, only 5% of companies required to produce a GPG report had done so on the government website.

The Equality and Human Rights Commission (EHRC) has published a draft policy setting out its planned approach to enforcing the GPG Regulations (GPGR). Its stated intention is to seek an informal resolution with defaulting employers in the first instance, failing which, it will then pursue formal enforcement action. A summary of the proposals is set out below:

Stage 1 – Informal resolution: If an employer does not comply with the GPGR by 4 April, the EHRC will contact them requiring them to confirm within 14 days that: (i) they will comply with the GPGR retrospectively for the past reporting year within 42 days of the EHRC letter; and (ii) they will comply with the GPGR on or before the relevant reporting date in the current reporting year.

The EHRC will then monitor compliance.

Stage 2 – Investigation: In the event of non compliance at stage 1, the EHRC will investigate whether the employer has breached the GPGR. The employer can make written representations on the investigation terms of reference and on the draft EHRC investigation report. The EHRC may serve a notice on the employer requiring it to provide information and documents in its possession or to provide oral evidence. The EHRC may apply for a court order requiring the employer to take the steps necessary to comply with the notice. Non compliance with the order is an offence.

During the course of its investigation, EHRC will offer the employer the opportunity to enter into a written agreement to comply with the GPGR as an alternative to continuing with the investigation. A section 23 agreement will require the employer to: (i) comply with the GPGR retrospectively for the past reporting year within an agreed period; and (ii) comply with the GPGR for the present reporting year on time.

The employer will then be monitored for compliance; in the event of non compliance, the EHRC will apply to court seeking a court order requiring compliance with the undertakings in the agreement.

Stage 3: Unlawful Act Notices and Action Plans: If an employer does not accept the offer of a section 23 agreement and the EHRC investigation concludes that the employer has breached the GPGR, it will issue an unlawful act notice requiring the employer to prepare a draft action plan within a specified time, setting out how they will remedy their continuing breach of the GPGR and prevent future breaches. The EHRC will either approve it or issue a further notice stating that the action plan is inadequate.

In the event of non compliance, the EHRC will apply to the court for an order requiring the employer to comply. Failure to comply with any such order without reasonable excuse is an offence liable to unlimited fines.

It should be noted that the GPGR themselves do not include any criminal or civil sanctions in the event of non compliance. The EHRC proposals appear to be made on the basis that non compliance with the GPGR amounts to an unlawful act under the Equality Act 2010 in relation to which it make take enforcement action; this is perhaps questionable and the EHRC itself made the point in its response to the consultation on the draft GPG Regulations.

The EHRC consultation document can be found here. The consultation closes on 2 February 2018.

The Government Equalities Office has recently published a toolkit for employers suggesting a number of actions that can be taken to reduce any existing gender pay gap. This can be found here.

Whistleblowing: disclosure made out of self interest and unacceptable conduct defeat unfair dismissal claim

An employee who makes a 'protected disclosure' has the right not to be subjected to a detriment by his employer on the grounds that he has 'blown the whistle'. In addition, if the reason or principal reason for an employee's dismissal is that they made a protected disclosure the dismissal is treated as automatically unfair. To succeed with an unfair dismissal claim the employee therefore has to overcome two hurdles: first there must be a disclosure that is protected, secondly the making of the disclosure had to be the reason (or principal reason) for the dismissal.

A case recently considered by the Employment Appeal Tribunal (EAT) illustrates the problems that employers can face when an employee persistently raises concerns (some of which may be protected disclosures) resulting in a strained or unworkable relationship because of the sheer volume of complaints and management time being taken up to address them; will dismissal in such circumstances be automatically unfair?

C, was employed by R as its Legal and Compliance Officer, subject to a six-month probationary period. From early in her employment, she raised numerous concerns with R and the manager in the parent company to whom she reported. She was given training and support but those managing her became increasingly concerned as to the way in which C was raising matters, her inability to work with others and her rudeness. After attempting to reassure C and to remove some of the pressure, R was unable to see any improvement and decided she should be dismissed, due to a "cultural misfit". C claimed automatic unfair dismissal by reason of various protected disclosures she had made.

In order for a disclosure to be protected it must satisfy various statutory requirements, one of which is that in the reasonable belief of the disclosing employee the disclosure must be in the public interest. Some of the matters raised by C qualified as protected disclosures. Other disclosures were not, because C had raised the matter out of self interest to protect herself from criticism in the future not because she believed that her disclosure was in the public interest.

The issue therefore was whether the fact C made the disclosures that were 'protected' was the real reason for C's dismissal. The EAT recognised that a whistleblower may well be perceived (sometimes with justification) as a difficult colleague; that it is easy for an employer to believe that it is the *manner* of blowing the whistle that is the issue when really it is simply *the fact* of blowing the whistle which has motivated the dismissal. It upheld the Tribunal's decision that R was not concerned by C blowing the whistle but rather with what she did after; her demands, conduct at meetings, failure to give rational reasons for her beliefs, her irrational fixation on personal liability and her inability to listen and take on board what her colleagues had to say. It was C's conduct, relationship with her colleagues and inability to be effective at her job that were the reason for dismissal.

Although serial complainers do put employers in a difficult position, caution does need to be exercised if performance management, disciplinary action or dismissal is contemplated. Such employees should only be dismissed, or disciplined, if the employer is as confident as it reasonably can be that the disclosures in question are not protected, or, if a distinction can clearly be made between the fact of the disclosures and the manner in which they are made or subsequently conduct on the individual's part e.g. accompanied by threats of violence or other inappropriate conduct.

[Parsons v Airplus]

2018: what can we expect?

Topic	What	When
Employment Status and 'Gig Economy'	Government Response to the Taylor Review (see our Briefing here).	Q1/2 2018?
	Supreme Court to consider status of "Pimlico Plumber".	February 2018
	Court of Appeal to consider status of Uber drivers.	Q3/4 2018
Data Protection	General Data Protection Regulation comes into force (see our Briefing here).	25 May 2018
Holiday Pay on Termination	Court of Appeal will rule on whether a "worker" should be paid in lieu of all accrued holiday on termination if the right to paid holiday was denied during the engagement (see our Briefing here).	Q3/4 2018
Enhanced Shared Parental Leave Pay	Is the failure to pay enhanced shared parental leave pay when enhanced maternity pay is available sex discrimination? (see our Briefing here).	EAT Judgment pending EAT to hear second case January 2018

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