Parker & Co

Employment Update

October 2007

INTRODUCTION

This quarter's update focuses on compromise agreements, the statutory disciplinary & dismissal and grievance procedures together with the Companies Act 2006 which recently came into force.

Links in blue in the pdf are clickable to take you to the appropriate site. If you have any questions arising from the articles, please call or email us and we will be happy to discuss them with you. As ever, your comments are welcome.

CONTENTS

COMPROMISE AGREEMENTS & WARRANTIES

It is common practice for an employer to ask an employee to warrant in a compromise agreement that they are not aware of any circumstances that would entitle the employer to dismiss summarily. By including such a warranty the employer seeks to avoid paying out substantial sums by way of compensation when, due to circumstances unknown to it at the time of entering into the agreement, it could have dismissed the employee immediately and without any compensation, e.g. for gross misconduct.

In the case of *Collidge -v- Freeport plc* the employer had entered into a compromise agreement with Mr Collidge. It was clearly stated in the agreement that the payments under the agreement were "subject to and conditional upon the term set out below", including a warranty declared to be a "strict condition of this agreement" that the employee was not aware of any circumstances which would entitle the employer to terminate his employment without notice. Following the termination, but before the compensation payment was due, the company discovered that Mr Collidge had carried out a series of dishonest acts, including using a company driver to do private work, misusing his company credit card, removing company equipment, claiming personal expenses as company expenses and claiming mileage allowance and petrol costs for personal trips.

The High Court found that Mr Collidge had acted dishonestly on a number of occasions. The question for the court to determine was whether the company had the right not to pay the compensation sum or whether the company would have to accept Mr Collidge's breach of warranty as bringing the entire agreement to an end and leaving the company with a claim for damages.

The High Court held that the employer was under no obligation to pay compensation if Mr Collidge had breached that term of the agreement. A crucial point was that the warranty was a precondition of payment. Employers should therefore review their standard form settlement agreement to ensure that, if such a warranty is included, the agreement makes it clear that the warranty is a precondition to the obligation to make the compensation payment. Further, employers should, where possible, investigate to see if the departing employee has been guilty of any acts of gross misconduct, either prior to negotiation of a compromise agreement or as soon as possible after.

Parker & Co Solicitors
27 Austin Friars
London EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578
www.parkerandcosolicitors.com

IN BRIEF

Holiday Entitlement

On 1 October 2007 the statutory minimum holiday entitlement increased from 20 days to 24 days per annum. Employers can include bank and public holidays in this entitlement. Those employers that already offer 16 days (or more) of holiday in addition to the bank and public holidays will not need to amend their holiday policies.

National Minimum Wage

The national minimum wage increased to £5.52 from 1 October 2007.

Commission for Equality & Human Rights

From 1 October 2007 the Commission for Equality & Human Rights (CEHR) replaced the existing bodies such as the Equal Opportunities Commission and the Commission for Racial Equality. The CEHR will cover all forms of discrimination

GRIEVANCE PROCEDURE

What constitutes a "grievance" under the Employment Act 2002 ("the Act")? Case law on this is far from clear, and it seems that a grievance can take on a number of forms.

In the case *Dick Lovett Ltd (t/a Porsche Centre Swindon) v Evans* the EAT considered whether an employee's sickness absence report could constitute a grievance under the Act, when combined with comments made after the report was filed. A grievance is defined as *"a complaint by an employee about an action which his or her employer has taken or is contemplating taking."*

Ms Evans was informed in a meeting with her employer that she would not be receiving a pay rise for reasons related to her pregnancy. She left the meeting upset and was absent from work for a week. On her return to work, Ms Evans completed a sickness absence report, which stated "following on from the meeting with Richard and Mark, went home very upset. Didn't sleep and suffered numerous nosebleeds." A few days later, in a meeting between Ms Evans and her employer, Ms Evans explained that she had been upset after being informed that she would not receive a pay rise for reasons related to her pregnancy.

Ms Evans brought a claim for sex discrimination and equal pay. In order to bring a claim, however, Ms Evans had to show that she had submitted a written grievance and waited 28 days. Ms Evans argued that the absence report constituted a written grievance. The Tribunal found that the absence report could constitute a grievance when considered in the context of the comments made in the meeting a few days later.

The employer appealed. The EAT considered that the absence report did not constitute a grievance, as events that occur after the creation of the document could not be used to interpret it. The document itself must give some indication of the grievance that is being raised, which in this case it did not. The EAT did however suggest that the outcome could have been different had Ms Evans stated in the original meeting regarding her pay rise that she was unhappy with the decision and the reasons behind it, as the comments would have been made prior to the report being completed.

The EAT's judgment seems to adopt a narrower interpretation of what constitutes a grievance. The decision is, however, far from reassuring for employers. While conversations occurring after documents have been created cannot be taken into consideration, the EAT suggests that those predating the grievance can be considered. Employers will as a result need to consider letters or other documents they receive from employees and understand them in light of conversations that may have occurred. In large organisations this may mean having to consult a number of people if the nature of a document is ambiguous.

Parker & Co Solicitors
27 Austin Friars
London EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578
www.parkerandcosolicitors.com

IN BRIEF

Who owns contact lists?

Employees often keep both personal and business-related contact details on computers and mobile phones owned by their employer. If asked who owns that information, what would your response be? And should the employee be entitled to keep copies of this when they leave the company? These issues were considered in the recent case of *PennWell Publishing (UK) Ltd v Ornstein.*

A senior employee had built up a contact list in Microsoft Outlook over a number of years. Nothwithstanding the fact that some of the contacts pre-dated his employment the Tribunal found they belonged to the company.

In relation to any personal information an employee has saved onto his employer's system, the Judge held that it is reasonable to imply a term allowing an employee to take copies of their own personal information. Practically, for employers this illustrates the need to have clear email/computer use policies.

COMPENSATION IN UNFAIR DISMISSAL CASES

In *Cex Ltd –v- Lewis* the EAT considered the uplift in compensation that tribunals can award where an employer has failed to follow the statutory disciplinary and dismissal procedure (DDP).

A dismissal will be held to be automatically unfair where an employer has failed to comply with a requirement of the relevant DDP. In addition, where the relevant DDP was not completed wholly or mainly as a result of a failure by the employer, the tribunal can increase any award it makes to the employee by between 10% and 50%.

Mr Lewis was employed by Cex Ltd. He was told his job would be restructured, retaining some of his duties but adding other substantially different tasks. He was also told that he would have to apply for the restructured post. Mr Lewis' application was rejected; the reason given was that he did not have the necessary experience in the new areas.

He successfully brought a claim for unfair dismissal. The Tribunal found (i) that a redundancy situation existed and (ii) that the way in which he had been made redundant was unfair. The company had failed to warn him of the risk of redundancy, it had not carried out a suitable selection process nor had it adequately consulted him. In addition, the Tribunal found that the dismissal was automatically unfair as the employer had failed to comply with the DDPs. The Tribunal increased the award it made by 10%.

However, the employer successfully appealed to the EAT to have the case remitted to the tribunal to reconsider whether or not there should have been a reduction in compensation on the basis that Mr Lewis would have been dismissed even if the correct procedures had been followed (the rule known as the "Polkey" deduction – Polkey v A E Dayton Services Ltd [1987] IRLR 503.) Mr Lewis cross appealed the decision to uplift the compensation by only 10% for the failure to follow the statutory procedures.

The EAT refused to interfere with the Tribunal's assessment that the compensation uplift should be 10%. It was reluctant to set out general principles when deciding on the level of the uplift. It did say that tribunals have a broad discretion to decide to increase the award by more than the minimum amount of 10% (up to a maximum of 50%) and that it is for the tribunal to decide on the basis of what is 'just and equitable in the circumstances of each individual case'.

Parker & Co Solicitors
27 Austin Friars
London EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578
www.parkerandcosolicitors.com

IN BRIEF

Dismissal procedures

The EAT in *Aptuit Ltd –v- Kennedy* has decided two important points in relation to the statutory dismissal procedure. First, the EAT has held that the statutory dismissal process does not require notification of the right to appeal to be given in writing. Verbal communication is sufficient.

Second, the EAT overturned an uplift of 40% awarded by the Tribunal on the basis that (a) the company was a large employer; (b) there had been a general lack of consultation; and (c) the claimant had been treated in a "shoddy" manner. The EAT considered these factors irrelevant. It found that in calculating the uplift, tribunals should only have regard to the company's failure to follow the statutory procedure.

It is questionable whether the EAT's approach in this case is correct as there is nothing in the wording of the relevant statute to prohibit tribunals from having regard to the surrounding circumstances and no specific limit on the circumstances that can be taken into account by tribunals considering when applying uplift. The finding has therefore been met with some controversy particularly in view of the decision in *Cex Ltd –v- Lewis* in which tribunals were said to have a broad discretion in determining the uplift.

THE COMPANIES ACT 2006

Prior to the Companies Act 2006 ("the CA 2006") directors' duties were a mixture of obligations set out in the Companies Act 1985 and common law fiduciary duties. These duties are owed to the Company rather than individual shareholders. The CA 2006, some of which came into force on 1 October, includes a statutory statement of directors' duties. The statement effectively codifies the common law duties but this should be interpreted with common law rules and equitable principles in mind.

The **statutory statement** includes the following duties:
Section 171 - Duty to act within powers and for a proper purpose
Section 172 - Duty to act in good faith and promote the success of the company
Section 173 - Duty to exercise independent judgement
Section 174 - Duty to exercise reasonable care, skill and diligence
Section 175 - Duty to avoid conflicts of interests (Oct 2008)
Section 176 - Duty not to accept benefits from third parties (Oct 2008)
Section 177 - Duty to declare interest in proposed transaction or arrangement (Oct 2008)
Section 182 - Duty to declare interest in an existing transaction or arrangement (Oct 2008)

Directors Service Agreements
Section 188 provides that where a director's employment is to exceed a guaranteed period of 2 years (previously 5) or it will not be possible to terminate the agreement with less than 2 years' notice, the service agreement will need to be approved by the shareholders. Before a resolution is voted on, a memorandum must be made available setting out the proposed terms of the service agreement. If more than 6 months before the end of the guaranteed period the company enters into a further agreement, the unexpired term of the original contract may need to be added to the new term in calculating the guaranteed period. This will depend on the terms of the original contract.

Payments for loss of office
Section 215 defines a payment (whether cash or otherwise) for loss of office as one made to a director or a former director (or any person connected to them):

(a) as compensation for loss of office as a director of the company;
(b) as compensation for the loss of any other office or employment in connection with the management of the affairs of the company;
(c) as compensation for the loss of any office or employment in connection with the management of the affairs of any subsidiary undertaking of the company; or
(d) as consideration for or in connection with retirement from the employment or offices outlined in (a), (b) and (c) above.

ARTICLE CONTINUES ON PAGE 5 ►

Parker & Co Solicitors
27 Austin Friars
London EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578
www.parkerandcosolicitors.com

THE COMPANIES ACT 2006, continued from page 4:

Under section 217 the general position is that companies cannot make a payment for loss of office to a director unless the payment is approved by a shareholders resolution. Where a company wishes to make a payment to a director of its holding company the payment must also be approved by the shareholders of the holding company. The details of the proposed payment must be made available to the shareholders in advance.

The following payments can be made without approval, provided they are made in **good faith**:

- Where the payment is made in accordance with an existing legal obligation (that was not entered into in connection with the event giving rise to the payment for loss of office). Examples of existing obligations include payment in lieu of notice and payments relating to change of control.
- Where the payment is in respect of damages for breach of a legal obligation. To ensure such payments are made in good faith consideration should be given to mitigation and accelerated receipt.
- Where the payment is for the settlement or compromise of a claim arising in connection with the termination of office or employment. Sensible estimates of loss taking into account future prospects would need to be made to fall within the exception.
- By way of pension in respect of past services. However, large payments may need to be approved.

Definition of Group Company

The definition of parent and subsidiary company (referred to as parent and subsidiary undertaking) can be found in sections 1159 and 1162 of the CA 2006. These definitions will be used as and when provisions referring to them come into force. The definitions are often used in compromise agreements and contracts of employment.

WHAT'S COMING UP?

6 April 2008: Employers with between 50 and 99 employees will become subject to the Information and Consultation Regulations.

1 October 2008: The statutory minimum holiday entitlement will be increased from 24 days to 28 days (including bank holidays).

DISCLAIMER

All information in this update is intended for general guidance only and is not intended to be comprehensive, or to provide legal advice. If you have any questions on any issues either in this update or on other areas of employment law, please contact Parker & Co. We do not accept responsibility for the content of external internet sites linked to in this update.

We currently hold your contact details to send you Parker & Co Employment Updates or other marketing communications. If your details are incorrect, or you do not wish to receive these updates, please let us know by emailing info@parkerandcosolicitors.com

CONTACT US

Helen Parker	020 7614 3501	helen.parker@parkerandcosolicitors.com
Richard Woolmer	020 7614 3505	richard.woolmer@parkerandcosolicitors.com
Dan Begbie-Clench	020 7614 3504	dan.begbie-clench@parkerandcosolicitors.com
Jackie Holden	020 7614 3508	jackie.holden@parkerandcosolicitors.com
Charlotte Schmidt	020 7614 3503	charlotte.schmidt@parkerandcosolicitors.com

See our website for details of the employment and business immigration services we offer

Parker & Co Solicitors
27 Austin Friars
London EC2N 2QP
Tel: 020 7614 3577
Fax: 020 7614 3578
www.parkerandcosolicitors.com