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Employment Update

March 2009

INTRODUCTION

This quarter's update focuses on the following topics: religious, sexual orientation and disability discrimination, together with TUPE and alternatives redundancies.

Where you see links in blue in the pdf form, you can click on them to be taken 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.

CONTENTS

CONSIDERING REDUNDANCIES? HAVE YOU EXPLORED THE ALTERNATIVES?

When faced with the need to cut costs across your business, it is often instinctive to think first of redundancies. While this may sometimes be the only option, there are other ways of cutting costs. In exploring alternatives, you also meet your obligation to take reasonable steps to avoid compulsory redundancies.

Retraining and redeploying

While you may need to make cuts in some areas of your business, in others you may still be recruiting. By retraining and redeploying existing employees you will retain valued individuals who are familiar with your business. You will also save on redundancy payments and recruitment fees.

Overtime bans

If your business is in an industry which pays overtime consider implementing a reduction or ban. You should first check your employment contracts to ensure that your employees do not have a contractual right to overtime – this will rarely be the case. You may want to consider offering time off in lieu of overtime as an alternative to cash payments. You should still consult with your employees about this change and explain that this option is being explored in order to avoid redundancies. Employees will often accept such changes if they feel they understand the reasons for them and that they are being treated fairly. It is essential to implement such changes across the board to avoid resentment. Employees that rely on overtime may look for alternative employment.

Sabbaticals

Some employees may welcome a temporary period off work to pursue for example further education or their domestic circumstances may be such that they would like to take an extended period off. It may therefore be worth offering employees the opportunity to take a sabbatical.

Agency

You should also focus on terminating arrangements with temps/contractors/agency workers, provided they are not fixed term or part-time employees, rather than making permanent members of staff redundant.

ARTICLE CONTINUES ON PAGE 2 ►

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INCAPACITY BENEFIT AND COMPENSATION FOR LOSS OF EARNINGS

The EAT has held that a Claimant receiving incapacity benefit can still claim compensation for loss of earnings. Individuals can be "deemed" incapable to work for the Social Security (Incapacity for Work) (General) Regulations 1995 under a number of tests while not necessarily being incapable of working. If, as a matter of fact, a Claimant is capable of working, they can still theoretically recover damages for loss of earnings resulting from their employer's actions while in receipt of incapacity benefit. (*Sheffield Forgemasters International Ltd v Fox and Telindus Ltd v Brading*)

ILLEGAL WORKING AND THE NATIONAL MINIMUM WAGE

The Claimant in the case of *Blue Chip Trading Ltd v Helbawi,* was in the UK under a student visa which allowed him to work at certain times. The EAT held that the Claimant could claim the national minimum wage in respect of work done in compliance with the terms of his visa but not for work done in breach of those terms. The EAT considered that the breach did not render the entire contract of employment illegal and the legal part could be severed from the illegal part of contract.

CONSIDERING REDUNDANCIES? HAVE YOU EXPLORED THE ALTERNATIVES?, continued from page 1

Arrangements for returning should be agreed before the sabbatical begins and employees should always be advised that there may not be a job for them to return to. If this does transpire to be the case, you should seek to redeploy these employees internally.

Pay-cuts/reducing hours

This option is likely to be a last resort before implementing redundancies and you will need to get the agreement of your employees. When presenting this option to your employees, it is essential that you clearly explain the terms of the pay-cut, to include:

- Why a pay-cut is necessary;
- How much the pay-cut will be;
- How long the pay-cut will remain in place before it is at least reviewed;
- Whether when business improves they will receive some or all of the money they lose during the period of the cut;
- Consider whether you might want to drop to a 4 day week where the pay-cut is 20% or more;
- Consider offering an incentive such extra holiday;
- Confirmation of who will be affected. It is better to implement such changes across the board to avoid resentment and problems in securing the agreement of your employees.

Lay off/Short time working

If you do not have sufficient for work for employees you may consider a lay-off or short time working. A lay-off is where an employee remains employed but is asked not to come into work. Where an employee is given less than 50% of their pay they will be considered to be on short time working. You should be aware that employers do not have a general right to lay-off employees without pay and you will normally still have to pay their full pay unless their contract states otherwise. Employers should however note that employees who only get paid for work they actually do, have the right to leave and claim redundancy after a certain period of time.

Redundancies

If you have no alternative but to consider redundancies, you should if practicable first invite employees to take voluntary redundancy. However, you do need to be careful how and to whom you offer this option, as you may end up with key individuals whom you wish to retain, taking voluntary redundancy. It is possible to invite volunteers while retaining the right to reject an application for business reasons.

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REPORTING REQUIREMENTS IN RESPECT OF MIGRANT WORKERS

Under the new Points Based Immigration System, licensed sponsors must use the sponsorship management system to comply with reporting obligations. The UK BA has recently updated its guidance to make clear who must notify them when a TUPE transfer results in the transfer of migrant workers.

- If a sponsor takes over an organisation that is not a licensed sponsor, the sponsor must inform UKBA within 28 calendar days.

- If a sponsor is taken over by a company that is not licensed, then the existing sponsor must tell UKBA. The new company must apply for a sponsorship licence, within 28 calendar days. If it does not, the immigration permission of all sponsored migrants is likely to be reduced to 60 calendar days.

- If both companies are licensed sponsors, then both companies must tell UKBA about the takeover within 28 calendar days. The organisation that was taken over must state who now has responsibility for its respective migrants; and the organisation that took over must tell UKBA about the migrants that it has taken responsibility for.

BRITISH AIRWAYS & DISCRIMINATION ON THE GROUND OF RELIGION

In *Eweida v British Airways plc,* the EAT agreed with the Employment Tribunal's finding that there was no evidence that Christians as a group were adversely affected by British Airways' ("BA") policy which prohibited the wearing of visible items of jewellery at work. The EAT found that for indirect discrimination to apply it is not sufficient for an individual to suffer personally where others sharing the same belief do not. The policy should place a particular disadvantage on a group of believers, not just an individual believer.

The Claimant, a Christian who wore a silver cross necklace to work, was told this was contrary to BA's uniform policy which allowed employees to wear jewellery under their uniform, provided it was not visible. The policy also allowed religious items to be worn visibly if this was a 'mandatory' religious requirement. The Claimant was sent home without pay after she refused to remove her necklace for the third time. She brought claims for direct and indirect religious discrimination.

The EAT upheld the Tribunal's finding that BA had not directly discriminated against the Claimant on religious grounds because they would have treated anyone wearing visible jewellery of any kind in exactly the same manner regardless of their religion. The ET's finding on the Claimant's indirect discrimination claim was also upheld on the basis that the policy did not put Christians at a particular disadvantage to others. The wearing of a cross was not a religious requirement so there was no evidence to suggest that BA's policy had created a 'barrier' for Christians. As a religious group, Christians had not been placed at a particular disadvantage.

In light of the EAT's finding, employer's policies should not restrict religious practices which are a mandatory religious requirement and employers should be able to look at a religion and know whether its policy will put religious believers at a particular group disadvantage. If this is not the case, indirect discrimination should not apply. However, the difficulty lies in identifying whether a practice is (i) a religious requirement, (ii) a widely adopted practice but not necessarily obligatory or (iii) a subjective personal belief which may also be shared by a handful of others. Employers should stop to consider the potential impact on different groups before implementing any blanket bans or policies.

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ENTITLEMENT TO HOLIDAY PAY WHILE ON LONG TERM SICK LEAVE

A reminder that the ECJ has held in the long running saga of *Stringer v HMRC* that a worker who is absent for the entire holiday leave year is entitled to receive paid annual leave. It is for national courts to decide when that leave can be taken or when payment in lieu is made, but the ECJ confirms that the right itself is not lost merely because sickness has prevented its exercise. The case will now be sent back to House of Lords and it is likely that the Court of Appeal's decision will be overturned. We will update you once the final judgment is issued.

CHANGES TAKING EFFECT FROM APRIL 2009

Flexible working

The right to request flexible working will be extended to parents of children aged 16 and under. With regards to disabled children, the age limit will not change meaning that parents with disabled children under the age of 18 can still request flexible working. Remember that the right also extends to carers of adults aged over 18, and that in all cases only employees with at least 26 weeks' service can apply for flexible working.

RECENT DEVELOPMENTS IN DISABILITY DISCRIMINATION

Disability Discrimination – Reasonable Adjustments

The DDA excuses an employer from making reasonable adjustments in limited circumstances. However, the EAT has now described the limitations of this defence. In *Eastern & Coastal Kent PCT v Grey*, it was held that an employer must demonstrate that it did not know (or could not reasonably be expected to know) that the person was disabled or was likely to be placed at a substantial disadvantage when compared to a non disabled person.

The defence was often used by employers accused of discrimination in the recruitment process and the EAT decision shows how important it is for employers to be alive to possible disabilities so they can properly address the question of adjustments.

Disability Discrimination – Comparators

The EAT has, in *Child Support Agency v Truman*, now confirmed that the comparator test laid down by the House of Lords in *Malcolm* (a housing case) also applies to the employment aspects of the DDA. Therefore, the correct approach to disability related discrimination is to compare the treatment of the claimant with a non disabled person who is in the same circumstances. This approach has overruled a Court of Appeal decision which had stood for 10 years.

The impact of this decision is to require Employment Tribunals to undertake a narrower comparison than was previously required, with the likely consequence that it will become more difficult for claimants to succeed in proving disability related discrimination.

The EAT had little room to manoeuvre given the disability related discrimination test for housing and employment cases is identical in the DDA and noted the result was a matter for a Parliament to address. The Government has already conducted a consultation to seek views on the approach to be taken by the forthcoming unifying Equality Act, so there may be further developments.

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CHANGES TAKING EFFECT FROM APRIL 2009

Holiday entitlement

The minimum full-time holiday entitlement under the Working Time Regulations 1998 increases to 5.6 weeks in any holiday year. This means an increase to 28 days from the current 24. The entitlement includes bank holidays, so the minimum legal requirement is to provide a full-time employee with at least 20 days' holiday plus 8 bank holidays.

We expect that most of your employees are entitled to at least as much holiday as this already, but you should review entitlements to be certain and notify employees that their entitlement will increase accordingly if they do not. If you operate a system whereby holiday increases with service, you may find that if you are having to increase holiday at the lower end of the scale you will need to make similar increases for other employees.

HOMOPHOBIC BANTER

The Court of Appeal has held, in *English v Thomas Sanderson Limited*, that "homophobic banter" directed at an employee could be harassment under the Employment Equality (Sexual Orientation) Regulations 2003 ("the Regulations"), even where the victim was not gay; his "tormentors" did not believe him to be gay; and he knew that his tormentors did not believe him to be gay. In the majority's view, the repeated and offensive use of the word "faggot" amounts to conduct "on grounds of sexual orientation" within the meaning of the regulations, regardless of the victim's true sexual orientation or his tormentors' perception of it. In doing so the Court of Appeal overturned both the Employment Tribunal and the Employment Appeal Tribunal's decision. Critically the single, crucial assumed fact was that Mr English was repeatedly taunted as if he were gay.

Mr English brought a tribunal claim complaining that he had been harassed contrary to the Regulations. He argued that his colleagues had subjected him to homophobic banter because he had attended boarding school and lived in Brighton.

It was noted that there are policy reasons why this type of conduct should be covered by the Regulations. It cannot have been Parliament's intention that a claimant must declare their true sexual orientation in order to show that abuse directed at them was "on grounds of sexual orientation". Given this, the approach to Mr English's case would be the same if he had elected to remain silent about his sexual orientation, and indeed if he was gay or bisexual but preferred not to disclose this.

The majority decision in this case (that where the subject matter of teasing is related to sexual orientation, this can found a harassment claim under the Regulations) could have significant consequences for UK discrimination law:

- Similar definitions of harassment to that in the Regulations are contained in the race, religion or belief, and age legislation. Therefore, the above decision opens the door for similar "teasing" claims to be brought in these areas.

- There may be confusion around the Disability Discrimination Act 1995, the relevance to this case being that disability discrimination, like sexual orientation discrimination, derives from the same European Directive.

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CHANGES TAKING EFFECT FROM APRIL 2009

Statutory Maternity, Adoption and Paternity Pay
These weekly limit for these statutory leave payments increases to £123.06 per week.

Statutory Sick Pay
The weekly SSP limit increases to £79.15 per week.

FEBRUARY CHANGE

Redundancy payments
A week's pay for statutory purposes increases to a limit of £350 per week (from the current £330). This is relevant if you are calculating statutory redundancy payments.

THE SCOPE OF THE OBLIGATION ON EMPLOYERS TO INFORM AND CONSULT

The EAT in *Royal Mail Group Ltd v Communication Workers Union* considered the scope of the information and consultation obligations under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

Post Office Ltd (PO), a wholly owned subsidiary of Royal Mail Group Ltd (RM), operated a network of post offices. As a result of losses, RM transferred a number of post offices to franchisees, on the basis that the employees would not transfer to the franchisees, but would either be redeployed within the PO (using an express contractual power) or would take voluntary redundancy. Therefore they considered that TUPE did not apply.

The union's argument was that RM was mistaken in its belief that TUPE did not apply, and that it was therefore in breach of its information and consultation obligations.

The EAT held that under regulation 13, employers are only obliged to provide their view of the legal implications of the transfer and are not in breach of their information and consultation obligations if that view is not correct. However, the EAT suggested that it would not be a defence for an employer to say that it did not inform or consult because it had not realised that there was a TUPE transfer at all, or genuinely believed that there was not. While a subjective test should be applied to the information that should be provided, an objective approach should be applied in determining if the obligation arose at all.

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