Parker & Co

Employment Update

January 2008

INTRODUCTION

This quarter's update focuses on the implied term of trust and confidence, equal pay and planned changes to employment legislation. There has also been a flurry of TUPE cases which we have focused on.

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.

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THE EMPLOYMENT BILL 2007/2008 – WHAT CHANGES WILL EMPLOYMENT LEGISLATION SEE?

Last month the Employment Bill 2007-2008 detailing changes to employment legislation was published. The changes will not take effect for some time yet.

Changes of particular interest include:

- Statutory Dispute Resolution Procedures – as recommended by the Gibbons Review, the statutory disciplinary and dismissal and grievance procedures are to be repealed.
- Tribunals are instead to be given the discretion to increase an employee's compensation award by up to 25% if an employer unreasonably fails to comply with a relevant Code of Practice, the most obvious being those produced by ACAS.
- Where an employee unreasonably fails to comply with a Code of Practice, the Tribunal will have the discretion to reduce any compensation award by 25%.
- Section 98A is to be repealed. The section provided a defence of sorts to an employer in circumstances where its procedure in dismissing an employee fell to be assessed according to general principles of reasonableness, if it could show that it would have still decided to dismiss the employee had it followed the relevant procedure.
- ACAS' conciliation powers are to be extended. The Bill provides that ACAS will be able to become involved in the process before proceedings are issued. The fixed conciliation periods which currently limit ACAS' ability to conciliate in respect of some claims are to be removed.

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IN BRIEF

COMPENSATION INCREASES

The following increases will be effective from 1 February 2008:

- A week's pay for the purposes of calculating the basic unfair dismissal award and statutory redundancy will increase to £330 (currently £310) The maximum award will therefore increase from £9,300 to £9,900; and
- The maximum compensation for unfair dismissal will increase to £63,000 (currently £60,600)

AGE DISCRIMINATION CLAIMS

Many of you will have heard of the "Heyday Challenge" which is challenging the lawfulness of allowing a mandatory retirement age, currently 65. The Employment Tribunal has stayed all claims which involve such an allegation until the Heyday Challenge is determined. This means that claims could remain pending for some time. In addition until this issue is resolved employers cannot be certain that retiring an employee at 65 is lawful.

THE EMPLOYMENT RELATIONSHIP: THE IMPLIED TERM OF MUTUAL TRUST & CONFIDENCE

In *RDF v Alan Clements [2007] EWHC 2892 (QB)* Mr Clements entered into a service agreement to work as Director of Content of IWC Media Ltd following its sale to RDF Media Group PLC. The agreement was terminable on six months' notice.

Mr Clements entered into a number of restrictive covenants for a period of 3 years from the completion date (1 December 2005), in return for which he received almost £2million in cash and shares. In the event Mr Clements was unlawfully dismissed the restrictions would be reduced to 2 years from the completion date. In March 2007 Mr Clements gave notice of his termination and indicated that he would be taking a position with a competitor. RDF made it clear that it would seek to enforce the 3 year restrictive covenants and put Mr Clements on garden leave for his notice period.

Mr Clements' behaviour was subject to internal discussion. In a subsequent media briefing the MD of IWC made a number of comments to the press which were considered by Mr Clements to be "poisonous, untrue and highly damaging to his reputation". Some of these comments were published.

In response Mr Clements claimed constructive dismissal on the basis that there had been a breach of the implied term of mutual trust and confidence, and sought to argue that the restrictive covenants were now only enforceable for 2 years. RDF argued that Mr Clements had resigned voluntarily and sought an injunction to enforce the full term of the restrictions.

The facts of this case are particularly detailed and the decision is linked to the findings of fact made by the Court. However there are a number of points to come out of this decision which may in future assist employers facing constructive dismissal claims, particularly where a senior employee is involved.

- A company's Board of Directors is entitled to make negative allegations and representations (subject to what is reasonable and proper) about an employee without breaching the implied term of trust and confidence. The Board is effectively the "controlling mind" of the company and such representations are the company 'thinking aloud'

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IN BRIEF

EQUAL PAY – MATERIAL DEFENCE FACTOR

In *Chief Constable of West Midlands Police v Blackburn & Manley* the Claimants were female police officers who received less pay than their male comparators doing like work to them. The reason for the difference in pay was that the men worked shifts which involved night work (they received a bonus for this). The Claimants who had childcare responsibilities did not.

The EAT, disagreeing with the Tribunal, held that including a requirement to undertake night work in eligibility criteria for special priority payments (a "relatively modest" bonus) did not indirectly discriminate against female officers whose childcare responsibilities meant they did not undertake night shifts. The special priority payments scheme had the legitimate aim of specifically rewarding those officers who worked nights. That aim could not be achieved if those who did not work nights were paid the same amount.

The Equal Pay Act 1970 does not require employers to pay money to compensate for the economic disadvantages suffered by employees with childcare responsibilities.

THE EMPLOYMENT RELATIONSHIP: THE IMPLIED TERM OF MUTUAL TRUST & CONFIDENCE, continued from page 2:

- Making negative comments about an employee to the media will ordinarily amount to a breach of the implied duty of trust and confidence provided the employee can show an absence of reasonable and proper cause. However, an employer will have a strong counter argument if it can show that the employee had already fundamentally breached his contract of employment.

- When an employee resigns and is on garden leave, there may be reasonable and proper cause for an employer to put out a press release, for example to correct a "material misrepresentation" already in the press. Such a press release may include confidential information.

- Employees are not entitled to rely on a breach of the implied term trust and confidence by their employer in circumstances where they themselves are in breach of the same term.

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981/2006 ("TUPE")

Can TUPE apply to undertakings being transferred outside the UK and EU?

Holis Metal Industries Ltd ("Holis Ltd") v GMB & Newell Ltd UKEAT/0171/07/CEA decided an important point of law relating to the application of TUPE. The question before the EAT was whether TUPE can apply to a transfer of a business, which after the transfer, is based outside the UK and also outside the EU. Newell Ltd operated a track, pole and blind manufacturing business. Holis Ltd purchased the track and pole part of the business and advised the affected employees that unless they wished to move to Israel they would be redundant following the transfer.

Although not convinced of the importance of this question in this particular case the Court did consider detailed arguments about whether TUPE has the potential to apply beyond the UK and the EU. The EAT found that the wording of TUPE and also of the Acquired Rights Directive makes it clear that the key factor in determining

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IN BRIEF

EQUAL PAY – LOCAL GOVERNMENT AND THE UNIONS

There have been a number of articles in the press this month reporting that councils and unions face a financial crisis as a result of the huge number of equal pay claims.

Local councils are having to fund payouts without assistance from central government and argue that as a result of employees choosing litigation rather than negotiation through the unions they face even bigger liabilities which may lead to cuts in services and jobs.

The unions are facing sex discrimination claims as female employees argue that the unions failed to properly represent their interests undervaluing their claims and protecting the interests of male colleagues, in particular agreeing caps on back pay. The Equal Pay Act allows claims for up to 6 years of back pay.

As the cases continue to grow in number the extent of the differential in pay becomes ever clearer. There are a number of competing interests involved and whatever the rights and wrongs, it is clear that the arguments are set to continue.

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981/2006 ("TUPE"), continued from page 3:

whether TUPE applies is whether prior to the transfer the undertaking is located in the UK. Other factors such as whether that undertaking retains its identity following the transfer (as is necessary for TUPE to apply) is a matter of fact to be determined on a case by case basis. Employers should note that this finding is also relevant to the outsourcing of service provisions. Offshore outsourcing of parts of businesses is becoming increasingly common but TUPE is often ignored in this context. Employees usually prefer redundancy to relocation overseas. However, TUPE does impose pre transfer consultation obligations and failure to consult could result in an award of up to 13 weeks pay per affected employee.

Can employees claim additional rights as well as their pre-transfer entitlements? - *Jackson v Computershare Investor Services plc ("CIS") [2007] EWCA CIV 1065*

Ms Jackson joined Ci (UK) Limited in 1999 but transferred to CIS pursuant to TUPE 1981 in June 2004. In 2005 CIS made Ms Jackson redundant. TUPE ensures that an employee's terms and conditions are protected when their employment transfers but the question in this case was whether TUPE entitled her to claim a more favourable redundancy entitlement, being an enhanced redundancy payment made available to employees of CIS who had joined it before 1 March 2002. The Tribunal held, and CIS subsequently accepted, that CIS' redundancy scheme had become part of Ms Jackson's contract. However, the key question was whether or not she should be treated as having joined CIS prior to 1 March 2002 as a result of being employed by CIS since 1999 for the purposes of continuity of employment. The Tribunal said yes but both the EAT and Court of Appeal disagreed.

For the purposes of her statutory rights and contractual terms of employment prior to the transfer it is necessary to treat her as being employed by CIS since 1999. However, TUPE does not allow Ms Jackson to benefit from every change introduced by CIS since 1999. The EAT and Court of Appeal considered that "joined" should be given its normal meaning (rather than its meaning under TUPE for the purposes of continuity of employment) in interpreting the contract and that it therefore meant June 2004.

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IN BRIEF

STATUTORY MATERNITY AND ADOPTION PAY

Plans to increase statutory maternity and adoption pay from 39 weeks to 52 weeks have been delayed by a year and the increase is now expected to take effect in respect of babies due on or after 1 April 2010.

Plans to increase paternity leave and pay have also been delayed by a year and will take effect in respect of babies due on or after 1 April 2010.

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981/2006 ("TUPE"), continued from page 5:

The EAT and CA held that the aim of TUPE was not to give Ms Jackson additional rights to those she had prior to the transfer. Ms Jackson was not therefore entitled to be treated for the purposes of the enhanced redundancy scheme as if she had joined CIS prior to 2002.

Can an employee object to a transfer after it has occurred?

TUPE 2006 provides for the automatic transfer of employment unless an employee objects to being employed by the new employer in which case employment terminates on the date of the transfer. The wording of TUPE 2006 suggests that such objections should be made before the date of the transfer. However, the High Court, in *New ISG Ltd v Vernon [2007] EWHC 2665 (ch)*, held that where the employee only becomes aware of the identity of the new employer after the transfer s/he will still be able to object and their employment will then terminate. Mr Vernon resigned two days after being informed that a transfer had occurred and of the identity of the new employer. He then went to work for a competitor and New ISG Ltd sought to enforce the restrictive covenants.

Mr Vernon's resignation was considered a valid objection as TUPE does not require an objection to take a particular form and waiting two days did not mean he had lost his rights in this regard. Consequently his employment had not transferred and New ISG Ltd was not entitled to enforce the restrictive covenants. Interestingly this situation only occurred because contrary to the consultation requirements of TUPE, Mr Vernon had not been given such information before the transfer.

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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

THE TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981/2006 ("TUPE"), continued from page 5:

Can employees rely on positive variations to their terms and conditions following a TUPE transfer? *Regent Security Services Ltd –v- Power [2007] EWCA CIV 1188*

In July 2005 Mr Power's employment transferred to Regent Security Services Ltd pursuant to TUPE 1981. Prior to the transfer Mr Power received a letter stating that his contractual retirement date would change from 60 to 65 following the transfer of his employment. However, he was subsequently sent a further letter advising him that his contractual retirement age would remain at 60. Mr Power sought to rely on the change in his retirement age when he was dismissed at 60 and wanted to claim unfair dismissal.

As many of you will be aware TUPE prevents an employer making changes to employees' terms of conditions of employment even where the employee agrees to those changes or is no worse off overall. Changes may only be made where the sole or principal reason for making the changes is unconnected with the transfer, or where connected to the transfer, there is an economic, technical or organisational reason entailing changes in the workforce, for example a reduction in numbers or job functions.

The Court of Appeal and the EAT in this case held that Mr Power was entitled to choose between an existing contractual term and a more favourable variation and thus he could rely on the change to his retirement age. However, it was not open to the employer to argue that TUPE rendered the variation it made to Mr Power's contract unenforceable as the aim of TUPE is to protect the employee and not the employer.

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