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Legal Updates & News

Bulletins

In Brief -- February 2007

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Talkback

In the fourth issue of our employment and HR newsletter, we focus on three of 2007's key areas. The Work and Families Act brings about the key legislative change whilst bonuses and employment status look likely to be this year's case law 'hot topics'. 2007 promises to be another busy year with some significant cases being appealed, although there is less legislative change (which is a relief after last year's new TUPE and age discrimination legislation!). We've also updated our 'quick check' guides for easy reference. We welcome all suggestions regarding future content, so do let us know what you would like to see in our next edition.

Bonus Time!

The champagne has definitely lost its 'fizz' for some of this year's bonus participants who will no doubt be watching with interest the recent round of bonus cases.

For those employers that operate a discretionary bonus scheme, the case of *Commertzbank AG v Keen [2006]* is a welcome decision. For some years there has been a debate about whether the Unfair Contract Terms Act 1977 ("UCTA") (consumer protection legislation) applies to contracts of employment and, if so, the impact of UCTA, and in particular the 'reasonableness test' in section 5.3 of UCTA, on exclusion clauses in bonus schemes such as the standard provision that those not employed at the date of payment are not entitled to any bonus. It is worth remembering that as UCTA does not apply to shares, non-cash bonuses will never be within the scope of UCTA. In the *Commertzbank* case, Mr Keen claimed damages for breach of contract for the underpayment of his 2003 and 2004 bonuses and the non-payment of a 2005 bonus. The Court threw out Mr Keen's claims and went on to hold that section 3 of UCTA does not apply to a term in a contract of employment relating to remuneration of an employee (note, it may apply to other terms).

The result is that any employee who now wishes to challenge the award of a discretionary bonus will have to show that no rational employer would have acted as the employer did – a high threshold. We understand that Mr Keen is seeking leave to appeal.

Two other interesting bonus related issues are also soon to be considered by the Court. Does awarding an employee his or her bonus in deferred shares or options render it worthless? Also, to what extent can an employee rely upon representations about bonus entitlement made to him or her as a prospective employee? Mr Marti-Sanchez, a former bond trader for Nomura, is suing them for £7.5 million. He was awarded a bonus of £1.3 million in shares, deferred for three years. He claims that he was given a verbal promise in the recruitment process that he would receive 25% of any profits he generated for the bank and that as the deferred shares will have no value for three years, they are not adequate remuneration. The case may prove interesting reading for employers who operate deferred share or option schemes. In addition, promises and assurances made in the recruitment process may well come under closer scrutiny.

Whilst *Commertzbank* gives employers some comfort, Mr Takacs' claim against Barclays Services Jersey Limited could arguably take the breadth of implied terms to a whole new level. Mr Takacs failed to make target

and was dismissed by the bank. He is claiming that the failure to pay him bonuses constituted breaches of the implied terms of trust and confidence, cooperation and anti-avoidance. He argues that his position was undermined when the bank carried out a management restructure and brought in a senior executive and a 40 strong team. He says that he set up a facility which, if completed, would have led to him hitting his targets. The bank says it could not complete the transaction because of risk issues but Mr Takacs claims the deal was completed after his departure. He also claims that the bank then dismissed him to avoid paying his bonus. The trial is due to take place in March 2007, so watch this space.

So where do the above cases leave employers operating discretionary bonus schemes?

Ensure that those involved in the recruitment process have a clear understanding of the level of any bonus award. Back this up with a good entire agreement clause in the contract of employment.

Review your existing bonus scheme and confirm the basis upon which any bonus is awarded. Ensure that the bonus scheme includes express wording that states whether the employee has any entitlements in the event that he or she is placed on garden leave, is given or receives notice or is dismissed. Make it absolutely clear that the employer retains an absolute right to carry out restructures and not to complete a transaction on grounds of compliance or risk issues.

Whilst showing that an employer has acted irrationally or perversely is a high threshold, keeping notes as to how someone's bonus was calculated will ensure that claims of unfair or discriminatory bonus awards can be disposed of in a speedy and cost effective manner.

New Family Friendly & Flexible Working

The Work and Families Act 2006 is this year's key legislative change. It has resulted in some increased rights, some new rights and some controversy.

Increased Maternity/Adoption Rights
For those employees whose expected week of childbirth or date of adoption is on or after 1 April 2007:

1. they will now be entitled to up to 39 weeks' paid maternity or adoption leave if they have 26 weeks' service with the employer;
2. all pregnant employees and those adopting will qualify for 12 months' maternity or adoption leave, regardless of their length of service;
3. an employee returning early from additional maternity or adoption leave will have to give eight weeks' notice;
4. employees will be entitled to 10 'keeping-in-touch' days; and
5. employers will be entitled to make 'reasonable contact' with employees on maternity leave.

In addition, those who employ 5 or fewer employees will no longer be exempted from a finding of automatic unfair dismissal if they do not allow the employee to return to the same or similar job after additional maternity or adoption leave.

Flexible Working for Carers
As of 6 April 2007, the flexible working regime will be extended to carers of adults. Carers will have the right to request working flexibly and the employer will have a duty to consider the request. Adults for the purposes of this legislation are the spouse or partner of the employee, a near relative or someone who lives at the same address. It is estimated that this new right will be of benefit to 2.65 million employees.

Increased Paternity Leave
A 'one to watch' which has created quite a stir is the proposal to give employed fathers up to 26 weeks' paternity or adoption leave and pay. It is anticipated that this change will not take place until around 2010 when paid maternity or adoption leave is extended to 12 months. How the right will operate in practice is still the subject of some debate. The consultation process has now ended and we will update you as soon as we have more news but the right appears to be shaping up as follows:

it will be modelled on the statutory maternity and adoption schemes (i.e. for the purposes of calculating pay there will be the same length of service requirement and reference period);

- it will be available when a woman returns early from maternity or adoption leave;
- it will be available to fathers 20 weeks from the date of birth or adoption; and

- it will not have to run back-to-back with the end of the period of maternity or adoption leave.

Whether male colleagues will actually exercise the right is another matter! In the meantime, one to ponder – if you operate an enhanced maternity or adoption pay scheme, should men equally be entitled to enhanced rights to pay?

Employment Status

Theoretically, how many people your organisation actually employs should not be a taxing question. However, this issue looks likely to be one of the hottest topics for 2007.

Cases such as *Dacas [2004]* and *Cable and Wireless v Muscat [2006]* have caused employers concern and rightly so as they have highlighted the risk employers (who want to use temporary staff for flexibility) run of tribunals implying a contract of employment between the temp and the end-user through conduct, particularly in a temp-to-perm arrangement.

However, the case of *James v Greenwich Council* [2006] should give employers some comfort. In *James*, the EAT gave guidance on when contracts of employment will be implied. The EAT held that it will not be appropriate to imply a contract where:

- the end-user cannot insist on the agency supplying a particular worker;
- the arrangements are genuine and when implemented accurately represent the relationship between the parties; or
- the basis for implying a contract is merely the passage of time.

Further, in the case of *Cairns v Visteon UK Ltd* [2007] the EAT held that it was not necessary to imply a contract of employment with an end-user where an express contract already exists with the agency.

Therefore, if your organisation uses temporary staff, to minimise your risks, you should consider:

1. negotiating warranties and indemnities to cover off claims of employment status from temps;
2. keeping an up-to-date record of the length of the assignments of any temps;
3. ensuring that there are regular breaks in temps' continuity; and
4. training managers to ensure that on a day-to-day basis they do not exercise control over temps.

On Appeal

Can a worker on sick leave for a whole year claim entitlement to paid annual leave both during, and on termination of, employment? The Court of Appeal said no in *Commissioners of Inland Revenue v Ainsworth and others* but the case, now referred to as *Her Majesty's Revenue and Customs v Stringer*, has been appealed and the question has been referred to the ECJ. In the meantime, employers must differentiate between annual leave under the Working Time Regulations and contractual holiday and the position in relation to those who are on sick-leave for part of a year is that such workers are not entitled to take annual leave whilst off sick. Confused? We can but hope that the ECJ decision clears this up.

Paying the Penalty: Latest Median Awards for Tribunal Claims

(Taken from the Employment Tribunal Service's Annual Report for 2005-6 in comparison with 2004-5)

Unfair Dismissal (*up 21%*)	£4,228
Disability Discrimination (*up 63%*)	£9,021
Sex Discrimination *(down 12%)*	£5,546
Race Discrimination *(no change)*	£6,640

Know Your Limits

As of 1 February 2007, the following limits now apply…

One week's pay (where capped)	£310
Compensatory award for Unfair Dismissal*	£60,600
Redundancy payment	£9,300
Discrimination	No limit
Breach of contract in employment tribunal	£25,000
Failure to inform/consult in redundancy	90 days' pay (no cap)
Failure to inform/consult in TUPE transfer	13 weeks' pay (no cap)
Failure to provide employee liability information on TUPE transfer	£500 minimum for each employee (no maximum)

Dates for the Diary

6 April 2007: Employers with 100 or more employees will be subject to the Information and Consultation of Employees Regulations and the Occupational Pension Schemes (Consultation by Employers) Regulations 2006.

6 April 2007: Carers of adults will have the right to request working flexibly. (See Family Friendly Rights).

1 October 2007: Statutory annual leave is due to increase from 20 days to 24 days (rising to 28 days from 1 October 2008) for more details, see In Brief: Issue 1: Working Time Round-Up http://www.mofo.com/docs/pdf/InBrief0606.pdf.

Age Update – Mandatory Retirement Age Uncertainty at an End?

Heyday, a membership organisation affiliated to the Age Concern charity, has mounted a judicial review claim stating that the default retirement age in the age legislation was tantamount to forced retirement and in contravention of the EU Equal Treatment Directive (the "Directive"). In December 2006, the issue was referred to the ECJ. The difficulty with the ECJ reference is that it can take a year to obtain an answer and in the

meantime, what happens to those employees who have or will be made to retire post 1 October 2006? Commentators stated that some employees were being advised to submit a claim to the tribunal and to ask for it to be stayed pending the outcome of the ECJ reference. However, this uncertainty could now be at an end as, in a Spanish reference to the ECJ, an Advocate General has stated that a national default retirement age is not inconsistent with the Directive. The ECJ will usually follow an Advocate General's opinion so for now employers can at least breathe slightly easier.

Stop Press

Post-transfer Changes to Terms & Conditions : In a rather surprising move, the EAT has held that contractual variations made by reason of a TUPE transfer are not void if they are for the benefit of the employees. This means that where an employer makes post-transfer changes to terms and conditions, the employee can effectively pick and choose which benefits he or she would like from both the old terms and the new terms.

Disability Discrimination : The EAT has confirmed again that an employer will not normally have to pay salary for those disabled (within the meaning of the Disability Discrimination Act 1995) on long-term sickness absence once they have exhausted their entitlement to sick pay.

Work-Related Stress : It had been thought that having a counselling service for your stressed-out employees was sufficient to discharge an employer's duty of care when faced with a personal injury claim. However, the Court of Appeal has held this will not always be the case. So, whilst having a counselling service will help – the emphasis rests on management to take action.

A Big Fat Thing: A tribunal has held that a T.V. producer who was sacked for referring to her boss as a 'big fat thing' and a 'blob' in an email, was unfairly dismissed (albeit she was 75% to blame). Whilst we may all have our own views on our boss...it remains unwise to commit them to writing!

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