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On Notice

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The Beecroft Report

This month the Beecroft report was published. This Government commissioned report identifies areas of proposed employment law reform and has received significant press attention.

The Report includes the following proposals:

- Compensated no-fault dismissals, allowing businesses to dismiss an employee where no fault is identified, provided that the employer pays a set amount of compensation.
- Delaying laws which will force companies to provide pensions for their workers from this autumn.
- Watering down of the TUPE rules.
- Eliminating plans for companies to introduce equal pay audits.
- Reducing the number of days for consultation for large scale collective redundancies to 30 days.

Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill has also been introduced this month which includes further proposed changes to the current employment law statutory framework:

- A mandatory period of Acas conciliation before instituting tribunal proceedings.
- An Extension of limitation periods to allow for pre-issue Acas conciliation.
- The introduction of 'legal officers' to make decisions in certain cases if all parties agree in writing.
- EAT cases to be heard by a judge alone, unless ordered otherwise.
- The power for the Secretary of State to limit unfair dismissal compensatory awards to a maximum cap which will be somewhere between the national median earnings and 3 x median earnings.
- Alternatively, a power for the Secretary of State to limit unfair dismissal compensatory awards to one year's earnings.
- A power for a tribunal to impose a penalty on employers of 50% of any financial award, subject to a minimum of £100 and maximum of £5,000, where there are 'aggravating features', with a 50% discount for payment within 21 days.
- A new definition of a 'qualified disclosure' in whistleblowing legislation to be restricted to disclosures 'in the public interest'.

Age Discrimination

Seldon v Clarkson Wright and Jakes,

S was an equity partner in a firm of solicitors. S was compulsorily retired on reaching the age of 65, in accordance with the partnership deed. S wished to continue beyond this age but his request to do so was turned down by the firm. S therefore brought a claim for age discrimination.

The ET dismissed S's claim. Subject to remitting one matter relating to justification to the ET, the EAT and Court of Appeal dismissed S's appeal. The Supreme Court confirmed the decisions of the EAT and Court of Appeal and held that whilst the compulsory retirement age in the partnership deed was a directly discriminatory measure, it was capable of justification because it was based on various legitimate aims.

Although this judgment could be interpreted as encouraging the continued use of normal retirement ages, care should be taken by employers in doing so. The Court accepting the use of a normal retirement age in this particular set of circumstances should not be interpreted as a general liberalising of this area. Given the current statutory regime the use of normal retirement ages should be the exception rather than the rule.

Homer v Chief Constable of West Yorkshire Police [2012]

H retired from the police in 1995 at the age of 51, when he had reached the rank of Detective Inspector. On his retirement H began to work for the Police National Legal Database as a legal adviser. In 2005 a new grading system was introduced involving 3 Grades and in order to reach the highest grade a law degree was required. H did not have one and, as a result, was held at the second grade, despite the fact that his knowledge and experience were sufficient to allow him undertake work of the highest grade.

H claimed indirect discrimination contending that, at the age of 62 years (as he was in 2005) he was too old to be able to obtain a law degree, which took four years to complete, before reaching the retirement age of 65. H also submitted that the rule confining the highest grade to those with a law degree was not objectively justified. As such the policy was indirectly discriminatory.

The ET found in favour of H. The employer successfully appealed to the EAT and the Court of Appeal upheld the EAT's decision. However, the Supreme Court disagreed with both the EAT and the Court of Appeal in holding that H's inability to satisfy the rule requiring a law degree was the result of his impending retirement and that retirement directly related to age. Consequently, H's inability to benefit from the rule was also as a result of his age and the rule therefore constituted indirect age discrimination. The issue of objective justification was remitted to the ET to decide on the facts but the Supreme Court gave the following useful guidance:

1. Is the objective sufficiently important to justify limiting the fundamental right of an employee not to be discriminated against?
2. Is the discriminatory measure rationally connected to the objective?
3. Are the discriminatory means chosen no more than necessary to accomplish the objective?

Homer highlights the wide reach of indirect age discrimination and also underlines the difficulty employers will face seeking to justify a rule which puts any particular age group at a "particular disadvantage".

Bankers Bonuses: can an oral promise made at a staff meeting be contractually binding?

Attrill and others v Dresdner Kleinwort Ltd and Commerzbank AG [2011]

The Claimants were employed in the investment banking division of Dresdner Kleinwort (the "Bank"). The claimants were contractually entitled to be considered for a discretionary annual bonus.

It was the established practice of the Bank to allocate bonuses in November each year, communicate the allocation to its employees in December and pay the cash element of such bonus in January the next year, provided that the

employee was still employed by the Bank at that point.

At a meeting in August 2008, the CEO of the Bank announced a guaranteed minimum bonus pool to be allocated according to individual performance. The decision was reiterated on many occasions and on the Bank's intranet.

In December 2008 the Bank issued bonus letters to its employees notifying them of their provisional discretionary bonus awards, but stating that the bonus award could be reduced in the case of material adverse change in the Bank's revenue.

In January 2009 the merger took place and the new entity invoked the "material adverse change" clause and paid only 10% of the provisional bonus award. The claimants brought proceedings claiming the unpaid 90% of the bonuses provisionally awarded.

In a quasi class action brought by a large number of the affected employees the High court found in the employees' favour and upheld the claim for breach of contract, on the basis that the announcement by the CEO was contractually binding. It was also held that by introducing the "material adverse change" clause the Bank had breached the implied term of trust and confidence as it was a mechanism to enable the Bank to break its promise.
This case underlines the importance of all managers involved in compensation decisions taking great care over the content of communications about bonus pools and individual awards whether verbally or in writing.

In brief:

- In *Neidel v Stadt Franfurt*, the ECJ held that where national law provides statutory annual leave in excess of the four weeks required by the Working Time Directive, workers are only entitled to carry forward 4 weeks accrued annual leave where they have been absent due to sickness. The implication of this judgment for UK Courts is that this obligation to allow carry over does not apply to the additional 1.6 weeks holiday contained in the Working Time Regulations.
- In *Hounga v Allen*, a Nigerian woman, who deceived the British High Commission to work in the UK, had no right to bring a case for unfair dismissal and discrimination against her employer.