Employment Law News
February 2011

Here is our latest Employment Law newsletter . We hope you will also visit our web site at http://www.oxford-employment-law.co.uk/ which now includes a comprehensive and regularly updated free employment law section available for you to use whenever and as often as you like to find answers to basic employment law questions. We will, of course, be pleased to assist you with individual advice when that is required.

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1. New compensation limits for unfair dismissal etc

Here is a list of the main new Employment Tribunal compensation maximum limits where the "appropriate date" *(for example date of dismissal)* is on or after **1st February 2011:-**

- New limit on a week's pay taken into account for various purposes - £400;
- Max unfair dismissal basic award (and statutory redundancy pay) - £12,000 (viz 30 X a week's pay;
- Max unfair dismissal compensatory award - £68,400;
- Discrimination cases - no limit;
- Additional award - £20,800 (viz 52 X a week's pay);
- Protective award - 90 days' pay;
- Reinstatement and reengagement orders (cash addition) - £1,600 (viz 4 X a week's pay);
- Guarantee payment - £111.00 in any 3 month period;
- Minimum basic award if an employer has not complied with the duty to consider an employee's request not to be retired - £1,600 (viz 4 X a week's pay);
- Minimum basic award in certain other cases - £5,000
- Breach of contract - £25,000
- Refusal of right to be accompanied (see Disciplinary procedures/Right to be accompanied and/or Flexible Working/2003 rules) - £800 (viz 2 X a week's pay).
- Failure to consider request for flexible working - £3,200 (viz 8 X a week's pay).
- Failure to inform/consult on TUPE transfer - £5,200 (viz 13 X a week's pay)
- Failure to provide written particulars of employment - £1,600 (viz 4 X a week's pay)

- *For further information generally click here on Basic facts and figures for 2011 to go to notes on our website.*

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2. What the government giveth (to employers) with one hand...

A consultation to *"improve the way in which workplace disputes are resolved"* was issued on 27th January 2011 by the Department for Business (BIS). It is mainly concerned with cutting the cost of the employment tribunal service so many proposals are of a technical nature, for example allowing employment judges to sit alone in unfair dismissal cases. However some of the proposals are of more direct help to employers:

- to increase the period of employment required to qualify for claiming unfair dismissal from one to two years (although, of course, on its own this may not have much effect as many cases include allegations of unlawful discrimination which do not require any qualification period of employment);
- positive encouragement of ways to prevent employees bringing unmeritorious claims (in particular, there will be a further consultation about requiring a claimant to pay a "court fee" when lodging a tribunal claim);
- introduction of a "payment into court" system (not currently available in employment tribunals) with cost penalties if a claimant wins their case but is awarded a sum lower than the amount paid "into court" by the employer.

Other proposals include that employees should submit any employment law claims to Acas before being allowed to go to an employment tribunal. There would then be a "cooling off" period of up to a month for Acas to attempt pre-claim conciliation. Mediation will be positively encouraged and is proposed that all monetary claims to employment tribunals should include an upfront "statement of loss".

Along with the consultation, BIS issued an "Employer's Charter" to explain that the law is not as one sided as many might believe. The so-called "Charter" is a simple list of "employer rights", explaining that "As an employer – as long as you act fairly and reasonably – you are entitled to…

- ask an employee to take their annual leave at a time that suits your business;
- contact a woman on maternity leave and ask when she plans to return;
- make an employee redundant if your business takes a downward turn;
- ask an employee to take a pay cut;
- withhold pay from an employee when they are on strike;
- ask an employee whether they would be willing to opt-out from the 48 hour limit in the Working Time Regulations;
- reject an employee's request to work flexibly if you have a legitimate business reason;
- talk to your employees about their performance and how they can improve;
- dismiss an employee for poor performance;
- stop providing work to an agency worker (as long as they are not employed by you);
- ask an employee about their future career plans, including retirement.

All well and good, but as the "Charter" sensibly concludes "*...individual circumstances may vary and employers should act in accordance with their legal obligations*". One might add that it would be a foolhardy an employer who exercised these "rights" without thinking carefully about repercussions if he puts a foot wrong. However simple the position may seem to civil servants in Whitehall, it remains prudent for employers to seek proper legal advice even if a proposed action is on the list above.

- *For further information generally click here on Unfair dismissal / qualifying period / normal cases and/or Mediation and ADR to go to notes on our website.*

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3. ...it takes away with the other.

Against the advice of business organisations, the Government confirmed in January that it is to press ahead with plans to abolish, rather than increase, the so-called age 65 "default retirement age". As is well known, under current law an employer can require an employee to retire at age 65 or over without fear of the latter claiming unfair dismissal, provided specified procedures are followed. A valuable benefit of this has been that it enables employers to dismiss employees who are getting stale without the embarrassment of having to tell them they are no longer capable of doing their job to the standard required.

This of course is not just a matter of politeness. Underlying it is the fact that removal of the default retirement age will mean that unfair dismissal claims will be possible whenever an employer requires an employee to take retirement. The inevitable result will be that employers will have to be more cautious than ever as they will run the risk of being required by the retired employee to justify their decision to an outside tribunal, generally on capability grounds, or face a compensation order. In theory, of course, this is fine but in practice it is likely to lead to extra cost and complication (and will do nothing to reduce the number of tribunal claims). Employers may well feel that increasing the "default retirement age" to 66, 67, 68 or even 70, would have gone a fair way towards achieving the Government's desired result with far less undesirable side effects.

The practical point is that any employer seeking to require an employee to retire must give the employee 6 months notice by the end of March 2011 if he is to be able to complete the procedures currently available to avoid any risk of a claim.

While considering unpleasant (for employers) changes in the pipeline, it is worth noting that the consultation document referred to in the immediately preceding item in this newsletter includes a sting in the tail. It proposes that "naughty" employers should be liable to be fined. Specifically it proposes that employment tribunals should have power to "*levy financial penalties on employers found to have breached*..." employment law. The penalties would be payable to the Exchequer rather than to the claimant, *"providing some element of recompense for the costs incurred to the system through the employer's failure to comply with their obligations*" without at the same time providing an incentive for employees to bring speculative claims

- *For further information generally click here on Age discrimination / retirement to go to notes on our website.*

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4. Voluntary workers, interns and employment law rights

Ms X had a position as a specialist volunteer adviser with the Mid-Sussex Citizen's Advice Bureau. Her purpose in seeking the post was to obtain the qualifications and experience to establish her own business as an adviser on welfare law. She was unpaid, was not an employee and was under no legal obligation to attend work but it was anticipated that there would be *"a level of trust and a hope that expectations would be honoured*".

She later brought a disability discrimination claim against the Bureau when she was asked to cease to attend as a volunteer. She lost her case, the critical point being that the relevant law (now in the Equality Act 2010) protects those who come within the definition of employee, defined for the purpose as a person who works pursuant to *"... a contract of employment, a contract of apprenticeship or a contract personally to do work".* It was held that she was not an employee within the very similar definition which applied at the relevant time and further that her role with the CAB did not constitute "occupation" for the purposes of EC Directive 2000/78 (which establishes a general framework for equal treatment in employment and occupation).

She lost on appeal to the EAT and has now lost again on further appeal to the Court of Appeal (X v Mid Sussex CAB and anor, Court of Appeal on 26th January 2011). This was in spite of the fact that the Equality and Human Rights Commission instructed a barrister and intervened in her support - the Christian Institute and the Government also intervened, but in support of the CAB.

The main point, amongst others, was that the Court of Appeal agreed with the CAB that Ms X's role did not count as "occupation" for the purposes of the Directive. Lord Justice Elias said, amongst other things, that:

"it is inconceivable that the draftsman of the Directive would not have dealt specifically with the position of volunteers if the intention had been to include them. Volunteers are extensively employed throughout Europe, and it is unrealistic to believe that they were intended to be covered by concepts of employment and occupation which would not naturally embrace them. The concept of worker has been restricted to persons who are remunerated for what they do".

The ruling is relevant in relation to all forms of discrimination, not just disability discrimination. However the Court of Appeal was careful to point out that on other facts it might have decided differently, saying *"Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law".*

In this connection it is worth noting that in an employment tribunal case in Reading in November 2009 a woman who worked as an intern on expenses only was held to be entitled to be paid the National Minimum Wage. There is no legal definition of an "intern" and the decision was at employment tribunal level so does not amount to a legally binding precedent - but it is interesting nevertheless, especially in view of the fact that graduate and undergraduate internships are quite common practice in Parliamentary circles as a useful source of intelligent unpaid help.

- *For further information generally click here on Voluntary workers and/or Interns to go to notes on our website.*

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5. Bankers bonuses and new FSA rules

During the summer and autumn of 2010 EU officials were working on new rules to place legally enforceable controls on bankers' bonuses to be applied throughout the EU. The result was Directive 2010/76 CRD3 of 24th November 2010

which came into effect from 1st January 2011. In the UK the Directive has been implemented by a new Financial Services Authority Remuneration Code. This is included as "SYSC19A" in a revised edition of the FSA Handbook.

All banks and building societies plus currency and derivative firms are covered - some 2,700 firms in total. There is *"transitional guidance to allow firms within the scope of the present Code up to six months, where necessary, to comply with the requirement to pay at least 50% of variable remuneration in shares or other instruments"*.

The new Code does **not restrict the size of bonuses.** Rather it is simply intended *"to ensure that firms have risk-focused remuneration policies, which are consistent with and promote effective risk management and do not expose them to excessive risk"*. To this end the new rules provide for at least 50% of the amount of a bonus to be in shares rather than cash and for clawback and/or what are commonly called "malus" arrangements to be in force (a 'malus' is a term derived from insurance underwriting - although similar in many ways to a "clawback", under a "malus arrangement" the bonus is calculated and agreed upfront but is not paid unless and until the specified targets are met, whereas under a clawback the bonus is paid but is subject to "claw back" if the specified targets are not met.

Therefore the British rules do **NOT** directly restrict the amounts which can be paid as bonuses, save to the limited extent that "*A firm must ensure that total variable remuneration does not limit the firm's ability to strengthen its capital base*" and that variable remuneration must be based "*principally*" on profits, not turnover.

Not surprisingly Price Waterhouse Coopers' reaction to the new FSA Code, which may be typical of many in the City of London, is headed "It could have been worse". It rather gives the game away by concluding that on balance the new Code will be *"a relief to the UK financial services industry"*. However the Chancellor of the Exchequer is on record as subsequently saying in the House of Commons that he believes the new Code is *"... the most stringent code of practice of any financial centre in the world"* - but perhaps that has to be taken with a pinch of salt given (as was pointed out by an MP in the same debate) that every other EU Member State is required to comply with the same Directive which led to introduction of the FSA's new Code.

To be fair, the Chancellor did go a bit further. In the same debate he said that the government is seeking *"a new settlement with the banks and if we do not agree a new settlement - if they are not able to meet our requirements - then nothing is off the table"*. He also pointed out that recipients of city bonuses pay a lot of tax, saying:

"Two hundred and fifty thousand people or thereabouts are eligible for the 50p rate, which came into effect in April. As I have said, other taxes, too - such as employers' national insurance - are levied on bonuses, and in the Finance Bill, which we have published in draft, we have taken specific measures, on which we will seek to legislate later this year, to deal with some of the avoidance practices in the financial sector that were allowed to proliferate under the previous Government".

- *For further information generally click here on Company Directors / remuneration to go to notes on our website.*

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6. Gold plating EU Directives - and TUPE

From an employment law angle one of the most notorious examples of "gold plating" of EU directives is the provision which ensures that "service provision changes" are covered by the TUPE regulations. The relevant EU Directive does not require this provision.

An example of a "service provision change" would be where a local education authority outsources to a private company the provision of school meals which it previously provided using its own employees. The private company would be obliged under the TUPE regulations to employ the same staff as had been employed by the LEA at the same pay. "Service provision changes" also include in-sourcing (eg where a local education authority takes in-house provision of school meals previously provided by a private company) and changes of contractor (eg where a local education authority moves the contract for providing school meals from one private company to another private company).

The above are public sector examples but the same rules apply in the private sector.

Two things have happened recently which highlight relevant issues.

Firstly the European Court of Justice has held that there is nothing in the Directive to require a Member State to have a rule drafted in the way that the UK chose to draft the particular rule concerned - TUPE 2006 reg 3(1)(b). Señora Valor worked for a Spanish company that had a contract with a government department ("AdeC") for cleaning schools. AdeC cancelled

the contract, deciding to do the cleaning itself. As a result Señora Valor lost her job. She sued, claiming that under the Directive AdeC was obliged to employ her. Not so, ruled the European Court.

The Court held that for the Directive to apply there must be a transfer of an "economic entity" which retains its identity after the change of employer (*CLECE SA v (1) Valor (2) Ayuntamiento de Cobisa CJEC Case C463/09, 20th January 2011*). Whether that condition is fulfilled depends on all the circumstances but where the "economic entity" depends mainly on manpower the Court held that its identity cannot be retained if most employees are not taken on by the alleged transferee employer. Therefore the Directive did not apply.

If the same situation were to arise in the UK the position would be different. The TUPE regulations "gold-plate" the Directive with the result that under British law the equivalent of AdeC would, in all likelihood, have been obliged to employ a Mrs Valor.

Secondly the Coalition Government has recently undertaken to end 'gold-plating' of European Regulations generally. BIS announced shortly before Christmas that *"The key to the new measures will be the principle of copying out the text of European directives directly into UK law"* (given the aspirational wording of some directives this could lead to interesting results). Nonetheless it seems that there is no intention to change the TUPE regulations to remove the anomaly noted above - at any rate in early November the government said that it had no plans to revise the regulations.

- *For further information generally click here on Transfer of business or undertaking / service provision change to go to notes on our website.*

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7. Pensions Bill and the State Pension age

Different State Pension ages for men and women are temporarily allowed under EC/EU rules. The Pensions Act 1995 set out proposals for equalising the age for both men and women at 65, phasing in the change over 10 years from April 2010 to April 2020. A new Government Pensions Bill 2011, introduced in the House of Lords on 12th January 2011, proposes to speed this up. It will bring women's State Pension age into line with men's at 65 by November 2018.

The same Bill review goes on to provide for State Pension age for both men and women to be increased from 65 to 66 by April 2020 (instead of 2026 as under previous proposals).

In both cases the change will be phased in. The Government says that the changes are being made because evidence on life expectancy demonstrates that *"the current timetable is too slow in reacting to increased longevity*" and that they take into account *"the urgent need to stabilise the public finances both in the immediate and longer-term..."*.

Other recent Pension related matters include confirmation that the current rule which, in general terms, requires those with personal pension funds to use their fund to buy an annuity by age 75, is to be scrapped. Draft clauses to effect this change have been published and will be in the next Finance Bill, with a view to being effective from 6th April 2011. There is no proposal to restrict the ability to withdraw a tax free lump sum of up to 25% of the pension fund.

- *For further information generally click here on Pensions / State Pension / age equalisation to go to notes on our website.*

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8. Civil servants redundancy pay

Civil servants are not eligible to receive statutory redundancy pay. Instead they have entitlements under the Civil Service Compensation Scheme (this, of course, covers only civil servants, not local authority and other public sector employees who are eligible for statutory redundancy pay under normal rules).

A year ago, in February 2010, the government attempted to amend the terms of that scheme to reduce the maximum limits on lump sum payments to civil servants whose appointment is terminated prematurely (ie who take compulsory or voluntary redundancy). However after a judicial review instigated by the Public and Commercial Services Union the High Court quashed the government's amendments as unlawful in May 2010.

Following this setback for the government, the Superannuation Act 2010 was passed shortly before Christmas. Along with the Superannuation Act 2010 (Repeal of Limits on Compensation) Order 2010, this changed the law to remove the requirement for there to be union consent to detrimental (to staff) changes to the Civil Service Compensation Scheme. The Act does, however, introduce a requirement that any such change must be the subject of a genuine consultation whose outcome must be reported to Parliament.

The Paymaster General, the Rt Hon Francis Maude MP, then laid before the House of Commons the renegotiated Civil Service Compensation Scheme (Amendment No.2) Scheme 2010 and associated revisions to the Principal Civil Service Pension Scheme. Mr Maude identified the main provisions of the new compensation scheme, which came into effect on 22nd December 2010, as being:

- **voluntary redundancy** - for employees below normal retiring age, compensation will be one month's pay per year of service, up to an absolute maximum of 21 months' pay with a taper for people who are approaching pension age. For employees above normal retiring age, the payment will be one month's pay per year of service, up to a maximum of six months;
- **periods of notice** - the minimum notice period for all staff will be three months;
- **compulsory redundancy** - compensation will be one month's pay per year of service, up to a maximum of 12 months' pay, and all staff will be offered the opportunity to take voluntary redundancy before being made compulsorily redundant;
- **pay thresholds for redundancy payments** - redundancy payments for staff earning less than £23,000 (full-time equivalent) will have their lump sum payments calculated using this figure; those earning more than £149,820 will have their lump sum payments calculated by reference to this figure.

The above terms should be compared with the absolute maximum statutory redundancy pay in the private sector of £12,000 (available to those who have worked for at least 20 years after their 41st birthday, subject of course to better contractual terms if any have been agreed with their employer).

The PCS Union remains unhappy. PCS general secretary Mark Serwotka has implied that his union may take legal action on the basis that the changes infringe the Human Rights of the Union's members. He said in a press release "*We have successfully defended our members' rights in court before and believe we have a very strong case to do so again.*"

- *For further information generally click here on Redundancy / civil servants and public officials to go to notes on our website.*

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9. A warning - compromise agreements

This is a short, non-technical note, by way of warning to those considering settling an employment dispute "out of court" - the subject matter is highly technical and thus not appropriate for a general newsletter of this sort (those who wish to go into the position in detail are recommended to read the practice note of 13th January 2011 on the Law Society's website).

Basic law is that "out of court" settlements of disputes which could be heard by an employment tribunal are not fully binding, even if in writing, unless they comply with very precise rules. Out of court settlements effected with the involvement of an Acas conciliation officer automatically comply with the rules. A "compromise agreement" which complies with strict conditions provides another fully effective method of settling such a dispute.

There is no particular difficulty if a compromise agreement is settling an unfair dismissal or other case under the Employment Rights Act 1996. However there is a problem if the compromise agreement is settling a discrimination, harassment or victimisation case under Equality Act 2010. The problem concerns wording of the relevant section of that Act which is at best ambiguous and at worst plain wrong.

For some unexplained reason the Equality Act 2010 does not use the same wording as that used for several years in other statutes dealing with "compromise agreements". Eminent employment lawyers (notably John Bowers QC and Tom Linden QC) have disagreed about what the new wording actually means. The government appears confident that even though the wording in Equality Act is slightly different from that used previously it has the same meaning as before. However others are not so sure. The most obvious reading of the new wording means it would be impossible to fulfil the essential condition for a fully valid compromise agreement that the employee concerned has been advised by an independent adviser. That result would clearly be absurd and if correct can only be a mistake.

As suggested above, some learned lawyers have found sophisticated ways of interpreting the wording to make it achieve the result which everyone agrees was intended but the fact remains that others disagree. Certainly the wording itself does not on the face of it do what was intended.

Doubtless any court or tribunal would lean over backwards in attempts to interpret it as intended but, pending any decision to that effect or clarification by Parliament by amendment of the wording, the best current advice must be to proceed with great care. Expert advice should be taken before relying on a compromise agreement to settle any dispute under Equality Act 2010.

- *For further information generally click here on Compromise agreements / general position to go to notes on our website.*

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10. New cases and statutes

You can find on our website summaries of all employment law cases reported in the most recent editions of the monthly ICR and IRLR case reports (the two leading series covering recent developments in employment related case law).

You can also find on our website notes on employment law related Acts of Parliament and statutory instruments.

- *For further information generally click here on Industrial Cases Reports (ICR) and IRLR and/or Acts of Parliament etc to go to notes on our website.*

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11. ...and finally

Richard Tremelling, head of technology at a comprehensive School in Swansea, South Wales, was disciplined for allowing two 15 year old students to ride on a sledge in the snow without carrying out an appropriate risk assessment, failing to provide a written risk assessment and failing to ensure they were wearing protective clothing and protective headgear. It seems that some two years later he has been dismissed as a result of the incident.

Unsurprisingly there are some pithy comments on what happened from readers of the Daily Telegraph.

On a related theme, the "Mail on Sunday" recently ran a headline article on the Equality Act 2010. The article concentrates on some of the dottier, non-employment law, consequences of the Act. It makes entertaining reading but it is only fair to point out that a main part of the Act is beneficial in that it effects what has been called "Harmanisation" of anti-discrimination law in the employment field. The Act, the brainchild of former Labour Minister Harriet Harman, repeals, revokes and ingeniously replaces a morass of anti-discrimination laws which had accumulated since 1970.

Other recent matters of interest include:-

- a proposed review of the operation of the Bribery Act , due to come into force in April 2011;
- an employment tribunal case in which a hunt-saboteur is claiming unlawful discrimination on the basis that he was sacked from his job because of his views on animal rights;
- the long delayed start of the first prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007; and
- the (nicely written) recent decision of Judge Rutherford in the Bristol County Court in Hall & Preddy v Mr and Mrs Bull in which the Christian owners of a private hotel were found "guilty" of unlawful direct discrimination by refusing to allow a gay couple who were in a civil partnership to share a double bed. The decision is based on the conclusion that there is no material difference for the purpose of relevant law between marriage and a civil partnership - but the judge pointed out that there "*is little or no direct authority*" on the point and gave the hotel owners permission to appeal.

- *For further information generally click here on Equality Act 2010 to go to notes on our website.*