CIPD Newsletter – November 2011

Focus on … Employment law in 2011 – a brief recap and look ahead

Employment law and practice is ever changing and evolving but this year has seen particularly marked change, in the hands of the coalition government. Even now we are hearing about further changes due to come in for the New Year – scarcely time to catch breath or take stock. Nevertheless; onwards and upwards …

At the beginning of the year we were still seeing some of parts of the Equality Act 2010 coming into force, such as positive action and the new public sector equality duty, whilst other parts were scrapped, such as dual discrimination and gender pay reporting. In the meantime we said goodbye to the default retirement age under the transitional provisions and the Government launched its "Red Tape Challenge" under which it aimed, amongst other things, to reduce the burden of regulation on smaller employers.

We also saw the introduction of additional paternity leave and pay in April, part of the Government's wider strategy of introducing shared parental leave and extending flexible working practices; the Bribery Act 2010, in July; and the introduction of the Agency Worker Regulations 2010 in October, which now give greater rights to agency workers.

It was then announced in October that qualifying periods for unfair dismissal claims would increase to two years with effect from 6 April 2012, but it is not yet clear what transitional provisions will apply. Further, the introduction of Tribunal fees was announced but again we are awaiting further details of these proposals.

In the meantime employment law has been put under the spotlight with rumours about significant changes to unfair dismissal rules, 'protected conversations', and a possible opt-out for the UK from parts of the EU Working Time Directive. Watch this space – anything that can help clear up the current uncertainty with holiday pay and sickness absence will certainly help!

If you want to hear more about the Tribunal and employment law reforms, and keep up-to-date with other changes, come and join us at the branch's New Year Employment Law Update seminars - we have lots of great and varied events planned - click here to see more details and to book. For more information about this seminar and to book your place, please visit the events page at: http://www.cipd.co.uk/branch/nyork/events.

Employment Tribunal Reforms

The Government has announced two proposals for fundamental employment law changes relating to a claimant's ability to bring claims in an Employment Tribunal.

From 1 April 2012 the intention is that the qualifying period for an employee to bring an 'ordinary' unfair dismissal claim will increase from one year to two.

From 1 April 2013, a Claimant wishing to pursue a claim in the Employment Tribunal will be required to pay a fee of £250 to lodge a claim, and a further fee of £1,000 when a hearing is listed. The fees will be higher if the value of the claim exceeds £30,000. In the event that the Claimant is successful, the fees will be refunded; however they will be forfeited if the Claimant is unsuccessful. However, it

has also been announced that Claimants with no money (which is the vast majority, as they have just lost their jobs) will not be required to pay the fee.

Certainly on paper this looks like good news; what we can reasonably expect, though, is for disgruntled employees to focus on bringing claims that do not require a qualifying period, such as discrimination or unfair dismissal for whistleblowing, asserting a statutory right, health and safety or maternity. These claims are usually more complicated and last longer and therefore are more commercially expensive for employers to defend, with the associated discriminator “label” risk. It is also likely, in practical terms, that employees will simply bolster any settlement demands by any outlay making settlement more difficult.

This means the focus must remain on slick, crisp, and timely process with considered decisions being taken. Identifying risk at the outset will remain key to reducing any liability and exposure to litigation.

And some other proposals, which have not been previously leaked/trailed in the newspapers:-

- amendment to s147 of Equality Act 2010, to clarify compromise agreements can be used to settle discrimination claims
- complaints about breach of employment contract to be taken out of whistleblowing law
- financial penalties to be introduced on employers who breach employment rights, payable to the Exchequer, subject to a discretion exercisable by Employment Judges
- Employment Judges to sit alone in unfair dismissal cases
- CRB checks to be portable, so no need for a fresh application when moving jobs
- maternity and paternity leave to be 'modernised', with emphasis on greater involvement for fathers

Watch this space …

<u>Protected Conversations</u>

So you’ve all heard of the “without prejudice” conversation?

The government has announced a consultation programme to provide a greater framework around what it is describing as “Protected Conversations”, suggesting that employers should be able to hold "protected conversations" with staff about poor performance without them being used in future employment tribunal claims. Business Secretary Vince Cable said he wanted to help firms expand without making existing staff feel insecure, thereby reducing “unnecessary bureaucracy” without reducing individuals’ rights.

The key points include:

- a consultation on "protected conversations", which would allow employers to have frank discussions about poor performance with workers without fear that they could be used as evidence in a tribunal
- a "call for evidence" on the length of time required for a consultation period on planned redundancies. It is currently 90 days, but the government is considering reducing that to 30

- a requirement for all claims to go to the conciliation service ACAS before reaching employment tribunal
- options for a "rapid resolution scheme" for more simple cases to be settled within three months

The number of cases going to employment tribunal has risen by 40% in the past three years. Some 218,000 claims were received by employment tribunals last year.

Is this a return to what used to be known as "old fashioned industrial relations" when an arm was placed around the shoulder and by the time a walk around the block had finished an employee had chosen to resign? That's what some commentators are suggesting but there is concern that the practicalities of this will be difficult with individuals still potentially claiming constructive dismissal, or discrimination on the back of such conversations. Certainly this is going to be an interesting topic to watch.

<u>National Minimum Wage increases</u>

From 1 October 2011

Adults

£6.08 (previously £5.93)

18-20 year olds

£4.98 (previously £4.92)

16-17 year olds

£3.68 (previously £3.64)

Apprentices

£2.60 (previously £2.50)

<u>Recent Interesting Decisions</u>

What amounts to a reasonable adjustment?

This question is often asked, and the nebulous answer of "whatever is reasonable" is rarely is a satisfactory response. Case law varies with the weather and for larger businesses, often the weather is stormy!

In a recent decision, the Employment Appeal Tribunal confirmed that the Employment Tribunal (ET) is not required to compare on the one hand the disadvantage caused to the employee if adjustments are not made with, on the other hand, the cost of making them. All the ET can do is assess what adjustment would be right, just and reasonable in all the circumstances of the case. Whether there is breach of the duty to make adjustments will depend on whether a particular adjustment is "reasonable". This is an assessment which is very much fact-sensitive. The Equality and Human Rights Commission's Statutory Code of Practice sets out factors to be considered by an employer

when making reasonable adjustments. The factors to be considered include the effectiveness and practicality of any adjustment, the cost of and disruption caused by any adjustment, the resources available to the employer, the availability of outside assistance and the nature/size of the employer's business. The test of whether an adjustment is 'reasonable' or not is an objective one and employers should discuss proposed adjustments with the employee concerned and should consider whether medical advice is also required on adjustments.

TUPE: were post-transfer changes to terms connected with the transfer?

In the case of *Enterprise Managed Services Ltd v Dance & others* the EAT considered whether employees who were dismissed because they did not agree to changes to their terms of employment after a TUPE transfer were dismissed for a reason connected with the transfer.

Enterprise Managed Services Ltd (EMS) provided appliance maintenance services and Williams provided building maintenance services to Modern Housing Solutions (MHS) under separate services contracts. MHS informed EMS and Williams that, on the expiry of their current contracts, a single contract for appliance and building maintenance services would be awarded and the successful contractor would need to provide the services at a reduced cost with improved service delivery, efficiency and productivity.

In January 2009 (prior to the expiry of its contract with MHS), EMS reviewed the terms of employment of its appliance maintenance engineers working on the MHS contract (EMS engineers) and proposed the introduction of performance-related pay and different hours. After consultation, the changes were agreed. Williams did not change the terms of its building maintenance engineers working on the MHS contract (Williams engineers).

EMS was awarded the contract for appliance and building maintenance services. On 24 April 2009, the Williams engineers transferred to EMS under TUPE. After the transfer, EMS decided that it would not be able to meet MHS' productivity requirements without the introduction of performance-related pay for the Williams engineers. Around 20 of the Williams engineers did not accept the changes and were dismissed. They complained to an employment tribunal that they had been automatically unfairly dismissed for a reason connected with the transfer. EMS argued that the dismissals were for "sound business reasons" and were not connected with the transfer.

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE) any dismissal of an employee either before or after a relevant transfer will be automatically unfair where the sole or principal reason for the dismissal is either:

- The transfer itself; or
- A reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce (an ETO reason).

Whether a dismissal is connected with the transfer is a question of fact. It will be for the employer to prove that there is no connection between the two events.

Whilst sending the case back to an ET for further consideration, the EAT gave useful guidance when it concluded that the essential question to be answered was: what was the reason in the minds of

the management of EMS for proposing changes to the terms of the Williams engineers and for dismissing those who refused to accept the varied terms?

In another useful decision on a similar issue the EAT upheld a tribunal's decision that the consensual variation of the contractual rates of pay of a number of employees, following the transfer of their employment under TUPE 2006, was not void because it was not by reason of the transfer or for a reason connected with the transfer. The rates had been changed because the transferee believed that the existing rates were a "mistake", in that they did not reflect standard practice. This was not a reason connected with the transfer, and the fact that the change would not have happened "but for" the transfer was not enough to bring the case within regulation 4(4) of TUPE 2006.

Nevertheless, the significant risk with variations to contract post-transfer, even where consensual, is that if they are transfer-related, they are potentially void. As such, whilst this trend in case law is encouraging, the decisions are very fact specific. Often it will be a judgment call for the Tribunal to determine what the reason behind the decision was. There is some discussion on removing the “gold-plating” provided by TUPE 2006 with regard to terms and conditions but until the law has changed and the case law is clear, it will always be wise to continue to approach post-transfer variations to terms and conditions with extreme caution.

And finally …

In 2004, 16 violinists in the city of Bonn, Germany, brought a claim for a pay rise based upon productivity. Their assertion … that they played more notes per concert than their colleagues and therefore worked much harder.

The violinists eventually changed their tune and dropped their claims!

Quote of the month …

“There is a saying: yesterday is history, tomorrow is a mystery, but today is a gift. That is why it is called ‘the present.’" – *Oogway to Po, Kung Fu Panda*

If you have any ideas for what you would like to see in this quarterly newsletter, get in touch with Nick Sheppard, Branch Communications