MAYER · BROWN

Employment Legal Update

Summer 2008

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Summertime and the living is easy?

Welcome to our Summer issue.

The pace of new legislation has slowed from its recent peak. Instead, existing legislation is now being tinkered with. From immigration to sex discrimination, data protection to dispute resolution, as always, there are changes afoot.

Many employers will be relieved to hear that after years of uncertainty, Ministers in Europe have recently reached an agreement to allow the UK to retain the opt-out to the 48 hour limit on weekly working time under the Working Time Regulations.

The gain in flexibility this gives may be offset by the announcement that the Government has agreed a deal between unions and employers which will entitle agency workers to equal treatment once they have been employed for 12 weeks. Draft legislation is expected on this in the coming months.

While some issues come and, in the case of the statutory dispute resolution procedures, fortunately also go, issues surrounding pregnancy and maternity leave remain centre stage. Our article in this issue looks at some of the tricky questions that routinely arise. These include bonuses, pay rises and redundancy. Our Asian and European colleagues have also contributed a brief guide to maternity rights in their countries. Unsurprisingly, these are very varied.

Our regular employment dilemmas column looks at what to do when a sales person has left with clients' contact details and the implications of needing to recruit for roles which have recently been made redundant.

Finally, one of our case reports in this issue considers whether the provision of flexible benefits is unlawful under the age discrimination legislation. In this case, one element of the package was private medical insurance where premiums were calculated according to the employee's age. The provision of insurance benefits was an issue which concerned many employers when the age discrimination legislation was introduced nearly two years ago and this case provides useful guidance.

Another issue which had a high profile at that time was the UK government's inclusion of a retirement age of 65 in the age discrimination regulations. As we have reported before, this issue is being challenged in the European Court of Justice by Heyday, part of Age Concern, on the basis that it breaches the EU Equal Treatment Directive. The hearing started on 2 July and it is expected that the judgement will be available late 2008/early 2009.

News

Working time opt-out secure

Ministers in Europe have recently reached an agreement to allow the UK to retain the opt-out to the 48 hour limit on weekly working time under the Working Time Regulations. This has been under discussion for a number of years and has been agreed as part of a deal also covering protection of agency workers (see below). Although the opt-out will be retained, it is proposed that there will be a cap of 60 hours per week for those who have opted-out. Workers will also be required to renew their opt-out after a year, otherwise it will lapse.

In addition, on call time will be reclassified into active and inactive on call time. Active on call time will continue to count as working time. Inactive time will not count as working time or as rest time. This change is to deal with the fall out from the on call cases where time spent asleep but on call was deemed to be working time.

It is not yet clear when these changes will come into effect.

ACAS Code of Practice on disciplinary and grievance procedures

In anticipation of the abolition of the statutory dispute resolution procedures in April 2009, ACAS have published a first draft of its new Code of Practice on discipline and grievance. The consultation closes on 25 July 2008.

The draft Code of Practice is principles based and encourages informal steps to resolve disputes before any formal action is taken. It effectively takes dispute resolution back to the position in 2004 before the statutory procedures were introduced.

Although the formal procedures will disappear, tribunals will be able to adjust any compensation by up to 25% for unreasonable failure to comply with the Code. Although not expressly stated, the implication is that an employee's award could be adjusted downwards if they have unreasonably failed to comply with the Code. The important thing to note is that it is only unreasonable failures to comply with the Code that may lead to an adjustment in compensation.

It is hoped that when the changes come in there will be a move away from the current approach to dispute resolution which has been heavily criticised for being overly procedural.

A copy of the draft Code of Practice is available at:
http://www.acas.org.uk/CHttpHandler.ashx?id=880&p=0.

Changes to workplace dispute resolution

In addition to the new draft ACAS Code of Practice on discipline and grievance, the Government is proposing a number of other measures aimed at improving workplace dispute resolution. These include:

- The abolition, from 1 April 2008, of fixed conciliation periods. ACAS will now be able to conciliate for the duration of a tribunal claim;
- Consultation on a 'fast track' procedure for simple monetary claims. This will allow claims for holiday pay, national minimum wage, breach of contract and redundancy pay to be determined without a hearing in certain circumstances; and
- Consultation on a new simplified ET1 form.

Immigration checks following TUPE transfers

The Home Office has recently confirmed that buyers can rely on a seller's immigration checks following a TUPE transfer. There had been confusion on this issue, as following the introduction of the new immigration offences in February this year, the Border and Immigration Authority had issued guidance which stated that buyers had a 28 day grace period to carry out post-transfer immigration checks on all transferring employees. This guidance appeared to contradict the Transfer Regulations which state that anything done by a transferor prior to transfer is deemed to have been done by the transferee.

Transferee employers will still need to conduct appropriate due diligence to ensure that the seller's immigration checks are complete and accurate but this recent guidance means they will not need to repeat checks on every individual.

Provision of employee information on a TUPE transfer

The Information Commissioner has recently issued guidance confirming that the provision of employee liability information by a seller to a buyer on business sales is not a breach of the Data Protection Act. This is because the provision of certain information about employees, known as "employee liability information" is required by the Transfer Regulations (Regulation 11).

Sellers requested to provide a wider range of information should continue to be alert to data protection issues and consider anonymising data or obtaining employee consent.

New immigration scheme for skilled workers

As part of the five year strategy for immigration, the Home Office has published its proposals for the new points-based system for skilled workers. The introduction of Tier 2 which replaces the work permit scheme is planned for Autumn 2008.

Once Tier 2 comes into operation, employers will need a licence issued by the UK Border Agency to offer jobs to skilled workers. Licensed employers will be able to issue a foreign worker with a Certificate of Sponsorship, if it can show that the skilled role could not be filled from the resident workforce. Employers will need to have advertised the position for a minimum of two weeks before being able to issue the certificate. There are exceptions for intra-company transfers and shortage occupations. Employees will also need to have attained a certain number of points for qualifications, earnings and English skills.

The new system has been designed to make it easier for employers to hire foreign nationals as it removes the lengthy work permit application process. However, it also puts a far greater responsibility on employers to conduct relevant checks, keep accurate and up to date records and report any changes in migrant workers' circumstances. Employers who fail to do so risk having their licence downgraded or even revoked completely.

As a result of the increased responsibility on employers, coupled with the new criminal and civil penalties which came in on 29 February 2008, employers are advised to have a dedicated and trained member of their HR team to deal with all their immigration needs and duties.

U.S. immigration still possible, but more difficult

Following the collapse of efforts to reform U.S. immigration policy, U.S. immigration authorities have markedly stepped up enforcement of U.S. immigration laws against illegal workers and their employers.

The ability of U.S. employers to hire non-U.S. professional workers, and for non-U.S. companies to send key employees to the U.S., has generally become more difficult. The backlog for U.S. permanent residence ("green cards") has continued to lengthen, so that qualified workers may now have to wait years to finalise the process. The demand for professional (H-1B) visas has continued to grow without any increase in the annual quota. In April 2008, 142,000 petitions were filed for 65,000 slots. Disappointed employers will not be able to hire H-1B workers again until October 2009.

Employers might have expected that intra-company transfers from a UK or other European business to an affiliated U.S. entity would be unaffected by these pressures, since those visas are not subject to a quota. Yet even these applicants have recently

been subjected to a higher level of scrutiny of their visa petitions by U.S. immigration authorities. Some of the requests have been particularly onerous, such as requiring certified bylaws of publicly traded companies, and asking for an organisational chart for all levels of a company with 60,000 employees.

The prospect for changes to U.S. immigration policy remains high. In the short term any changes will be incremental, while larger reform is unlikely before late 2009 following the U.S. elections this Autumn. In the meantime, companies wishing to hire or send non-U.S. personnel to the U.S. will need to be creative and will need to ensure their submissions to U.S. immigration authorities are well-prepared.

This News item was produced by Allen Erenbaum, Partner in our Los Angeles office.

Data protection - new financial penalties for breaches

Employers who breach their data protection responsibilities risk fines in future. The Criminal Justice and Immigration Act 2008 has given the Information Commissioner new powers to impose fines on organisations that breach their data protection obligations. In future a fine can be imposed if there has been a serious contravention of one of the data protection principles and the contravention was likely to cause substantial damage or distress. This is in response to the recent spate of high profile information security breaches.

The Act also introduces custodial sentences of up to two years for those who unlawfully trade or disclose personal data. This is aimed at stamping out illegal trading in personal data.

A date has not yet been set for these new provisions to become law and some of the detail is still to be fleshed out. However, employers should take advantage of this early warning to check their data protection practices and policies.

Increased rights for agency workers

The Government has recently agreed a deal with unions and employer groups which will entitle agency workers to equal treatment once they have been employed for 12 weeks. This means agency workers will be entitled to at least the same basic working and employment conditions as employees that have been recruited directly for the same job. It will not cover occupational social security schemes, which we understand to mean statutory sick pay and pension.

The deal has paved the way for a new Agency Workers Directive in Europe which was announced shortly afterwards. It is understood that it had been agreed as part of a package to enable the UK to retain the working time opt-out. Although a timeframe has not been fixed, it is anticipated that legislation on agency workers will be implemented in 2010.

Extension of flexible working rights

The Government intends to extend the right to request flexible working arrangements to parents of children up to the age of 16. It currently only applies to parents with a child under six or a disabled child under 18. It has been recommended that rather than being phased in gradually, the extension should be introduced in one hit. The Government has accepted the recommendations and plans to consult on how they should be implemented.

New guidance issued on pregnancy and work

As set out in detail in the Spring 2008 Update, various changes were introduced to the Sex Discrimination Act, which took effect in April 2008. Consequently, the DBERR has updated and published its guidance on maternity entitlements and responsibilities.

The guidance can be viewed at the following link:
http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page34031.html.

Illegal contracts

If a contract is illegal it is against public policy to allow an unfair dismissal claim to go ahead. The issue of illegality often arises in relation to the immigration or tax status of an employee.

A recent Court of Appeal decision has narrowed the definition of an illegal contract. It decided that the contracts of two employees who had previously been treated as self-employed were not illegal. A contract of employment will only be void for illegality where it is proven that the employee misrepresented the facts of their employment relationship to HMRC. Even though the employees had benefited from the tax advantage of being self employed, in the absence of any active misrepresentation to HMRC it did not, in this case, prevent them from later claiming the advantages of being employed.

This is a much narrower interpretation of illegality and means that it will, in future, be harder for employers to succeed with an illegality argument in similar circumstances (*Enfield Technical Services v Payne and BF Components v Grace*).

Part-time workers and overtime

Employers who require part-time workers to work unpaid overtime, may be at risk of claims if the proportion of women who work part-time is greater than proportion of men and the practice can not be objectively justified.

A decision of the European Court at the end of last year (*Voss v Land Berlin*), found that an employee who normally worked 23 hours per week and 3.5 hours unpaid overtime, was paid less for her total hours than a full-time worker who worked 26.5 hours.

Employers should review their overtime schemes in light of this decision.

Changes to employment terms do not necessarily amount to a redundancy

In a recent case, the EAT confirmed that even significant changes in the terms and conditions of employment, do not necessarily amount to a redundancy situation. However, it also went on to say that this is not a general rule and whether or not the change can amount to a redundancy can only be determined on a case-by-case basis.

In this case, the employer dismissed the employees when they could not agree changes to their terms and conditions and offered to re-engage them on new terms. The dismissed employees argued that the changes were so significant that they amounted to a redundancy situation. Despite agreeing that the changes were considerable, the Tribunal did not accept that they resulted in redundancy.

The EAT upheld the decision. It was a question of fact for a tribunal to decide if the changes in the nature and quality of the role were sufficient enough to amount to work of a different kind from the role that employees had previously undertaken. Here the employees were still selling financial services, they were merely performing the role in a different way including spending significantly more time on selling (*Martland v Co-operative Insurance Society*).

The joy of sport

The 2008 Olympics open in Beijing on 8 August. Although the time difference means many events will be televised here in the early morning, this still has the potential to cause a headache for employers with short term absenteeism.

For tips on how to handle the summer sporting season see the article in our Summer 2004 issue: http://www.mayerbrown.com/london/article.asp?id=1432&nid=1569.

When is a grievance not a grievance?

In a recent EAT case, it was decided that an informal written complaint by an employee was a grievance under the statutory grievance procedure (SGP). This was despite the fact that the employee's letter expressly stated that it should not be treated as a formal grievance under the statutory procedure.

The case arose because the employee subsequently brought a tribunal claim. The employer argued that it could not be heard because the employee had not brought a grievance under the statutory procedures.

The EAT disagreed. The letter satisfied the requirements for a grievance under the SGP. How the employee labelled it was not relevant. The employer was concerned that, if the employee's claim was successful, it would be unfairly penalised by an uplift in compensation for failure to follow the procedures. However, the EAT made it clear that although tribunals have a discretion to award an uplift in compensation for failure to follow an SGP, it is not mandatory. The fact that the employee expressly stated that he did not want the complaint treated as a grievance would be a relevant factor.

The statutory grievance procedures are due to be abolished next Spring. The new dispute resolution procedures are expected to be less procedural and more principles-based. It is hoped that these type of situations will therefore not arise in the future.

In the meantime, this case should not, in our view, change an employer's approach to dealing with informal complaints. Employers should be alert to the fact that, if in writing, a complaint is very likely to satisfy the criteria for being a statutory grievance. As this case shows, this is even the case if the employee expressly states that they do not want it to be.

Employers should, as before, balance the risks and costs of unnecessarily elevating a complaint to a formal grievance against the risk that the employee subsequently brings a claim. However, regardless of whether a complaint is formal or informal, it should still be dealt with. A meeting should take place, the outcome should be documented and the employee offered a further meeting (or the formal process) if still unhappy. Provided this is done, grounds for an uplift in any subsequent compensation should be limited (*Procek v Oakford Farms).*

Features

Labour Pains

By Ann Robson, an Associate in the London Employment Group

Questions surrounding maternity leave continue to be a key issue for employers. More legislative changes take effect in October and later this year the EAT will consider a sex discrimination claim concerning the right of an employee to return to her existing client base after maternity leave (*Tofeji v BNP Paribas*). Below are some questions which arise on a regular basis and raise some of the more difficult issues.

PAY RISES DURING MATERNITY LEAVE

The pay to which a woman is entitled whilst on maternity leave is governed by her contract of employment, or if silent, by the regulations governing Statutory Maternity Pay (SMP). These provide for a payment of 90% of the employee's normal weekly earnings for the first six weeks of maternity leave and the statutory "prescribed rate" for the remaining 33 weeks, currently £117.18. Normal weekly earnings are the employee's average earnings during the eight week period ending with the qualifying week (the 15th week before the expected week of childbirth).

If a pay rise is awarded after the start of the eight week reference period and before the end of the statutory maternity leave, this pay rise must be taken into account in calculating the normal weekly earnings for the purposes of SMP as if the pay rise had taken effect at the start of the reference period. Even if a pay rise is awarded in the last week of the employee's maternity leave, by which time she may no longer be receiving SMP, the employee's entitlement from day one will have to be recalculated and a top-up payment made.

There is a risk in anticipating a pay rise and including it in the initial SMP calculation. The employee could resign before the day when the pay rise would take effect, leaving the employer with an overpayment of SMP, and a liability for a repayment to HMRC. Therefore, it is safest to recalculate the SMP once the pay rise has been given and send the employee a top-up payment at that time by way of a lump sum. The top up payment should not be left until the employee returns to work.

The requirement to backdate pay rises does not necessarily apply to contractual maternity pay in excess of SMP. Employers should check their maternity policies as the way in which the contractual maternity pay is calculated will be relevant. If it is simply expressed as the pay which the employee would have received had she not been on leave, then backdating is arguably not necessary. This position will be strengthened if the policy expressly provides that pay rises will only be applied to maternity pay from the date of the rise.

IF AN ANNUAL BONUS PAYMENT WOULD NORMALLY BE MADE DURING THE EIGHT WEEK REFERENCE PERIOD, DOES THIS HAVE TO BE TAKEN INTO ACCOUNT IN CALCULATING SMP?

The payment of an annual bonus during the eight week reference period would provide the employee with an SMP windfall in that the annual bonus would significantly increase the normal weekly earnings figure over the reference period. There is a good argument for saying that an annual bonus is not normal weekly earnings. The SMP Regulations do not define normal weekly earnings but do make it clear that SMP is intended to provide an employee on maternity leave with a weekly income based on what that they would have received, if they had been at work. Including an annual bonus in the figure for the reference period would significantly inflate the amount of SMP, which will give an employee a windfall. A sensible option in our view, where bonuses fall due in the reference period, is to pro-rate the annual bonus payment when calculating SMP so that someone on maternity leave will receive eight weeks' worth of this payment in making the SMP calculation.

Employers who provide maternity pay in excess of SMP will again need to check their scheme to determine whether a bonus will have to be included in calculating contractual maternity pay. It is not unusual for a contract to provide for employees on maternity leave to receive their "normal weekly salary" in full for a period of time and half of that salary for a further period. When drafting schemes, it is important to make it clear what the definition of "normal weekly salary" means and to state that it does not include any incentive or bonus payment, if that is the intention.

HMRC has recently issued guidance on the effect of salary sacrifice schemes on the calculation of SMP payable. A common such scheme is childcare vouchers, where the employee agrees to accept a reduction in salary in exchange for vouchers. The guidance is available at: www.hmrc.gov.uk/employers/sml-salary-sacrifice.pdf.

DO EMPLOYERS HAVE TO PAY A BONUS TO SOMEBODY ON MATERNITY LEAVE?

If the bonus is for work done prior to the maternity leave commencing, it must be paid in full. A pro-rata deduction can be made, however, if the bonus is paid to reflect work done which includes a period when the employee is on maternity leave. The pro-rata deduction must not include time during which the employee is legally prohibited from work, which is the two week compulsory maternity leave period following childbirth.

If the bonus is a contractual one, the employer must take care to avoid any claim under the Equal Pay Act if it decides not to pay the bonus or pro-rates it. The Court's interpretation of a contractual bonus is a very wide one and includes any bonus "regulated" by the contract even if the contract refers to the bonus as discretionary. In practice, employers should include a provision in their bonus scheme or maternity policy for the pro-rata apportionment of any bonus to employees on maternity leave.

If the bonus is truly discretionary, for example an adhoc decision by the employer to make a bonus payment to incentivise employees for future performance, the employer may need to defend their decision under the Sex Discrimination Act.

IF A REDUNDANCY SITUATION ARISES WHILST AN EMPLOYEE IS ON MATERNITY LEAVE, IS THAT EMPLOYEE ENTITLED TO PRIORITY TREATMENT?

In this situation the employee enjoys special protection in relation to suitable alternative vacancies. These vacancies should be offered in preference to any other employee who is similarly affected by the redundancy situation but who is not absent on maternity leave. This mandatory requirement extends to vacancies within an associated employer or a successor company. If an employer has a suitable vacancy but does not offer it to the employee on maternity leave, any subsequent dismissal of her would be automatically unfair if the sole or principal reason for the dismissal was redundancy. It is worth remembering that this right does not apply to a pregnant employee who has not yet started maternity leave.

Provided employers take note of the right of first refusal to alternative roles, an employee on maternity leave or a pregnant employee can be dismissed on the grounds of redundancy, although particular care must be taken to ensure that she is properly selected and consulted and given the correct notice. Employers should always take special care when selecting a pregnant employee or an employee on maternity leave for redundancy to ensure that the reasons for selecting her in preference to other comparable employees have nothing to do with her pregnancy/maternity leave. If they did, then the dismissal would be automatically unfair and the employee would be able to claim unlawful sex discrimination.

DOES AN EMPLOYEE ACCRUE HOLIDAY DURING ADDITIONAL MATERNITY LEAVE (AML)?

During ordinary maternity leave (OML), all contractual terms continue so annual leave continues to accrue at the contractual rate. Annual leave does not currently accrue during AML unless the contract specifically provides otherwise. However, future changes to the SDA mean that women whose expected week of childbirth falls on or after 5 October 2008 will have the right to the same terms and conditions during AML as they currently enjoy during OML. This means that employees will, in future, accrue contractual holiday during the entire maternity period.

This change also means that employers will be required by law to provide other fringe benefits such as health insurance, company cars and gym membership during both OML and AML in future. In reality, many employers already provide these benefits during AML as the administrative burden of withdrawing benefits for this period is often prohibitive. However, this will now be required by law and employers should check their maternity policies to ensure they comply.

Maternity Rights – A European and Asian perspective

Maternity rights around the world vary significantly. The country by country guide below gives a brief summary of the key issues. It is not intended to be comprehensive, and specific advice should always be obtained.

In this edition for the first time, we are pleased to include an Asian perspective from our colleague, Duncan Abate at Mayer Brown JSM in Hong Kong. Mayer Brown combined with Asian law firm JSM (formerly Johnson Stokes & Master) earlier this year. JSM is one of the leading law firms in the world's fastest growing legal market and has offices in Hong Kong, mainland China, Thailand and Vietnam. They are recognised as market leaders in employment law, so we are especially pleased to welcome them as they enhance considerably our international capabilities in Asia.

If any of our readers would like an introduction to either our Asian or European colleagues, they should speak to their regular contact in the Group.

Maternity rights – Hong Kong

By Duncan Abate, Partner at Mayer Brown JSM in Hong Kong

WHAT MATERNITY LEAVE ARE EMPLOYEES ENTITLED TO?

Employees are entitled to 10 weeks maternity leave. For employees who have the requisite service, and who have satisfied the notification and certification requirements, this is paid. Otherwise, it is unpaid.

With the agreement of her employer, a pregnant employee may decide on the date of commencement of her maternity leave provided that it is between two and four weeks before the expected date of delivery.

Maternity leave may be extended on the grounds of illness or disability related to the pregnancy or birth.

WHAT IS STATUTORY MATERNITY PAY ENTITLEMENT?

For eligible employees the daily rate of maternity pay is a sum equivalent to 80% of the average daily wages earned by the employee in the 12-month period before the start of the maternity leave. If an employee is employed for less than 12 months, the calculation is based on the shortened period.

Hong Kong employers usually follow the statutory maternity leave requirement. Larger employers may pay full pay for the leave period rather than 80%.

WHAT RIGHTS AND OBLIGATIONS CONTINUE DURING MATERNITY LEAVE?

An employee will be entitled to employment protection during maternity leave. After a pregnant employee has served notice of pregnancy on her employer, her contract of employment cannot be terminated from that date until the end of her maternity leave or the date of cessation of pregnancy (otherwise than by reason of birth).

Employers are, however, entitled to terminate a pregnant employee's contract during the first 12 weeks of a probation period for reasons other than pregnancy. Employers may also terminate a pregnant employee's contract for reasons permitting summary dismissal.

Where an employee serves notice of her pregnancy after being informed of the termination of her contract, the employer must withdraw the notice of termination.

WHAT ARE AN EMPLOYEE'S RIGHTS ON RETURN TO WORK?

The employee is protected from discrimination due to her pregnancy or having a dependant child. Therefore a mother cannot be treated less favourably due to her maternity leave. This does not necessarily amount to a right to return to the same job on the same salary once their maternity leave has ended. However, for practical purposes, it may have a similar effect.

IS THERE A RIGHT TO STATUTORY PATERNITY LEAVE? IF SO, HOW LONG IS IT AND IS IT PAID?

There is no statutory entitlement to paternity leave.

Maternity rights – France

By Lionel Paraire, Associate in our Paris office

WHAT MATERNITY LEAVE ARE EMPLOYEES ENTITLED TO?

Employees pregnant with their first or second child are entitled to 16 weeks maternity leave. Leave begins six weeks prior to the expected date of delivery and ends 10 weeks after the birth.

Employees pregnant with their third or subsequent child are entitled to 26 weeks maternity leave. Leave begins eight weeks prior to the expected date of delivery and ends 18 weeks after the birth.

Maternity leave is extended in certain circumstances including multiple births.

WHAT IS STATUTORY MATERNITY PAY ENTITLEMENT?

During maternity leave, the employee receives a daily allowance paid by the social security system. The employer is not required to pay the employee's wages during maternity leave. However, numerous collective bargaining agreements provide that the employer must pay the difference between the employee's usual remuneration and the statutory daily allowances.

WHAT RIGHTS AND OBLIGATIONS CONTINUE DURING MATERNITY LEAVE?

The effect of maternity leave is to suspend the employment contract. However, maternity leave is treated as a period of actual work for the calculation of paid holiday and for the determination of the rights related to seniority (including optional and mandatory profit-sharing).

An employee who is pregnant or is on, or has recently finished, maternity leave is entitled to special protection against dismissal as follows:

- During pregnancy and maternity leave the employee cannot be dismissed or be given notice of dismissal.
- For four weeks after the expiry of the maternity leave, the employer is not entitled to dismiss the employee, except for gross misconduct (not related to pregnancy), or if it is impossible for the employer to maintain the contract (for a reason other than pregnancy).

WHAT ARE AN EMPLOYEE'S RIGHTS ON RETURN TO WORK?

Following maternity leave, an employee is entitled to return to her original position or a similar position on the same remuneration.

The employee should also receive any individual or collective pay rises which were awarded during her maternity leave.

IS THERE A RIGHT TO STATUTORY PATERNITY LEAVE? IF SO, HOW LONG IS IT AND IS IT PAID?

A working father is entitled to three days leave on the birth of a child. They are also entitled to 11 consecutive calendar days of leave. These 11 days need not be taken immediately after the birth, but must be taken within four months.

As for maternity leave, during paternity leave the employee receives a daily allowance paid by the state. The employer is not required to pay any difference between this and the employee's wages unless there is a specific provision in an applicable collective bargaining agreement.

Maternity rights – Germany

By Annette Knoth, Counsel in our Frankfurt office

WHAT MATERNITY LEAVE ARE EMPLOYEES ENTITLED TO?

Employees are entitled to 14 weeks maternity leave. Leave begins six weeks before the expected date of delivery and ends eight weeks after the birth.

WHAT IS STATUTORY MATERNITY PAY ENTITLEMENT?

Women on maternity leave receive their full salary. Health insurance or the Federal Social Insurance Authority pays a maximum amount of 13 Euros per day and if the employee's average net wage for the three months before maternity leave is more than this, the employer is required to make up the difference.

Some larger employers grant their employees additional maternity benefits and other social benefits to support the family. However, this is not common practice.

WHAT RIGHTS AND OBLIGATIONS CONTINUE DURING MATERNITY LEAVE?

Maternity leave does not interrupt or end the employment relationship, but the obligation to perform services is temporarily suspended.

Maternity leave does not affect holiday entitlement or any other benefits granted by the employer. Women on maternity leave remain protected by statutory social insurance (including health insurance).

Employees are protected from dismissal while pregnant and up to eight weeks after the birth. This is extended if the mother then takes parental leave as both parents are protected against dismissal during parental leave.

WHAT ARE AN EMPLOYEE'S RIGHTS ON RETURN TO WORK?

Following maternity leave, an employee is entitled to return to her original position with the same salary and seniority.

IS THERE A RIGHT TO STATUTORY PATERNITY LEAVE? IF SO, HOW LONG IS IT AND IS IT PAID?

There is no specific paternity leave but all parents (men and women) have the statutory right to parental leave until the child is three. The maximum parental leave is three years shared between both parents and can be taken at the same time or consecutively.

Statutory parental benefit is paid for the first 12 months of a child's life (i.e. not for the full parental leave period). Parents may receive the statutory parental benefit for 14 months if both parents jointly take parental leave (this is to encourage men to take parental leave as well). The monthly payment is 67% of the average net income of the entitled parent subject to a minimum of €300 and a maximum of €1,800.

Employers do not pay the parental benefit and are not required to make up any shortfall between statutory parental benefit and the employee's usual salary.

During parental leave, the employment relationship continues but the obligation to perform services is suspended. Employees returning to work from parental leave have the right to return to an equivalent, but not necessarily the same, position.

Maternity rights – Italy

By Marco Musella, Associate and Andrea Patrizi, Partner at our associated firm Tonucci & Partners, Italy

WHAT MATERNITY LEAVE ARE EMPLOYEES ENTITLED TO?

Employees are entitled to five months' mandatory maternity leave (*Astensione Obbligatoria*). Leave begins two months before the birth and ends three months after the birth. Maternity leave may be brought forward or extended if there are relevant medical reasons or health and safety issues.

Employees may elect to take up to six months additional maternity leave (*Astensione Facoltativa*).

WHAT IS STATUTORY MATERNITY PAY ENTITLEMENT?

During the period of mandatory maternity leave, employees are entitled to receive 80% of their average daily salary earned in the month immediately before maternity leave. During the period of additional maternity leave, employees are entitled to receive 30% of their average daily salary earned in the month immediately before maternity leave.

Maternity pay is usually paid in advance by the employer and then refunded by the National Social Insurance Institute (INPS). Collective bargaining agreements often provide that the employer must pay the difference between the employee's usual salary and statutory maternity pay.

WHAT RIGHTS AND OBLIGATIONS CONTINUE DURING MATERNITY LEAVE?

The entire maternity leave period is treated as an actual period of work for determining rights related to seniority. However, holiday leave does not accrue during additional maternity leave.

Employers cannot dismiss an employee from the beginning of their pregnancy until one year after the birth. There are limited exceptions to this, for example summary dismissal for gross misconduct.

WHAT ARE AN EMPLOYEE'S RIGHTS ON RETURN TO WORK?

Following maternity leave, an employee is entitled to return to the same unit/office she worked in before (or in one in the same municipal district) and has to be assigned to the same or equivalent tasks.

IS THERE A RIGHT TO STATUTORY PATERNITY LEAVE? IF SO, HOW LONG IS IT AND IS IT PAID?

If the mother does not take maternity leave (due to death, illness or where exclusive custody is given to the father), then the father is entitled to take three months "Astensione Obbligatoria". In these circumstances the father is entitled to the same rights (pay, right of return, protection from dismissal) to which the mother would have been entitled.

The father is also entitled to a six month period of additional paternity leave (Astensione Facoltativa). However, the mother and father cannot take these additional periods of leave together at the same time and the total additional maternity and paternity leave by a set of parents cannot exceed 10 months. Therefore the parents cannot both have six months additional leave. The right to this period of leave expires once the child is eight years old.

Maternity rights – Spain

By Livia Solans, Associate at our associated firm Ramón & Cajal, Spain

WHAT MATERNITY LEAVE ARE EMPLOYEES ENTITLED TO?

Employees are entitled to 16 weeks maternity leave. Six weeks of this leave must be taken immediately after the birth but otherwise a woman can choose when to start or end her maternity leave and may also transfer leave to the father.

In the case of multiple births, leave is extended by two weeks for each additional child.

WHAT IS STATUTORY MATERNITY PAY ENTITLEMENT?

An employee is entitled to paid maternity leave for the entire 16 week maternity leave period provided she has made sufficient social security contributions. This is usually on full salary. However, for employees on high wages, this is capped at €3,074.10 per month.

In Spain employers do not usually offer enhanced maternity pay as the social security system covers the mother's full salary.

WHAT RIGHTS AND OBLIGATIONS CONTINUE DURING THE MATERNITY LEAVE?

During maternity leave, employers are released from their obligation to pay salary as maternity pay is paid by social security. In addition, employers may hire another worker to cover the maternity leave without having to pay their social security.

Employees on maternity leave are entitled to carry forward holiday entitlement to the next holiday year.

WHAT ARE AN EMPLOYEE'S RIGHTS ON RETURN TO WORK?

Following maternity leave, an employee is entitled to return to the same job.

Employees cannot be dismissed for nine months following the beginning of the maternity or paternity leave. Pregnant employees are also protected from dismissal.

IS THERE A RIGHT TO STATUTORY PATERNITY LEAVE? IF SO, HOW LONG IS IT AND IS IT PAID?

Fathers are entitled to 13 days paternity leave. Provided they have made sufficient social security contributions this is usually paid at full salary (subject to the cap) by the social security system.

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Employment dilemmas

A SALES PERSON HAS LEFT THE COMPANY AND TAKEN CLIENTS' BUSINESS CARDS WITH HIM. WE HAVE ALL THESE CONTACTS ON A DATABASE, BUT WE DON'T WANT HIM APPROACHING OUR CLIENTS IN HIS NEW ROLE. CAN WE STOP HIM FROM DOING THIS?

This is a common situation and one which is no different to client telephone numbers stored on an employee's mobile telephone. Whilst some employers accept that departing employees retain such information, others will not.

The legal position is clear; it is the remedy which may not be so apparent. So long as the cards were given to the employee as part of his duties, they belong to you and you are entitled to them back. Then what? Unless you have a confidentiality clause classifying those contacts as confidential and enforceable restrictive covenants preventing him from soliciting or dealing with those of your customers he dealt with, your legal remedies are likely to be limited. The reason is that, without these clauses, business contacts can lose their protected status as confidential once the employee leaves. Moreover, memory recall of names and contact details may have become part of his knowledge which he is free to use. The deliberate removal of multiple business cards to facilitate competition or the deliberate memorising of names and contact details may, in extreme cases, entitle you to a springboard injunction (i.e. to stop the employee taking advantage of his wrong behaviour), but you will need to judge whether it is worth taking that step. If, on the other hand, you have the necessary protection in your contract, the chances of getting the courts to help you will be improved.

DUE TO COMPANY CUTBACKS WE HAD TO MAKE SEVERAL STAFF REDUNDANT. HOWEVER, THREE MONTHS ON, WE NOW FIND OURSELVES ABLE TO RECRUIT FOR THE SAME POSITIONS. ARE THERE ANY LEGAL IMPLICATIONS IN ADVERTISING THE POSITIONS, OR APPROACHING THE STAFF THAT WE MADE REDUNDANT?

As long as the original redundancies were legitimate at the time and not a sham, there is no legal reason to prevent you from recruiting for the same positions. The fact that you now wish to approach those employees you made redundant backs up this proposition.

If you do not approach them, there is the danger that they will suspect you had an ulterior motive for getting rid of them. This may encourage them to present claims for unfair dismissal if they are still unemployed. The fact that the time limit for doing so has passed will not save you if they did not suspect that redundancy may not have been the real reason for their leaving until after the deadline had passed. The way to avoid this is to ask them if they are interested in coming back, explaining what has happened. If you only advertise, their suspicions could be raised. If you only want some of them back, you can cherry pick so long as the original redundancies can be shown to be genuine.

Key Cases

Flexible benefits

Swann v GHL Insurance Services

When age discrimination legislation was brought into force in October 2006, many employers were concerned about the implications for the provision of insured benefits where premiums are calculated according to an employee's age. Less favourable treatment on the grounds of age is unlawful unless the discrimination can be objectively justified i.e. where the treatment is a proportionate means of achieving a legitimate aim.

In the case reported below, the Employment Tribunal decided that a flexible benefit scheme was lawful. Although the size of the fund from which an employee could purchase benefits was a fixed percentage of salary, and so age neutral, the cost for certain elements of the package, such as private medical insurance depended on the employee's age.

FACTS

Following a merger, the employer wanted to offer uniform benefits to its employees and at the same time improve recruitment and retention of staff. It researched the composition of a flexible benefits package with expert advisers with the intention of producing a package that would assist in recruiting and retaining staff. It also used a specialist consultant to consult employees and gain their views, before implementing the package.

The new package offered a "flex fund". The fund was calculated as a percentage of an employee's basic salary (5%). It allowed employees to select individual options from a variety of benefits including private medial insurance (PMI), additional pension contributions, childcare vouchers, gym membership and various other options. It was an employee's choice whether to select the PMI option.

The employee was offered and accepted the new package of flexible benefits. She chose PMI from the new package and was told the premium was £631, based on her age at that time (51) and gender. However her total flex fund available was only £462 per year. The premium for a 20 year old female would have been £256. The employee brought a claim for age discrimination.

DECISION

The employee argued that she was treated unfavourably because the premiums for the private medical insurance element of the new package were age-related and therefore more costly to her than a younger employee.

The employer argued that the benefit given to its employees was an amount of money based on a percentage of salary. This was calculated without reference to age and so there was no unfavourable treatment.

The majority of the Tribunal concluded that the treatment to be considered was the employer's decision to make a flex fund available from which employees could purchase different benefits rather than the provision of the PMI benefit alone. Both parties agreed that calculation of the flex fund was age neutral. The treatment was therefore not related to the employee's age and so was not age discriminatory.

The Tribunal went on to conclude that, even if the provision of the PMI benefit was the treatment they should have considered, although it was discriminatory on the grounds of age, it would have been justified.

The employer had shown that the new package was a proportionate means of achieving their legitimate aim of recruiting and retaining staff. They took into account that the employer had sought professional advice to select a package of benefits and that through consultants they had surveyed employees' views on the most attractive benefits before assembling the new package. They also found that the premiums for the PMI scheme were arrived at by reference to actuarial assessments of the risk and it was accepted that all PMI providers calculate premiums on the basis of age.

IMPACT

This is an employment tribunal decision, and so is not binding on other tribunals. However, it contains useful guidance on the way tribunals will approach these issues.

In our view, the decision that there was not any less favourable treatment is open to challenge. The flexible benefits package should have been compared on a term by term basis. The question is whether an employer can justify providing insured benefits, the cost of which varies with age (as many do).

Employers are in a difficult position because if they try to avoid the problem by providing PMI at a flat rate to all employees, they are still at risk. This would potentially be discriminatory to younger workers who could otherwise benefit from lower rates.

The tribunal's decision that age-related provisions can be justified will come as a relief to employers. It is worth noting, however, that the employer in this case was helped by having a paper trail showing that:

- the purpose of the new package was to encourage recruitment and retention;
- they had sought professional advice on the appropriate package; and
- they had surveyed their employees on the most attractive elements for a flexible benefits package.

These elements are all helpful in enabling an employer to show that, even if the flexible benefits package offered is discriminatory, it is justified.

The personal touch

WRN Limited v Ayris

Restrictive covenants are a useful tool for protecting employers from departing employees and there have been an increasing number of covenant cases in recent months. This latest case looked at the enforceability of non-solicitation and non-dealing covenants.

FACTS

The employee was initially employed as Marketing and Rebroadcasting Manager. He was then promoted to Head of Sales and Marketing. When he left, he took business cards with him and copied his work email address book to his home computer.

The employer attempted to enforce restrictive covenants in the employee's contract which sought to prevent him from soliciting or dealing with its customers.

The covenants were drafted to apply for a period of six months after termination of employment. Customers were defined as those who were negotiating with the employer for the supply or provision of any restricted products or services or to whom the employer had during the period of one year prior to the date of termination supplied or provided any restricted products or services.

The contract also prohibited the employee from removing or copying company property or any confidential business information. This included names and contact details of customers and suppliers.

DECISION

The High Court held that the non-dealing and non-solicitation clauses were not enforceable. They were too widely drafted because they included customers that the employee had never dealt with. It has previously been argued that, in cases involving small businesses, it may be reasonable to assume that an employee will deal with or have knowledge of all customers. That argument did not succeed here.

With regard to the removal of business cards and email addresses, the Court accepted that the employee had been in breach of his obligations to his former employer as the information belonged to it. However, the information was not deemed to be confidential as it was readily available. The Court was influenced by the fact that the employer's website contained a comprehensive list of its customers, including contact names in some cases.

IMPACT

Although the decision itself was not in any way surprising, this case is a useful reminder to employers to be cautious when drafting restrictive covenants. A one size fits all approach does not work. For customer/client covenants, however, it will normally be necessary to limit the scope to those clients with whom the employee has dealt or about which he has confidential information.

Since the courts analyse the reasonableness of the covenants at the time at which they are entered into, it is imperative that they are revisited as and when promotions occur or roles change substantially.

And finally, a reminder to employers that if they wish client contact details to be viewed as confidential they must ensure that they treat them as such. Employers who make such information easily accessible will find it harder to enforce confidentiality obligations, and possibly restrictive covenants, in contracts of employment.

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