MAYER·BROWN

UK Employment Round-Up

March 2015

Our monthly review of key cases and new law affecting employers

Holiday pay and commission

The case: We have now received the eagerly anticipated Tribunal judgment in the *Lock v British Gas* case. In this case, Mr Lock, a sales consultant with British Gas, brought a claim to the Tribunal for holiday pay on the basis that it did not include what he would have earned from commission had he been at work. The Tribunal felt unable to decide whether EU law, from which the UK Working Time Regulations are derived, requires pay while on annual leave to include commission payments, and they referred the case to the European Court of Justice (ECJ). The ECJ concluded that Mr Lock's commission was directly linked to the work he carried out, and so must be taken into account when calculating holiday pay. However, they left it to the UK Tribunal to decide whether the UK law could be construed consistently with the EU position.

Last week, the Tribunal ruled that the UK working time law could be construed in accordance with the EU directive and that "commission or similar payments" must be included when calculating holiday pay. In doing this, the Tribunal added words into the Working Time Regulations to treat employees who receive commission in the same way as employees whose pay varies with the amount of work they do. This, in turn, means that the reference period for calculating the average pay will be the 12 week period preceding the holiday in question (it had been thought that a longer period might be applied).

The impact: A 12 week rolling period could be difficult to administer for employers with large workforces who earn commission, and it is also unlikely to be representative in a business where commission fluctuates during the year. Another concern is whether the concept of commission could be extended to include bonuses, particularly those tied closely to the volume or value of business produced by an employee. Given that the two year cap on backdated claims takes effect on 1 July 2015, the next few months will be ones to watch.

Lock v British Gas Trading Ltd and another ET/1900503/2012

How far must an employer go to avoid having constructive knowledge of a disability?

The case: Ms Donelien was dismissed by her employer for unsatisfactory attendance and failure to comply with absence procedures. During the course of her employment, she claimed to suffer from several medical conditions and, in her last year of employment, was absent on 20 separate occasions for varying reasons. Before dismissing Ms Donelien, her employer requested GP letters regarding her absences, held return-to-work meetings to discuss her conditions, and referred her to occupational health. The OH report did not sufficiently answer their questions, and so they made follow-up enquires. These were not addressed sufficiently, but the report concluded that the employee was not disabled. Ms Donelien brought a claim for disability discrimination and failure to make reasonable adjustments, but the Tribunal did not uphold her claim. On appealing to the EAT, it held that her employer did not have constructive knowledge of her disability, i.e. they could not reasonably be expected to know that she was disabled. The discrimination claim, therefore, had to fail. The EAT recognised the difficulties faced by the employer in relation to the employee's various and often unrelated conditions, and felt that the employer had carried out a reasonable investigation into her health, looking at a number of different sources, rather than relying solely on the OH report.

The impact: This case is a useful one for employers, providing some reassurance on the extent to which an employer is required to make enquiries to satisfy a Tribunal that it has taken all steps reasonable to establish whether an employee is disabled. An employer can take some comfort from this case that a Tribunal will view its consideration of an OH report in the context of the other actions it has taken. Importantly here, the employer had spoken to the employee and her GP, as well as having made follow-up enquiries where there were gaps in the OH report.

Donelien v Liberata UK Ltd UKEAT/0297/14/JOJ

Gender pay gap reporting

Since the Equality Act 2010 came into force, the government has had the power to introduce regulations requiring employers to publish information about the difference in pay of male and female employees. To date, this has not been implemented, and gender pay gap reporting has only been done on a voluntary basis, although very few employers have published any such information. A change to the Small Business, Enterprise and Employment Bill 2014-2015 (SBEEB) has very recently received royal assent, which means that compulsory gender pay gap reporting will now be introduced within the next 12 months, for companies with over 250 employees.

The practical impact of this change is yet to be determined, since the detailed regulation, which will set out the level of detail required in the reporting, has not been published. The Liberal Democrats suggest a minimum level of reporting will set out the gap for full-time and part-time workers and the overall gap, though the regulations could go further and require a comparison of average earnings for men and women, broken down by grade and job type. Regardless of the detail required, employers with more than 250 staff should start thinking about how their statistics will look and how information could be presented. Simply publishing the gap for full-time and part-time workers and the overall gap may not present an accurate picture of the true position, and adopting a more sophisticated approach could present the employer in a much better light.

Zero hours contracts

The government's desire to clamp down on zero hours contracts is moving ahead, with the legislation banning exclusivity clauses (which appears in the SBEEB referred to above) having received royal assent. So, going forward, while employers will still be able to use zero hours contracts, the worker concerned cannot be prevented from working for other employers.

There is some concern that, even with a ban on exclusivity clauses, unscrupulous employers will come up with ways to avoid the ban. For example, offering workers a token minimum number of guaranteed hours, possibly as low as one hour per week, so that they are not considered to be on a zero hours contract. However, in an effort to prevent this, the Government has published proposed anti-avoidance measures. These new rules would cover contracts that do not guarantee a worker at least a specified minimum income and would seek to provide the same protections in respect of exclusivity clauses to workers under those type of contracts as to pure zero hour contract workers.

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update.

Christopher Fisher
Partner, London
E: cfisher@mayerbrown.com
T: +44 20 3130 3724

Ann Robson
Senior Associate, London
E: arobson@mayerbrown.com
T: +44 20 3130 3345

Lizzi Hodgkinson
Senior Associate, London
E: ehodgkinson@mayerbrown.com
T: +44 20 3130 3745

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

0628emp