STAY CURRENT
A Client Alert from Paul Hastings

PAUL HASTINGS

February 2012

What UK Employers Need to Know: Staying Ahead in 2012

BY SUZANNE HORNE & SARAH CLARKE

At a Glance

We outline the key forthcoming and recent legislative developments in UK employment law for 2012 and summarize the new rates and limits. We also take a look at what is on the horizon so you can stay ahead and we identify the key employment cases due before the European court, the UK courts and the employment tribunals this year.

TABLE OF CONTENTS

A. Key employment law changes, rates & limits

February

1. *Unfair dismissal basic and compensatory award and statutory redundancy payment increases*[1]

On 1 February, the limit on a week's pay for calculating statutory redundancy and the basic award for unfair dismissal increased from £400 to £430 and the maximum compensatory award for unfair dismissal increased from £68,400 to £72,300. However, no maximum applies in certain circumstances, for example where the dismissal is for making a protected disclosure. The new maximum statutory redundancy pay is £12,900.

March

2. *Parental leave increases from three to four months*

Although a new EU Directive on Parental Leave Directive (2010/18/EU) comes into force on 8 March 2012 giving birth and adoptive parents the statutory right to four rather than three months leave, the Government has confirmed that it will rely on the exception that allows member states an extra year for implementation, and that it will implement the change by March 2013.

April

3. Qualifying period for unfair dismissal increases to two years

At present, employees need one year's continuous service to bring a claim of unfair dismissal against their employer (the "qualifying period"). On 6 April, the qualifying period will increase from one year to two years. The change will apply only to employees who start a new job on or after 6 April. Those who are already in employment before that date will retain the current one-year qualifying period.

4. Changes to tribunal procedure come into force

It costs employers a substantial amount each year to defend unmeritorious claims to the tribunal by current and former employees. In an attempt to combat the more spurious claims, the Government has announced changes to certain tribunal procedure. From 6 April, the maximum amount of a deposit order, which a tribunal can order a party to pay as a condition to continuing with tribunal proceedings, increases from £500 to £1,000. The maximum amount of a costs order, which a tribunal may award in favour of a legally represented party, increases from £10,000 to £20,000[2]. It remains to be seen if the tribunal exercises these powers.

5. New statutory payment rates

From 1 April, the standard rate of statutory maternity, paternity and adoption pay increases from £128.73 to £135.45 per week. From 6 April, the standard rate of statutory sick pay increases from £81.60 to £85.85 per week.

October

6. Automatic enrolment comes into force

All employers in Great Britain will be required to automatically enroll eligible jobholders into a pension scheme. The new duties will be formally implemented over four years starting on 1 October, with larger employers being affected before smaller employers and new businesses. The initial wave of employers will be able to voluntarily start auto-enrolment as early as July.

7. Increases to national minimum wage

Although no rates have been published yet, these are expected to increase in the normal way as of 1 October.

B. Key consultations

In 2011 it was difficult to avoid the vast number of consultations and calls for evidence published by the Government. Below, we touch upon those which we anticipate will have the most significant effect in 2012 and the issues still being considered.

8. Resolving workplace disputes: a consultation: Government's response

On 27 January 2011, the Department for Business, Innovation and Skills ("BIS") and the Tribunals Service consulted on proposals to deregulate business and reduce the regulatory burden facing British businesses. The paper marked a significant first step in taking forward the Government's review of employment law. The Government's response[3] stated that it intends to bring into force a number of planned changes this year including, amongst others, early conciliation, financial penalties for employers and up-rating tribunal awards and statutory redundancy payments.

9. Charging fees in employment tribunals and the employment appeal tribunal

On 14 December 2011, the Government published a consultation entitled 'Charging fees in employment tribunals and the employment appeals tribunal', which seeks views on two

significantly different fee charging structures which might be adopted for fees in the employment tribunal. The consultation closes on 6 March 2012.

10. Consultation on modern workplaces: flexible parental leave etc.

On 16 May 2011, the Government published 'Consultation on Modern Workplaces', which makes proposals for a new system of shared flexible parental leave, an extension of the right to request flexible working, revisions to the way annual leave is dealt with under the Working Time Regulations 1998 (SI 1998/1833) (the "WTR 1998") and compulsory pay audits for employers found guilty of pay discrimination. The consultation closed on 8 August 2011. However, on 6 December 2011, BIS advised that the Government's response would not be published until early 2012.

11. Executive remuneration discussion paper

On 19 September 2011, BIS published a discussion paper on the governance of executive remuneration in quoted companies. The Government published its response on 23 January 2012 and proposed that there should be more detailed regulation of the content of remuneration reports, greater diversity in remuneration committees, greater transparency on the work of remuneration consultants, amendments to the UK Corporate Governance Code to put an end to the practice of serving executives sitting on the remuneration committees of other large companies and requiring large public companies to adopt incentive clawback provisions. The proposals are likely to result in a consultation paper later this year.

12. Call for evidence on collective redundancy consultation rules

On 23 November 2011, BIS published 'Call for Evidence: Collective Redundancy Consultation Rules', which sought to explore the consequences of reducing the current 90-day period for collective consultation in a large-scale redundancy to 60, 45 or 30 days. The call for evidence closed on 31 January 2012 and the evidence will be used to formulate policy proposals to be put forward for public consultation.

13. Call for evidence on the effectiveness of the transfer of undertakings (protection of employment) regulations 2006

On 23 November 2011, BIS published 'Call for evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006', seeking views on the effectiveness of TUPE 2006 given concerns that the regulations gold-plate the EU Acquired Rights Directive and are overly bureaucratic. There is a particular focus on service provision changes, insolvency proceedings and collective redundancy consultation. The call for evidence closed on 31 January 2012 and the evidence will be used to formulate policy proposals to be put forward for formal public consultation.

14. Further reviews: protected conversations, compromise agreements

The Government intends to consult on the introduction of "protected conversations" this year, which will enable employers to raise workplace issues in an open way without the worry that they will be used in evidence at an employment tribunal. The Government also intends to consult on compromise agreements, particularly in relation to their use, costs, advantages and disadvantages.

C. Key cases

2012 promises to be another busy year. We anticipate perhaps a trickle of cases in respect of the relatively new Bribery Act 2010 and the Agency Worker Regulations 2010. We set out below the key cases that have already been decided this year, those where decisions are yet to be handed down and those yet to be heard.

Working time: requirement to take four weeks annual leave has direct effect

The European Court of Justice ("ECJ") has held in *Dominguez v Centre Informatique du Centre Ouest Atlantique* that Article 7(1) of the Working Time Directive[4], which obliges member states to take measures to ensure that workers are entitled to at least four weeks' paid annual leave, is sufficiently precise and unconditional to have direct effect against an emanation of the state. It follows that public sector workers will be able to enforce Article 7(1) in employment tribunals even if the WTR 1998 cannot be interpreted as giving full effect to the Directive's requirements. However, the ECJ confirmed that national provisions in conflict with Article 7(1) cannot be set aside in cases against private employers.

Holidays & sickness absence

The question of whether the carry-over of holiday is allowed under the WTR 1998 depends on whether the WTR 1998 can be interpreted in line with the ECJ's decisions in *Stringer*[5] and *Pereda*, which confirmed that under the EU Working Time Directive, workers on sick leave continue to accrue annual leave and that a worker must have the option to defer annual leave if sick whilst on annual leave. It is for member states to decide whether workers can actually take their statutory holiday during a period of sick leave and the post-Stringer UK employment tribunal decisions are inconsistent in this regard. In *Larner*[6], the EAT held that a worker on long-term sick leave for a whole leave year was entitled to carry over her holiday and be paid in lieu on termination. The employer is appealing the decision and it is due to be heard in March. This decision is important as it impacts a number of cases at lower levels of the tribunal system.

Limits of UK's unfair dismissal and discrimination legislation

We are awaiting decisions by the UK's Supreme Court in the case of *Ravat*[7] in respect of the territorial scope of unfair dismissal law and *BA v Mak*[8] in respect of discrimination legislation. These decisions are expected in February and October respectively and will prove significant due to the lack of legislation in these areas.

Age discrimination & retirement

In January, the UK's Supreme Court reviewed the justification of direct discrimination, and in particular whether the forced retirement at 65 of a partner in a law firm was justified as a proportionate means of achieving legitimate workplace-related aims in the case of *Seldon*[9]. In addition, the Supreme Court considered in the case of *Homer*[10] whether a 61 year-old employee's rejection for a top salary grade on account of his not having a law degree was discriminatory on the ground of age, or simply a consequence of age. The Court is yet to hand down the judgments in either case. As of 6 April 2011 any termination on the grounds of age must now be objectively justified. Therefore, these are important decisions for employers to understand their obligations in the absence of a default retirement age.

Religion & belief: whether preventing an employee wearing a cross at work was a breach of her human rights

The European Court of Human Rights will decide in *Eweida*[11] whether the UK courts contravened Articles 9 and 14 of the European Convention on Human Rights in rejecting the claimants' indirect discrimination claims on the basis that they were unable to identify others with their beliefs who suffered particular disadvantage as a result of their employers' dress codes.

Associative pregnancy discrimination: is it unlawful under European law?

The Court of Session will refer to the ECJ the issue of whether under the recast EU Equal Treatment Directive[12] it is unlawful discrimination on the grounds of sex to treat someone less favourably on the ground of their association with a pregnant woman. The case of *Kulikauskas*[13] could be an interesting new development in associative discrimination.

The trigger for collective redundancy consultation

In *Nolan*[14], the ECJ will determine if an employer must start collective consultation under the EU Collective Redundancies Directive[15] when the employer is proposing a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies or only when that decision has actually been made and it is then proposing consequential redundancies. The case came before the ECJ in January 2012 and we await the judgment.

What happens to collective agreements after a TUPE transfer?

Under TUPE, any collective agreements which apply to the in scope employees transfer to the transferee. In *Parkwood Leisure*[16], the UK's Supreme Court confirmed that there should be a reference to the ECJ as to whether European law[17] means that on a TUPE transfer, the transferee should be obliged to honour any changes to terms and conditions collectively agreed after the transfer (the "dynamic approach") or if the transferee is only bound by the terms and conditions as at the date of transfer (the "static approach"). Until a ruling is handed down, the current UK position is that the static approach prevails and the transferee is not bound by changes collectively agreed post-transfer.[18]

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

London
Suzanne Horne
44.20.3923.5129
suzannehorne@paulhastings.com

Paris
Deborah Sankowicz
33.1.42.99.06.79
deborahsankowicz@paulhastings.com

Shanghai
K. Lesli Ligorner
86.21.6103.2968
lesliligorner@paulhastings.com

New York
Erika Collins
1.212.318.6789
erikacollins@paulhastings.com

[1] The increase to the statutory cap on a week's pay from £400 to £430 on 1 February 2012 has raised the limit on certain other awards a tribunal can make. These include the award for refusing to allow an employee to be accompanied at a disciplinary or grievance hearing and for failure to follow the statutory procedure in relation to a request for flexible working.

[2] Other changes to employment tribunal procedure, include changes to witness statements, which are no longer read aloud, and are instead taken "as read", unless the tribunal directs otherwise. Tribunals have the power to direct that the parties to a dispute are responsible for paying witnesses' expenses and that the party who loses the case should reimburse the successful party for any such costs already paid out. Employment judges will hear unfair dismissal cases alone in the employment tribunal, unless they direct otherwise, and judges will hear all cases alone in the Employment Appeal Tribunal, unless they direct otherwise.

[3] A link to the Government's response can be found here: 'Resolving Workplace Disputes: Government Response to the consultation'.

[4] 2003/88/EC.

[5] *HM Revenue & Customs v Stringer and others* [2009] IRLR 214.

[6] *NHS Leeds v Larner* [2011] IRLR 894.

[7] *Ravat v Halliburton Manufacturing and Services Ltd* [2010] CSIH 52; [2010] IRLR 1053.

[8] *British Airways Plc v Mak and others* [2011] EWCA Civ 184.

[9] *Seldon v Clarkson Wright and Jakes (A Partnership)* [2011] ICR 603.

[10] *Homer v Chief Constable of West Yorkshire* [2010] IRLR 619.

[11] *Eweida v United Kingdom and Chaplin v Royal Devon and Exeter NHS Trust Hospital* [2011] ECHR 738

[12] No.2006/54.

[13] *Kulikauskas v MacDuff Shellfish and anor* EAT 0062-3/09.

[14] *United States of America v Nolan* [2010] EWCA Civ 1223; [2011] IRLR 40.

[15] No.98/59.

[16] *Alemo-Herron and ors v Parkwood Leisure Ltd* [2011] UKSC 26, 15 June 2011.

[17] Article 3.1 of the EU Acquired Rights Directive.

[18] SI 2006/246.