

StayCurrent

A Client Alert from Paul Hastings

European and UK Employment Law: Quarterly Case Update and New Legislation Review

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AT A GLANCE

This *Stay Current* summarises important new employment law developments affecting employers with operations in the UK and Europe.

CONTENTS

1. Cases	1
1.1 EU Jurisdiction and Employment Contracts	1
1.2 Collective Redundancies	2
2. Legislation	2
2.1 Statutory Holiday	2
2.2 Flexible Working	2
2.3 Religious Hatred.....	3

1. Cases

1.1 EU Jurisdiction and Employment Contracts

The Court of Appeal issued a stark warning to multinational companies based outside the EU about the jurisdictional rights of EU-based employees in *Samengo-Turner and Ors v J&H Marsh & McLennan (Services) Limited and Ors* [2007] EWCA Civ 723. The Court ruled that Marsh & McLennan, and two of its subsidiaries, could not sue three former UK-based employees in New York, even though that was the

forum agreed by the parties in the contract, stating that “a multinational business must be expected to be subject to the employment laws applicable to those they employ in different jurisdictions”.

EC Council Regulation 44/2001 governs jurisdiction and the enforcement of judgments in civil and commercial matters (the “**Regulation**”). Section 5 of the Regulation deals with jurisdiction over individual contracts of employment and provides that an employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

Marsh & McLennan sued former UK employees (the “**Claimants**”) in New York over alleged breaches of the Claimants’ US bonus agreements, which contained non-compete obligations. The Claimants contested the jurisdiction of the New York court and submitted a claim in England seeking declarations on jurisdiction and a worldwide anti-suit injunction. The Claimants relied on Section 5 of the Regulation.

The UK court concluded that Section 5 of the Regulation applied and prohibited Claimants from being sued in New York. The court held:

- the US bonus agreements were part of the UK contracts of employment – it was not possible to ascertain the terms of the Claimants’ employment without looking at both the contract of employment and the bonus agreement;
- any company in the Marsh & McLennan Group wishing to sue on the terms of the bonus agreement would therefore be required to sue in the courts of the employee’s domicile.

The court issued a worldwide anti-suit injunction forbidding Marsh & McLennan from suing the Claimants in except in the United Kingdom.

Comment: Unless agreement on an alternative jurisdiction can be reached with the employee after the dispute arises, the employer is bound by the Regulation. This means that multinational corporations wishing to sue on a contract governed by the law of an EU member state are prohibited from suing an EU-based employee in a jurisdiction other than that of the employee's domicile.

1.2 Collective Redundancies

In the UK, collective consultation obligations under the Trade Unions and Labour Relations (Consolidation) Act 1992 ("TULRCA") apply when an employer is proposing to dismiss 20 or more employees as 'redundant' within a period of 90 days or less. The obligations require an employer to consult on its proposal with representatives of the affected employees and also to notify the Department of Trade and Industry. Failure to comply with the obligations could result in an employment tribunal granting a protective award of up to 90 days' gross pay per employee.

In *Optare Group Limited v Transport and General Workers Union*, the Employment Appeal Tribunal ("EAT") considered whether employees volunteering for redundancy were to be included in the total number of employees to be dismissed.

Optare decided to accept three voluntary redundancies and to effect the mandatory redundancy of 17 other employees. The trade union, acting as the employees' representative, informed Optare that the collective consultation obligations under TULRCA were triggered as the proposal was to dismiss 20 employees. Optare responded that the volunteers could not be added into the calculation; it was only proposing to dismiss 17 employees by reason of redundancy. Optare therefore proceeded on the basis that TULRCA obligations had not been triggered.

The EAT held that the volunteers should be considered to be persons whom Optare had proposed to dismiss as redundant, and that, accordingly, Optare had failed to comply with its obligations under TULRCA. A protective award was made to each redundant employee.

Comment: Employers must be mindful of the wide definition of 'redundancy' under TULRCA. Any employee dismissed (or volunteering to be dismissed) for a "reason not connected with the individual employee" may be included in the total number of employees proposed to be dismissed for redundancy.

2. Legislation

2.1 Statutory Holiday

The Working Time (Amendment) Regulations 2007 (the "Regulations") came into force on 1 October 2007. From that date, they require UK employers to give employees four days' paid holiday per year in addition to the 20 days' paid holiday to which they are currently entitled. The Regulations will further raise the minimum paid holiday requirement to 28 days, starting 1 April 2009. The entitlements will differ for employees who do not work five days per week. There is still no requirement for UK employers to give employees paid holiday on the eight UK bank holidays.

Comment: If employers currently offer less than 20 days' holiday (including bank holidays), contracts should be amended to reflect the statutory increase to 24 days with effect from 1 October 2007.

Employers should also check whether employment contracts state that employees are entitled to "statutory minimum holiday plus public holidays". Full-time employees with similarly worded contracts have previously been entitled to a total of 28 days' holiday consisting of 20 days of statutory minimum holiday plus 8 days for bank holidays. However, from 1 October 2007, such employees have been able to argue that they are entitled to a total of 32 days' holiday (24 days' statutory minimum and 8 days' public holidays). This will increase to a total of 36 days' holiday after 1 April 2009. Since employers are only required to provide statutory minimum paid holiday, not paid bank holidays, they may wish to amend employment contracts worded in this way to avoid unintentionally increasing employees' holiday to more than 28 days.

2.2 Flexible Working

Since 6 April 2003, parents and certain others who are responsible for looking after children aged under 6 (or under 18 if the child is disabled) have had a legal right

to request flexible working arrangements. Employers are not obliged to give effect to such requests but must seriously consider them. Typically flexible working arrangements include part-time working or working from home. Effective 6 April 2007, this right was extended to employees with caring responsibility for: (i) spouses/partners; (ii) adult relatives; and (iii) adults living at the same address as the employee.

Prior to 1 October 2007, only foster carers with responsibility for children placed with them through official fostering services had a right to request flexible working. Effective 1 October 2007, this right has been further extended to private foster carers who foster children other than through official fostering services, and the spouses, partners and civil partners of such private foster carers.

Changes have also been made to the current definition of "adopter". Prior to 1 October 2007, adopters only had

a right to flexible working arrangements in respect of an adopted child placed with them by an official UK adoption agency. That right has now been extended to individuals who are adopting a child through non-UK adoption agencies.

2.3 Religious Hatred

Starting 1 October 2007, it will be a crime to stir up hatred against a person on the grounds of religion with threatening words or behaviour intended to stir up religious hatred. The new offence is punishable by a fine or prison sentence of up to seven years.

Although not limited to employment-related offences, when the offence is committed by a company or organisation with the "consent or connivance of a director, manager, secretary or similar officer", then both the organisation and the individual may be guilty of the offence.



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