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Employment Matters

Autumn Statement – Employment Issues

The Chancellor has issued an autumn statement setting out certain proposed fiscal changes in the UK. One of these is to the Employee Shareholder Status (ESS) regime, which is set to be abolished. ESS was introduced in 2013, and granted beneficial tax treatment on shares owned by a new class of employee—an "employee shareholder"—in their employer, where these shares had a minimum value of £2,000 on receipt. The tax advantages linked to shares awarded under ESS will be abolished for arrangements entered into on, or after, 1 December 2016. The status itself will be closed to new arrangements at the next legislative opportunity. This is in response to evidence suggesting that the status is primarily being used for tax planning instead of supporting a more flexible workforce. Another change is to salary sacrifice arrangements. The tax and employer National Insurance advantages of salary sacrifice schemes will be removed from April 2017, except for arrangements relating to pensions, childcare, Cycle to Work and ultra-low emission cars, which will be retained. This will mean that employees swapping salary for benefits will pay the same tax as the vast majority of individuals who buy them out of their post-tax income. Arrangements in place before April 2017 will be protected until April 2018, and arrangements for cars, accommodation and school fees will be protected until April 2021.

Dismissal Can Be Fair Despite Final Warning Being Inappropriate

In *Bandara v BBC*, the Employment Appeal Tribunal (EAT) has held that the claimant employee's dismissal could be fair. The EAT agreed with the Employment Tribunal (ET) that on the facts the issuing of the final written warning was "manifestly inappropriate". However, in determining whether the dismissal was fair, the standard remained the objective standard of the reasonable employer.

The EAT referred the case back to the ET to consider whether the claimant employee's conduct had been sufficient for dismissal without the final written warning. In other words, the ET had to decide how much weight had been placed on the final warning by the employer to support the dismissal.

What Should Employers Do Next?

Employers should take confidence that a single misstep in the disciplinary process will not necessarily prevent the desired outcome being reached. Each dismissal will be assessed on all its facts in the context of the reasonableness of the employer's decision.

SMP Not Included in Settlement Agreement; SMP and Bonuses

The First-Tier Tribunal Tax Chamber has concluded that a settlement agreement purporting to apply to "all and any claims" did not negate the employer's duty to pay statutory maternity pay (SMP). Where a woman satisfies the conditions for SMP, an absolute right arises that cannot be excluded. However, part of the settlement sum could have been designated as SMP fulfilling the employer's SMP obligation. This had not been done, so the employer was obligated to pay SMP additionally.

The first six weeks of SMP are calculated as 90% of normal weekly earnings between 23 and 15 weeks before the expected week of birth. The employee had been paid a discretionary bonus (as contemplate in her contract) during this time, and as such it fell within the "normal weekly earnings" definition and was right to be included in the calculation of the 90% for SMP purposes.

What Should Employers Do Next?

Employers should ensure that settlement agreement payments explicitly include reference to including SMP, where relevant.

This case also serves as a useful reminder that bonus payments paid between 23 and 15 weeks before the expected week of birth must be included for the purpose of calculating the first six weeks of SMP payment.

School's Sex Segregation Not Direct Discrimination

The "parallel arrangements" for the teaching of boys and girls separately made by a mixed-sex Islamic faith school were considered in relation to a breach of section 13 Equality Act 2010 in *X School v HMCI*. The Administrative Court concluded that, in the circumstances present at the school, female students were no more disadvantaged by the segregation than male students were. Ofsted, acting by HMCI, was unable to demonstrate deliberate discrimination.

One argument considered by Mr Justice Jay was that the segregation could not be isolated from the historical and cultural treatment of women in society. However, he held that was incorrect due to 1) inappropriate comparisons with compulsory segregation in other jurisdictions, 2) no girls having felt or appearing to feel inferior as a result, and 3) an absence of evidence that faith schools segregated because they regard women as inferior and/or to prepare them for a lesser societal role.

Employer's Failure To Establish the Reason for Trade Union Detriment Not Fatal to Case

The Court of Appeal in *Dahou v Serco Ltd* upheld the EAT's decision. Where there is detrimental treatment in regard to trade union activities, thereby contravening of section 146 Trade Union and Labour Relations (Consolidation) Act 1992, it is open to the tribunal to conclude that the real reason was one not advanced by either side.

Typically the failure of the employer to establish its reason for the detrimental treatment will lead to the ET accepting the employee's reason. This decision extends the position already established in unfair dismissal cases by *Kuzel v Roche Products Ltd* to trade union detrimental treatment cases.

Refusing Rest Breaks

In the case of *Grange v Abellio London*, the Employment Appeal Tribunal held that the instruction to work without a rest break could be construed as a refusal to grant a rest break even where there has not been an explicit request by the employee for a rest break. In this case the claimant was contracted to work an eight-and-a-half-hour shift, which included a half-hour break for lunch. He was told that, instead, he should work for eight hours without a break, and leave early. The claimant made a claim under the Working Time Regulations alleging he had been refused a break but the Employment Tribunal held he had never asked for a rest break and therefore could not be said to have been refused one. The EAT disagreed with this reasoning.

What Should Employers Do Next?

Employers should ensure that contracts of employment and practices within their organisations allow for rest breaks in accordance with the Working Time Regulations.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 20 7776 7663 or Sarah Bull at +44 (0) 20 7770 5222.

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