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Employment Law Newsletter

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Improved order books and strong growth in manufacturing output for October have encouraged some to think that UK industry is showing definite signs of recovery.

The results recorded in October's Institute of Purchasing and Supply Manager's Index exceeded expectations and represents the highest achieved since November 2007.

This positive news was further boosted by reports from the US that their economy has now emerged from recession. Furthermore consumer confidence across the UK has reached the highest level for 18 months, according to October's British Retail Consortium survey with more people feeling positive about job prospects.

However concerns over debt and work/life balance are increasing. Those still with a job are working harder.

As 'Equal Pay Day' dawned on 30 October, some 35 years after the introduction of the Equal Pay Act, we were reminded by the Fawcett Society that, taking the average gap between women's and men's pay into account, women would effectively be working for the rest of the year for free.

Set against the backdrop of the lengthy unresolved dispute in Leeds over equal pay we examine how the much heralded Equality Bill, should it reach the statute book, could impose further burdens on many employers, at a time when employees feel particularly vulnerable and many employers are under serious financial pressure.

We also look in detail at two recent appeal cases which have clarified the equal pay obligations of private sector employers who take on public sector employees and the claims of male workers who "piggy-back" onto those brought by their female colleagues.

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We examine the detail of an appeal case concerning compensation for an unfairly dismissed employee during their notice period. Seeking advice at the right time can make all the difference and ensure you will rarely be in such a situation.

Finally, the recently published government proposals on transfer of maternity leave entitlement are also under scrutiny along with some other recent legislative and case law changes.

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Equal Pay Is A Reality

Who is liable?

Equal pay is generally perceived to be an issue affecting local authorities and the NHS, with countless claims from low paid female manual workers being submitted to Employment Tribunals across the country.

This issue is unlikely to remain restricted to the public sector.

Whilst the fate of the Equality Bill remains unclear with the prospect of a general election looming next year, it is worth noting that the Bill provides the power to issue regulations requiring employers with 250 or more employees to publish information relating to employees' pay for the purposes of showing whether there are differences in the pay of male and female employees.

However, the Government will only introduce regulations if there has been insufficient progress in bridging the pay gap by 2013.

The Equality and Human Rights Commission is seeking to promote transparency on a voluntary basis to avoid the need for statutory enforcement.

The trend towards open and transparent pay arrangements and the narrowing of the gender pay gap in both the public and private sectors is here to stay. Recent judgments in two cases would seem to reinforce this trend.

The judgment in the ***Gutridge v Sodexo & North Tees and Hartlepool NHS Trust case***, handed down by the Court of Appeal during the course of this Summer, and the findings of the Employment Appeal Tribunal in the case of ***McAvoy v South Tyneside Borough Council and others*** are likely to have far reaching effects.

TUPE Transfer

Facts Of The Case

Mrs Gutridge and her colleagues were employed as cleaners by Hartlepool NHS Trust until July 2001.

Their employment was subsequently transferred to Sodexo under TUPE and more than five years later, in December 2006, they brought an equal pay claim before an Employment Tribunal.

It was argued that the statutory equality clause, under the terms of the Equal Pay Act 1970, applied to their contractual situation whilst working for the Trust and that under the terms of TUPE, this obligation transferred to Sodexo.

The claimants sought to recover back pay going back six years using comparators who worked for the Trust but who had not transferred to Sodexo.

Sodexo argued that the claims were out of time, and that the claimants should not be allowed to compare themselves with Trust employees.

Nub Of The Matter

The Court of Appeal ultimately decided that liability for

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an equal pay claim transferred from the Trust to Sodexo on the date of transfer. As the claimant successfully established the right to equal pay with a comparator employed by the Trust, Sodexo was obliged to pay the claimant the same as the comparator after the date of transfer.

This was the case whether or not the comparator remained employed by the Trust and even though Sodexo might have been unaware of its liability.

The Court of Appeal also decided that an equal pay claim in respect of a period pre-dating a TUPE transfer had to be brought against the Trust within six months of the transfer date.

The time limit on a claim against Sodexo however did not begin to run until the termination of the employment to which the claim relates i.e. the termination of employment or the termination of the contract of employment in relation to a specific role.

Implications

Third parties could therefore find themselves with ongoing liabilities in respect of equal pay. This could leave transferees at risk of claims of up to 6 years arrears of pay, even when they are not aware that they are paying less than they should because 'comparable' employees were not transferred at the same time.

In practice, this could occur where a public body has outsourced services such as cleaning or catering to a third party.

In light of this case third parties in this situation should consider including a specific indemnity to protect themselves against liability for equal pay claims relating to the post-transfer period.

Piggy Back Claims

Facts Of The Case

An equal pay claim was brought against Hartlepool, Middlesbrough and South Tyneside Borough Councils by a number of employees. The claims were made by both men and women, doing the 'same work' for the same pay.

The male claimants argued that if the women won their case, they would be able to use them as comparators. This is known as a "piggy back" or contingent claim.

Although many of the women's claims were successful, the Council did not settle the men's "piggy back" claims.

Nub Of The Matter

The Employment Appeal Tribunal found that the male claimants did not need to wait for the claims of their female colleagues to succeed.

Their claims could be brought on a contingent basis pending the outcome of female claims. The male claimants would be entitled to 6 years' back pay from the date of claim, as in the case of female claimants.

The EAT further maintained that making a settlement payment only to female claimants was discriminatory under the Equal Pay Act 1970.

The local authority had argued that this treatment was justifiable because the male and female claimants had different chances of litigation success.

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At this point no male "piggy back" claim had been successful so this seemed a legitimate argument. The explanation was given short shrift by the EAT.

Implications

Any public sector organisation seeking to settle equal pay claims will need to be mindful of this decision as it is clearly no longer safe to assume that settlement with the female claimant population will solve the problem and will undoubtedly result in sex discrimination claims brought by male employees excluded from settlement.

There are an estimated 12,000 male claims waiting in the wings pending the outcome of this decision. Leave to appeal to the Court of Appeal has been given and it remains to be seen what the outcome will be.

However, the recent trend in favour of expanding rather than narrowing the scope of the Equal Pay Act would seem to suggest that the Court of Appeal will uphold the EAT's decision.

The Equal Pay Act 1970 was intended to address the issue of equal pay rather than fair pay. What is clear from these decisions is that the case law is introducing the concept of fairness to equal pay claims by broadening the scope of liability and making it easier for claimants to bring equal pay claims.

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Relief From Compensation

Credit from Employee

When an employee is found to have been unfairly dismissed, a Tribunal will make a Basic Award and a Compensatory Award.

When assessing the level of any Compensatory Award to be made in claims of Unfair Dismissal / Constructive Unfair Dismissal, a Tribunal will award an amount it deems to be 'just and equitable' in consideration of the losses sustained by the employee by reason of the dismissal, in so far as such losses were attributable to the employer's actions.

When considering the Compensatory Award, Tribunals will give due consideration to the long established 'Norton Principle', following the case of ***Norton Tool v Tewson [1972] ICT 501*** in both Unfair Dismissal and Constructive Unfair Dismissal cases.

The 'Norton Principle' established that an employer who fails to comply with a formal and proper procedure when summarily dismissing an employee without notice, should not be in a better position than it would have been if it had carried out a fair procedure.

Therefore, when assessing what was 'just and equitable', a Tribunal would consider a dismissed employee to be entitled to receive a Compensatory Award including a full payment in lieu of any notice entitlement, regardless of whether that employee had received earnings from new employment during this notice period.

Stuart Peters v Bell

Facts Of The Case

Until this case, the Norton principle applied when considering compensation in both Unfair Dismissal and Constructive Unfair Dismissal cases.

The case involved a claim brought by Ms Bell, an employee of Stuart Peters Ltd. The Employment Tribunal found that she had resigned in direct response to conduct by her Employer amounting to a repudiatory breach of contract, namely a breach of the mutual duty of trust and confidence.

Ms Bell was entitled to a six-month notice period but subsequently obtained temporary employment for three months of the six-month period. Having resigned with immediate effect, she did not receive payment in respect of this notice period and therefore included it in her claim for compensation.

Considering itself bound by the Norton Principle, the Tribunal did not offset Ms Bell's earnings from alternative employment during what would have been her notice period against the unpaid notice pay due from the Employer.

Nub Of The Matter

The Employer appealed to the Employment Appeal Tribunal ('EAT'), which upheld the Tribunal's decision. However the EAT did express dissatisfaction with the position that arose as, essentially, the employee was in a position where she could achieve a degree of double

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recovery. This sat uncomfortably with the requirement that the Compensatory Award should be an amount considered 'just and equitable' in the circumstances with a view to compensating the employee for 'actual losses'.

Stuart Peters Limited then appealed to the Court of Appeal. The Court of Appeal considered that the key question was to address what 'good industrial relations may require' in considering whether credit had to be given for sums earned by an employee during a notice period.

The Court of Appeal held that the principle in Norton was aimed at upholding the expectations of good industrial practice and that this principle should not be applied to Constructive Unfair Dismissal cases. It therefore held there was a distinction between the two types of dismissal and the different practices applicable to both.

It held it was good industrial relations practice for an employer who has summarily dismissed an employee to compensate them fully for their notice period.

However, the same practice (or lack of practice) would not apply in cases of Constructive Unfair Dismissal as, in such circumstances, the employee would trigger the dismissal and there would typically be a dispute regarding whether a repudiatory breach had been committed by an employer.

Therefore, the decision of the Employment Appeal Tribunal was overruled and it was ordered that sums earned by Ms Bell in alternative employment during her notice period were to be deducted from the notice pay due from the Employer when considering the Compensatory Award.

Implications

The Court of Appeal's decision is therefore a welcome relief for employers defending Constructive Unfair Dismissal claims, particularly from those of former senior employees with long notice periods in their contracts of employment.

However, the Norton Principle still applies when considering the Compensatory Award in cases of Unfair Dismissal and employers are still urged to follow good practice when dealing with either type of dismissal.

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Fathers To Share Maternity Leave

Counterproductive or redressing the balance?

From April 2011 fathers will be able to take up to six months paternity leave. Fathers will have the right to take up to three months' paid paternity leave during the second six months of a child's life, provided that the child's mother has gone back to work, and a further three months of unpaid leave.

Originally in consultation before the Work and Families Act 2006 the idea was sidelined as it was felt that the proposal was too administratively burdensome.

Implications

At a cost of over £500 million, future plans to extend total paid leave to twelve months are likely to be put on hold as the government is under increasing pressure to save money.

Reaction to the announcement has been mixed. David Frost, Director General of the British Chambers of Commerce maintained that:

"This is not the time to do it. It is a huge burden to plan for both a male and female employee being away."

The Institute of Directors has welcomed the proposals:

"providing the government ensures that the new system is simple for businesses to administer and that there is no overall increase in the total amount of paid and unpaid leave parents can take."

In a report published in October it is estimated that almost half of fathers fail to take up their right to two weeks paternity leave.

The Equality and Human Right Commission recently revealed that their research indicates that two men out of five do not ask for flexible working arrangements because they believe it will harm their career prospects.

Moreover, it is estimated that the take up of additional paternity leave will be less than 6%, affecting only 1 in 137 small businesses.

Eight Week Consultation

The government has launched a third consultation about additional paternity leave and pay. Although the draft regulations do not change the substantive proposals previously put forward by the Government, the proposed evidential requirements for taking leave and pay will be of particular interest. The consultation period closed on 20 November 2009.

When Will The Regulations Come Into Force?

The purpose of the consultation is to give both employers and parents a chance to view and comment on the draft regulations before legislation is brought before Parliament. It is the government's intention that the legislation be enforced from April 2010, with effect for parents of babies due from April 2011.

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Will The Regulations Be Effective?

The government is seeking views on the wording of the draft regulations and has asked whether the regulations strike the right balance, paying particular attention to:

- The need to keep the administration of leave and pay relatively simple;
- The need to provide certainty as to when entitlement arises;
- The need to give employer's sufficient protection against abuse.

How Will It Work In Practice?

The good news for employers is that the Government has decided to adopt a "light touch" approach to the question of how entitlement to leave and pay will be verified by the employer.

Rather than involving HMRC or the mother's employer in the verification process in every case, the Government has chosen a system which relies largely on "self certification".

Under the draft regulations:

- The employee must provide a signed declaration to the employer, confirming that the eligibility criteria for additional paternity leave or additional statutory paternity pay are met;
- The mother (or adopter) must also sign part of this declaration, confirming certain details, including the date she intends to return to work.
- If the employer makes a request, the employee must also provide the name and address of the mother's (or adopter's) employer.
- The employee must notify the employer if his circumstances change so as to affect eligibility.

The Government has made it clear that HMRC will conduct random checks on employers and employees to ensure that the system is not being abused.

Whatever the outcome of a future general election, it is likely that the ability to share leave between parents following the birth of a child will be endorsed.

Ultimately, it will be interesting to see how this develops and how effective the legislation will be in addressing concerns from both employers and parents.

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Legislation Round Up

Latest News

A number of changes to employment law came into effect in October 2009. The main changes are summarised below.

Please get in touch if you would like further information or advice.

Maximum Weekly Pay

The Work and Families (Increase of Maximum Amount) Order 2009 SI 2009/1903 raises the maximum amount of a week's pay, for the purpose of calculating certain statutory payments, from £350 to £380 as of 1 October 2009.

The weekly maximum is used to calculate statutory redundancy payments and basic awards for unfair dismissal, among other things.

National Minimum Wage

On 1 October, the National Minimum Wage Regulations 1999 (Amendment) Regulations 2009 SI 2009/1902 raised the level of the national minimum wage (NMW) from:

- £5.73 to £5.80 an hour for workers aged 22 and over;
- £4.77 to £4.83 for 18 to 21-year-olds; and
- £3.53 to £3.57 for 16 and 17-year-olds.

The Regulations also changed the law so that tips can no longer be used to top up wages to meet the NMW. The Department for Business, Innovation and Skills has published a 'Code of Best Practice' on tipping and service charges.

Data Controller Registration Fee

From 1 October 2009, a new notification fee of £500 applies to register as a data controller for private sector organisations with a turnover of £25.9 million and 250 or more staff.

The new £500 rate also applies to all public bodies with 250 or more staff. All other data controllers will continue to pay the current standard charge of £35 per annum, unless exempt from the requirement to notify altogether.

Vetting and Barring Scheme

The Vetting and Barring Scheme for checking the suitability of potential employees to work with children and vulnerable adults launched on 12 October.

On that date, existing lists of barred individuals - such as the list established under the Protection of Children Act 1999 – was replaced by two new 'Barred Lists'. From 26 July 2010, applicants will be able to apply for registration with the Independent Safeguarding Authority (ISA).

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Once the scheme is fully implemented, anyone working or volunteering with children or vulnerable adults in a 'Regulated Activity' will have to be registered with the ISA.

It will be an offence for an employer to hire a person in a Regulated Activity without first confirming his or her ISA registration, and employers will have a legal duty to refer appropriate information to the ISA.

Increase in Vento Bands

The EAT's judgment in Da'Bell v NSPCC has revised the Vento guidelines for compensation in relation to injury to feelings in discrimination cases to bring them in line with inflation.

The increases are as follows and are applicable with immediate effect:

Lower band: up to £6,000 (formerly £5,000)
Middle band: £6,000 to £18,000 (formerly £15,000)
Higher band: £18,000 to £30,000 (formerly £25,000)

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