Proskauer

newsletter

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A monthly newsletter covering the latest developments in UK Employment Law.

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It has been a busy period for those involved in drafting employment legislation.

In our January 2013 edition, we summarised various expected changes to employment law. Since then, these changes have been debated and amended, and many have been or are about to be implemented through the Enterprise and Regulatory Reform Bill (the "**Bill**"). On top of this, European legislators announced significant new limits on remuneration within the financial services sector. As if this was not enough to grapple with, the Budget presented on 20 March 2013 announced a myriad of tax-related changes that will impact employment law, changes have come into force in relation to family-rights and further consultation about such rights has been announced, ACAS has launched a consultation about the scope of without prejudice communications and there have been changes to the law on collective redundancies.

This month's bumper edition of A Month in UK Employment Law provides a summary of these important developments.

Enterprise and Regulatory Reform Bill

As previously reported, the Bill reflects the Government's aim to cut the costs of doing business and is intended to remove regulatory burdens that currently inhibit innovation. Since our last edition, the Government has proposed a number of amendments to the Bill, which have been approved by the House of Lords.

1. No qualifying period for unfair dismissal rights where a dismissal relates to political opinion or affiliation

Employees who allege that the principal reason for their dismissal is or relates to their "political opinion or affiliation" will no longer need to satisfy the qualifying period to have unfair dismissal rights. The new provision will not mean that dismissals by reason of political opinion or affiliation will be automatically unfair; rather, employees will have the right to challenge the fairness of any dismissals irrespective of their length of service. This new provision will take effect two months after the Bill receives Royal Assent (which is expected later this month) and will apply to dismissals that take place on or after that date.

2. Changes to whistleblowing protection

A number of amendments have been made to this legislation.

> **Public interest and the removal of the "good faith" requirement**: One change already announced in relation to whistleblowing is that for a disclosure to be protected, it must be the reasonable belief of the worker making the disclosure that the disclosure is made in the public interest. This contrasts to the current

position under which a disclosure of any breach of a legal obligation (including a mere breach of contract of employment) constitutes a protected disclosure. However, following the announcement of this change, a further proposed amendment has been agreed to dispensing with the current requirement that for a disclosure to be protected, it must have been made in "good faith". Under the new proposal, where a disclosure is not made in good faith, rather than the claim necessarily failing (as is the case now), there will be a power to reduce any compensation by up to 25%. On the surface this change is counterintuitive. There would appear to be good policy reasons for requiring disclosure to be made in good faith, especially in the light of decisions such as that of the Employment Appeal Tribunal in *Bachnak v. Emerging Markets Partnership (Europe) Ltd* (No 2) UKEAT/0288/05, in which it was held that a disclosure that is made predominantly to put pressure on an employer not to dismiss, or to strengthen the employee's position in negotiations, is unlikely to be in good faith (and therefore not protected). The proposed change means that even where a disclosure is made to strengthen an employee's position, an employee may still benefit from whistleblowing protection. However, the rationale behind this change is that, in the context of the new public interest requirement, having an additional requirement of good faith would serve as too great a deterrent against individuals making disclosures, and that moreover, given the new public interest requirement, a disclosure, even if made in bad faith, should not necessarily be unprotected if it is in the public interest.

- **Vicarious liability for whistleblowing:** Under current legislation (and as confirmed by the Court of Appeal decision in *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190, there is no provision making it unlawful for employees to subject a colleague to acts of detriment. Because vicarious liability can only arise where an employee has done an unlawful act, the consequence of this is that an employer cannot currently be vicariously liable for whistleblowing where its employees subject a colleague to acts of detriment. To rectify this gap, the Bill has introduced provisions mirroring those on vicarious liability in UK anti-discrimination legislation, whereby individual workers or agents will become personally liable for subjecting whistleblowing colleagues to acts of detriment, and employers will be vicariously liable for any such wrongdoing. Employers will have a defence to a claim for vicarious liability where they can show they have taken all reasonable steps to prevent the treatment complained about. In order to deal with this change, if not already doing so, employers will need to adopt and properly implement whistleblowing policies and training to prevent whistleblowing.

3. Power of Employment Tribunals to impose fines for aggravated breaches of employment law

Employment Tribunals will have the power to impose fines of between £100 and £5,000 per claimant for aggravated breaches of employment law. The amendment provides that an Employment Tribunal must have regard to an employer's ability to pay before imposing such a fine and remove the minimum of £100 per claimant for multiple claims. As yet it is unclear what will constitute an "aggravated breach" but it is likely to include a calculated decision by an employer to disregard employment rights where to do so is cheaper than complying with them.

We continue to monitor the progress of the Bill and will keep you updated on any developments.

ACAS Consults on the Draft Code of Practice on Settlement Agreements

ACAS has launched a public consultation on a draft statutory code of practice to accompany a provision in the Bill which will enable employers to hold termination settlement discussions prior to starting a disciplinary or performance management process without the risk of the discussion being referred to in an unfair dismissal claim, unless there has been "improper conduct". The closing date for responses is 9

April 2013. The need for this is in part due to a perception of uncertainty arising from cases which some commentators have viewed as limiting the extent to which the "without prejudice" rule can apply in the employment context.

The aim of the ACAS Code is to help employers and employees negotiate settlement agreements by providing a clear explanation of the law as it relates to the confidentiality of such negotiations and the circumstances when they will be admissible as evidence in any proceedings. A key element of the Code will be to illustrate "improper behaviours" that would render the contents of the negotiation potentially admissible in an unfair dismissal hearing. The draft Code does, however make it clear that what is improper would ultimately be a decision for the Tribunal on the facts of the case.

Family Rights

Increase in Unpaid Parental Leave

From 8 March 2013, the total amount of unpaid parental leave that can be taken increased from 13 to 18 weeks per child. Parental leave is a form of statutory unpaid leave available to some working parents in addition to statutory maternity, paternity and adoption leave. Currently, leave must be taken before the child's 5th birthday or a disabled child's 18th birthday. The Government plans to allow parental leave to be taken up until the child's 18th birthday for all children, from 2015. Employers' parental leave policies should be updated to reflect this change.

Children and Families Bill: Shared Parental Leave

The Government is consulting until 17 May 2013 on how the shared parental scheme to be introduced in 2015 should be administered. The new system of shared parental leave is to be enacted by the Children and Families Bill. The full details of the new system are still subject to consultation and the drafting of regulations.

The key elements of this new system include:

- A new system of shared parental leave following childbirth and adoption;
- A new right for employees and qualifying agency workers to take unpaid time off work to attend up to two antenatal appointments with a pregnant women;
- An extension of the right to request flexible work to all employees.

Redundancy

Collective Consultations

From 6 April 2013, the collective consultation period for making 100 or more employees redundant at one establishment will reduce from 90 to 45 days. ACAS will be publishing a non-statutory code of practice to facilitate good practice during consultations.

Financial Services

1. Financial Services – FSA Publishes Discussion Paper on Financial Conduct Authority Transparency

On 4 March 2013, the FSA published a discussion paper on Transparency DP31/1.Co. The paper seeks views on the possibility of the Financial Conduct Authority (the "**FCA"**) publishing more information about improving its own transparency; information released by the FCA about firms, individuals and markets and information that firms might be required to release about their products and about other aspects of their performance and behaviour.

The deadline for submissions is 26 April 2013.

2. Cap on Bankers' Bonuses

Last month, the Council of the European Union issued a press release announcing the intention to introduce legislation under which "*Bankers' annual bonuses must not normally exceed their annual salaries*". The exception to this rule would be to permit bonuses of up to twice annual salary if explicitly approved by a majority of shareholders. These plans were subsequently approved at a meeting of European Union finance ministers, with the sole dissenter being George Osborne from the United Kingdom.

Beyond these headlines, there remains some uncertainty as to the details of the new legislation, such as the definition of base salary and whether the definition of bonus will include stock awards and other non-cash elements (and if so, how non-cash elements will be valued). However, given the changes will be implemented as part of a new Capital Requirements Directive ("**CRD IV**"), which will replace existing legislation ("**CRD III**") dealing with remuneration in the financial services industry, and based on the draft legislation, the expectation is that key concepts will be similar to or the same as those contained in existing legislation placing restraints on bonuses in the financial services sector, such that the new provisions will cover the same institutions and the same individuals (i.e. Code Staff) as are already covered by constraints on variable pay. In addition, as currently proposed (and like existing legislation) the new provisions will apply to both European Union-based operations of groups headquartered outside of the European Union as well as non-European Union-based operations of groups headquartered inside of the European Union. For example, they will apply to a French operation of a U.S-headquartered bank as well as the U.S. operation of a UK-headquartered bank.

In order for the proposals to become law they must now be voted on by Member States and the European Parliament – the expectation is that this will be a formality, albeit there are rumours of a legal challenge and even the possibility (which may be far-fetched) that the United Kingdom will invoke the little-used "Luxembourg Compromise", an exceptional power for a member state to block a majority decision which is deemed to seriously affect a very important national interest. However, notwithstanding speculation that the United Kingdom may exercise this option, European Union commissioner for Internal Markets and Services Michel Barnier has said that he wants the new rules on bonuses and capital requirements to come into force on 1 January 1, 2014, even though several member states said they need at least 12 months to write them into national law.

We will keep you posted on this significant development.

Employment and the 2013 Budget

The Chancellor of the Exchequer presented the annual Budget on 20th March 2013, which was followed by a further draft of the Finance Bill 2013. These contained a number of announcements relevant to employment law, many of which had already been published in the draft Finance Bill in December 2012, and which are reiterated here.

1. Employee Shareholder Shares: Tax Treatment

In the autumn, the Government announced that it was introducing measures to enable individuals to choose to relinquish certain employment rights (including certain rights not to be unfairly dismissed) in exchange for an equity interest in their employer company. The Budget included further details about this new legislation,which was published in the draft Finance Bill.

The new provisions will now apply to shares acquired on or after September 1, 2013 – a change from the April date in the draft Finance Bill. The minimum acquisition will be £2,000 worth of shares, and only the first £50,000 of shares acquired by an individual will be eligible for the capital gains tax exemption. These figures are unchanged from the draft legislation of December. The legislation also has been revised to exclude an income tax charge on a buyback of capital gains tax-exempt employee shareholder shares, and to strengthen the "material interest" restriction.

Additionally, there are new details on income tax and National Insurance contributions (NICs). Legislation in these areas will be amended to deem, for tax and NICs purposes, that an employee shareholder pays £2,000 for employee shareholder shares. This will make the first £2,000 worth (only) of employee shareholder shares free from income tax and NICs.

2. Employee Share Schemes

In July 2011, the government asked the Office of Tax Simplification ("OTS") to review the four UK tax-advantaged share schemes – the EMI scheme, the Company Share Option Plan ("CSOP"), the Save As You Earn ("SAYE") scheme and the Share Incentive Plan ("SIP"). The OTS issued a report following this request and HMRC subsequently responded and engaged in consultation in this area.

The Finance Bill 2013 introduces changes deriving from the process described above. These will mostly take effect when the Finance Bill receives Royal Assent. Certain provisions within the schemes are to be harmonised, such as retirement provisions and those relating to people leaving employment in favourable circumstances.

Additionally, the rules in SIPs, SAYEs and CSOPs prohibiting the use of restricted shares will be abolished. The material interest rule, which prevents employees with certain interests in the business from participating in a scheme, will be abolished for SAYEs and SIPs, and the threshold for the application of this rule will be increased from 25%-30% for CSOPs. In relation to EMI options, the time limit for exercise of the options with favourable tax treatment following a "disqualifying event" has been increased from forty to ninety days.

Furthermore, the Budget included an announcement that the Government will proceed with plans to allow self-certification of SAYE, SIP and CSOP schemes. These currently have to be submitted to HMRC for approval. Legislation will be introduced in the Finance Bill 2014 in this area. The Budget also included an announcement that consultation will commence in the area of unapproved share schemes, although there are no further details on this as yet.

3. Entrepreneurs' Relief

Entrepreneurs' relief is a capitals gains tax relief which allows for a capital gains tax rate of 10% (as opposed to the usual 28%) on eligible shares. Generally speaking, shares must be acquired by an employee or officer of the business who must own at least 5% of its value and voting rights. The relevant interest must have been held for a period of twelve months.

The Finance Bill 2013 extends the application of entrepreneurs' relief to those acquiring shares through enterprise management incentive ("EMI") options. EMI options are a popular means of incentivising those who work for small, growing companies. The period during which the option was held will count towards the twelve month holding period required for entrepreneurs' relief, and the 5% vote and value requirement will not apply.

4. Corporation Tax Relief – Employee Share Acquisitions

The Government has published draft legislation, which applies from 20 March 2013, to clarify the scope of corporation tax deductions in respect of employee share acquisitions under Part 12 of the Corporation Tax Act 2009 (CTA 2009). The draft legislation replaces section 1038 of the CTA 2009 with a revised section 1038, and adds a new section 1038A. The new provisions are designed to put beyond doubt that where a corporation tax deduction is available under Part 12 of the CTA 2009, no other deduction is available in connection with the provision of the shares or the option, or any matter connected with the shares or the option. The new provisions also disallow any corporation tax deduction in respect of share options where shares are not ultimately acquired pursuant to the option. The measures are intended to prevent companies attempting to claim accounting deductions for share-based payments in addition to a deduction under Part 12, or in connection with an option on occasions where shares are not acquired pursuant to a share option (and therefore no deduction is available in connection with the acquisition of the shares).

5. LLP Members' Self-Employed Status

For tax purposes, members of a limited liability partnership are automatically self-employed. This means that employer NICs are not payable in respect of their earnings, which can mean a considerable saving for an LLP even if "junior" members often are effectively treated as employees. The Government has announced that it will enter into consultation to review the automatic self-employed status of LLP members. It is likely that this will involve consideration of factors denoting employment or self-employment from an employment law perspective, and LLPs will need to consider the position of existing members carefully. Legislation is anticipated in the Finance Bill 2014.

6. Employer Pension Contributions

Draft legislation has been published that will restrict the exemption from tax and NICs for employer contributions to registered pension schemes. From April 6, 2013 the exemptions will apply only to employer contributions to the employee's registered pension scheme. This will end the tax efficiency of remuneration arrangements that include an employer paying pension contributions into a registered pension scheme of an employee's family member.

7. Real Time Information

The Finance Bill 2013 includes draft amendments to the Pay As You Earn ("PAYE") penalties regime to accommodate real time information filing (RTI). Most of the amendments will apply from 6 April 2014. The penalty regime will charge penalties for late RTI returns based on the number of employees in an employer's PAYE scheme. Penalty rates will be set by regulations.

8. Pensions Relief

Draft legislation has been published which reduces the amounts upon which individuals can claim tax relief in relation to pension contributions. The proposals reduce the annual allowance to £40,000 and the lifetime allowance to £1.25million. These provisions take effect from 6 April 2014. HMRC has stated that the Government will discuss "with interested parties" whether to offer personalised protection for individuals with pension pots in excess of £1.25 million on 5 April 2014. A form of personalised protection would allow individuals to continue to accrue pension, whereas fixed protection 2014 prohibits further accruals.

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Please feel free to contact your regular Proskauer lawyer or any member of our International Labor & Employment Group if you have any questions or need any assistance in evaluating this important newsletter. In addition, if you have any questions regarding the matters discussed herein, please contact any of the lawyers listed below:

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