Proskauer

UK Employment Law – A Year In Perspective – Changes Past and on the Horizon

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2013 has been a significant year for UK employment law. In particular, an abundance of new legislation (both about substantive law and Employment Tribunal procedure) has heralded a number of important changes.

This publication provides an overview of the most significant developments of 2013 and those on the horizon for 2014 and 2015.

JANUARY 2013

For many years, there has been uncertainty as to the consequences of an employer terminating an employee's contract of employment in breach of contract by failing to give the employee the notice of termination to which the employee is entitled. Specifically, there has been uncertainty as to whether the termination, despite being in breach of contract, automatically brings the contract of employment to an end (the "automatic theory", or whether the employee has a right to refuse to accept the employer's breach of contract and therefore elect to keep the contract of employment alive ("the elective theory"). While this sounds highly theoretical, this distinction can have important consequences, in particular as to the date that the employment in fact comes to an end, which is often highly significant for issues such an employee's entitlement to a bonus or other deferred compensation.

This was precisely the issue that arose in the Supreme Court decision in *Geys v Société Générale, London Branch.* In that case, many millions of pounds were at stake under a bonus provision depending upon when Geys' employment came to an end. In that decision, the Supreme Court ruled that the elective theory applied, and that where an employer dismisses an employee with immediate effect without providing an employee with the contractual notice of termination to which they are entitled, the employee has a choice of either: accepting the breach as bringing the contract to an end or affirming the contract so that it continues until the end of the contractual notice period (along with any contractual entitlements which accrue during this period, unless there is express provision to the contrary).

This decision highlighted the importance of including pay in lieu of notice provisions (a provision expressly giving an employer a contractual right to terminate the contract of employment by making a payment in lieu of notice) in employment contracts, particularly for senior employees. With such a provision, an employer can terminate a contract of employment with immediate effect without being exposed to the risk of an employee refusing to accept the termination and therefore keeping their employment alive.

In fact, in *Geys*, the employee's contract of employment did contain a payment in lieu of notice. However, it was held that the employer had not exercised that provision. In important guidance, the Supreme Court held that an employer has to unambiguously and explicitly make clear that it is exercising its right to make a payment in lieu of notice if it wishes to rely on such a provision. So for example, in *Geys*, the relevant clause provided for immediate termination "*by making a payment in lieu of notice*". The Supreme Court held that provisions like this will be subject to an implied term that termination only takes effect once (i) the payment in lieu of notice has been paid, (ii) the employee has received notice that the payment has been made, and (iii) the employee has received notice that the payment was being made in exercise of the contractual right to terminate with immediate effect**.**

The lessons from this case are:

- **Make sure any payment in lieu of notice provision you rely upon is unambiguous.**

If you exercise a payment in lieu of notice provision, be explicit and unambiguous to the employee that you are terminating their employment by exercising that provision.

MARCH 2013

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.

Moreover, there are proposals to allow parental leave to be taken up until the child's 18th birthday for all children starting from 2015. Employers' parental leave policies should be updated to reflect this change.

APRIL 2013

Consultations for collective redundancies

When an employer is proposing to make 20 or more redundancies within 90 days at a single establishment, collective consultation obligations are triggered. Where there are 20 or more redundancies but less than 100, the minimum collective consultation period remains 30 days. However, from 6 April 2013, where there are 100 or more redundancies, the minimum collective consultation period was reduced from 90 to 45 days. Despite this reduction, it remains crucial to recall that these are minimum periods, and that in any event, any consultation should commence "in good time" which must be before any final decisions have been made.

ACAS will be publishing a non-statutory code of practice to facilitate good practice for carrying out collective consultation.

JUNE 2013

New exception to right to unfair dismissal without a qualifying period

Generally, the right to bring a claim for unfair dismissal is dependent upon the employee having the requisite period of continuous service: one year for those who started employment before 6 April 2012 and two years for those who started employment on or after 6 April 2012. However, section 108 of the Employment Rights Act 1996 contains a list of reasons for dismissal where the qualifying service requirement is dispensed with. These reasons include, among others:

- dismissal as a result of having made a protected disclosure (i.e. whistleblowing)
- trade union membership
- maternity and asserting a statutory right.

From 25 June 2013, dismissals relating to "the employee's political opinions or affiliation" have been added to the list.

This change is needed to bring existing legislation in line with the European Court of Human Rights' (ECtHR) ruling in *Redfearn v United Kingdom*. In that case, the ECtHR ruled that the UK is in breach of Article 11 of the European Convention on Human Rights by preventing individuals who do not have the requisite qualifying period of service from making claims for unfair dismissal on grounds of political opinion or affiliation.

Please note that this does not mean that a dismissal relating to 'an employee's political opinions or affiliation' will be automatically unfair; instead, simply that the qualifying service period will not apply.

Whistleblowing changes

With effect from June 2013, a number of changes to whistleblowing legislation have been implemented.

Protection for whistleblowers was introduced under 1998 legislation called the Public Interest Disclosure Act. This name suggests that whistleblowing legislation was only intended to protect workers in relation to disclosures made in the "public interest". However, as case law developed, it was held that, despite the name of the legislation, there was no requirement for a disclosure to be in the public interest for it to be protected. The high water mark of this position was illustrated in *Parkins v. Sodexho*, where it was held that disclosing a breach of any legal obligation (including a mere breach of a contract of employment), even where such disclosure was not in the public interest, was capable of constituting a protected disclosure.

The broad scope of protected disclosures, especially in the context of the underlying "public interest" title of the original statute, has attracted criticism. In response to this, the legislation has been amended so that for a disclosure to be protected, it must be in the reasonable belief of the worker that their disclosure is made in the public interest. On the surface, the narrowing of the scope of protection in this way is something that that businesses may welcome. However, the potential cost of narrowing the definition of a protected disclosure is the resulting uncertainty on the difficult issue of defining the public interest – the expectation is that this will only be resolved through litigation.

In conjunction with the new "public interest" requirement, a further amendment to UK whistleblowing legislation is to remove the current requirement that for a disclosure to be protected, it must be 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 *Bachnak v. Emerging Markets Partnership* (*Europe*) *Ltd* (*No 2*), 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.

The scope of those protected by the legislation has expanded. At present, the protection is afforded to "workers", a category larger than employees, which includes agency workers, non-employees undergoing training or work experience and homeworkers. However, the changes to this definition will largely apply to contractors in various parts of the National Health Service who would not otherwise be "workers", and seems to be a direct response to structural changes within the UK's National Health Service. It is noteworthy that, despite the broad definition of worker, a recent Court of Appeal decision, *Clyde & Co LLP v. Bates Van Winkelhof,* held that a partner in a law firm was not a worker within the meaning of the legislation and, therefore, not protected by whistleblowing legislation.

Under previous legislation there was 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 was that an employer cannot be vicariously liable for whistleblowing where one of its employees subjects a colleague to acts of detriment. To rectify this gap, there are now new whistleblowing provisions mirroring those on vicarious liability in anti-discrimination legislation. Accordingly, 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 unless they can show they have taken all reasonable steps to prevent such treatment.

In order to deal with this change, if not already doing so, employers should adopt and properly implement whistleblowing policies and training in the same way as they do equal opportunities policies and training.

JULY 2013

Employment Tribunal Proceedings

New rules were introduced for all Employment Tribunal claims issued on or after 29 July 2013 (save for certain counterclaims and appeals which are covered by the transitional provisions). The rules seek to simplify Employment Tribunal procedures.

A new "sift" process has been introduced whereby an Employment Judge will automatically review every case once the ET1 (claim form) and ET3 (response) have been submitted. The Employment Judge will have the power to strike out claims or responses which have no reasonable prospect of success. Parties to a decision to strike out will have the right to make written representations and, if these are not accepted, proceed to a hearing on the matter.

From April 2014, a mandatory pre-claim ACAS conciliation period is to be introduced which is intended to facilitate the settlement of claims and ease Employment Tribunal caseloads.

The process of submitting claims and responses has changed. There are new, simplified ET1 and ET3 forms which can be downloaded from **www.justice.gov.uk**. Respondents who miss the 28 day deadline for submitting an ET3 will now be able to apply for an extension even after the deadline has passed. A default judgment also will no longer be issued automatically without a hearing where the employer has failed to submit an ET3 within the time limit. The judge will have discretion to determine if a hearing is required in order to make a determination.

A new single preliminary hearing will replace with pre-hearing review and case management discussions. Both procedural and substantive matters will be addressed at the preliminary hearing. Employment Tribunals also are required "wherever practicable and appropriate to encourage parties to use ACAS or mediation to settle disputes". Parties will need to attend any hearings ready to discuss their attitudes to settlement.

Employment Tribunal Fees

Claimants now have to pay court fees to have their claims accepted and heard by the Employment Tribunal. There is no refund if the claim is settled prior to the hearing. Fee payments may be made online or through a central processing center.

There are fee structures for single and multiple claimants. Within each structure there are two levels of claims: Level A are – those of lower value and less complexity; level B claims are those of higher complexity and value (including unfair dismissal, discrimination and whistleblowing). For single claimants, Level A issue fee is £160 and the hearing fee is £230, whereas Level B claims the issue fee is £250 and the hearing fee is £950.

Employers will also have to pay a fee in certain circumstances, by the date specified in the Employment Tribunal notice. These will apply on application for default judgment, dismissal of a case, on issuing a counter-claim or for judicial mediation.

Fees also apply when an application is made to the Employment Appeals Tribunal (which hears appeals from Employment Tribunals).

A successful claimant may also be entitled to be reimbursed the fees incurred, if a tribunal so orders.

New caps on unfair dismissal compensatory awards

The maximum compensatory award which an Employment Tribunal is now able to award will be the lower of the cap set annually (currently £74,000) and 12 months' gross pay**.**

Compromise Agreements

Compromise agreements have been renamed settlement agreements. The changes that you will need to make to standard form compromise agreements are as follows:

- The agreement must be described as a "settlement agreement" rather than a compromise agreement on the cover sheet, at the start of the agreement and in any references in the agreement and the schedules (example, the advisor's certificate); and
- The agreement must state that the conditions relating to both settlement and compromise agreements under the relevant pieces of legislation are satisfied**.**

Pre-termination negotiations

All pre-termination negotiations in unfair dismissal claims are now confidential and will be inadmissible in subsequent litigation unless there was improper behaviour. ACAS has issued a statutory Code of Practice on the issue and gives examples of what may constitute "improper behavior". These include: harassment, victimization, criminal behavior, discrimination and placing the employee under undue pressure. It is intended that the new rules will assist employers in making settlement offers as an alternative to outright dismissal.

This change only applies to ordinary unfair dismissal cases and does not extend to other cases such as automatically unfair dismissals (including whistleblowing and trade union membership), discrimination, breach of contract and wrongful dismissal. An employer will need to continue to rely on the "without prejudice" rule in any negotiations concerning these types of cases**.**

SEPTEMBER 2013

Employee shareholders

With effect from 1 September 2013, employee shareholders will receive shares in their employer company in return for giving up specified employment rights. In exchange for the shares, the employee shareholders will give up the right to:

- Claim unfair dismissal (except in health and safety cases, automatically unfair cases, or cases where the dismissal is discriminatory under the Equality Act 2010).
- A statutory redundancy payment.
- Make a statutory flexible working request.
- Make a statutory request in relation to study or training.

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. 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 NIC.

Before an individual can agree to having employee shareholder status, the employer must provide a written statement explaining the rights that would be given up or varied. In addition, the statement must explain the rights attaching to the shares, such as whether they carry any voting or dividend rights and any restrictions on transferability.

The individual must receive independent legal advice as to the terms and effect of the proposed agreement. Following such advice, the individual will have seven days in which to change their mind on accepting the employee shareholder agreement. The employer will be liable for the reasonable costs of obtaining such legal advice, whether the individual takes up the offer or not. If the individual does not receive the statement or advice, or changes their mind within the seven-day period, any agreement to become an employee shareholder will be of no effect.

Existing employees will be protected from detrimental treatment for refusing to change to employee shareholder status. Dismissal for refusing to accept an offer to become an employee shareholder will be deemed an automatically unfair reason for dismissal.

OCTOBER 2013

Employers' liability for third party harassment

With effect from 1 October 2013, the third-party harassment provisions under the Equality Act 2010 were repealed. Prior to 1 October 2013, employers could be held liable if their employees were harassed by third parties (e.g. clients and suppliers) if certain requirements were met. The UK government consulted on the repeal of the provisions and noted that there was "*a lack of evidence that there is any significant need for them or that they are effective in practice.*"

ON THE HORIZON

2014

TUPE reform

The UK TUPE Regulations protect employees if the business in which they are employed changes hands, by moving them and any liabilities associated with them from the old employer to the new employer by operation of law. They were first passed in 1981 in order to implement the EU's Acquired Rights Directive, and were significantly overhauled in 2006.

In November 2011, The Department for Business, Innovation and Skills (BIS) began a call for evidence on the effectiveness of the TUPE regulations and how they could be improved. It concluded from this evidence that there was scope to remove a number of provisions that went further than required by the Directive from the UK regime, as well as making some general clarifications and improvements.

The Government will proceed with the majority of its proposed changes according to a response to the consultation by BIS.

Importantly, employers will be given more freedom to change the terms and conditions of transferred employees after the transfer has taken place, where the consenting employees consent to the change. This contrasts to the current (and counter-intuitive) position, where employers are not permitted to change terms and conditions of employment if such changes are the reason for the transfer, even with employee consent.

Employers also will have additional flexibility under the new rules which will even allow scope to make changes by reason of the transfer to contractual terms and conditions stemming from a pre-transfer collective bargaining agreement. They will be able to do so provided that 12 months have elapsed since the transfer and the changes are "no less favorable overall" to the employee.

However, the consultation paper makes it clear that the Government will not proceed with plans to remove the service provision change (SPC) rule from the TUPE Regulations, as previously proposed. This means that where work is outsourced, brought back in-house or the service provider is changed, employees will continue to benefit from the TUPE regime.

Flexible Working

The right to request flexible working will be extended to all employees from 2014 (not just those with parental responsibility for a child, or caring responsibilities for an adult as is currently the case). The 26-week qualifying period for employees to make a request for flexible working will be retained. The Government also has decided to keep the restriction that means that employees can make only one flexible working request in any 12-month period.

Financial penalties on employers

Employment Tribunals will have the power to order employers that have breached workers' rights to pay a financial penalty of between £100 and £5,000 where there are "aggravating features". The penalty for employers will be 50% of any award, with a cap of £5,000, which is halved if paid within 21 days.

Discrimination questionnaires

On 6 April 2014 the statutory discrimination questionnaire process will be abolished and replaced with informal guidance from ACAS. Currently, written questionnaires can be served on any person or organization that is believed to have unlawfully discriminated against the person making the request. The questionnaire can be served any time before an Employment Tribunal claim is issued or within 28 days after issue. Responses should be provided within eight weeks of the request having being made and failure to provide any response or if only an evasive response is given, will result in an adverse inference of discrimination by the Employment Tribunal.

ACAS Early Conciliation

Claimants will be required, from 6 April 2014, to submit their claim first to ACAS before lodging it at the employment tribunal to allow an opportunity for ACAS to offer its conciliation service before a claim gets under way. Neither party, however, will be obliged to engage in conciliation.

2015

Time off for Ante-Natal Appointments

Fathers and other qualifying persons will be entitled to time off work to attend two ante-natal appointments with expectant mothers.

Shared Parental Leave

At present a mother can take 52 weeks' maternity leave whereas the father can take only 2 weeks' paternity leave. The framework for shared parental leave and flexible working is set out in the Children and Families Bill, which currently is going through Parliament and is planned to come into effect in 2015. The plan is to allow parents of a new baby to share the leave taken around the birth of a child.

It is intended that there will be a requirement on employees to provide an indication to their employer of their expected pattern of leave. However, this will not be binding. Certainty for the employer will be provided eight weeks prior to the leave being taken; however, employers will be entitled to have eight weeks' notice from their employee – in effect a request to take leave – in respect of each period of leave.

The second key provision is that in the first 26 weeks of leave taken, either in one stretch or in aggregate, the employee's job will have to be kept open for them to return to – the provisions give a right to return to the employee to their role. However, for leave in excess of 26 weeks, employers will be able to offer a different job but only in circumstances in which it's not reasonably practicable to offer the same job. These provisions reflect the existing right to return to work after maternity leave, alleviating fears that the right to return to the same job could be extended to employees who took leave in excess of 26 weeks.

Each parent shall be entitled to have up to 20 keeping in touch days to use while on shared parental leave. As these will be in addition to the 10 "keeping in touch" days for maternity leave, they will be given a new name to differentiate them.