Newsletter

BURGES SALMON

In Focus

Summer 2013

Welcome

Welcome to the Summer edition of In Focus, our quarterly update keeping you informed of developments in employment law.

For further information on employment issues, please email roger.bull@burges-salmon.com

To cap it all

The cap on the unfair dismissal compensatory award changes on 29 July 2013 to the lower of one year's gross pay or the existing maximum award (currently £74,200). The new cap will apply where the effective date of termination is on or after 29 July 2013. For details of the timetable of other key changes please see our updated **Employment law Timeline 2013**.

Employment tribunal fees

The introduction of employment tribunal fees takes effect on 29 July 2013. Please see our **email alert on employment tribunal fees** for further details. The introduction of fees has been challenged by UNISON in an application to the High Court for judicial review on the basis that it is in breach of EU law and contrary to the principle of access to justice. Unison also argues that the introduction of employment tribunal fees is indirectly discriminatory because the fees will have a disproportionate adverse effect on women who are likely to earn only an "average income" and therefore not be entitled to a fee remission.

In the meantime, a Scottish law firm, Fox & Partners, have lodged an application in the Court of Session in Scotland for judicial review into the introduction of employment tribunal fees. The Court of Session refused to grant an interim interdict (injunction) prohibiting employment tribunal fees, as the Lord Chancellor provided an undertaking that any tribunal fees paid after 29 July will be repaid if, at the full hearing, the Court decides that the fees are unlawful. We await to hear the outcome of these cases.

In confidence

On 29 July a number of other reforms under the Enterprise and Regulatory Reform Act come into force relating to confidential pre-termination negotiations. Please see our **email alert** for further details.

Collective redundancies

The current rules on collective consultation in a redundancy situation have been changed by the decision in the case of *USDAW & Others v WW Realisation 1 Limited (in liquidation) and USDAW v Ethel Austin Limited (in liquidation)*. The duty to consult collectively now arises where 20 or more redundancies are proposed across an employer's business as a whole rather than just at one "establishment". The Secretary of State has made an application to appeal against the decision.

The Northern Ireland Industrial Tribunal has referred questions to the ECJ on the scope of the EU Collective Redundancies Directive and the meaning of "establishment" in the case of *Lyttle and Others v Bluebird UK Bodco 2 Ltd*. Whilst we await the outcome, any employers planning to make a number of redundancies involving multiple establishments, need to be aware of this change and take advice on their specific circumstances.

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Static or dynamic?

The Court of Justice of the European Union (ECJ) has issued its decision in an important case concerning the effect of industry or sector-wide negotiated terms after the transfer of an undertaking. The case is particularly significant to those private companies involved in the outsourcing of public sector work.

In the case of *Alemo-Herron and others v Parkwood Leisure Limited*, the issue at stake was whether the terms of a collective pay agreement, which was negotiated through a central bargaining forum, bound a transferee employer (ie the new private contractor) for employees who transferred to it under TUPE, even though it had not had the opportunity to be a party to the negotiations of the terms of the collective agreement. The UK courts had disagreed over which of the two interpretations of the Acquired Rights Directive to prefer (static or dynamic).

In February this year, the Advocate General recommended that the ECJ prefer the dynamic approach whereby the transferee employer is bound by all collective agreements (and in this case the outcome of the collective pay award formula), whether the negotiations occurred prior to or after the transfer.

However, in its decision published last week, the ECJ rejected the Advocate General's findings and held that the Directive prohibits member states from applying the dynamic approach where the transferee has not had the opportunity to negotiate the collective terms. The ECJ stated that the dynamic approach didn't strike the right balance between the interests of the employees and the interests of the transferee. It also held that, in binding the transferee to terms it has no opportunity to negotiate on, the dynamic approach impinged too greatly on the transferee's freedom to conduct business under Article 16 of the Charter of Fundamental Human Rights.

This decision will be good news for private sector employers as it gives greater certainty when taking on public sector contracts. It means that incoming employers can more easily price for such contracts as they have greater control over employees' terms and conditions.

Taxing times

A recent decision of the High Court in the case of *Barden v Commodities Research Unit & Others* has highlighted the importance of specifying whether a severance payment is to be paid gross or net of income tax. In this case, the compromise agreement was silent about the tax and simply set out the agreement "to pay £1,350,000". The court rejected the claimants assertion that it should be paid gross (without deduction of tax) as a "commercial absurdity". Employers should, however, make sure that they are clear about how the severance payment will be taxed in order to avoid any future disputes.

News in brief

- Compromise agreements are to be renamed as settlement agreements on 29 July 2013. Employers should ensure that this change is reflected in any settlements agreed after this date.
- Also coming in force on 29 July 2013 are revised Employment Tribunal Rules of Procedure and the rules relating to interest on tribunal awards.
- The new employee shareholder status provisions in the Growth and Infrastructure Act 2013 come into effect on 1 September 2013. For more details of the new arrangements, (whereby employees will be able to give up certain employment rights in return for shares in the employer which have a value on the day of issue or allotment of at least £2,000 and no more than £50,000) please see our **briefing**.
- From 1 October 2013, the national minimum wage will increase. The adult rate for workers aged 21 and over will increase to £6.31 per hour (from £6.19).
- The government has begun consultation on proposals to strengthen and simplify the current rules on illegal working and civil penalties. Please see our **email alert** for further details.
- The government has published "Whistleblowing framework: call for evidence" to examine existing protections for whistleblowers, consider whether further changes are required and seek views on introducing a non-statutory code of practice to guide employers on best practice principles for whistleblowing policies within their organisations. The call for evidence closes on 1 November 2013.
- The government has announced plans for the future of the UK's reserve armed forces, including proposals to remove the qualifying period for army reservists' unfair dismissal claims where the dismissal is by reason of the employee's reservist service.

In the office

Congratulations to **Peter Finding** on his marriage to Maxine.

We are delighted that **Katie Wooller** is joining the team following her qualification as a solicitor in September.

Email alerts

To access our recent email alerts please visit **www.burges-salmon.com/practices/employment/news/default.aspx**

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