EMPLOYMENT EXPRESS

Employment, Pensions & HR News Digest by Silverman Sherliker LLP

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Editor's Note…

Welcome to our latest edition of the Employment Express

In this newsletter we have a selection of articles touching a number of interesting topics. It's becoming more and more complicated for city workers to be paid their bonuses. The reality is that there must now be a worry that either we dis-incentivise people from doing so or push people towards working from lower tax jurisdictions something UK PLC can ill afford.

All the talk about flexible working is simply just that. You can ask but so what...the employer can say no. Ironically the last few years have seen an increase in flexible working because it has suited employers to say yes in order to cut costs. Lets see what happens now!

Zero Hours Contracts - legislation is fine but is this really the right solution ? Seems to me that employees are being turned into quasi-agency workers allowed to work where they like and when but with no real permanent employment.

Last but not least more consultations on pensions which seems to be a never ending saga .

Nicholas Lakeland
LLP Partner

Ask the Editor!
If you have any questions you'd like our Editor to answer, please email:
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The Remuneration Code and Settlement Agreements – An End to the Soft Option?

By Martin D Donoghue
Employment Partner

Good times ahead! The economy is improving and purse strings are starting to loosen. At last there may be more money available to resolve that awkward employment situation. Funding you can use to make that difficult employee's exit a little easier on both of you.

There is, however, a slight problem. The funding may now be easier to come by, but your Compliance Team may scupper any deal you may wish to make, quoting the provisions of the Remuneration Code ("the Code") as their justification.

Since early 2011, the number of employers caught by the Code has increased. It now covers all banks, building societies, investment firms, and some brokers, venture capital and corporate finance firms.

It applies to all Code Staff, the definition of which is outside the purpose of this article, but which will be covered in a future article.

The purpose of the Code is to manage risk, ensuring remuneration policies are risk focused. Undue risk taking and failure are not to be rewarded. The employee's reward must be linked to numerous factors, and not short term paper gains.

The Code contains numerous provisions to encourage this. There are rules on bonus ratios, deferment and payment in non-cash forms, and rules in relation to variable deferred remuneration and linking it to, amongst other criteria, individual performance.

Neither should you forget the concept of Malus, which can be used to reduce unvested deferred variable remuneration where there is reasonable evidence that an employee has misbehaved or has made a material error.

Further, and although not of direct concern now, there will be consultation starting in January 2015 on subjecting all variable remuneration to repayment.

Faced with these restrictions, you will be wise to keep the following guidance in mind when negotiating future termination packages:

1. Any termination payment should reflect the individual employee's performance over a long period of time;
2. Termination payments should not reward failure;
3. If an employee is permitted as part of a termination package to retain an outstanding bonus or other equity participation, it should be on the basis that it continues to be deferred on the same basis as provided in the applicable vesting rules;
4. Think very carefully before you guarantee anything. You may be committing your employer to do something it cannot legally do; and
5. If in doubt, talk to your Compliance/ Legal Team.

Although you will always need to tread with care, of particular risk will be negotiations with senior exiting employees where there have been significant compliance or risk taking issues. Agreements with this category of employee will no doubt be under closer scrutiny than ever before.

Of course, deals with exiting employees can still be done, and there will continue to be circumstances when being generous will be commercial and legal, however, always keep the Code in mind. You never know when it will come back to haunt you.**EE**

Pub Talk

Employment law tends to get caught up in exaggerated news-paper headlines which filters into pub conversations. Here are some of the current hot topics…

Obesity is not a disability ... well actually ... if a person is obese to the extent that it puts them at a disadvantage to others then obesity can be a disability says the Advocate General in the ECJ in Kaltoft v The Municipality of Billund.

Is making 'heightism' illegal the next frontier for employment law ? It is if you listen to the speaker of the House of Commons John Bercow who thinks that insulting someone because of their height (Mr Bercow is 5 foot 6 inches tall) is akin to racism or homophobia.

Well since MPs make our laws he's in a prime position to bring pressure to bear...but where does it stop ? Weight (mind you that is nearly there already - see article above), colour of hair or eyes, shoe size or even looks ? Perhaps even those of us are interested in equality might consider that we are in danger of bringing the law into disrepute.

Finally, you may have read the story in the Daily Mail about the worker sacked for having a visible tattoo. If you did read this story you may also have noticed a comment from the Editor of this publication.

The case involved an agency worker and the detail of the case was not quite as favourable to the worker as she might have hoped…

The process for flexible Working requests isn't that flexible for employetrs

By Victoria J Russell
Employment Partner

The right of employees to request flexible working arrangements have previously only been afforded to those employees with 26 weeks continuous service who have with children or disabled dependents. From 1 July 2014 this right has now been extended to all employees with 26 weeks continuous service regardless of their personal circumstances. Although the new regime is supposedly less prescriptive, there is still a fairly rigid procedure to follow and employers must be aware of the new ACAS Code of Practice which supports this new legislation and provides a "principles based approach" for dealing with applications.

As before, the right is actually only a right to request, not a right to have flexible working arrangements. Only one request can be made in any 12 month period and the request must relate to a change in the number of hours worked, the times when work is undertaken or the location of the workplace.

There are specific rules as to how the flexible working request must be made; requests have to be in writing, be dated, explain the requested change for one of the three reasons and the desired start date, explain the effect that it is considered there may be on the workplace and how that will affect the employer, state if this request has ever been previously made and, state that the application has been made under the statutory procedure. Employers are advised to assist employees by directing them to a handbook or policy which should set out how to make a request.

The reasonableness of the approach taken by the employer in dealing with the request is key. The ACAS Code and Guide provides guidance about the process and suggest meeting the employee, setting out clear time frames for dealing with the request and ensuring that both parties needs can be met in discussing the proposed arrangement. All aspects of the request should be considered so that practical matters such as working from home arrangements and the changes that would take effect to the remuneration package are worked through in the discussion stages.

There are still eight justifiable reasons for refusing a working time request. The test is subjective on the part of the employer, although care must be taken to explain with some detail why one of the grounds for refusal has been decided. The ACAS guide provides useful direction on refusals to request. If there are any doubts on how a proposal could be implemented, an employer should consider a trial period to allow a subsequent decision to be made with practical experience as to the effect of it.

An employee who feels aggrieved at having the request for flexible working and appeal rejected can bring a claim in the Employment Tribunal although a Tribunal cannot question the commercial rationale or business reasons behind a refusal and only look at the procedure followed and whether the decision was taken seriously, was made on the correct facts and was refused because of on one of the eight acceptable grounds for refusal. Hence, provided the employer has a neat paper trail with details of the procedure followed and reasons for the decision, they should not have cause for concern. In circumstances where the Tribunal decides the employer has not followed the correct procedure compensation awards are low.

However, a Tribunal claim for refusing a flexible working request is often coupled with a claim for discrimination and employers must take care that their refusal for flexible working is not actually a refusal to make reasonable adjustments on the grounds of disability or could be considered indirect sex discrimination if the refusal relates to a request made by a female employee about their child care arrangements.

Flexible working has many benefits helping retain staff who may otherwise look to leave and often can increase the breadth of service offered to clients. Employer must be alive to the risks of discrimination claims and should act positively in considering the request, ensuring that the paper trail of the process followed is neat and tidy. **EE**

Has something really been done about zero hours contracts?

By Dilini Loku
Solicitor

An estimated 3.15% of the UK workforce are employed on zero-hours contracts. These contracts have no current legal definition but are generally considered to be an employment contract between an employer and a worker, whereby the employer is not obliged to provide the worker with any minimum working hours, and the worker is not obliged to accept any of the hours offered. The worker has limited employment rights and does not accrue continuous service when not working for the employer. Some employers also prevent zero-hours workers from working for other employers (exclusivity clause).

Most commonly, zero-hours contracts are used by employers for seasonal work, holiday cover, employee absences, or unexpected work. The advantage of employing workers on zero-hours contracts is the ability of the employer to maintain a flexible work force, with minimal employment law obligations whilst maintaining maximum productivity.

A recent survey carried out by the Chartered Institute of Personnel Development found that some employers are not providing written terms and conditions for zero-hours contract staff and a significant proportion of zero-hours workers reported having pre-arranged work cancelled with no notice or at the start of a shift. There was also significant confusion among zero-hours workers over the issue of employment status and rights.

The use of zero-hours contracts were heavily criticised in the media. In response, the Government launched a consultation on the use of exclusivity clauses and the lack of transparency. On 25 June 2014, the Government published its response to the consultation (Response) and The Small Business, Enterprise and Employment Bill 2014-2015 (the Bill).

The Response found that the majority were in favour of a ban on exclusivity clauses which the Government estimates will benefit approximately 125,000 zero-hours workers be tied to an exclusivity clause.

The Government confirmed that it would develop a code of practice by the end of 2014 on the fair use of zero-hours contracts and review existing guidance and improve information available to workers and employers.

The Bill defines zero-hour contracts for purposes of the exclusivity van and gives the Government powers to extend the ban on exclusivity clauses to other workers, and to address any steps taken by employers to avoid the effect of these provisions.

Clause 139 will insert two new sections, 27A and 27B, into the Employment Rights Act 1996.

Section 27A defines a zero-hours contract under which "*the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and there is no certainty that any such work or services will be made available to the worker.*" In relation to such a contract a clause which "*prohibits the worker from doing work or performing services under another contract or under any other arrangement, or prohibits the worker from doing so without the employer's consent, is unenforceable against the worker.*"

Section 27B allows the Secretary of State to make further regulations to ensure that zero-hours workers are not restricted from working for another employer.

On reflection, the definition of zero-hours contracts in the Bill appears to be vague. The term "*no certainty ….of work*" and not in keeping with what is generally understood to be a zero-hours contract.

The Bill does not prevent a worker from suffering a detriment or being penalised by the employer for accepting work from a different employer.

If the definition is widened, this might have a negative impact on other types of employment contract offering flexible working.

With only a 125,000 out of approximately 1.4 million zero-hours workers benefiting from the Bill, it is questionable what practical effect the Bill will have in curbing the abuse of zero-hours contracts. **EE**

Quiz

Email ee@silvermansherliker.co.uk with the answers to the questions below to enter into a draw for a bottle of champagne. Closing date: 8th August.

1. How many weeks continuous employment does an employee have to have to be able to make a request for flexible working:
A. None, it automatically arises on the first day of employment
B. 26 weeks
C. 2 years

2. How many permissible grounds are there for an employer to rely on to refuse a request for flexible working?
A. 8
B. 16
C. There isn't a set number of grounds, it's all about being reasonable.

3. When can an employee claim Unfair Dismissal ?
A. After 1 year of continuous employment
B. After 1 year and 50 weeks of continuous employment
C. After 2 years of continuous employment

4. The DWP has announced minimum governance standards for pension schemes including:
A. A costs cap set at 0.75% of funds and transaction costs under management on all member paid charges
B. Establishment of Independent Governance Committees
C. A cap on additional costs when a member stops paying into the scheme

5. An individual employed under a zero-hours contract is considered for the purposes of employment law, to be:
A. An employee
B. A worker
C. Dependent on the specific facts and circumstances of the individual's employment

Pensions Corner

All Good Intentions

The Law Commission has recently reported on the Fiduciary Duties of Investment Intermediaries following a Consultation in October 2013. What has that got to do with Pensions I hear you ask? Well, actually, quite a lot.

As Auto Enrolment gets rolled out to smaller employers, Defined Contribution schemes have come under the spotlight. In particular, the Government has been concerned that most employees don't bother to engage much with pension and employers have very little incentive or capability to drive competition in the marketplace. This so called 'governance gap' has led to little pressure to keep charges low – always something close to employers' and employees' hearts – and there is very little review of investment strategies.

With the old traditional Defined Benefit arrangements written usually under trust, it was the Trustees who are expected to fill this gap. With contract based schemes, there is no similar body in place, and even for those DC schemes written under trust, smaller schemes may have trustees that lack the necessary skills and support, while large multi-employer Master Trust arrangements may lack independence.

But there is change on the horizon. Following an Office of Fair Trading Report (Defined contribution workplace pension market study – Sept 2013 and revised Feb 2014), the Association of British Insurers have agreed to set up Independent Governance Committees (IGCs) within all providers of contract based schemes. These IGCs will be required to act in members' interests, scrutinising whether the schemes are providing value for money. If a problem arises, it will prepare a report on proposed remedial action to the pension provider's board. That action must then be taken or an explanation given why action has not been taken. Ultimately, formal complaint can be made to the relevant regulator and media exposure may occur. Never underestimate the court of public opinion for trashing a reputation!

The Government also of course has plans. In March 2014, the DWP announced a raft of changes to help address these issues. These include new minimum governance standards for all schemes, the establishment of IGCs by contract based providers, a costs cap set at 0.75% of funds under management on all member paid charges (but note that this doesn't include transaction costs!) which may also apply on the default funds of DC auto enrolment qualifying schemes. There will also be a ban on what have euphemistically been called 'active member discounts'. AMDs – or more realistically deferred member penalties – which are additional costs placed on members when they stop paying into a scheme. These are all good initiatives (although some may argue the charge cap doesn't go far enough) and it's hoped that member outcomes will be greatly helped as a result.**EE**

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