Proskauer

newsletter

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

Daniel Ornstein
+44.20. 7280.2067
dornstein@proskauer.com

Erika C. Collins
+1.212.969.3555
ecollins@proskauer.com

Peta-Anne Barrow
+44.20. 7280.2027
pbarrow@proskauer.com

Kelly M. McMullon
+44.20.7280.2137
kmcmullon@proskauer.com

News & Legislation Update

Taxation of termination payments draft legislation published

At present, in certain circumstances the first £30,000 of a termination payment is exempt from income tax and national insurance ("NIC"). However, there have been concerns for many years about a lack of certainty as to the circumstances when this exemption applies. One key area of confusion is the circumstances under which any part of termination payments relating to notice periods attract the tax exemption. There have been various calls to simplify the rules, and the Government's response to their 2015 consultation on this topic has now been published, including proposed draft legislation.

The key changes the Government plans to make include:

- Align the rules for income tax and employer NICs on compensatory payments so that employer NICs will now be payable on the excess of any compensatory payment above £30,000 (in contrast to the current position where the full amount of a compensatory payment is not subject to any employer NICs). This will increase the overall cost of termination payments.
- Tax and make subject to NICs any payment that the employee would have received if he or she had worked his or her notice period (creating certainty in relation to the tax treatment of payment referable to notice periods but also removing any scope for such payments to attract the tax exemption).

However, despite the fact that the £30,000 limit has been in place since 1988, the Government has rejected calls to increase it.

The Government has proposed that the changes come into place in April 2018.

Privacy shield now in force

The long-awaited EU-US Privacy Shield came into force on 1 August 2016. The UK Data Protection Authority (the "ICO") has published a blogpost on the position in relation to EU-US data transfers. Importantly, the ICO warns against relying on the Safe Harbor Framework to ensure the lawful transfer of personal data from the UK to the U.S. Rather, in order to lawfully transfer personal data to the U.S., it advises businesses either to:

(i) use data transfer agreements based on standard contractual clauses;

(ii) use binding corporate rules; or

(iii) participate in the Privacy Shield.

However, the ICO has caveated this advice by referring to pending ECJ decisions which may impact the validity of standard contractual clauses and binding corporate rules, stating that there is still uncertainty about the Privacy Shield in light of the Article 29 Working Party's various concerns (the Article 29 group contains representatives from each of the EU member states' data protection authorities). While this uncertainty remains, there is still no "risk-free" method for data transfers to the U.S.

The Privacy Shield will be reviewed in May 2017 and the Article 29 Working Party has stated that data protection authorities in the EU will not challenge the adequacy of the Privacy Shield until at least after this review.

In addition, an Irish privacy advocacy group, Digital Rights Ireland, has filed a legal challenge against the Privacy Shield, stating that it provides inadequate protections. A hearing on the challenge is not expected for at least another year.

Stay up to date with the latest developments on the Privacy Shield by subscribing to Proskauer's Privacy Law blog and the International Labour and Employment Law blog.

Corporate Governance inquiry launched

Following recent high profile investigations into the management and businesses of BHS and Sports Direct, the Business, Innovation, and Skills ("BIS") Committee has launched an inquiry on "corporate governance" covering directors' duties, executive pay and the composition of boards (including diversity, worker representation and gender). We will keep you abreast of any updates.

Case Update

Disability discrimination and reasonable adjustments – *G4S Cash Solutions (UK) Ltd v Powell*

The Employment Appeal Tribunal (the "EAT") has held that not reducing an employee's salary (even when moving that employee to a lower-paid job) could be a reasonable adjustment, within the meaning of disability discrimination legislation contained in the Equality Act 2010, in appropriate circumstances. In addition, an employee needs to consent to a change in their terms and conditions for a change to take effect, even where that change constitutes a reasonable adjustment.

BACKGROUND

Under UK disability discrimination legislation, an employer has a duty to make reasonable adjustments where it knows or ought reasonably to know that a person has a disability and there is a provision, criterion or practice which puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. An employer must take such steps as are reasonable to avoid the disadvantage. A failure to make a reasonable adjustment amounts to unlawful discrimination.

FACTS

Mr Powell worked as an engineer on ATMs until he became disabled through a back injury that meant he was no longer fit for jobs involving heavy lifting or working in confined spaces. G4S Cash Solutions (UK) Ltd ("G4S") gave him a new and alternative role as "key runner" at his original salary. Mr Powell was led to believe that this role was long term; however, G4S later considered discontinuing the key runner role for organizational reasons. G4S provided Mr Powell with a list of alternative vacancies, but stated to him that if nothing was available he would be dismissed on medical grounds. After Mr Powell involved solicitors, G4S decided to make the key runner role permanent but at a reduced rate of pay (£207 per month less before tax, a roughly 10% reduction in his salary) because the role did not require engineering skills. Mr Powell refused to accept the lower rate of pay, as a result of this refusal and because no other suitable vacancy could be identified, he was dismissed.

The Employment Tribunal (the "ET") found that:

- G4S was fulfilling its statutory duty by making reasonable adjustments and it was entitled to make that adjustment without the consent of the employee.
- The duration of a reasonable adjustment is not indefinite and can be subject to change in certain circumstances.
- However, G4S failed to make a reasonable adjustment because it should have allowed Mr Powell to work as a runner without reducing his salary. Accordingly, his dismissal amounted to discrimination arising from disability and was unfair.

EAT DECISION

The EAT held that the ET had made an error of law on the variation of contract issue. A change to terms and conditions of employment, even if made pursuant to the statutory obligation to make reasonable adjustments, still requires employee consent.

The EAT further found that pay protection could be a reasonable adjustment in appropriate cases. The EAT found no reason why pay protection could not be a reasonable adjustment – it was just another potential form of cost that an employer might need to incur in order to comply with its duty to make reasonable adjustments.

COMMENT

- This case provides useful guidance that pay protection can be a reasonable adjustment in appropriate cases. It also makes clear that reasonable adjustments that vary an employee's employment contract must be consented to by an employee like any other variation of terms.
- All offers made and changes to terms and conditions should be made clear and documented so that there is a paper trail.

Whistleblowing and who has to know about a protected disclosure – *Royal Mail v Jhuti*

The EAT found that a dismissal was automatically unfair in circumstances where the Claimant's line manager (to whom the Claimant had made a protected disclosure) had engineered her dismissal by misleading the person who decided to dismiss the employee.

FACTS

Ms Jhuti started work in the sales division at Royal Mail as a media specialist. Shortly after, Ms Jhuti witnessed and believed that another employee was offering incentives to clients contrary to Royal Mail's internal regulations and regulatory requirements. Ms Jhuti later notified her concerns to her line manager, Mr Widmer, who told her that she should admit that she had made a mistake about the irregularities and advised her to send an email retracting the allegations made. She reluctantly sent the retraction email.

Following a series of events, including Ms Jhuti expressing concern to Mr Widmer that she had been unfairly allocated customer accounts, Mr Widmer began to monitor Ms Jhuti's progress through weekly meetings and set her an "ever changing unattainable list of requirements". Mr Widmer remained critical of Ms Jhuti and told HR that "if things don't change, we will need to look at exiting this individual". This was in contrast to another team member who complimented Ms Jhuti on her fulfilment of Mr Widmer's latest requirements.

Ms Jhuti raised the issues about Mr Widmer's treatment of her with HR, but no action was taken. She raised a grievance (which was not dealt with until 18 months later), and soon after was signed off sick. She was offered three months' salary and then one year's salary to not return to work, which she refused.

Subsequently, Ms Vickers was appointed to review Ms Jhuti's case (excluding her grievance). The ET found that Mr Widmer had withheld material information from Ms Vickers. Based on the information provided to her, Ms Vickers terminated Ms Jhuti for poor performance.

The ET found the fact that Ms Jhuti had been offered a termination payment of one year's salary in circumstances where she was deemed to be a poor performer raised suspicions that Ms Jhuti had made protected disclosures. However, applying *CLFIS (UK) v Reynolds [2015] ICR 101* (a case about direct discrimination), which held that the focus should be on the decision-maker, rather than those who provided information to the decision-maker, Ms Vickers herself needed to have been motivated to terminate Ms Jhuti because of the protected disclosures. However, there was no basis to suggest Ms Vickers was so motivated and, accordingly, the ET held that Ms Jhuti was not automatically unfairly dismissed because she had made protected disclosures.

EAT DECISION

The EAT held that even though the person who was responsible for dismissing Ms Jhuti was not aware of the protected disclosures, Ms Jhuti was still automatically unfairly dismissed because of the protected disclosures.

Importantly, the EAT held that *CLFIS (UK) v Reynolds* did not apply because that case focused on direct discrimination rather than protected disclosures, which are subject to different rules of causation. The EAT was satisfied that even though Ms Vickers made the decision in ignorance of true facts, because her decision was manipulated by someone in a managerial position responsible for an employee and who was in possession of the true facts, a causal link could be made between Ms Jhuti's protected disclosures and the decision to dismiss her, such that her dismissal was deemed to be because of her having made protected disclosures.

In reaching this decision, important factors here included that (i) Mr Widmer was Ms Jhuti's line manager, (ii) Ms Jhuti made protected disclosures to Mr Widmer and Mr Widmer appreciated the significance of those disclosures, (iii) Ms Jhuti was

deliberately subjected to detriments by Mr Widmer following the protected disclosures, (iv) Mr Widmer lied to Ms Vickers about the disclosures, and (v) Ms Vickers was not given access to all information. This meant that the reason and motivation of Mr Widmer also needed to be taken into account.

COMMENT

- In certain circumstances, especially where there has been willful concealment of relevant facts, a decision-maker can be fixed with knowledge of a protected disclosure about which they are unaware.

Whistleblowing and the definition of "Worker" – *McTigue v University Hospitals Bristol NHS Foundation Trust*

The EAT decided that an agency worker can bring a whistleblowing claim against the entity for whom they provide services (the "end user") even if the end user does not employ that agency worker, if the end user substantially determines the terms of an agency worker's engagements and even where the agency that engages the agency worker also substantially determines the terms of engagement.

BACKGROUND

Section 43K of the Employment Rights Act 1996 (the "ERA 1996") provides an extended definition to the term "worker" in the context of protected disclosures and whistleblowing. This provision was enacted primarily to protect agency workers provided to an end user in circumstances where the worker would not fall under s.230 ERA 1996, which sets out definitions for "employees" and a limited definition for "workers". The dispute in this case centered on s.43K(1)(a)(ii) ERA 1996, which requires that the terms on which the worker is engaged to do the work are or were in practice *substantially determined* not by the individual but the person for whom the individual works, by a third party or both of them.

FACTS

Ms McTigue was an agency worker employed by Tascor Medical Service Limited ("Tascor") under a contract of employment to perform work for University Hospitals Bristol NHS Foundation Trust (the "Trust"). She was removed from this engagement and raised claims alleging that she was subject to detriments by the Trust. Ms McTigue's employment contract with Tascor dealt with remuneration, holiday entitlement, sick pay, pension, maternity leave, disciplinary and grievance procedures and notice to terminate. Ms McTigue also had an "honorary contract" from the Trust. The honorary contract authorised her to carry out her duties for the Trust, it identified her supervisor and it reserved the right to terminate the honorary contract in certain circumstances. There were significant amounts of cooperation between Tascor and the Trust in relation to her employment/engagements including in relation to holiday, time off and uniform requirements.

The ET held that it was Tascor who substantially determined Ms McTigue's terms, rather than the Trust, so that Ms McTigue's claims against the Trust failed.

EAT DECISION

The EAT held that the ET erred in law in its approach to section 43K(1)(a)(ii) ERA 1996 in deciding that because Tascor substantially determined the terms of Ms McTigue's contract, the Trust could not. It was not a question of either/or: both Tascor and the Trust could be said to substantially determine Ms McTigue's terms. The ET should have focused on the Trust and Ms McTigue's relationship, rather than conduct

a comparison exercise between the Trust and Tascor. The EAT's decision is consistent with the fact that the overall purpose of s.43K ERA 1996 is to extend protection to agency workers in relation to victimisation for protected disclosures made while working at the end user (indeed it was specifically designed to protect health workers).

COMMENT

- The case sets out the questions to be addressed in determining whether an individual is a worker within the meaning of s.43K(1)(a) ERA 1996.
- Businesses can be liable for whistleblowing claims brought by agency workers they do not employ and whom they engage through third parties.

Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

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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:

Daniel Ornstein
+44.20.7280.2067 — dornstein@proskauer.com

Erika C. Collins
+1.212.969.3555 — ecollins@proskauer.com

Peta-Anne Barrow
+44.20.7280.2027 — pbarrow@proskauer.com

Kelly M. McMullon
+44.20.7280.2137 — kmcmullon@proskauer.com