



Employment Bulletin

February 2007

Bonus of Contention

Recent publicity concerning bonuses paid to workers in the City has shown that a discretionary bonus can make up a substantial amount of the remuneration of some employees. But to what extent does the law relating to contracts impinge on the employer's decision as to how much to award and whether to make any bonus payment to an employee who has been dismissed?

These questions have been considered in two recent cases. The first concerned a banker who challenged his employer's decision to award him discretionary bonus payments of €2.8m in 2003 and €2.95m in 2004. Whilst the Court of Appeal accepted that an employer must exercise its discretion under a bonus scheme rationally and in good faith, it said that an employee would have to show overwhelming evidence of irrationality to persuade a court to interfere with levels of bonuses determined in accordance with market conditions. Such irrationality had not been shown in this case.

The Court of Appeal went on to consider whether a term in the banker's contract

stating that the employee would not receive a bonus if he was no longer employed at the date a bonus was due to be paid could be challenged as an unfair contract term. The Court rejected this argument, deciding that the Unfair Contract Terms Act 1977 did not apply to employment contracts. As the employer had dismissed the banker before the 2005 bonus became payable the employee had no claim to a bonus in 2005.

The other recent case also concerned an employee who was dismissed before a bonus became due. This employee argued at a preliminary hearing that where a bonus payment was reliant on continuing employment, an employer was under a duty not to terminate the contract in order to avoid paying the bonus. The High Court decided that this argument had a good chance of success and allowed the matter to proceed to a full hearing. The outcome of this case will be of great interest to employers who may face breach of contract claims (with no statutory limit on the compensation payable) in respect of unpaid bonuses.

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Age Discrimination

We reported in the last Bulletin that implementation of the provisions in the age discrimination legislation relating to access to pension schemes had been delayed to 1 December 2006 to allow for further consultation. The relevant rules have now come into force and list the exceptions to the general rule that pension schemes must be operated according to non-discriminatory rules.

The exceptions include:

- setting minimum and maximum ages for entry into a scheme;
- paying different rates of employer contributions for employees of different ages (where the aim is to equalise benefits that members will be entitled to); and
- closing pension schemes to new joiners.

On the subject of age discrimination, ASDA, the supermarket chain, have announced that they will no longer ask job applicants to reveal their age. It seems likely that other employers will follow this example.

Work and Families

We highlighted a number of changes to the maternity legislation in the last Bulletin. Employers may be interested in new guidance issued by the Department of Trade and Industry, which applies to women expecting a baby on or after 1 April 2007. The guidance covers the new rules, such as extending entitlement to statutory maternity pay from 26 to 39 weeks, and can be found at www.dti.gov.uk.

A further development in the work and families arena is the extension of the right to request flexible working to carers of adults. Currently the right applies only to parents of children aged under six or parents of disabled children under 18.

From 6 April 2007 an employee may make a request for flexible working if he or she is caring for an adult who is either married to or the partner or civil partner of the employee, a relative of the employee or living at the same address as the employee. The definition of relative is wide and covers mother, father, adopter, guardian, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, uncle, aunt and grandparent. To qualify an employee must have 26 weeks' continuous employment.

Disability Discrimination by Association

Judgment is awaited from the European Court of Justice in a potentially ground-breaking case as to whether the EC Equal Treatment Directive prohibits disability discrimination by association.

The claimant in the case is not disabled herself but has a disabled son. She is claiming that she has been discriminated against by association with her son's disability.

In December 2006 the Appeal Tribunal held that the European Court should be asked to make a ruling. The tribunal said that if the Directive was intended to give protection to those who associate with the disabled, and who are discriminated against as a result, the Disability Discrimination Act 1995 could be read to fit in with this intention.

This interpretation of the Directive accords with the position in relation to race discrimination where discrim-

ination 'on racial grounds' has been held to include discrimination against an employee because of her husband's race. It is also the case that the prohibition on discrimination 'on grounds of sexual orientation' would cover discrimination based on the claimant's association with someone of a particular sexual orientation.

The European Court will decide the case later this year. If the Court decides that the Directive is intended to prohibit discrimination by association, there are potential ramifications in other fields such as age discrimination.

Taxing the Self-Employed Twice

The perils of getting employment status wrong have been demonstrated by a recent taxation decision. Both the company and the contractor involved in the case believed the contractor to be self-employed. Consequently the company paid the contractor a gross amount and paid no PAYE income tax or national insurance on the sums paid. The contractor declared his earnings as part of his self-assessment tax returns and paid tax accordingly.

The Revenue decided to challenge the contractor's employment status, claiming that he was in fact an employee and not self-employed. The Special Commissioner agreed with the Revenue but in a move which has surprised commentators he decided that the company would not be given credit for any tax already paid by the

contractor. This meant that the company was liable for up to six years of back tax and national insurance together with interest and penalties.

The Revenue are in continuing negotiations with various professional bodies to attempt to reach an understanding as to the implications of this case for employers. In the meantime the advice must be to look very carefully at the status of independent contractors and ensure that it is not open to challenge.

In this case the sum involved was just over £15,000, but clearly there is the potential for much larger amounts to be involved depending on the fees paid and the number of contractors involved. In some cases it may be advisable to seek a tax indemnity from a contractor from the outset. If in doubt specialist advice may be needed.

Religious Discrimination - close shaves...

The laws prohibiting discrimination on the grounds of religious belief have been in force for three years now but have given rise to relatively few tribunal cases. In the first appeal case on the religious discrimination provisions the issue of uniform policies was considered in relation to a Muslim employee whose religious beliefs required his beard to be a minimum of one fist's length. The uniform policy required employees to keep any beards neatly trimmed and smart.

The Appeal Tribunal decided that the tribunal had been entitled to find that the employer had not discriminated against the employee when he was dismissed. Although the employer had asked the employee to adhere to the uniform policy, this was not related to the reason for his dismissal.

...and veiled threats

Hot on the heels of the above case came another decision, which generated a huge amount of publicity, concerning the

wearing of a veil by a female Muslim teaching assistant. The employee was suspended from the school she worked at for refusing to comply with an instruction not to wear the veil.

The employment tribunal in this case held that it was not direct discrimination on the ground of religion or belief for the employee to be required to remove her veil while teaching. The evidence showed that anyone who covered their face would have been treated in the same way as the inability to pick up on visual clues from the teacher's face hampered learning.

The tribunal went on to find that there had been no indirect religious discrimination either. Although the teaching assistant was put at a disadvantage compared to others not of her belief, it was a proportionate response to the legitimate aim of providing unhindered language tuition to the children at the school.

There are likely to be more cases involving uniform policy and religious dress in the future as the furore over the suspension by British Airways of an employee for wearing a cross on a chain suggests. Employers need to ensure that all employment policies have been considered in the light of the religious discrimination laws and that staff have been trained in their implications.

Drafting Restrictive Covenants

A recent case has highlighted the need to take particular care in the drafting of restrictive covenants.

The contract in question contained two restrictions. First, that the employee could not work as a solicitor anywhere within a six-mile radius of the firm's offices for a period of one year after the termination of her employment. Secondly, that for a period of one year she could not act as a solicitor for any person who had been a client of the firm in the year preceding the end of her employment.

When the solicitor left employment she set up practice in an office one and a half miles away from her ex-employer and sent unsolicited e-mails to a large number of her ex-employer's established clients.

The High Court began by confirming that a restriction will be enforceable if it goes no further than reasonably necessary to protect the employer's legitimate business interests, including customer connections and goodwill. The six-mile restriction did not attempt to limit its application to clients of the ex-employer and sought to prevent the ex-employee from

competing for the business of a very large number of people, most of whom were not clients of the ex-employer. This covenant was unenforceable.

The Court did, however, uphold the validity of the non-dealing covenant, holding that it was not necessary to limit it to clients of the firm in the preceding year with whom the employee had had personal dealings. When the contract was entered into both parties expected the employee to become a partner in the firm and to be introduced to a large number of clients.

The Court had to make a difficult decision as to the enforceability of the non-dealing covenant and arguably the employers were fortunate to make this covenant stick. Employers drafting such restrictions must ensure that they are carefully worded to suit the particular circumstances of their business, paying close attention to how they obtain and secure their business connections. In general terms, the narrower the restriction, the easier it will be to enforce.

DDPS are VIPs

The statutory disciplinary and dismissal procedures (DDPs) are the minimum statutory procedures that employers must follow when considering dismissal or disciplinary action. The standard DDP consists of three stages:

- a written statement given to the employee;
- a meeting to discuss the issue; and
- an appeal.

In a recent case the employer had in place contractual provisions which required the employee to set out the grounds for an internal appeal in writing. However, the standard DDP requires only that the employee 'informs' the employer of his wish to appeal. When the employee failed to appeal in writing the employer refused to allow an appeal to take place. The Appeal Tribunal stated that the employer was obliged to hold an appeal under the standard DDP, and the employee's dismissal without an appeal was automatically unfair. The case reinforces the importance of the standard DDPs: employers ignore them at their peril.

When is a Shareholder an Employee?

The question of whether a company director and shareholder is an employee arises most commonly on the company's insolvency where the director in question is seeking to claim outstanding wages, holiday pay and notice pay from the Secretary of State.

In a recent case the Appeal Tribunal considered a case where an executive director and 50 per cent shareholder claimed that he was an employee of the company. The tribunal decided that although the fact that an individual was the joint controller of the company would be significant and in some cases

decisive, it was not determinative of the issue. Just because someone is a shareholder does not preclude him or her also being an employee. The case was sent back to the employment tribunal to be reheard.

Factors which may also be relevant into the enquiry as to employment status include the existence of a genuine contract between the company and the shareholder, the degree of control the employer has over the work of the individual, and whether the individual works full-time for the business, is paid on a PAYE basis and has set holidays.

Increase to Compensation

The Government have announced new compensation limits effective from 1 February 2007. The maximum 'week's pay', used to calculate the unfair dismissal basic award and statutory redundancy payments, has increased from £290 to £310. The maximum compensatory award for unfair dismissal goes up from £58,400 to £60,600.

Contacts

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

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