KING & SPALDING

Client Alert

Corporate Practice Group

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UK Employment Law Update

Several key changes to UK employment law are coming into force this summer.

New settlement agreements replace compromise agreements

Compromise agreements are currently used by employers to document termination arrangements with departing employees. Crucially, they include a provision ensuring that the employee waives all rights to bring a claim against the employer. This will generally be in return for an ex gratia payment from the employer. They are the only method of ensuring that an employee validly compromises all statutory and contractual claims which he or she may have against the employer. From 29 July 2013, compromise agreements will be renamed "settlement agreements". This is a change in name only and will not affect the contents of the agreements or the validity of existing compromise agreements.

Additionally on 29 July, a new regime will come into effect enabling employers to undertake "pre-termination negotiations" secure in the knowledge that these negotiations will not be admissible as evidence in a tribunal in unfair dismissal proceedings. The current legal position is that discussions regarding a potential termination of employment are only inadmissible in litigation where there is an existing dispute. The Government's view is that employers are not always clear at what point a dispute has arisen and, therefore, when they may initiate "without prejudice" discussions regarding termination which are properly inadmissible in litigation. The new regime aims to make it easier for both employers and employees to have off-the-record discussions about termination without concerns that they could be admitted as evidence in an unfair dismissal claim. The existing common law "without prejudice" rules will continue to run alongside the new statutory regime.

The key drawback to the new regime is that the discussions are inadmissible only in certain unfair dismissal proceedings. If negotiations are unsuccessful and no settlement agreement is signed by the employer and the employee, the contents of the discussions may, therefore, be admissible in future claims relating to breach of contract, wrongful dismissal, discrimination, harassment and victimisation. It also specifically does not apply where the claimant goes on to claim that they have been dismissed for a reason which is automatically unfair, such as whistleblowing, asserting a statutory right or on grounds of trade union membership.

The new legislation provides that pre-termination negotiations will only be inadmissible where there has not been "anything said or done which in

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the tribunal's opinion was improper or was connected with improper behavior". If there has been "improper behaviour", the discussions will only be inadmissible at the discretion of the tribunal. Given the potential for uncertainty over what is "improper", the Government has asked the Advisory, Conciliation and Arbitration Service (ACAS) to publish guidance on the new regime (the "ACAS Code"), including a section on what would constitute "improper behaviour". Examples given include all forms of harassment, bullying and intimidation (including the use of offensive words or aggressive behaviour), physical assault or the threat of physical assault, all forms of victimisation and unlawful discrimination and putting undue pressure on a party to execute a settlement agreement. The last example is likely to arise most frequently. From an employer's perspective, they must ensure that they do not inform the employee before any form of disciplinary process has begun that the employee will be dismissed if they reject the company's settlement proposal. The ACAS Code also suggests that a minimum period of ten calendar days should be allowed in order for the other party to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise. In order to avoid an accusation of "improper behavior", employers should therefore ensure that they allow employees at least this period to consider the terms of a settlement agreement.

Another key point for employers to note is that pre-termination discussions can still be initiated verbally. Where a meeting is held for this purpose, there is no legal requirement to allow the employee to be accompanied, but the ACAS Code states that employers should allow the employee to bring a work colleague, trade union representative or trade union official.

Although the ACAS Code is statutory, it specifically states that failure to follow it will not, in itself, make a person or organisation liable to proceedings; nor will a breach lead to an adjustment in any compensation award made by a tribunal. Employment tribunals will, however, take the ACAS Code into account when considering relevant cases and employers should adhere to the best practice procedures set out in the ACAS Code when entering into pre-termination negotiations.

Employment Tribunal Fees

Unlike in most civil court claims, there is currently no fee payable to lodge an employment tribunal claim. From 29 July 2013, anyone who files a claim with an employment tribunal and any party who lodges an appeal with the Employment Appeal Tribunal will be required to pay a fee or to provide an application for fee remission. The main fees to be introduced are issue fees and hearing fees. The level of these will depend upon the type of claim. In broad terms, claims relating to unlawful deductions, notice pay and statutory redundancy pay will lead to an issue fee of £160 and a hearing fee of £230; fees for more complex claims such as unfair dismissal, discrimination and whistleblowing will incur an issue fee of £250 and a hearing fee of £950. In the Employment Appeal Tribunal, there will be a flat fee of £400 to lodge an appeal and £1200 for a full hearing. There will be a fee remissions system which will apply to individuals in receipt of certain benefits or who have an income below a certain level. The income of a claimant's partner will also be taken into account when determining whether a fee remission is given. As and when tribunal fees do come into effect, the employment tribunal will have discretion to order the unsuccessful party to reimburse the fees paid by the successful party, but the successful party will not automatically recoup their fees from the losing party

Unsurprisingly, this reform has met with stiff opposition from trade unions and other employee representative bodies. UNISON, one of the UK's largest trade unions, lodged an application in the High Court for judicial review on the basis that the introduction of such fees would make it difficult to exercise individual rights conferred by EU law. It also argues that fees are discriminatory because they would disproportionately affect women on "average incomes" who will not be entitled to fee remissions. The High Court refused the application on 23 July, but the union is renewing the application and seeking an oral hearing. UNISON is also applying for a stay on the

introduction of the new fees pending a decision. Additionally, a law firm has lodged an application in the Scottish Court of Session arguing that the introduction of fees would place unfair and potentially disproportionate financial burdens on employees who wish to bring equal pay, unfair dismissal, whistleblowing, unlawful deductions from wages and holiday pay claims. There will be a full hearing later this year and the case elicited an undertaking from the Lord Chancellor to the effect that any employment tribunal and EAT fees paid in Great Britain after 29 July will be refunded (with interest) if the fee regime is held to be unlawful.

Unfair dismissal compensatory award

The current cap on the compensatory award in an unfair dismissal claim is £74,200. For any dismissal which takes effect on or after 29 July 2013, the cap on the compensatory award will be the lower of £74,200 or 52 weeks' pay. A week's pay will be based on the employee's annual gross salary prior to their dismissal and will not include pension contributions, benefits-in-kind or discretionary bonuses. According to the Government, the aim of this reform is to give employers and employees more realistic expectations about unfair dismissal award levels.

This change is unlikely to affect the level of most unfair dismissal awards as damages are based on projected losses, which will only in very narrow circumstances exceed 12 months' salary. Such high awards are extremely rare: the most recent statistics published by the Tribunals Service (for the period 1 April 2011 to 31 March 2012) show that the median unfair dismissal award was £4,560 and the average award was £9,133.

Whistleblowing

Changes to the laws on whistleblowing came into effect on 25 June 2013. Qualifying disclosures must now be "in the public interest" in the reasonable opinion of the worker. This closes a loophole which enabled employees to claim the protection of whistleblowing legislation when alleging that their own contract of employment had been breached, which was clearly not the intention of the original legislation. From 25 June 2013, there is no need for the protected disclosures to be made "in good faith". They can now be made for self-serving interests such as revenge or personal advantage. The motive for the disclosure may nevertheless be taken into account by the tribunal, which could reduce the employee's compensation by up to 25%. The concept of vicarious liability has also been introduced, meaning that whistleblowers will be protected from suffering a detriment, bullying or harassment by another employee. The employer will be able to establish a defence to such a claim if it can show that it took all reasonable steps to prevent the co-worker from subjecting the whistleblower to a detriment.

Companies should therefore update their whistleblowing policies to take into account the recent changes in legislation and, in particular, to assist them in establishing a defence to a claim of vicarious liability.