Welcome to our Mid-Year Executive Summary, in which we highlight key developments in UK Employment and Labour Law since the beginning of the year.

A summary of cases and developments is provided below. For further details concerning cases and developments discussed in this Executive Summary or for assistance on any UK Employment or Labour law matter, please contact James Cox or Daniel Pollard in Gibson Dunn’s London office.

(1) Unlimited Compensation for Breach of Contractual Procedures. The Court of Appeal has held that where an employer fails to follow a contractual disciplinary procedure an employee can, in principle, claim contractual damages that extend beyond the expiry of the notice period.

Employers in the UK benefit from two sets of rights upon the termination of their employment. Firstly, they have the rights set out in their contract, which will typically entitle them to advance notice of termination of employment or a payment in respect of the notice period. Secondly, qualifying UK employees enjoy a statutory right not to be unfairly dismissed, with the possibility of claiming additional compensation to the extent that they are unable to mitigate their losses by finding alternative work. However, in most "ordinary" cases, where there are no allegations of discrimination, whistleblowing, etc., unfair dismissal compensation is capped at £65,300.

An employee who is dismissed without notice (or equivalent payment) can recover damages in the ordinary courts in respect of the notice period without any cap. However the courts have been reluctant to award damages for the manner of dismissal as a result of the statutory remedy of unfair dismissal.

In Edwards v Chesterfield Royal Hospital NHS Foundation Trust (2010), Mr. Edwards was employed as a consultant orthopedic surgeon. His contract provided that he could be dismissed on three months’ notice and that he was subject to the hospital’s disciplinary procedure. Whilst this kind of contractual disciplinary procedure is common in the National Health Service ("NHS"), it is less common in the private sector.

Following a disciplinary hearing, Mr. Edwards was summarily dismissed for gross misconduct. Mr. Edwards brought a claim arguing that: (a) the disciplinary procedure formed part of his contract of employment; (b) the employer had failed to properly follow the procedure; (c) he would not have been dismissed if the procedure had been followed; and (d) as a result he would never be able to work again as an NHS consultant. He claimed his losses would extend beyond his contractual notice period until his expected date of retirement at 65. Consequently he sought £3.8 million in damages.

The Court of Appeal held that Mr. Edwards had a right to claim the expanded damages that he was seeking. As a matter of law, an employee can recover losses that extend beyond the notice period where an employer breaches a disciplinary procedure which expressly forms part of the contract. Although Mr. Edwards succeeded on the point of law, he still faces the very substantial practical difficulty of proving his losses. He will have to satisfy the court that he would not have been dismissed had the employer followed its procedure, that this caused ongoing losses until his retirement date, and that his losses were not too remote.

Whilst it is important that employers have formal disciplinary and grievance procedures, this case is a useful reminder of why employers should ensure that their disciplinary procedures are clearly expressed to be non-contractual.

(2) Drafting Termination Notices. A recent decision of the High Court emphasizes the...
importance of carefully drafting termination notices. In this case, the employer failed to expressly state it was terminating the employment immediately under a payment in lieu of notice ("PILON") clause, meaning that the employee became eligible for a substantial bonus.

The UK does not recognize employment "at will". Consequently all employees are entitled to receive (and required to give) advance notice of termination of employment. Many well-drafted employment contracts also contain a provision that allows an employer to immediately terminate employment by making a payment in lieu of notice. These are often referred to as "PILON" clauses.

In the case of Geys v Société Générale, London Branch (2010), the employee, Mr. Geys, had a contract which provided that his employment was terminable on three-months' notice by either party. The contract also contained a PILON clause.

Mr. Geys was called to a meeting and given a letter confirming that he would be dismissed "with immediate effect". He was escorted from the building. He did not return to work.

Mr. Geys' solicitors wrote to the employer to demand an explanation and reserved his rights. Two weeks later the employer made a payment in lieu of notice directly into Mr. Geys' bank account. The employer did not tell Mr. Geys to expect the payment. Another two weeks later the employer wrote a standard letter to Mr. Geys confirming that it was exercising its contractual right to make a payment in lieu of notice.

The High Court held that Mr. Geys' employment was neither terminated by the letter purporting to terminate his employment "with immediate effect" nor by the making of the payment. Mr. Geys had not accepted the employer's fundamental breach of contract and so the contract remained alive. His employment did not come to end until the employer notified Mr. Geys that his employment was being terminated in accordance with the PILON clause.

As a result, Mr. Geys' employment continued 4 days into the following financial year and he became entitled to a substantial contractual bonus payment.

Employers frequently exercise their rights to make a payment in lieu of notice and it is important that the employee is informed in clear, unequivocal terms that the employer is exercising its right.

(3) Extra-Territorial Scope of UK Employment Law. UK employment protection legislation has a degree of extra-territorial effect. Here, we consider two recent decisions which grapple with the complex question of when an employee who ordinarily works outside the UK can sue for unfair dismissal in the UK.

Employees who ordinarily work in the UK benefit from a wide range of employment protection legislation including the right not to be unfairly dismissed. Employees who are unfairly dismissed can claim compensation of up to £65,300 (or more in some cases).

Determining the precise territorial scope of the right not to be unfairly dismissed continues to cause practical difficulties for tribunals and employers alike. This is perhaps not surprising as, following amendment in 1999, the legislation is entirely silent about its territorial application.

The application of the right not to be unfairly dismissed to employees ordinarily working outside the UK was considered in the leading case of Lawson v Serco Limited (2006). The House of Lords held that unfair dismissal protection does not just apply to the "ordinary cases" of employees who ordinarily work in the UK at the time of their dismissal but there is an element of extra-territoriality. Unfair dismissal protection extends to:

- **Peripatetic Employees** – those based in the UK but who work overseas (such as airline pilots).
- **Ex-Patriot Employees** – those overseas but who either work in a British enclave (such as on a military base), work overseas for the purposes of a British business (such as a newspaper reporter), or have a similarly strong connection with Great Britain and British employment law.

The House of Lords are reluctant to give definitive guidance and so many questions remained unanswered. Two recent decisions address these questions:

In Ravat v Halliburton Manufacturing and Services Ltd (2010), Mr. Ravat lived in the UK but spent alternate months working in Libya as an "international commuter". He was paid in sterling into a UK bank account and paid UK tax and national insurance. He was recruited in
the UK and had also worked in London and Algeria. His line manager was based overseas although he was subject to UK disciplinary and grievance procedures and dealt with the UK human resources department. He was told that his employment relationship was governed by UK law. During periods of home leave he would undertake some light administrative work for 2-3 days per month in the UK but otherwise worked exclusively in Libya. He was made redundant and the redundancy process took place in Aberdeen.

By a majority, the Court of Session held that Mr. Ravat could claim unfair dismissal. According to Lord Carloway this was on the basis that he was a peripatetic employee and according to Lord Osborne on the basis that he could demonstrate a “sufficiently strong connection” between his employment and Great Britain.

In *YKK Europe Ltd v Heneghan* (2010), Mr. Heneghan was originally hired in the UK. He transferred to Germany to open a sales office focusing on the EMEA region. His line manager was based in the UK, he managed employees in the UK and travelled to the UK to work for 1-4 days per month. He was informed that his role would cease to continue and that he would have to return to the UK. He ceased to actively work but remained in Germany for 5 months before being repatriated to the UK. He was dismissed a month after his return to the UK.

The Tribunal found that Mr. Heneghan was working in the UK at the time of his dismissal and so entitled to bring a claim of unfair dismissal. The Employment Appeal Tribunal disagreed. They said it was necessary to consider the entire employment relationship and not just the last month during which the employee was employed but not actively working. The claim was sent to another Employment Tribunal to reconsider.

As cross-border employment relationships become ever more common, further litigation in this area will inevitably follow. Where it is unclear where a claim might be brought it is difficult for employers to determine which employment procedures that they should follow. Employers can improve their position by being consistent in the manner in which these relationships are structured and documented. Gibson Dunn attorneys have considerable experience helping employers navigate the complex issues that arise when structuring, documenting and terminating cross-border employments.

(4) **Transferring Maternity Leave to Fathers.** After a period of uncertainty it has been confirmed that mothers will be able to “transfer” half of their 12-month maternity leave to their partners for babies born on or after 3 April 2011.

The Government originally started consultation about transferable maternity leave in February 2005, and this resulted in the Work and Families Act 2006. The new rules were supposed to apply to babies born after April 2009 although this measure has been repeatedly delayed. Final regulations have now been published, and it is expected that the rules will apply to babies born after 3 April 2011.

Currently mothers are entitled to 52 weeks’ maternity leave. Although not entitled to their usual pay, mothers are entitled to statutory maternity pay during the first 26 weeks (at 90% of pay for the first 6 weeks and at the weekly rate of £124.88* for the remaining 20 weeks) and to a continuation of certain benefits for the entire maternity leave period. Fathers/partners are currently entitled to two weeks paternity leave with statutory paternity pay at the statutory rate of £124.88* per week.

The right to additional paternity leave is summarised below:

- Applies to babies born on or after 3 April 2011.
- Subject to a 26 weeks’ qualifying service requirement for the father/partner.
- Father/partner can take up to 26 weeks’ additional paternity leave and (in most cases) will be entitled to additional paternity pay at the statutory rate of £124.88* per week.
- Leave can only be taken once the mother has returned to work and the child is over 20 weeks old.
- Leave must be taken before the child’s first birthday.

Entitlements relating to benefit continuation during paternity leave, the right to return and protection against dismissal/retaliation for exercising the right, broadly mirror the corresponding maternity leave provisions.

We expect that the new regulations will attract interest among employees. Employers with detailed maternity policies should consider updating them to reflect these changes.
The rate of £124.88 is the current rate of statutory maternity pay and statutory paternity pay. This is expected to be increased in line with inflation on 6 April 2011. To be eligible, employees must be an “employed earner” and special rules apply to lower paid employees.

(5) Fines of up to £500,000 for Breaches of UK Privacy Law. On 6 April 2010, the UK Information Commissioner acquired meaningful new powers to issue monetary penalty notices for serious data protection breaches of personal data belonging to employees, customers and others.

On 6 April 2010, the UK Information Commissioner acquired new powers to issue monetary penalty notices for serious breaches of the eight data protection principles set out in the Data Protection Act 1998 (the “Act”). The new power provides the Information Commissioner with meaningful enforcement powers for the first time. They form part of a series of measures which shift the emphasis of the Information Commissioner's compliance role from education to deterrence.

When will notices be issued?

Monetary penalty notices are in addition to the Information Commissioner's existing powers and will be reserved for the most serious breaches. Before issuing a monetary penalty notice, the Information Commissioner must be satisfied that:

- there has been a serious contravention of the duty to comply with the eight data protection principles set out in the Act;
- the contravention is of the kind likely to cause substantial damage or substantial distress; and
- the breach was either deliberate or reckless (i.e. the data controller knew or ought to have known that there was a risk that the contravention would occur and would cause substantial damage/distress but failed to take reasonable steps to prevent the contravention).

Statutory Guidance

The Information Commissioner has produced statutory guidance on the circumstances in which he will consider it appropriate to issue a monetary penalty notice and the amount of such penalties.

Examples are given including the failure by a data controller to take adequate security measures resulting in the loss of a compact disc holding personal data – as a result of which an individual suffers a financial loss as a result of identity fraud, or an individual suffers worry and anxiety that his sensitive personal data will be made public, even if his concerns do not materialise.

The Guidance sets out a list of factors that the Information Commissioner will take into account when determining whether to impose a penalty and the size of the penalty. These will include:

- Size of the organisation question.
- Nature of the personal data concerned.
- Duration and extent of the contravention.
- Number of individuals actually or potentially affected.
- How culpable – was the breach premeditated, as a result of failing to follow advice, a failure to carry out a basic risk assessment or as a result of a cavalier approach towards compliance.
- Deterrence.
- Elimination of any financial gain or benefit obtained by the data controller from non-compliance with the Act.

What Next?

All data controllers should carry out a documented risk assessment to help demonstrate that they have taken reasonable steps towards compliance. As part of this process data controllers should review their data protection policies and procedures.

Data controllers which process large volumes of data or sensitive personal data, or where there is a high risk of harm (such as financial data), should consider a formal data protection audit.
Whilst by no means the only example of breaches which may attract penalties, data controllers should ensure that personal data held on laptops and sent through the post is appropriately encrypted.

(6) Immigration Rules Tightened. On 19 July 2010, the UK Border and Immigration Agency introduced a temporary numerical cap on the total number of Highly Skilled General (Tier 1) and Sponsored Skilled General (Tier 2) visas that will be issued whilst it consults on a permanent limit.

The Government has announced that it intends to set an annual limit on the number of non-EU migrants admitted into the UK. The Government has expressed the policy of intention of reducing net long term immigration to "tens of thousands" from the levels of recent years. In 2008 (the last year for which data is available), net long term immigration was 163,000 – and so this reflects a very significant reduction.

The Government is currently consulting on its proposals – which may include a US style cap on the total number of visas that are issued. The Government is also considering whether the cap should apply to inter-company transferees or whether the duration of such visas should be restricted.

Pending the outcome of consultation, as an interim measure, monthly caps are being applied to both Highly Skilled General (Tier 1) and Skilled Sponsored General (Tier 2) visas. The interim cap is not currently being applied to Skilled Sponsored Inter-Company Transferee visas. In addition, the points required for Highly Skilled General (Tier 1) visas has increased from 95 to 100 points.

Gibson Dunn attorneys are participating in the consultation exercise. Until the consultation exercise is complete, it will be more important than ever to apply for any necessary immigration clearances as soon as possible prior to travel.

(7) Equality Act set to come into force in October 2010. The bulk of the Equality Act 2010, which consolidates and amends existing UK anti-discrimination legislation, comes into force on 1 October 2010. Whilst many of the changes are technical, the Act introduces a number of significant changes as a result of which employers will need to review their UK equality/harassment policies, application forms and any pay secrecy clauses.

Over the last 40 years, anti-discrimination law in the UK has developed in a piecemeal fashion and now includes protection on the grounds of age, disability, gender reassignment, marriage, civil partnership, pregnancy, maternity, race, religion/belief, sex and sexual orientation.

The much-anticipated Equality Act 2010 consolidates and harmonizes the existing legislation. Many of the changes are therefore technical in nature and aimed at resolving a number of inconsistencies between various strands of discrimination law. As a result, employers will almost certainly need to consider reviewing and amending their equality/harassment policies in light of these changes.

The Act also introduces a number of potentially significant new provisions. We will prepare a more detailed analysis of the changes in a future alert although the key changes of interest to employers are:

- Limiting the enforceability of pay secrecy clauses which seek to prevent employees from discussing their pay or bonuses with colleagues. Employers should review the operation of any such provisions that they may include in, for instance, their employment contracts, bonus award letters and salary review letters.
- Permitting "positive action" whereby it will become lawful for employers to choose to make recruitment and promotion decisions in favour of disadvantaged and underrepresented groups where two or more candidates are otherwise equally well qualified.
- A prohibition on generic questions about the health of a job applicant at pre-offer recruitment stage. There are exceptions, including for equal opportunities monitoring and for enquiries focussed on the ability to carry out functions that are intrinsic to the job in question. Changes may need to be made to standard application forms.
- A reversal of the controversial House of Lords decision in the London Borough of Lewisham v Malcolm (2008), which will again enhance the protection afforded to disabled employees who are absent on long-term sickness leave. Where an employer wishes to dismiss a disabled employee as a result of absence arising from a disability, the employer will need to not only show that it has complied with the duty to make reasonable adjustments but that the dismissal is "a proportionate means of achieving a legitimate aim".

http://gibsondunn.com/Publications/Pages/UKEmploymentandLabourLaw-Executive...
Uncertainties remain over perhaps the most controversial measure in the Act. As enacted by the previous Labour Government, the Act contained an enabling power to allow the Government to make regulations to require private sector employers to make public information regarding gender pay differentials. These were to apply to employers with at least 250 employees from 2013. It is not clear whether the new coalition Government will press ahead with the implantation of these or similar provisions. The Conservative party have previously been vocal about their lack of appetite for the gender pay transparency provisions and would only have required them in the case of employers who had previously lost an equal pay claim. Whatever form this measure takes, the obligation will undoubtedly be an onerous one from a HR administrative perspective.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these cases and developments. Please feel free to contact the Gibson Dunn lawyer with whom you work or the following lawyers in the firm's London office:

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