EMPLOYMENT NEWS HEADLINES MAR-APR 2016 ISSUE 2

TAXATION OF TERMINATION PAYMENTS – GOVERNMENT PLANS

After a period of consultation in 2015 on whether a new regime relating to the tax treatment of termination payments was necessary, the Chancellor, George Osbourne, announced in March this year that the government intends to introduce changes to the current taxation practices. These are intended to take effect from April 2018 allowing time for further consultation on the technical details. Although this is a couple of years away, it is important for employers to be aware of what the new regime might look like.

The current position of termination payments less than £30,000 remaining tax exempt will broadly remain with some significant changes as follows:

- Currently, where the employee's contract does not contain a Payment in Lieu of Notice ("PILON") provision, employers have traditionally treated this payment as damages for a breach of the contract terms (i.e., making a PILON instead of requiring the employee to work the notice period) and, therefore, paid this free of income tax and national insurance contributions ("NICs"). The proposed change will mean all payments that are PILONs will be subject to full income tax and NICs regardless of whether or not there is a PILON term in the employee's contract of employment. This is bad news for the exiting employee as the net figure of any severance package will be less than it is at the moment;
- There will also be an alignment between the income tax treatment for a termination payment and the NICs payable for terminations payments exceeding £30,000. Any payment that is above the exemption threshold will, in future, be subject to Employers' NICs but will remain exempt from Employees' NICs. This will considerably increase the employer's total pay-out bill for sums over £30,000 and should be factored into overall costs when negotiating an exit package;
- Rules relating to tax on other payments made on termination such as bonuses, golden parachutes etc., will also be tightened up as the government seeks to boosts its income;
- Global employers should also note that it is expected that the foreign-service exemption on terminations payments will also be removed. This means that where an employer has had its employee working outside the UK jurisdiction for a prolonged period, any termination payments made to the employee on termination will no longer be exempt from UK income tax and NICs unless tax relief is sought via a double tax treaty arrangement depending on the foreign jurisdiction in question.

HEADSCARVES IN THE WORKPLACE – BOUQNAOUI V MICROPOLE UNIVERS

In March 2016, the European Court of Justice heard the case on the controversial and politically sensitive issue of religious dress in the workplace. The case of *Bouqnaoui v Micropole Univers* was heard with another (*Achbita v G4S)*, and concerned the issue of whether an employer not allowing the wearing of Islamic headscarves whilst at work could be considered a "genuine and determining occupation requirement" in the *Bouqnaoui* case or was direct discrimination in the *Achbita* case.

Both the *Bouqnaoui* and the *Achbita* cases, French and Belgian cases respectively, related to specific facts on which the respective countries looked to the ECJ to determine:

- Both employees were Muslim women who wished to wear the Islamic headscarf whilst at work and performing their roles;
- Each employee worked at a third party client site for their respective employers;
- It was staff at the third party site or the client itself that objected to the practice of wearing anything which was an expression of political, religious or philosophical belief.

Although not directly affecting the UK, it will be of interest to all employers to hear the ruling. We will keep you posted on the outcome of these cases which were heard on 15 March 2016.

WORKPLACE MONITORING OF EMPLOYEES – BARBULESCU V ROMANIA

This European Court of Human Rights case is a reminder that an individual will not always be able to rely on his Article 8 right to privacy when the policies and procedures of an employer are clear, consistently applied and proportionate.

In *Barbulescu v Romania* the employee had, at the employer's request, set up an online messenger account for the purpose of dealing with customer queries on the company's products. The employer had a strict policy of employees not being permitted to use company systems for personal use. Mr Barbulescu used the on-line messenger account for personal use. The employer, when monitoring the quality of its customer service, found out and dismissed Mr Barbulescu for breach of company policy.

Mr Barbulescu claimed the employer had breached his Article 8 right to privacy. The Courts, however, found that his termination had been reasonable as:

- The employer's policy and practice was clear about not using company systems for personal use;
- As the on-line messenger account was a part of the company system, set up at the request of the company, it was entitled to legitimately monitor and investigate its proper use;
- The employer had only looked at the specific on-line messenger account to determine Mr Barbulescu's breach, it had not gone searching for other breaches so the investigation was reasonable and proportionate.

The practical implications of this case for employers is to ensure that IT policies are clear and that employees are informed as to any monitoring which will take place. This should be clearly highlighted to the employees. It is not enough to have a policy hidden away in a handbook. For monitoring to be justified it must be reasonable and proportionate. It is worth considering an impact assessment before implementing a policy and the Information Commissioner Office has provided online guidance on this.

Although employees do have a reasonable expectation of privacy at work, this needs to be balanced with the reasonable interests of the employer and the business.

PULLING A "SICKIE" IS DISHONEST AND A BREACH OF CONTRACT – METROLINE V AJAJ

The case of *Metroline v Ajaj*, although fact specific, is a salutary lesson to employees that pulling a "sickie" could result in dismissal for breach of contract. Mr Ajaj was a bus driver who claimed sickness absence for an injury at work. After a period of absence, the employer decided to carry out covert surveillance and found that Mr Ajaj had greatly exaggerated his injuries. He was dismissed for gross misconduct and at first tribunal won his case for unfair and wrongful dismissal on capability grounds.

The Employment Appeal Tribunal, however, overturned this decision based on Mr Ajaj's fraudulent conduct based on the employer's investigations. It found that his dishonesty and fraud did amount to a fundamental breach of the implied term of trust and confidence that exists in an employment relationship and the employer was entitled to treat the contract as breached based on its reasonable investigations on Mr Ajaj's conduct.

Although a favourable turnout for the employer, it is important to note that not all cases of malingering will amount to a fundamental breach of contract entitling the employer to terminate the contract. The level and detail of medical and other investigations carried out by the employer will be paramount as to whether dismissal is within the "band of reasonable responses" for the employer to take on the facts.

DISMISSAL FOR CONFIDENTIALITY BREACH CAN BE UNFAIR (SOMETIMES!) – STIMPSON V CITIBANK

The case of *Stimpson v Citibank* highlights the issues for the employer to consider when dismissing for a breach of confidentiality. Although, a breach of confidentiality by an employee will, in most cases, be justified as a dismissible offense, there will be circumstances where a closer look by the employer will be critical before action is taken. The present case, again emphasizes the importance of thorough investigation and review by the employer.

Mr Stimpson was a foreign exchange trader with Citibank where a number of documents such as codes of conduct, employee handbook, disciplinary and confidentiality policies, intranet statement highlighted to employees the importance of not disclosing confidential information to unauthorised persons.

Mr Stimpson was encouraged by his manager to communicate with other traders by IM as a means of networking and gaining market information which Mr Stimpson duly did. He was later dismissed for gross misconduct for inappropriately sharing confidential information in breach of contract.

As stated above, in ordinary circumstances, the employer would be justified in taking such action but this is a case, where Employment Tribunal ruled in Mr Stimpson's favour and found him to be unfairly and wrongfully dismissed by Citibank for the following reasons:

- Had Citibank carried out a detailed investigation, it would have found that there was a "culture" of information sharing in the business;

- The disciplinary procedure had not been applied correctly in that Citibank focused on the letter of the policies rather than what was happening on the ground in terms of the widespread culture;
- Citibank had failed to look into Mr Stimpson's claims of encouragement by management to information share;
- The Financial Conduct Authority had already conducted a regulatory investigation and found this to be the culture at Citibank and had fined the bank almost a quarter of a million pounds for its ineffective control of the business. An investigation would have revealed this had Citibank taken its time to carry one out.

Although this case is specific to the facts and in a highly regulated industry, for most employers, it is an important reminder to apply its internal policies appropriately, focusing on the facts of each particular incident and documenting investigations thoroughly before taking any action.

STATUTORY PAYMENTS AND TRIBUNAL AWARDS FROM 6 APRIL 2016

With the arrival of a new financial year, the government has released it revised and new statutory pay and award thresholds has follows:

- Statutory sick pay will stay at £88.45 per week from 6 April 2016.

- Statutory maternity, adoption and paternity pay will stay at £139.58 per week from 6 April 2016.

- The National Living Wage came into force in April 2016. The new hourly rate of £7.20 applies to employees aged 25 and over. (see Maxlaw Global News-Issue 1 for more details).

- Tribunal compensation limits increase to:
    - maximum compensatory award for unfair dismissal will increase from £78,335 to £78,962 and
    - the maximum week's pay for the calculation of redundancy payments and the basic award in unfair dismissal claims will increase from £475 to £479.

- A penalty for non-payment of employment tribunal awards was introduced which will be 50% of the original award, subject to a minimum of £100 and a maximum of £5,000. It will be possible to reduce the penalty by 50% if the employer pays both the original award and the penalty within 14 days of the penalty notice being issued.

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