EMPLOYMENT NEWS HEADLINES JAN-FEB 2018 ISSUE 13

GENDER PAY GAP REPORTING – PUBLICATION DATE LOOMS

The deadline date for accurately reporting on the gender pay gap on 4 April 2018 is now on the horizon.

In Maxlaw Global employment news (Issue 1) we set out the requirements of the Gender Pay Gap Regulations (GPGR) which made this requirement to publish, for any business with more than 250 employees, at the 'snapshot' date of 5 April 2017 law. The first round of publishing in now due and many businesses have already started to publish. However, what of the ones that ignore the GPGR and fail to publish by 4th April or indeed publish inaccurate data?

In December 2017, the Equality and Human Rights Commission (EHRC), the body responsible for regulating equality in the workplace, among other things, published a draft consultation paper about what enforcement of the GPGR might look like. Consultations ran until February this year and the highlights are set out below:

Where an employer fails to publish or inaccurately publishes by 4th April 2018, the EHRC will have the following powers:

- The EHRC would prefer to take an informal approach to enforcement in the first instance and will write to the defaulting employer to reiterate its obligation to comply with the GPGR;
- It will ask employers who default to acknowledge within 14 days of the EHRC writing to them to confirm they will comply with the current years reporting within 42 days of the date of the letter;
- The EHRC will also have the power to "name and shame" non-complying employers by publishing the names - which could be very damaging for some companies;
- Where the employer provides the assurance to comply, the EHRC will simply monitor it for compliance and accuracy of data published in the current and next reporting year;
- A more formal approach will be followed if the defaulting employer chooses to ignore the EHRC's informal request – which means they will be in suspected breach of law, i.e., the GPGR. In this case, the EHRC will investigate the employer in breach requesting documents and information;
- Once investigations are carried out the EHRC may consider issuing an Unlawful Act Notice or an Order for specific performance. A failure to comply with the Notice or Order, without reasonable explanation, would result in a Level 5 fine (i.e., no maximum cap on the fine).

It is critical for employers to ensure that the data requested under the GPGR is not only ready for publication but also that it is accurate and can withstand scrutiny which the EHRC, the media and the public will be closely monitoring. To date, there has been a lot of data published that has been described as "statistically improbable" and frankly inaccurate. It is important to have the internal reviews and checks before submitting to the Government portal and the employer's own website. If a gender pay gap exists, the best approach is to be transparent and to explain why it exists with a narrative about action the employer intends to take to reduce the gap.

HOLIDAY PAY CARRY OVER AND WORKER STATUS – KING V SASH WINDOWS LIMITED (ECJ)

The case of Mr King in *King v The Sash Window Workshop Limited* is an interesting case in light of the ongoing debate about worker status in the gig economy.

Mr King worked for Sash Windows for 13 years and was considered by the company to be a self-employed contractor. He was not, therefore, paid any holiday pay or sick pay. At some time during this 13 year period, Mr King was offered a contract of employment with paid leave but declined the offer. On reaching 65 years Mr King's contract was terminated, he brought a claim for age discrimination and holiday pay.

The Tribunal did find that Mr King was not a self-employed contractor and was in fact a worker and was, therefore, entitled to holiday pay for holiday he had been discouraged from taking because any leave taken was unpaid. It also found he had been discriminated against on the grounds of his age.

The question arose as to how far back could this accrued but untaken leave be calculated in this very specific situation of mistaken work status. The Court of Appeal referred the question to the European Court of Justice (ECJ) to consider. The ECJ has now ruled that:

- The worker is entitled to accrued but untaken holiday pay on termination for the full period of any untaken leave i.e., there was no limit to the accrual period;
- It was irrelevant that Mr King had not put is requests for paid leave or that Sash Windows believed him to be self-employed;
- This was different from leave carry over in the case of long term sickness absence which is limited to 18 months from the relevant leave year, the ECJ stated that where a worker is not able to take leave thinking it is unpaid the employer should not be protected in the same way.

This is an important ruling as the current law in the UK is that any backdated claims for unpaid holiday pay is two years where there has not been a break of a period of 3 months or more in the series of unpaid leave. This ruling, although fact specific, reopens the debate about whether these limits are unlawful and whether it should be possible to claim for any unpaid period whether leave is taken or not. The Court of Appeal will now need to decide if the 1998 Working Time Regulations (WTR) can be applied consistently with this ruling. At present a worker can only claim for unpaid leave after the leave is taken under the WTR. This ruling only applies to the 4 week holiday entitlement under the Working Time Directive and not the additional 1.6 weeks under the WTR.

ADMISSABILITY OF PROTECTED CONVERSATIONS – BASRA V BJSS LIMITED (EAT)

Employers will be familiar with a relatively new right under the Employment Rights Act which allows for them to have frank "protected conversations" with an employee before any termination or a dispute has occurred. This right enables any pre-termination negotiations to be "protected" from disclosure in any subsequent litigation provided the termination that follows in not for an

automatically unfair reason or does not involve 'improper behaviour' on the part of the employer. Negotiations can also include "without prejudice" conversations.

In the case of *Basra v BJSS Limited*, the issue for the courts to consider was where that line falls in terms of evidence that can be disclosed, in particular, where the effective date of termination is in dispute between the parties.

Mr Basra was an architect and his employers, BJSS Limited had concerns about his performance. They invited him to a disciplinary meeting regarding his performance and, at the same time, issued a "without prejudice subject to contract" letter offering a financial settlement instead of the disciplinary. Mr Basra accepted the offer by an email dated 3rd March. Some days later Mr Basra's solicitors wrote to BJSS stating Mr Basra had been signed off sick. BJSS replied on 15th March stating Mr Basra's employment had ended on 3rd March. No settlement was agreed and Mr Basra claimed unfair dismissal.

At first instance, the Employment Tribunal found that there had been no dismissal as it said any discussions before Mr Basra's email of 3rd March was inadmissible as a pre-termination protected conversation. It also found that Mr Basra had accepted the terms of the offer to leave on 3rd March and had resigned. It ruled that there had, therefore, been no dismissal.

Mr Basra appealed to the Employment Appeal Tribunal (EAT), the EAT found that:

- The ET should have looked at *when* the termination occurred as a preliminary point;
- Once this had been established, it could determine what was and was not admissible in court;
- It should then exclude what would be considered pre-termination negotiations;
- The ET had failed to do this and had disregarded evidence which may have been relevant before the 3rd March in determining the actual termination date.

The case was remitted to the ET for further consideration. This case is a reminder to employers to be:

- clear about when a termination has occurred in terms of an effective date of termination;
- to continue with 'open' conversation and process even where there is a "protected conversation" in the background as these negotiations may possibly come to nothing;
- ensure that where "protected conversations" do result in success, that the employee has clearly and unambiguously resigned or signed a settlement agreement before taking any action within the business.

Negotiations are only protected under this right up to the point where employment is terminated.

ANNUAL INCREASE IN PAY RATES WITH EFFECT FROM APRIL 2018

The arrival of April will see the usual increases in the statutory rates of pay as follows:

- Weekly maternity pay, paternity pay, shared parental leave rates will increase from £140.98 to £145.18

- Weekly statutory sick pay will increase from £89.35 to £92.05.

National minimum and living wage hourly rates:

- Apprenticeship rates: will increase from £3.50 to £3.70
- Under 18 years: will increase from £4.05 to £4.20
- 18-20 year olds: will increase from £5.60 to £5.90

- 21-24 year olds: will increase from £7.05 to £7.38
- 25 years and above: will increase from £7.50 to £7.83.

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Maxlaw Global
February, 2018