EMPLOYMENT LAW UPDATE

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WHAT'S NEW……

2009 Pre Budget Report - Employment Provisions

On 9 December 2009, the Chancellor announced his 2009 pre budget report. This report has been hailed by the press as the Labour government pre election manifesto, however we now look at the report and consider the employment issues surrounding the announcements.

Tax Rates and Allowances

2010-2011

- There will be no increase in personal allowances. For persons aged under 65, the personal income tax allowance will, therefore, remain at its current level of £6,475

- There will be no change in the higher rate threshold (which is the same as the upper earnings limit or upper profits limit for National Insurance Contributions "NICs"). Individuals will pay tax at 20% on the first £37,400 of taxable income and 40% on taxable income above that figure and under £150,000. The new top rate of tax of 50% announced in the 2009 Budget will apply to income over £150,000

2011-2012

- Employer NICs will rise from their current level of 12.8% to 13.8%.

- To compensate the lowest earners for the increase in NICs, the threshold and lower profits limit will be increased by £570 over the rate of the personal allowance (the alignment of the lower threshold, currently £4,940). The increase in the threshold will mean that workers earning less than £20,000 will not pay increased NICs.

- No announcement has been made about the NICs upper threshold and income tax higher rate threshold for this year.

Miscellaneous Provisions

- The Finance Bill 2010 will amend the existing tax exemption on the provision of free or subsidised meals in a workplace canteen. The exemption will be restricted where an employee is entitled to the meals as a result of entering into a salary sacrifice scheme or other flexible benefit arrangements. The measure will come into effect on 6 April 2011.

- The Finance Bill 2010 will set the Company Car Tax for 2012-13, reducing the tax on electric company car's over a period of four years to zero, setting a new lower flat rate benefit for electric vans in 2010-11 and set the fuel benefit charge for company cars (£18,000) and company vans (£550) from 6 April 2010.

- The Chancellor announced a new one-off Bank Payroll Tax ("BPT") payable by banks and other financial services firms. The BPT will be chargeable at 50% on bonuses (in any form) exceeding £25,000 per employee awarded between 12.30pm on 9 December 2009 and 5 April 2010, although certain payments (including existing contractual arrangements) are excluded. The draft legislation to enact the BPT includes carefully drafted anti-avoidance provisions.

- From 6 April 2011 the availability of higher-rate tax relief on contributions to registered pension schemes, will be restricted for those with income of more than £150,000 a tax year. Tapering will operate so that for those with income above £180,000 a tax year, relief will be available only at the basic rate (20%).

Comment

Whilst the Chancellor is obviously trying to service the national debt by bringing in the tax hikes for high wage earners, it will be interesting to see what will be enacted before the lead up to the next general election.

It is also surprising to see that certain measures have been left out of the pre budget report including anti-avoidance legislation targeted at employee benefit trusts and family benefit trusts, particularly those used to avoid income tax and national insurance contributions on benefits provided through the trust.

We will of course continue to update you regarding the draft provisions as and when they are enacted into legislation. In the meantime it is perhaps worth looking at your own personal finances and discovering if you can become more tax efficient.

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Case Round up… ……

National Minimum Wage

In Smith v Oxfordshire Learning Disability NHS Trust the EAT decided that a payment made in respect of time spent overnight at a residential care home, which constituted time when the Claimant was 'working', fell to be taken into account when calculating whether the employer had paid him the National Minimum Wage ("NMW"). Although the payment was consolidated into his standard pay, it was not an 'allowance' that could be disregarded when calculating the NMW.

As is usual with NMW claims, the Tribunal was required to calculate over a period of a month, the average hourly rate paid to the Claimant by dividing the total remuneration received, by the number of hours worked.

A 'sleep in payment' was held not to be an allowance in accordance with the Regulations as it was not conducive with the definition which states, 'a payment paid by the employer to a worker attributable to a particular aspect of his working arrangements or to his working or personal circumstances that is not consolidated into his standard pay'.

Therefore it was held by the EAT that the sleep in payment was "a payment" and in fact the only payment for the employee performing his duties during those evenings. If the employee was being paid an enhanced rate during that period on top of the sleep in payment, then that enhanced rate would have been an allowance for the purposes of the NMW and would not be included as part of the calculation to decide whether NMW is being paid.

Whilst the transport industry generally pays on average a rate that is well in excess of the minimum wage, there is a possibility that an employee may argue that any "night's out" expenses is not an allowance as described under the legislation and should therefore be taken into account for a NMW calculation.

It will be interesting to see how this case develops, through interpretation in other industries, but for the time being it is important for operators to understand how disputes of these types may evolve.

Discrimination

In Mayor & Burgess of the London Borough of Tower Hamlets v Wooster the Employment Appeals Tribunal (EAT) upheld a tribunal's decision that an employee had been directly discriminated against on grounds of his age when his employer dismissed him to avoid him remaining in employment until he reached 50, at which point he would become entitled to enhanced early retirement pension.

The Tribunal had been entitled to draw the conclusion that the employer's failure to redeploy the employee, or extend his employment by seconding him, was motivated by a desire to terminate his employment before he reached 50. When deciding the remedy, the Tribunal had been entitled to reach its conclusions concerning the employee's future employment prospects on the basis of what it considered would have happened had the employee been treated fairly and without discrimination on the grounds of his age.

Unfortunately for the employer in this case, the defence of "justification" was not pleaded as part of the Court papers and as such was unavailable to the employer. The aim of the employer was to avoid the costly expense of the early retirement pension and if pleaded, the argument would have been that keeping the costs down within the business was a legitimate aim which justified the discriminatory act of dismissing the employee before he became entitled to the enhanced contractual provision.

Case Round Up

LARGE SCALE / COLLECTIVE REDUNDANCIES

The case of *Akavan Erityisalojen Keskuslitto AEK ry and ors v Fujitsu Siemens Computers Oy (ECJ 2009 IRLR 944)* was recently decided by the European Court Of Justice (ECJ) who held that under the Collective Redundancies Directive (98/59/EC), the duty to consult with workers' representatives is triggered once the employer takes a strategic / commercial decision that compels them to plan or contemplate collective redundancies. Where the employer's parent company is making the decision to reduce staff numbers, the obligation to consult only arises once the subsidiary employer has been identified as the company where the redundancies will occur.

Additionally, the identified employer must conclude its redundancy consultation procedure before the parent company gives notice to the affected employees.

The implication of this decision means that if the subsidiary company fails to consult properly with its employees even if it did not know either in part or at all about the parent company's decision, it will be liable for that failure despite the mitigating circumstances. Employers will therefore have to begin the consultation process with whatever information they have available and then update the employees throughout the process as and when they receive information from the parent company.

COMPROMISE AGREEMENTS—TO READ THE SMALL PRINT

Compromise Agreements are often used by employers when they want to terminate the employment of an employee in situations that could otherwise give rise to an employee claim such as unfair dismissal. The employee is normally paid a sum of money by way of compensation

During termination negotiations, employers often use the agreement drafting process as an opportunity to review the provisions of any restrictive covenants in the employee's contract that will apply post-employment. However, employers need to ensure they inform their advisers about not only the content of the employee's terms and conditions of employment but also any events that have occurred during the term of the employment that might be relevant.

This did not happen in the recent Court of Appeal (CA) case of *Personnel Hygiene Services Ltd v Mitchell*. In this case, Mr Mitchell had been employed by Rent a Crate ("RAC") under a service agreement since 2004 and had bought RAC shares during his employment via share options. *Personnel Hygiene Services Ltd* (PHS) then purchased all of RAC's shares under a share purchase agreement three years later.

Mr Mitchell was subject to Restrictive Covenants in both the Service Agreement and the Share Purchase Agreement but the Compromise Agreement had not been drafted so as to displace both sets—only the Service Agreement's.

The CA therefore held that an entire agreement clause in the Compromise Agreement did not prevent the Restrictive Covenants in the Share Purchase Agreement from applying.

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- Corporate Recovery;
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- Partnership and LLP advice & formation;
- Corporate Governance & Companies Act compliance
- Commercial Contracts - Terms & conditions, Supply agreements etc; and
- Agency, distribution and franchise agreements.

Legislation Update —

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THE EQUALITY BILL— This will come into force in Spring 2010 if it receives Royal Assent. The Bill completed its Commons report stage earlier this month and has now been passed to the House of Lords for review.

The Bill makes some significant amendments with issues such as pre-employment enquiries to protect disabled job applicants. It also seeks (amongst other things) to outlaw pay secrecy clauses, consolidate the existing equality legislation and give Tribunals the power to make recommendations in discrimination claims that affect not just the successful Claimant but the workforce as a whole.

EQUALITY DIRECTIVES—The European Commission has recently given the UK two Reasoned Opinions in respect of two Equal Treatment Directives (Nos 2000/78 and 2002/73) that deal with discrimination based on religion / belief, age, sexual orientation, disability unequal treatment between men and women whether direct or indirect. The Opinions state that the UK has incorrectly implemented EC Law and the UK now has two months to respond.

Employees off work due to sickness—Employees will be subject to 'fit note' assessments by their Doctor on the new basis of being fit for work as opposed to being given a sick note from Spring 2010. The rationale behind this is to allow the Doctor to assess what the employee can and can't do and if they are thought to be fit enough to return to work (not necessarily their usual work), the Doctor can make suggestions to the Employer about what steps are needed to facilitate this. This should be useful especially for employers with malingering employees.

FLEXIBLE WORKING— The statutory right for certain employees with caring a responsibility to request flexible working came into force on 10 December 2009.

Although employees have a statutory right to request a flexible working arrangement, they do not have a right to be granted flexible working. Employers also need to be aware that the employees' statutory right to request to work flexibly is limited to those employees with caring responsibilities.

Another issue to be aware of with flexible working request is that of indirect discrimination i.e. where it affects those with caring responsibilities and young children.

Employees that are entitled to make a flexible working request need to be employed, have 26 weeks continuous employment at the time of making the application and not have made a previous flexible working formal application during this year.

There are additional requirements in respect of flexible working requests from those employees who care for children. In relation to those applications, the criteria is that the employee must have a child who is either age 16 or under, or aged 18 or under and in receipt of disability living allowance. Additionally, the applicant employee must be expected to have or have responsibility for the child's upbringing and be either the child's father, mother, guardian, adoptive parent, special guardian, private foster carer or foster parent or the spouse or civil partner/partners of those mentioned above or a person who has been granted a residence order in respect of that child.

Although the child must actually be born at the time that the application is made, employers may be approached by prospective parent employees who want to discuss their plans before the child is actually born, which is absolutely fine.

A formal flexible working request needs to be made in writing, be dated and state that it is being made under the statutory procedures; confirm the nature of their relationship with the person in question; confirm that they expect to have or have a caring responsibility for a child or adult; state when they would like the change to start and what type of working pattern they would like; state whether or not they have made any previous flexible working applications and when; and explain what effect they think the proposed working pattern will have on the business together with how they think this can be dealt with.

When an employer receives a flexible working request, they must arrange a meeting with the employee within 28 days of receiving the request. Whether or not the request is accepted or rejected, the employer must let the employee know within 14 days of the meeting with them. If the request is rejected, the employer must inform the employee that they also have the right to appeal that decision.

For further information please contact Steven Meyerhoff on 01254 828300 or e-mail steven@backhouses.co.uk

Note: This update does not constitute legal advice. You should not apply this information to any circumstances or facts without obtaining specific legal advice.