TRAVERS SMITH

Online Update

Essential Information for Employers

January 2010

In the News

Bonus backlash

Bonus season is here and recent press has focussed on large payouts in the financial sector as well as Government efforts to curb the "bonus culture". Perhaps most controversially, the Government has announced a new 50% "bank payroll tax" on bonuses in the banking sector. The new tax applies to discretionary bonuses to the extent that they exceed £25,000 which are awarded between 9 December 2009 and 5 April 2010, although the government has warned that it could be extended beyond that if insufficient changes are made to remuneration practices.

"…the Government has announced a new 50% 'bank payroll tax' on bonuses in the banking sector."

The new tax catches all discretionary bonuses, generally including those paid in the form of share incentives, and is payable by the employer on top of the normal PAYE liability and national insurance contributions.

Whilst the new tax is intended to apply to banks and building societies, concerns have been raised about its potential application to other financial institutions. Since first publication of the draft legislation, the government has accepted that the original scope of the tax was too wide. Although no redraft legislation has yet appeared, recent statements from HMRC indicate that most standalone agency brokers, adviser/arrangers and fund managers will be outside the scope of the tax. Furthermore, whilst fund managers within banking groups will be entities within the scope of the tax, in practice any bonuses they pay may well escape the tax on the basis that they are not paid to employees carrying out banking-type work. Employers concerned about the application of the tax should seek specific advice.

In parallel, the Combined Code on corporate governance is set to be revised with effect from mid-2010, following an independent Government review. The Code applies to listed companies but is also considered good practice for all companies. A draft of the revised Code recommends that:

- bonuses for executive directors are based on performance conditions that promote the long-term success of the company, including non-financial criteria such as effective risk management
- companies set and disclose upper limits on bonuses for executives
- consideration is given to awarding part of any bonus in shares to be held for a significant period
- deferred bonus payments, shares and share options should vest in not less than 3 years and
- consideration is given to including claw back provisions in cases of misconduct or misstatement of performance.

Childcare vouchers

Childcare vouchers have been in the news recently as the Government has reconsidered tax relief on employer-provided vouchers. Existing tax relief on vouchers will be retained for the time-being but will be phased out over the next 5 years.

Currently the first £55 a week (or £243 a month) of childcare vouchers is exempt from both income tax and national insurance contributions, provided certain conditions are met – eg the vouchers must be open to all staff at a particular site and the vouchers must be for approved childcare. Many employers, therefore, offer vouchers by way of a salary sacrifice scheme, as this results in savings on employer national insurance contributions.

A potentially unexpected factor for employers is that, as a non-cash benefit, childcare vouchers must be provided for the whole period where an employee goes on maternity leave. The value of the vouchers cannot be deducted from statutory maternity pay, meaning employers often end up funding them. By contrast, any enhanced maternity pay will usually reflect the employee's lower salary after sacrifice.

From 2011, employees taking up childcare vouchers for the first time will only be eligible for basic rate tax relief of 20%, although existing users of childcare vouchers will be unaffected. This relief will be scrapped for all users of childcare vouchers by 2015. Employers who offer vouchers may, therefore, wish to review their schemes as the position changes.

"Existing tax relief on vouchers will be retained for the time-being but will be phased out over the next 5 years."

Case Watch

Holidays on termination – how much should employers pay?

The employee was a professor of Chinese medicine at the employer's Herb and Health shop. Unusually, her employment contract was an oral one which allowed her to take 30 days' holiday each year. It was also agreed at the outset of her employment that, on any termination of her employment, she would be paid in lieu of any holidays not taken during employment. The employee was subsequently dismissed and claimed payment in lieu for 131.5 days' holiday that she had not taken during her 7.5 years' employment. The employer argued that, under the Working Time Regulations, holiday cannot be carried forward from year to year and so she was only entitled to be paid in respect of holiday not taken in her final year of employment.

The Employment Appeal Tribunal ruled that the employee was entitled to be paid in lieu for the full 131.5 days' holiday accrued during the whole period of her employment, not just the final leave year. Since her oral contract expressly entitled her to recover pay for all holiday untaken throughout her employment, not just the final leave year, it was more favourable than the Working Time Regulations. As this was a claim under her employment contract, the provisions in the Working Time Regulations that prevent carry over of holidays from year to year did not apply.

This case concerned a specific oral agreement and does not set a general precedent for pay in lieu of holiday on termination. However, it perhaps highlights the need for carefully-worded employment contracts – ie a right to payment in lieu of untaken holiday on termination should be limited expressly to holiday for the year in which termination takes place. Even if there is no such limitation, a term that expressly prevents or limits carry-over from one year to the next would arguably also prevent the employer from having to pay out untaken holiday from previous years on termination. The case seems to suggest that the "use or lose it" principle under the Working Time Regulations can be disapplied in an employment contract but it is questionable whether this is possible under the Working Time Regulations in relation to the minimum statutory holiday entitlement.

Beijing Ton Ren Tang (UK) Ltd v Wang

"…a right to payment in lieu of untaken holiday on termination should be limited expressly to holiday for the year in which termination takes place."

Changing contractors – when does TUPE apply?

The employee was a supervising chef in a company that provided catering services to a BMW car plant. The services included a central restaurant and various "satellites" that served cooked breakfasts and hot and cold meals. The employee worked in one of the satellites where her duties included preparing hot meals. The catering contract was not profitable and was ultimately terminated after the company was unable to renegotiate its terms with BMW. A new contractor was appointed to operate five "dry goods kiosks" which sold pre-prepared sandwiches and salads, but no hot meals. The employee and some of her colleagues brought claims against the old contractor, who argued that TUPE applied to transfer their employment to the new contractor.

The Employment Appeal Tribunal disagreed, ruling that the services provided by the new contractor were materially different to the old. The contract had gone from being a full canteen service with hot meals to merely the provision of pre-prepared cold food, so TUPE did not apply.

This decision could easily have gone the other way. Whether TUPE applies to a "service provision change" – where a contract changes hands from one contractor to another – depends on exactly what services are being provided. If the activities of the new contractor are fundamentally or essentially the same as those carried out by the old contractor, TUPE will apply. Minor differences in the nature of the tasks or the way they are performed will not prevent the operation of TUPE. Parties to a service provision change should, therefore, look very closely at the contracts to identify the scope of the services provided and, unless there are significant differences, it is usually safest to assume that TUPE would apply. In appropriate cases, TUPE risks can then be apportioned in the commercial contract.

OCS Group UK Ltd v Jones and another

"If the activities of the new contractor are fundamentally or essentially the same as those carried out by the old contractor, TUPE will apply."

Business transfers – when do staff need to know?

The employer decided to sell part of its business and a potential buyer was identified. Employees were notified initially by way of a general announcement without further details of the sale. However, the seller later provided the employees' trade union representatives with further information required by TUPE, including the timing of and reasons for the sale, the implications for employees, and the fact that the buyer had no plans to make redundancies or any other changes to terms and conditions. Two days later there was an annual shutdown where virtually all employees were on holiday for 2 weeks. The sale then completed immediately after the 2-week shutdown. The trade union representatives brought a claim alleging that, given the shutdown period, the seller had failed to comply with its duty to provide information in good time before the sale.

The trade union was successful. The Employment Appeal Tribunal ruled that the information required by TUPE must be provided long enough before the transfer to allow meaningful consultation to take place. Even though no changes or "measures" were envisaged and there was technically no duty to consult under TUPE, the seller should have allowed enough time for employee representatives to raise issues and engage in voluntary consultation if they wanted to. The shutdown period meant this was not possible, as it effectively allowed only 2 days for consultation. Accordingly, the seller was ordered to pay 3 weeks' pay to each employee concerned.

Employers engaged in a TUPE transfer, such as a business sale or outsourcing, must provide appropriate employee representatives with information about the transfer before it happens. Where changes or measures are envisaged (eg changes to terms and conditions, changes to day to day working arrangements or redundancies), there is an additional duty to consult with employee representatives about the changes. Whilst there is no fixed timetable, the information must be provided long enough before the transfer to allow for meaningful consultation to take place. The appropriate timeframe will vary in each case depending on how many employees are affected, the scale of the transfer and what measures are envisaged. The sanction for failure to properly inform and (if applicable) consult employee representatives under TUPE is an award of up to 13 weeks' pay for each affected employee. Whether or not a transferee is at fault, the transferee will be jointly liable for any failure by the transferor to inform or consult and should, where possible, seek indemnities to apportion this liability in the commercial agreement.

This case confirms that, even where no measures are envisaged and the employer thinks there is nothing to consult about, information must still be provided in enough time to allow for voluntary consultation to take place. Employees may raise other issues or may seek to argue that measures are envisaged. However, in the absence of any measures, the employer would not be obliged to engage in normal TUPE consultation.

Cable Realisations Ltd v GMB Northern

"…even where no measures are envisaged … information must still be provided in enough time to allow for voluntary consultation to take place."

Time off for IVF treatment

The employee was an immigration officer for the Border and Immigration Agency, part of the Home Office. She underwent two courses of IVF treatment, both of which failed. She brought various claims of sex discrimination and harassment, alleging, among other things, that she had been suspended for taking "too much time off work" for IVF treatment and that her manager had ignored her skills for the job and made jibes that she just wanted to "get pregnant". She also claimed that her time off for IVF treatment should not have counted as sick days under the Home Office's absence management policy.

The Employment Appeal Tribunal ruled that, on the evidence, her allegations of discrimination and harassment were not proven. It also ruled that less favourable treatment because of IVF treatment is not automatically sex discrimination. Infertility is a medical condition and absence due to IVF treatment should, therefore, be treated as sickness absence in the usual way. However, in the very final stages of treatment, where the ova has been fertilised and is about to be implanted, the employee will be protected from sex discrimination. The employee will also be protected once the fertilised ova is implanted, as she will be regarded by the law as pregnant in these circumstances.

The case confirms that, apart from the very final stages of treatment, employers can treat absences for IVF treatment as sickness absence in the usual way. If an employee's time off triggers the first stages of disciplinary action under the employer's absence management policy, the employer would be justified in taking action without discounting periods of absence for IVF treatment. In practice employers may wish to exercise their discretion in this regard. The position is different for time off related to pregnancy or the final stages of treatment, where employers would normally be expected to disregard this sort of absence for the purposes of any absence management procedure.

Sahota v Home Office and Pipkin

"…apart from the very final stages of treatment, employers can treat absences for IVF treatment as sickness absence in the usual way."

New Law

Unfair dismissal compensation

For dismissals taking effect on or after 1 February 2010, the maximum compensatory award for unfair dismissal will decrease from £66,200 to £65,300. The decrease reflects the fall in the retail prices index of 1.4% over 2009. As the maximum amount of a week's pay (for calculating the unfair dismissal basic award and statutory redundancy pay) increased to £380 in October 2009, there will be no further change in 2010.

Statutory maternity and sick pay

In April 2010, the rates of statutory maternity, paternity and adoption pay will increase from £123.06 to £124.88 per week. By contrast, the rate of statutory sick pay, which normally changes in April each year, will remain at £79.15 per week in 2010.

Time off for training

From 6 April 2010, employees with at least 6 months' service in large organisations will have the right to request unpaid time off for training that will benefit both the employee and the employer. Employers will have to consider such requests carefully following a set procedure, and will only be able to refuse requests for specified business reasons (eg additional costs or impact on customers) or where the training will not benefit the employer's business. As employers will not be obliged to pay for the training or the time spent away from work, commentators have suggested that take-up of the new right will be low. The right will, initially, only apply to employers with 250 or more employees but will extend to all employers from April 2011.

"…employees with at least 6 months' service in large organisations will have the right to request unpaid time off for training…"

Employing foreign workers

On 14 December 2009, the advertising rules changed for immigration sponsors who are recruiting new staff from outside Europe. All jobs advertised on or after 14 December 2009 must be advertised for at least 28 calendar days instead of just 2 weeks under the old rules (or 1 week where the salary was over £40,000). Apart from a few exceptions, the role must be advertised using JobCentre Plus in addition to one other recruitment method set out in a UKBA sector code of practice.

From Spring 2010, multinational employers wishing to transfer staff from an overseas office will only be able to do so where the employee has worked for them abroad for at least a year prior to the move – currently only 6 months' service is required. The minimum salary that will need to be paid for an employee to qualify as a skilled worker under Tier 2 will rise from £17,000 to £20,000.

Watch This Space

Health questionnaires and disability discrimination

The Government plans to introduce a new law to discourage employers from using pre-employment medical questionnaires early on in the recruitment process. Under the proposal, if the employer asks questions about a candidate's health before short-listing to the next round or making a job offer, a rejected candidate will automatically succeed in a disability discrimination claim unless the employer can prove some other innocent reason for rejecting them. The change would make it easier for an applicant to succeed with a disability discrimination claim.

Instead of asking all candidates about their health, the safest route is to select the chosen candidate and then ask whether they suffer from any condition which may affect their ability to carry out the role. This approach enables employers to assess an employee's fitness for the role, but avoids the risk of gathering irrelevant information about unsuccessful candidates which could form the basis of a disability discrimination claim.

"…the safest route is to select the chosen candidate and then ask whether they suffer from any condition which may affect their ability to carry out the role…"

The new rule will not apply where the questions are to find out whether any reasonable adjustments are necessary for the interview, for monitoring diversity, to help the employer take positive action, or where having a disability is an occupational requirement for the role. The new rule is to be included in the Equality Bill and will come into force in October 2010 (see May 2009 **Online Update** for further details on the Bill).

Consultation

Retirement

Ahead of its review of the default retirement age in 2010, the Government has commissioned a survey of employers' policies, practices and preferences. The Department for Business, Innovation and Skills is seeking submissions from employers and other interested parties by 1 February 2010 on:

- the operation of the default retirement age in practice
- the reasons that businesses use mandatory retirement ages
- the impact on businesses, individuals and the economy of raising or removing the default retirement age
- the experience of businesses operating without a default retirement age and
- how any costs of raising or removing the default retirement age could be mitigated.

Our Work

Since the last edition of **Online Update**, our work has included:

- advising on the new 50% tax on bonuses announced by the Chancellor in the Pre-Budget Report on 9 December 2009, including how it works and which organisations are covered
- advising on the enforcement of confidentiality provisions against employees and third parties in a cross-border situation
- advising on TUPE aspects related to a sale by one of our clients of a number of its business divisions
- advising on the settlement of a complex race discrimination claim
- presenting training on the Employment Tribunal process for HR professionals
- advising in relation to a Tribunal claim for failure to accommodate a flexible working request following a return to work from maternity leave.

If you have any queries on this edition of **Online Update**,
please contact any member of the Employment Department

Partners: Andrew Lilley, Siân Keall, Richard Baty, Tim Gilbert

Anna West, Russell Lamb, Ed Mills, Adam Rice, Jane Wheeler, Kathryn Renahan,
Simon Gorham, Jo Pengelley, Robbie Sinclair, Adam Wyman

If you have a colleague, or a contact in another organisation, who would like to receive **Online Update**, please send contact details to brenda.goodhew@traverssmith.com

Travers Smith LLP
10 Snow Hill
London
EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500

www.traverssmith.com

Travers Smith LLP is a limited liability partnership registered in England and Wales under number OC 336962 and is regulated by the Solicitors Regulation Authority. The word "partner" is used to refer to a member of Travers Smith LLP. A list of the members of Travers Smith LLP is open to inspection at our registered office and principal place of business: 10 Snow Hill, London, EC1A 2AL.