Devonshires

Employment Brief
Spring 2018

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Welcome

Welcome to our latest round up of employment law and cases. In this edition we consider the important judgment relating to shared parental leave and whether it is discriminatory to pay enhanced maternity pay but only statutory shared parental pay. We have also considered the important changes in relation to the tax treatment of payment in lieu of notice and the latest cases on perceived discrimination and the effective date of termination. Finally we have also issued some practical guidance for employers on the GDPR.

If you have any questions on the matters raised in this briefing please speak to your usual contact in the Employment & Pensions Team.

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Shared Parental Leave & Discrimination

In two key cases, the Employment Appeal Tribunal has confirmed that it is not directly discriminatory to pay enhanced maternity pay but only statutory shared parental leave pay. However, there is a risk that such a practice could be indirectly discriminatory.

Direct Discrimination: Ali v Capita

Mr Ali's wife suffered from post natal depression and had been advised to return to work to deal with this. Mrs Ali transferred the balance of her maternity leave to Mr Ali under the statutory shared parental leave scheme. Under Capita's shared parental leave policy, Mr Ali was allowed to take two weeks' fully-paid paternity leave following the birth of his child, followed by a number of weeks' annual leave.

Mr Ali asked Capita for his shared parental leave pay to be enhanced and for him to be paid the same higher rate as a woman on maternity leave. He raised a grievance which was rejected. When this was refused, he then issued proceedings claiming both direct and indirect discrimination.

At first instance, the employment tribunal agreed that he should have the same entitlement as female staff members on maternity leave, since failure to match a mother's entitlement in these circumstances amounted to unlawful direct sex discrimination. In reaching this decision the tribunal compared Mr Ali to a woman on maternity leave. The tribunal also rejected the argument put forward by Capita that s.13(6)(b) of the Equality Act 2010 ("the special protection provision" afforded to women in connection with pregnancy or childbirth,

which allows more favourable treatment) could protect an employer from a challenge to enhanced maternity pay.

Capita appealed the decision to the Employment Appeal Tribunal (EAT) who agreed with them and overturned the decision of the employment tribunal.

The EAT held that the tribunal should have compared Mr Ali to a female partner of a birth mother who was taking shared parental leave, and not to a woman taking maternity leave. Mr Ali was unable to compare himself to a female on maternity leave because there was a material difference in the two types of leave. The purpose of maternity leave and pay was to protect the health of the mother following birth whereas shared parental leave was purely a childcare measure. The EAT also agreed with Capita that the special protection provision under s.13(6)(b) of the Equality Act applied making it lawful to afford more favourable treatment to pregnant women.

Many employers that do not duplicate maternity leave provisions in their shared parental leave provisions will welcome this outcome. However, it remains possible that a policy that paying different rates for shared parental leave and maternity leave is indirectly discriminatory. This issue was addressed by the EAT in another recent case.

Indirect Discrimination: Hextall v Chief Constable of Leicestershire Police

Like the above case, Hextall involved a father who was not paid enhanced pay during a three month period of shared parental leave. He argued a female police constable on maternity leave would have received full pay over the period he took shared parental leave and this was both directly and indirectly discriminatory. The employment tribunal dismissed both claims of direct and indirect discrimination, following the same reasoning as above that a man taking shared parental leave cannot compare himself to a woman taking maternity leave.

Mr Hextall appealed to the EAT. The EAT found that the tribunal had erred in applying a direct discrimination comparator (as in a woman on maternity leave) to an indirect discrimination claim. Assessing an indirect discrimination claim involves considering whether a policy, condition, or precedent (PCP) is in practice which has the effect of putting those with a particular protected characteristic at a disadvantage.

The EAT said: "It is the resultant disadvantage which must be considered in deciding a claim of indirect discrimination…… The disadvantage in this case was that the only option for men wishing to take leave after the birth of their child was to take SPL at the statutory rate. However, women wishing to take such leave had the possibility of taking maternity leave at full pay."

The EAT remitted the decision on the indirect discrimination claim to a new employment tribunal to reconsider, and examine whether the practice, if found to be discriminatory, can be justified.

Comment

Whilst the question of whether different rates of maternity and shared parental leave pay is direct discrimination now appears settled, until the case of Hextall is decided there remains uncertainty as to whether this may still be indirectly discriminatory.

The approach of the EAT in Hextall suggests that a successful indirect discrimination claim is now more likely and represents a risk to employers who have different approaches to maternity and shared parental leave pay. However, it is worth remembering that even where a PCP is found to put a particular group at a disadvantage, employers can still successfully defend any claim if they are able to show that that the policy of paying different rates is a proportionate means of achieving a legitimate aim.

Employers therefore need to consider how any difference can be justified. For example, an employer could argue that the enhanced rights to full pay of a woman in maternity leave is justifiable on the basis of preserving her health following pregnancy and the well-being of her child. Whether or not such an argument would succeed will depend on the facts of the case.

Payment in Lieu of Notice (PILON)

Taxation of Termination Payments.

From April this year, all payments in lieu of notice (PILON) are now subject to tax.

This change is designed, in the words of the government, to "simplify and tighten" the rules around the taxation of termination payments and represents a significant change from the previous position where different arrangements applied depending on whether there was a PILON clause in the employee's contract.

Taxation of PILON The Previous Regime

Under the previous regime where there was a clause within an employee's contract allowing for the payment of PILON, the PILON payment was taxed as earnings. This was because it was a payment derived from the employment contract.

On the other hand, where there was no PILON clause in the contract and the employer forced a employee to take pay in lieu of notice, then the PILON payment was generally regarded by HMRC as damages for breach of contract (the breach being the employee's contractual right to work his notice period) rather than as a true PILON payment. Damages are given a different taxation treatment by HMRC and are tax free up to a limit of £30,000 in any single tax year. This meant that the PILON payment in such cases could usually be made to the employee without the deduction of any tax up to the limit of £30,000.

However, there were exceptions to this which could cause confusion and uncertainty. For example, if there was a custom and precedent on the part of the employer to deduct tax from PILON payments even when there was no PILON clause in the contract, then HMRC could take

the position that an implied contractual right to PILON had arisen and that the payment was taxable regardless. This could cause difficulties in settlement negotiations where the employer would want to deduct tax when there was no PILON clause whilst the employee would insist that the payment should be made gross.

In such cases the employer would usually insist on an indemnity from the employee in a settlement agreement. But indemnities are unsatisfactory in many ways – the employer would have to enforce it, if necessary through the courts, and even then there was no guarantee that the employee would have the resources to pay.

The New Regime

The new position is that all PILON payments will now be subject to income tax and employee Class 1 NICs regardless of whether or not there is an express PILON clause in the contract.

This change essentially splits termination payments into two elements.

The first element is known as "post-employment notice pay" (PENP). This represents the amount of basic pay the employee will not receive because their employment was terminated without full or proper notice being given. This element will be subject to income tax and employee Class 1 NICs.

The legislation sets out a complex statutory formula to calculate the PENP, which involves carrying out calculations to establish the employee's basic pay, the amount of the notice period outstanding following the termination date and the number of days in the employee's last pay period. Once PENP has been calculated, any contractual PILON payment can be deducted to give the final taxable sum.

There is not yet any HMRC guidance on how to perform the PENP calculation. At present appears the PENP only takes into account basic pay, and that bonus and commission payments are not included. HMRC has promised that further details of how and when the PENP calculation should be applied will become available in due course.

The second element is the remaining balance of the termination payment. The balance of the payment is tax free up to £30,000 (provided that it is an ex gratia payment). Any excess over £30,000 will be subject to income tax. Employees will continue to benefit from an unlimited NIC exemption for payments related to the termination of employment, so the whole of the balance of the payment will be free from Class 1 NICs.

The new rules will not apply to statutory redundancy payments, which can still be made tax-free in their entirety. For example:

- An employee's employment is terminated without notice. The employee is paid £5,000 per month basic pay, they have a 3 month notice period and there is no PILON clause in the contract. The employee receives £35,000 compensation on termination.
- Under the old regime, £30,000 of the payment would have qualified for the whole tax free exemption. Income tax would have been due on the balance of £5,000 compensation which went over the £30,000 tax free limit.
- Under the new regime, income tax and NICs (both employer and employee) are due on the PENP of £15,000. The balance of £20,000 qualifies for the £30,000 exemption.

The Way Forward

Employers with no PILON clauses in their standard contracts may now want to consider including them, as there is no potential tax advantage in not including the clause. Employers may also wish to consider including a contractual PILON clause, as they will still be in breach of contract if they pay a PILON payment where there is no clause in the contract. Being in breach of the employee's contract makes it difficult to enforce other terms of the contract, such as restrictive covenants.

Employers still have the option of insisting an employee work their notice, or placing them on garden leave for their

Perceived Disability Discrimination

The case of The Chief Constable of Norfolk v Coffey is an important reminder that an individual does not always have to have a particular protected characteristic in order to be discriminated against on the basis of that characteristic. In the first case of this kind, a police officer was found to have been discriminated against because of a perceived rather than actual disability.

Disability under the Equality Act

A person is disabled for the purposes of the Equality Act 2010 ('the Act') if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities. This means that just having a particular medical condition does not automatically mean that a person is disabled as the effect on their abilities must be considered.

However, progressive conditions do fall under the definition of disability. These are conditions which have some impairment or effect on a person's day to day activities currently and are likely to have a substantial adverse effect in the future.

If an employer treats an employee or applicant less favourably because of a disability, this will be in breach of the Act. They will also be in breach should they treat an employee less favourably because they perceive that person to have a disability, even if that person does not actually have a disability.

The Facts

Ms Coffey was a serving police offer with Wiltshire Constabulary. During the medical examination required as part of her application to become a PC, it was discovered that she suffered from a type of hearing loss. Although overall her hearing was found to fall below the police National Recruitment Standards, Ms Coffey passed a practical functionality test and worked on front-line duty in Wiltshire with no side-effects or restrictions.

In 2013 Ms Coffey applied to transfer to Norfolk Constabulary ('Norfolk'). A medical assessment found that she still had significant hearing loss in both ears and was just outside the standards for recruitment, but recommended that as she had been undertaking an operational police role with no issues that an at-work test should be conducted. The decision maker for Norfolk, an ACI Hooper, rejected the recommendation for a practical test and declined Ms Coffey's application on the basis that her hearing was below the medical standard.

Ms Coffey brought a claim against Norfolk for direct discrimination on the grounds of perceived disability, i.e that another applicant for transfer who had the same abilities as Ms Coffey but was not perceived as disabled would have been treated differently.

Tribunal Decision

At first instance, the tribunal found that ACI Hooper had directly discriminated against Ms Coffey in refusing her application to transfer on the basis she was perceived to have a disability. Ms Coffey's transfer had been refused on the basis of assumptions as to the effect Ms Coffey's condition would have on her, including that she would

become an officer only capable of restricted duties, rather than on an assessment of her actual abilities. Norfolk appealed this finding to the Employment Appeals Tribunal ('EAT').

Decision on Appeal

On appeal, Norfolk argued that the tribunal had considered that ACI Hooper had perceived Ms Coffey would potentially become disabled in the future and this was not the correct test to apply. ACI Hooper had not perceived Ms Coffey's hearing loss to have a substantial and adverse effect on her day to day duties so did not perceive her as disabled. Ms Coffey simply did not meet the standards on hearing for recruitment.

However, the EAT disagreed. Although the tribunal at first instance had not explicitly referred to progressive conditions, it was clear that ACI Hooper had perceived Ms Coffey to have a condition which was likely to progress with time to the point where she would be on restricted duties not merely that she might potentially develop a disability in the future. As progressive conditions fall under the definition of disability, ACI Hooper had directly discriminated against Ms Coffey on the grounds of perceived disability.

Comment

The above is the first case to come to the EAT regarding perceived disability discrimination under the Act. As it demonstrates, employers should ensure decisions affecting an employee or applicant are based on an individual assessment of their abilities and not any stereotypical assumptions about what the implications of a particular medical condition may be. Any guidance or recruitment standards should reflect this.

It is also advisable for medical evidence to be obtained where possible to inform decisions about recruitment where an applicant has a condition which may affect their ability to perform the duties of the role, as one of the key flaws in the decision making in this case was that the decision was not based on the findings of a functionality test, particularly when this had been recommended by medical professionals.

Further, where a job applicant does have a condition which is likely to prevent them from fulfilling the duties of that role in future, employers should first consider if it is possible for that employee to still serve in that role for a reasonable amount of time.

Effective Date of Termination: Cosmeceuticals Limited v Parkin

The Employment Appeal Tribunal has confirmed that the effective date of termination of an employee who is summarily dismissed and then given notice will be the date of the summary dismissal and not when the notice expires.

When does a dismissal occur?

Under the Employment Rights Act 1996, an employee will be dismissed if their contract is terminated by the employer, with or without notice.

In assessing whether a dismissal has occurred, the tribunal will consider whether the employee's contract has been withdrawn or removed from them and whether this has been communicated to the employee. For example, removing an employee from the payroll, issuing a P45 or ending the current post in order to offer a new position have all been found to amount to dismissals.

Although the employer's conduct or words in terminating the contract does not have to be completely unambiguous, the tribunal will take into account whether an objective observer would consider the employee had been dismissed.

The Effective Date of Termination

If an employee was dismissed with notice, then the effective date of termination (EDT) will be the date on which the notice expires (as long as this notice is at least the statutory minimum).

However, if an employee is dismissed without notice, then the EDT will be the date on which the termination takes effect, i.e the date that the employee is informed they are dismissed. This is the case even if dismissal without notice is in breach of the employment contract.

The EDT is important as it is used to calculated a Claimant's period of continuous employment and to determine the date from which limitation will run in cases of unfair dismissal.

As the EDT is a statutory concept, it is not open to parties

to agree that an alternative date applies. This was the case in Cosmeceuticals v Parkin, where a re-assessment of the EDT by the tribunal from meant that the Claimant's claim for unfair dismissal had in fact been brought out of time.

Background

Ms Parkin was employed by Cosmeceuticals Limited, a manufacturer and distributor of skincare and makeup products, as a Managing Director from June 2009.

Following a period of poor performance, Ms Parkin agreed to go on a 2 month sabbatical to attend to some personal issues. During her absence, the company became further concerned about her performance and on her return to work on 1 September 2015 the company's Chairman, Mr Sullivan, raised these performance concerns and told Ms Parkin she could not return to her role.

Ms Parkin was then placed on garden leave and on 29 September 2015 Mr Sullivan wrote to Ms Parkin "for clarity" giving her notice of the termination of her employment. The notice expired on 23 October 2015.

Ms Parkin then brought a claim for unfair dismissal in the employment tribunal.

At first instance, the tribunal found Ms Parkin's dismissal had been unfair. Although there was a genuine belief that she had been unable to perform her role at the required level, she had not been given the opportunity to put forward her case as to the performance issues in question nor advised that poor performance could lead to her dismissal. Although the tribunal found Ms Parkin had been dismissed on 1st September 2015, it found the EDT was the 23rd October 2015.

Cosmeceuticals appealed to the Employment Appeals Tribunal (EAT) on the basis that the tribunal had committed an error in law in finding the dismissal took place on 1st September but the EDT fell on the later date.

Decision at the EAT

In response to her former employer's appeal, Ms Parkin pointed to the fact that it had previously been agreed between the parties that the EDT was 23rd October. She argued Mr Sullivan had merely made the decision to dismiss on 1st September and there had been no finding that this had actually been communicated to her in the meeting on that date.

However, the EAT disagreed. Ms Parkin had been dismissed on 1st September as this was when her employer made clear to her that her existing contract of employment had ended, notwithstanding the later serving of notice upon her. It was therefore not open for the tribunal to decide the EDT was a later date than this.

Importance of getting the EDT right

The EAT's decision is important because Ms Parkin had served her claim less than 3 months after 23rd October 2015 but more than 3 months from 1st September 2015, meaning that the tribunal changing the EDT to 1st September meant her claim was out of time.

This demonstrates how what can seem like an otherwise quite technical point can have significant implications. If the Respondent had determined the EDT was 1st September upon receipt of the claim they could have potentially avoided a full merits hearing by arguing at the preliminary stage the tribunal had no jurisdiction to hear Ms Parkin's claims on the basis they were out of time. For Ms Parkin's claim to now be considered, she will need to explain why it was not reasonable or practical for her to have brought her claim in time.

As this case demonstrates, it is essential that employers handle any termination of employment carefully and that clear records are kept of any meetings in the run up to dismissal so that the EDT can be accurately calculated.

GDPR is here

On 25 May 2018 the much awaited GDPR came into force. This piece of EU legislation will have a significant impact on the requirements employers must fulfil in order to lawfully collect and process personal data about their employees.
It's therefore important that employers are not only aware of the changes and new rights for data subjects, but put in place key documents required to demonstrate compliance.

Data Protection and Retention Policies

The GDPR makes wide ranging changes to the basic data principles and the rights of individuals in relation to data. The Data Protection Act 2018, also brought into law on 25 May, sits alongside and expands on some areas of the GDPR.

This means that data protection policies written to comply with the Data Protection Act 1998 will need to be updated. For example, any internal data protection policies will need to replace reference to the principles under the 1998 Act with the principles under the GDPR and should cover the bases on which the organisation will process personal and sensitive information.

Additionally, any internal data protection policy should cover how the employer will deal with criminal records information relating to staff, the obligations on employees to comply with the policy and consequences for failing to do so, and who employees should contact if they wish to exercise any of their rights or to report a data protection breach.
It is also important that, either within the data protection

policy or as a stand-alone document employers have a clear retention schedule relating to the documents they process. For each document processed, this schedule should specify either how long this document will be kept for or what test will be applied to calculate when the document is no longer needed and can be destroyed. For example, many employment related documents can be destroyed 6 years after the employment has terminated, as this is the limitation period for any contract based claims in the county court.

Privacy Notices

Many organisations will be familiar with using privacy or 'fair processing' notices for customers, which informs them what data will be collected and how this will be processed. In order to comply with the requirements under the GDPR that employers process data fairly and transparently all current and prospective employees should now also be issued with privacy notices.
These notices should set out:

- what data is collected and why;
- how the data will be collected;
- how the data will be used;
- who the data may be shared with;
- how long the data will be kept for;
- where the data will be held; and,
- whether the data will be transferred outside the EEA.

Information collected is likely to include names and contact details of the employee, their emergency contacts, their bank account details, information about grievances involving or about the employee, and sickness/absence records. It's important that each type of data and reason for processing is listed as it won't be possible to use "catch all" clauses to cover anything that the privacy notice doesn't explicitly list.

For prospective employees, privacy notices can be included with the standard information pack whilst existing employees can be signposted to an accessible copy of the notice, such as on the organisation's intranet.

Agreements with Third Parties

There are many circumstances in which personal data of employees may be shared with third parties, such as payroll or pension providers. Under the GDPR, data controllers must have a written contract with third parties they share data with under which the third party gives guarantees that they will act in accordance with the GDPR.
Agreements with third parties should therefore specify:

- the third party will only process the data provided on the employer's written instructions;
- employees of the third party and other persons who will process the data have a duty of confidentiality;
- the third party will assist the employer in dealing with subject access requests and circumstances in which individuals exercise their rights (such as the right of rectification);
- the third party will notify the employer of any data breach;
- the third party will delete or return all personal data at the end of the contract, and submit to any audits and inspections as requested by the employer; and,
- sub-processors may only be engaged by the third party with the employer's consent.

Where contracts with third party processors currently do not cover the above, then you may wish to consider varying these agreements or entering into an additional data processing agreement. In future it is likely that industry standards or kite marks will develop to assist in identifying suppliers which are compliant with these requirements.

If you would like any assistance in reviewing or preparing any of the documents mentioned above to comply with the GDPR, please contact your usual contact in the Employment and Pensions team.

Upcoming Legislation

Summary	Legislation	Date due to come into force	Details
National Minimum Wage	National Minimun Wage (Amendment) Regulations 2018	1 April 2018	Increases to the rate of national minimum wage. Rates are now as follows: • National living wage is £7.83 • Standard adult rate is £7.38 • Development rate is £5.90 • Young workers rate is £4.20 • Apprentice rate is £3.70
Damages for Injury to Feelings		6 April 2018	The Vento bands for awards to injuries to feelings have been uprated in line with the Retail Price Index. From 6 April 2018 the following bands will apply: • Lower band of £900 to £8,600 • Middle band of £8,600 to £25,700 • Upper band of £25,700 to £42,900
Taxation of PILON payments		6 April 2018	All payments in lieu of notice are to be treated as earnings subject to tax and class 1 NICs. The tax exemption for injury does not apply to injury for feelings.
Pensions Auto-enrolment		6 April 2018	The employer minimum contribution has risen to 2% and the total minimum contribution has risen to 5%. Employees must contribute at least 3%.
Statutory Maternity and Aportion Pay, Statutory Sick Pay		6 April 2018	The rates for statutory maternity, paternity, adoption and shared parental pay have been increased. The weekly rate is now £145.18 Statutory Sick Pay has increased to £92.05 per week.
Compensation in the Employment Tribunal		6 April 2018	The compensation limits and minimum awards payable to a Claimant have been increased: • The maximum compensatory award for unfair dismissal is £83,682 • A week's pay to calculate statutory redundancy payments and the basic award for unfair dismissal is £508 The new rates will apply where the 'appropriate date' for a claim is on or after 6 April 2018.
Employment Allowance		April 2018	Employers cannot claim employment allowance for one year if they receive a civil penalty for employing an illegal worker.

Summary	Legislation	Date due to come into force	Details
Taylor Review		May 2018	Following the findings of the Taylor review, the government launched a number of consultations into worker's rights, including treatment of agency workers. The consultation closed on 9 May 2018.
Data Protection	General Data Protection Regulation	25 May 2018	Significant new piece of EU legislation governing data protection. There will be a range of changes to how employers process personal and sensitive personal data, and additional requirements to demonstrate compliance.
Data Protection	Data Protection Act 2018	2018	Replaces the Data Protection Act 1998 to provide a legal framework for data protection which supplements the GDPR. Provides some additional grounds under which data can be processed in addition to those under the GPDR.
Gender Pay Gap-Enforcement		June 2018	The EHRC will commence investigations into those employers who failed to publish their gender pay gap report in April 2018.
Trade Secrets	Trade Secrets Directive 2016/943	June 2018	New rules on the protection against unlawful acquisition, disclosure and use of trade secrets for all EU members.
Parental Bereavement Leave		8 June 2018	A consultation into parental bereavement leave and pay was launched on 28 March 2018, seeking views on who should be entitled to take the leave, how the leave should be taken and what evidence must be provided. The consultation closes on 8 June.
Childcare Vouchers		5 October 2018	Employer backed Childcare Voucher schemes will close to new applicants. Eligible employees will be able to take advantage of the Tax-Free Childcare government backed scheme. The scheme was originally due to close on 6 April 2018 but the deadline has been extended.
Itemised Pay Slips	Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No 2) Order 2018 Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018	6 April 2019	All workers will have a right to an itemised pay statement and to enforce that right in the employment tribunal. The payslips must show the number of hours paid for where a worker is paid on an hourly rate basis.
Taxation of Termination Payments		6 April 2019	All termination payments above £30,000 will be subject to class 1A NICs (employer liability only).

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