



Employment Law Matters

Welcome to the spring edition of our quarterly newsletter. Please click on the links to read recent case updates and about current regulatory issues affecting employers.

[Case law update](#)

Round-up of recent employment cases...[click here](#)

[News update](#)

Summary of regulatory developments affecting employers...[click here](#)

[The need to review recruitment procedures](#)

Following the Employment Appeal Tribunal's (EAT) decision in *Osborne Clarke Services v Purohit*, employers who have recruitment restrictions based on an applicant's right to work in the UK should review their recruitment policies and procedures...[click here](#)

[Are discretionary bonuses really discretionary?](#)

Most HR departments are under huge pressure to support cost-saving drives within businesses. A common way of doing this, especially in the financial services sector, is to avoid making unnecessary or undesirable payments under bonus plans...[click here](#)

[A round up of TUPE cases](#)

Since the inception of the Transfer of Undertakings (Protection of Employment) Regulations in the early 1980s, the courts and tribunals have more than demonstrated a willingness to protect the interests of transferring employees...[click here](#)

[Automatic pension enrolment from 2012](#)

From 2012 employers will have to make arrangements for qualifying employees to participate in a pension scheme...[click here](#)

[Out with the old and in with the...old?](#)

On 6 April 2009 the Employment Act 2008 introduced new disciplinary and grievance procedures for the resolution of workplace disputes between employers and employees...[click here](#)

[Employee reward Budget summary](#)

Alistair Darling has delivered the Chancellor's Budget 2009. As expected, it mainly focused on the economy, but there were some very significant issues affecting employee incentives and taxation which may have a material impact on how employees are rewarded...[click here](#)

Case law update

Whilst the issue and the decision in *Osborne Clarke Services v Purohit* (UKEAT/0305/08/ZT) may be very straightforward, we regard this case as one of considerable significance for HR departments. Osborne Clark Services had a policy of not considering an application for a training contract from anyone needing a work permit. Mr Purohit, who was rejected on this basis, alleged **race discrimination** and succeeded. Osborne Clark’s policy was indirectly discriminatory and was not justified. According to the Employment Appeals Tribunal, questions about work permits should be verified in the final stages of the selection process to ensure that the appointment is based on merit alone. The firm produced little beyond mere conjecture to support their view that a work permit would in no circumstances be granted. We cover this case in more detail in a separate article later in this newsletter.

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The English Patents Court has handed down a landmark judgment in the case of *James Duncan Kelly and Kwok Wai Chiu v GE Healthcare Limited* ([2009] EWHC181(Pat)) in which it awarded £1.5m compensation to two former employees in **recognition of an invention** they created during their employment. This decision could encourage other potential claimants to make similar applications, especially in light of the fact that the case was decided in relation to patents filed before January 2005 on arguably a narrower test than now applies. For patents filed since January 2005, employees need to demonstrate that the invention, rather than the subsequent patent, is of outstanding benefit.

The Transfer of Undertakings (Protection of Employment) (TUPE) Regulations were updated in 2006 but there remains a steady stream of cases concerning their interpretation and application. The decision of the *Liverpool Employment Tribunal in Royden v Barnetts Solicitors* (ET 2103451/07) is eye-catching not just for law firms but for all professional advisors and their clients. A **‘service provision change’ under TUPE** occurred when Britannia Building Society decided to change its provider of conveyancing services from one law firm to two others. It followed that the employments of certain lawyers who had spent the majority of their time doing this work were transferred between the firms. In the present economic environment an outgoing advisor may be more inclined to invoke TUPE as a way of managing its workforce size. Incoming providers need to watch out for this, as should the clients who may discover that the new advisory team bears a very close resemblance to the old one.

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Public sector bodies sometimes **break up outsourced services** amongst a number different private sector providers. This can put a strain on the manner in which TUPE applies, and some court cases have resulted. When Clearsprings, which had provided accommodation and support services to asylum seekers under a five year contract with the National Asylum Seekers Service, stopped providing the services, asylum seekers were randomly redistributed amongst several new contractors. Various Clearsprings employees argued that this was a TUPE transfer under the service provision change rules. The Employment Appeals Tribunal acknowledged that there does not have to be one

transferee for there to be a ‘relevant transfer’. However, in this situation the allocation of employees was so fragmented that there was “no discernible pattern of re-allocation to the incoming contractors” and therefore it would not constitute a relevant transfer. (*Clearsprings Management Limited v Mrs M Ankers* (and others) - (UKEAT/0054/08/LA)).

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Alemo-Herron (and others) v Parkwood Leisure Limited - (UKEAT/0456/08/ZT) may well alarm many employers who have **taken over staff under TUPE**. The employees in question were employed by the London Borough of Lewisham until, in 2002, their employments were transferred, via a company called CCL Limited, to Parkwood. Their conditions of employment were subject to collective agreements with the National Joint Council for Local Government Services in relation to pay increases. A new collective agreement was negotiated and finalised in 2004. The employees believed that they were entitled to pay increases negotiated under this new agreement, even though the increases were made after they had moved out of the public sector. The Employment Appeals Tribunal agreed. The clause relating to collective agreements was ‘dynamic’ and as long as there was an entitlement under the employment contract to pay increases set by collective bargaining, the new employer was obliged to pay the increased wages. This is an area where UK law seems to go further to protect employee rights than EU law does. An appeal has been lodged.

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Case law update - cont'd

Klarenberg v Ferrotron Technologies GmbH (c-466/07) concerned an employee who worked for a division of a company which sold assets to another company, Ferrotron, and its parent company. The question was **whether the transferred entity lost its identity** because the assets went to different companies. The European Court acknowledged that the organisational structure can contribute to how an economic entity is defined, but changing the structure will not prevent the application of the Acquired Rights Directive. The continuing interdependence and complementary nature of different elements of production, i.e. using those elements in an identical or analogous economic activity even if that is in a new and different economic structure, will mean that the Directive applies.

The above four cases concerning TUPE are explained in more detail in a separate article in this newsletter.

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The Employment Appeals Tribunal has issued a reminder that there are four requirements, each of which must be met, for an employer to be exempt from the **duty to make reasonable adjustments**. Those requirements are: that the employer does not know, and could not be reasonably expected to know, that the disabled person has a disability; and that it does not know, and could not be reasonably expected to know, that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled. (*Eastern and Coastal Kent PCT v Grey* (UKEAT/0454/08).)

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In *Patel v Marquette Partners* (UK) Ltd (UKEAT/0190/08/JOJ), Mr Patel received substantial bonuses in the form of dividends on shares awarded to him under an employee benefit trust. The employer made certain deductions to the bonus as a result of a warning from HMRC that it would bring formal proceedings to recover amounts of unpaid PAYE income tax and national insurance contributions that the employer should have accounted for similar payments in previous years. Mr Patel filed a grievance and then resigned, claiming that the deduction for tax due on the earlier bonuses was an **unlawful deduction from his wages**. The Employment Appeals Tribunal held that HMRC's informal demand to account for the PAYE and NICs on the earlier bonuses was sufficient to justify the deduction in law, even without consent from the employee.

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When does an ill-judged remark cross the line into **unlawful discrimination**? Miss Dahliwal, a British woman of Indian ethnic origin who had lived in UK all her life, resigned with one month's notice. One of her employer's co-owners told her to work her notice in a professional way because they were likely to cross paths in the future unless she was "married off/or in India" (it was disputed whether he said "off" or "or"). She claimed racial harassment. Even though this was regarded as an ill judged remark rather than a comment intended to cause offence, it still represented harassment and compensation of £1,000 for hurt feelings was awarded. The Employment Appeals Tribunal recognised that there is a fine line between on the one hand preventing

hurt being caused by racially offensive comments or conduct, and on the other encouraging a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. Not every racially slanted adverse comment or conduct will constitute the violation of a person's dignity. However, this one did. (*Richmond Pharmacology v Miss A Dhaliwal* (UKEAT/0458/08/CEA).

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Hot off the press is the decision in *Commissioners for Revenue and Customs v Annabel's (Berkeley Square) Ltd* ([2009] EWCA Civ 361), concerning the **application of tips toward the national minimum wage** compliance. The restaurant operated a "tronc" system under which service charges received by the restaurant (normally through credit and debit cards) were handed to a troncmaster for distribution to the employees. Since it was the troncmaster, not the employer, which paid the amount to the employees, they could not count towards national minimum wage.

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Case law update - cont'd

The Court of Appeal has confirmed in the case of *Secretary of State for Business, Enterprise and Regulatory Reform v Richard Neufeld and Keith Howe* ([2009] EWCA Civ 280) that a director who is also the **majority shareholder of a company can be an employee**. In clarifying some contradictory case law on the subject, the Court of Appeal confirmed that when determining whether or not a director and majority shareholder is an employee two issues need to be considered. First, is the contract a genuine contract or a sham? Secondly, assuming it is a genuine contract, does it amount to a contract of employment or is it a contract for services?

In the case of *'A' v Revenue & Customs* ([2009] UKSPC SPC00734), the Special Commissioner confirmed that a compromise agreement payment for losses by reason of an employee's dismissal was subject to income tax as a termination payment, but that **payments for injury to feelings can be paid tax-free**. In determining the maximum amount that can be awarded for injury to feelings the Special Commissioner applied the "Vento" guidelines which confirm that the top band of payments for the most serious cases of injury to feelings would be between £15,000 and £25,000.



News update

In his Budget, the Chancellor of the Exchequer referred to an uplift in the maximum amount of a week’s pay for the purposes of calculating statutory redundancy payments from £350 to £380. He did not specify when the change comes into effect and this remains uncertain (although one possibility is that it had immediate effect and another is October which some commentators have suggested). This increase appears to be limited just to statutory redundancy calculations rather than other statutory payments, but again we await clarification.

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The European Court of Justice has given judgment in the so-called “Heyday case” on the UK’s provisions on retirement under the Employment Equality (Age) Regulations 2006. These provide that a worker over 65 can be dismissed for retirement without it being unfair dismissal and an employer can decide not to employ someone who is within six months of being 65. These rules were capable of justification and need not infringe EU law.

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A consultation on the implementation of the agency workers directive, in which agency staff are proposed to benefit from increased rights, has been issued. It closes on 31 July 2009. A consultation concerning amendments to the Conduct of Employment Agencies and Employment Businesses Regulations 2003 is planned

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The Government has confirmed its goal to allow employed fathers to take up to 26 weeks additional paternity leave, some of which might be paid if the mother of the child concerned has returned to work. Its aim is to do that before the end of this Parliament, but the change is unlikely in 2009.

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The rates of certain statutory payments went up on 6 April 2009. Statutory sick pay is now £79.15 per week. Statutory maternity, paternity and adoption pay is £123.06 per week.

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A reminder that, from April 2009 the statutory disciplinary, grievance and dismissals procedures came to an end, subject to transitional arrangements for ongoing matters, and that minimum holiday entitlement increased to 5.6 weeks.

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The Government’s consultation process on the question of whether tips should be paid in addition to the national minimum wage has now closed. The Government has made clear its view that it intends to change the National Minimum Wage Regulations so that in future employers will not be able to use tips to pay national minimum wages. According to the consultation paper, two options are being considered. One option is that all tips,

service charges, gratuities and cover charges, whether discretionary or mandatory, are excluded from counting toward national minimum wage. The other option is that only discretionary tips and gratuities, and mandatory and discretionary service charges be excluded from counting toward the national minimum wage. Either option, if implemented, will have a real impact on employers who currently bolster employees’ wages with tips.

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The Equality Bill has been published. The Bill covers a range of areas, some of which have received significant coverage in the national press. In the next edition of Employment Law Matters we will pick over the contents of the Bill to identify the areas that could have a real impact on business.

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The need to review recruitment procedures

Key messages:

- All employers should review their recruitment procedures to minimise risk of race discrimination claims.
- Employers must be able to objectively justify a decision to not consider a non-European economic area job applicant.

Following the Employment Appeal Tribunal's (EAT) decision in *Osborne Clarke Services v Purohit* (UKEAT/0305/08/ZT), employers who have recruitment restrictions based on an applicant's right to work in the UK should review their recruitment policies and procedures as a matter of urgency to minimise the risk of race discrimination claims.

Osborne Clarke had a policy of automatically rejecting job applicants for solicitor training contracts if, on the face of it, they did not have the right to work in the UK. They did this because they did not believe they could secure work permits for such applicants, as there were sufficient suitable applicants who did not require work permits. The EAT held that the rejection of Mr Purohit on this basis constituted indirect race discrimination. Osborne Clarke did not put forward enough evidence to persuade the EAT that its position was any more than mere conjecture.

This seemingly straight forward case has some significant implications for employers.

- Those who currently have a policy of rejecting candidates who appear not to have the right to work in the UK, or require Tier 2 entry clearance, are at risk of legal challenge. Whilst an inability to issue a sponsorship certificate may represent sufficient justification for rejection, that inability should be evidenced and should be part of a consistent policy. In any event, doing so at the beginning of the recruitment process may be dangerous. Even if a sponsorship certificate can not be issued, the potential exclusion of applicants who may be able to secure Tier 1 entry clearance many not be justifiable.
- Accordingly, recruitment processes must be reviewed to ensure they reflect legal requirements and application forms and websites may need alteration.
- An employer which has made a conscious decision not to apply for a sponsorship licence, and is therefore unable to issue sponsorship certificates, many need to objectively justify this decision.

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Are discretionary bonuses really discretionary?

Key messages

- Use of the word discretionary is not a panacea – an employee may still have a contractual benefit.
- Employers should review contractual wording relating to bonuses to avoid unnecessary payouts.

Most HR departments are under huge pressure to support cost-saving drives within businesses. A common way of doing this, especially in the financial services sector, is to avoid making unnecessary or undesirable payments under bonus plans. In this context, the decision in *Small v (1) The Boots Co PLC* and *(2) Boots UK Limited* appears to be causing some concern.

The issue

The case concerned a group of employees who transferred, under the Transfer of Undertakings (Protection of Employment) Regulations (TUPE), from Boots to Unipart, and then back to Boots. The employees claimed they had a contractual right to a performance related bonus.

Central to the case were various documents issued to employees, including a statement of employment particulars and a staff handbook. These included various references to a bonus, accompanied by the word “discretionary”.

The Employment Appeals Tribunal (EAT) considered that the use of the word “discretionary” could be, and in this case was, ambiguous. It could mean that the employer had discretion as to whether to pay a bonus. Alternatively, the discretion could attach to the manner of calculation, the amount paid, or indeed something else. In effect, a discretionary bonus could have a contractual content.

In fact, bonuses had been paid by Boots for many years before the transfer to Unipart. The EAT felt this was also a factor to be considered in deciding whether the bonuses had a contractual content.

The key message is that a liberal sprinkling of “discretionary” in contracts of employment or bonus documentation is not a solution to avoiding legal challenge over payment. More careful drafting is required, and all the more so when bonuses are regularly paid.

The EAT also reiterated principles from earlier cases, that any exercise of discretion in relation to provision of bonuses must be rational and in good faith. In fact, it used the term “reasonable exercise of discretion” which might encourage employees and their lawyers to argue that this requirement is moving nearer to one of “reasonableness” rather than merely “not capricious or irrational”.

What to do now

Documents given to employees referring to or describing bonus plans or arrangements which are intended to be discretionary could all benefit from legal review. This will ensure that the descriptions identify the intended contractual commitment (if any), and the intended scope of the discretion, unambiguously and consistently. For employers paying a material proportion of remuneration as variable discretionary bonus, this review could save significant costs in unintended bonus payments, especially as bonuses shrink and employees become more aggressive in trying to extract maximum possible payments, notably when they leave employment.

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A round up of TUPE cases

Key messages:

- The courts and tribunals continue to give effect to the overriding objective of TUPE which is to protect the interests of transferring employees.
- Employers taking over staff under TUPE may be subject to pay increases negotiated outside their control.
- Changes to professional service providers could trigger TUPE in many instances.

Since the inception of the Transfer of Undertakings (Protection of Employment) Regulations in the early 1980s, the courts and tribunals have more than demonstrated a willingness to protect the interests of transferring employees. A number of recent cases have reinforced this.

Collective agreements

TUPE provides that the new employer inherits the obligations contained in any collective agreement of the old employer. In the case of *Alemo-Herron & Others v Parkwood Leisure Limited* (EAT/0456/08), various local authority employees had their pay fixed by a collective agreement that lasted for a three year period.

The employees were initially employed by the London Borough of Lewisham and their contracts of employment contained a term that their terms and conditions would be in accordance with a collective agreement. In 2002, the employees transferred to CCL Limited pursuant to TUPE and then transferred in 2004 to Parkwood. Negotiations took place surrounding rates of pay for the period April 2004 to 31 March 2007 following the transfer of employment to Parkwood. Parkwood did not recognise the trade union nor was it a party to the collective agreement. It applied a pay increase in line with the 2004 agreement in 2005 (without acknowledging that it was liable to do so) but did not do so for the period April 2006 to March 2008.

The Employment Appeal Tribunal (EAT) held, finding against the decision of the Employment Tribunal, that Parkwood was bound by the new collective agreement, even though Parkwood was not involved in the negotiations nor recognised the trade union concerned. The decision has been appealed to the Court of Appeal.

This decision goes further to protect employees than the European Court of Justice did in *Werhof v Freeway Traffic Systems GmbH & Co* (C-499/04) where it was held that the buyer was bound by the terms of a collective agreement in force at the date of the transfer but not by subsequent collective agreements to which it is not a party. One of the key factors in the EAT's decision here was the fact that the collective agreement was incorporated into the employees' contractual terms and conditions of employment.

Fragmented services

The case of *Clearsprings Management Ltd v (1) Ankers and others (2) Angel Services UK Ltd* (UKEAT/0054/08) concerned whether there was a service provision change for the purposes of TUPE when activities were re-assigned from an original contractor to several new contractors.

Clearsprings was awarded a contract in 2000 relating to the provision of accommodation and support activities to asylum seekers. In February 2006, the activities were awarded to three new contractors. There was a four month transitional period when the activities

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A round up of TUPE cases - cont'd

were provided, during which the three new contractors acquired leases of properties to accommodate asylum seekers. The asylum seekers were then randomly distributed amongst the new contractors.

The EAT held that on the facts of this case, the activities carried out by Clearsprings were so fragmented that a service provision change had not taken place under TUPE. It is important to note that the fact that there was more than one transferee was not of itself a barrier to TUPE applying.

This fragmentation of services by public sector bodies is becoming more common and it does put strains on the application of TUPE. Bidders for contracts need to consider these issues very carefully, recognising that history shows that courts will find a TUPE transfer where they can. The possibility of different bidders taking different views on the application of TUPE, and pricing accordingly, also needs to be monitored.

[Retention of organisational structure](#)

A European Court of Justice (ECJ) case has considered the retention of organisational autonomy in the contract of the application of TUPE.

In *Klarenberg v Ferrotron Technologies GmbH* (C-466/07), Mr Klarenberg headed a part of a unit within a German company, ET. The remaining two parts of the unit were headed by another individual, Mr Neumann. Some of the staff in the unit headed by Mr Klarenberg, as well as Mr Neumann, were employed by Ferrotron.

In addition, Ferrotron's parent company acquired rights in certain products and Ferrotron itself acquired the hardware, inventory and list of suppliers and customers.

Mr Klarenberg unsuccessfully contended before the German courts that his employment had transferred to Ferrotron. The reason for this decision was that Ferrotron had not retained the organisational autonomy of the parts of the business it acquired.

The ECJ held that whether part of a business retains its identity does not depend solely on organisational autonomy. Instead, the ECJ held that there needs to be the retention of a "functional link of interdependence and complementarity" between the various elements of production which are transferred. The ECJ went on to state that the retention of such a functional link between the various elements transferred allows the transferee to use them to pursue an identical or analogous activity.

This is another example of the courts doing all they can to meet the overriding objective of protecting employees' interests. If the ECJ had found differently, there would have been the potential for companies to avoid TUPE by, as part of a restructure transferred activities, dividing them amongst different legal entities.

[Lawyers can transfer too](#)

In the first case to involve a law firm since the coming into force of TUPE 2006, TUPE was held to apply to the provision of conveyancing work on behalf of a client such as to transfer the employees to a new law firm provider.

The six claimants were employed in the conveyancing department of the law firm, Lees Lloyd Whitley (LLW). To a greater or lesser extent they all carried out work for Britannia Building Society. Britannia put the work out to tender and part of it was won by Barnetts Solicitors. The claimants contended that they transferred to Barnetts from LLW.

The Employment Tribunal held that there was a 'service provision change' and then considered each of the claimants and the extent to which their 'principal purpose' was the work for Britannia. Two employees successfully contended that their employment had transferred to Barnetts on the basis that non-Britannia work was a relatively minor proportion of their duties.

This is a reminder to all advisers and their clients that TUPE can apply to services handed on to new advisers. Outgoing firms may well be more inclined to rely on TUPE to manage workforce size and costs in the current economic climate, given that redeployment to other client work may be more of a problem

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Automatic pension enrolment from 2012

Key messages

- From 2012 employers will be required to enrol workers automatically in a pension scheme.
- Companies that do not comply could face fixed penalty notices up to £50,000.
- The new requirements should be considered now to keep costs and administration to a minimum.

From 2012 employers will have to make arrangements for qualifying employees to participate in a pension scheme known as a personal accounts scheme, or their own qualifying occupational or personal pension scheme, provided the scheme meets minimum standards.

Automatic enrolment

Whatever scheme is used, employers will be required to enrol automatically workers in a qualifying pension scheme to which both the employer and the worker contribute, unless the worker chooses to opt-out.

Automatic enrolment into a qualifying pension scheme of all workers who earn qualifying earnings (jobholders) is aimed at combating peoples' tendency not to save for retirement or join pension schemes. The Pensions Regulator states the aim to be to provide "a simple, low cost pensions savings vehicle giving all employees the right to a workplace pension with a contribution from their employer".

Most employers are currently obliged to provide employees access to a pension scheme, but a requirement of automatic enrolment is novel, and could prove expensive. Jobholders aged between 22 and state pension age, earning between £5,035 and £33,540 during a 12 month period – a large proportion of the workforce – must be enrolled automatically. Jobholders, who are under 21 or over state pension age, earning that amount, must be allowed to opt-in and receive an employer contribution. Even if workers chose to opt-out, they must be automatically re-enrolled after three years.

Self-employed people will be able to participate in personal accounts on a voluntary opt-in basis with no minimum contribution level. Workers without qualifying earnings must be allowed to opt-in to a registered pension scheme but employers are not required to make contributions.

Qualifying earnings for these purposes includes salary, wages, commission, bonuses, overtime, statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay, plus other amounts which will be set out in regulations.

A qualifying pension scheme can be an occupational pension scheme (e.g. defined benefit, defined contribution or hybrid), a contract based arrangement (e.g. a group personal pension) or a non-UK based scheme. Schemes must be UK tax registered. Each scheme needs to meet different criteria in order to be categorised as a qualifying pension scheme depending on the scheme type. If employers do not want to set up their own scheme they can use the Personal Accounts scheme which is being established by the Personal Accounts Delivery Authority.

Employers providing a defined contribution scheme will initially have to contribute 1% during the first year, 2% during the second year and 3% from then on. The minimum combined contributions for jobholders and their employers will be 2%, 5% and then 8% respectively. Employers providing access to a defined benefit or hybrid scheme must offer benefits at least equivalent to those provided by a test scheme standard.

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Automatic pension enrolment from 2012 - cont'd

Consequences of non-compliance

If an employer does not comply with the requirements, the Regulator has the power to issue compliance notice on the employer (and third parties) directing them to remedy the contravention, or an unpaid contributions notice requiring payment by a specified date. Failure to comply can lead to fixed penalty notice up to £50,000. It is also a criminal offence if an employer wilfully fails to comply with the provisions relating to automatic enrolment or re-enrolment and the jobholders' rights to opt-in and the employer may be liable to a prison sentence of two years or a fine or both.

How to prepare

Pension related costs and administration are likely to rise for most employers due to the requirement for automatic enrolment of all jobholders. There is also likelihood for confusion. Early planning is therefore crucial in order to be properly prepared. Certainly an employer considering any major changes to pension strategies or arrangements should also address the impact of these new requirements. In any event, the forthcoming additional cost should form part of pay budgeting.

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Out with the old and in with the...old?

Key messages

- New rules regarding disciplinary and grievance procedures were introduced on 6 April 2009.
- The new procedures do not apply to redundancy or the expiry of a fixed term contract.
- The concept of automatic unfair dismissal has gone although the compensatory uplift remains (in a reduced form).
- The three step procedures that were required and so widely used by employers under the previous statutory procedures will still be compliant but there have been some changes to the nature of disciplinary and grievance procedures.
- Employees are no longer required to lodge a grievance before bringing a tribunal claim.

On 6 April 2009 the Employment Act 2008 introduced new disciplinary and grievance procedures for the resolution of workplace disputes between employers and employees. The new procedures are set out in the ACAS Code of Practice 1 (the Code) and replace the statutory procedures previously contained in the Employment Act 2002 (Dispute Resolution) Regulations 2004.

These statutory procedures were widely criticised for their emphasis on strict compliance with the three step approach rather than an emphasis on the resolution of workplace disputes. The Code represents a partial return to the pre-2004 position, under which employers had more flexibility in choosing how to deal with their workplace disputes. The good news is that the Code is brief (10 pages), but it is accompanied by guidance running to some 75 pages.

Main changes

One of the most fundamental changes that the Code has introduced is that it does not apply to dismissal due to redundancy or the expiry of a fixed term contract. However, employers do need to bear in mind that there is still a requirement to follow a fair procedure in any dismissal to reduce the likelihood of unfair dismissal claims.

Although the compensatory uplift contained in the 2004 statutory procedures is carried over in the Code, this has changed both in terms of amount and scope. In particular, the maximum adjustment is now 25%, not 50%.

Importantly, there is no longer the concept of automatic unfair dismissal. The Code is not legally binding and failure to follow the guidance in the Code will not make a dismissal unfair automatically. However, adherence to the Code will be taken into account by an employment tribunal in determining fairness.

Finally, the Code places a clear emphasis on reasonableness and fairness throughout, depending on the "circumstances" of the case. This specifically includes an acknowledgement that the "size and economic resource of the employer" will be relevant.

Disciplinary procedures

Box A sets out the core steps in the Code that should be followed during a disciplinary process. These steps do not vary greatly from the statutory procedures, meaning that many employers can keep their existing three step procedures in place should these be working satisfactorily in practice.

Box A

1. Disciplinary procedure
2. Investigation
3. Inform the employee
4. Meeting and right to be accompanied
5. Action
6. Appeal

The Code does add emphasis to the investigation aspect of disciplinary procedures and the need to keep that stage separate from the disciplinary hearing itself. It also encourages having separate procedures for bullying, harassment and whistleblowing.

Out with the old and in with the...old? - cont'd

The Code recommends that employees who are subject to disciplinary procedures be provided with evidence and statements by witnesses in advance of any hearing. It goes on to say that the employer or employee should advise the other in advance of the hearing if they wish to call a witness during the hearing. Some people are concerned that this could move hearings closer to being mini court trials.

Under the statutory procedures, if an employee failed to attend a meeting twice, the employer was then excused from arranging any further meetings. This prescriptive requirement is not included in the Code. In principle, employers can make decisions based on what is reasonable, but the lack of certainty may in fact be unhelpful for an employer faced, for instance, with an employee who is suffering from stress and is repeatedly unable to attend hearings.

Grievance procedures

Box B sets out the core steps of a grievance procedure under the Code. As with the disciplinary procedures, these steps are not dissimilar to the statutory procedures, meaning that employers can keep their existing procedures in place should these be working satisfactorily in practice.

However, there are a couple of notable changes. First, an ex-employee is no longer required bring a grievance as a precursor to making a tribunal claim. This will be a welcome relief to many employers who found dealing with these very awkward, although in some situations – notably allegations of discrimination for example - it may still advisable to hear a grievance post employment.

Box B

Grievance procedure

1. Informal resolution
2. Grievance in writing
3. Meeting
4. Action
5. Appeal

genuine grievances this could assist internal resolution; for troublesome or awkward employees it could create complexities.

Implications at tribunal

As stated above, if the Code is not followed the tribunal now only has the discretion to increase or decrease any award by 25% (depending on who is at fault).

Importantly, employees are no longer required to lodge a grievance before they bring an employment tribunal claim. Whilst this could reduce the number of grievances raised, with the benefits referred to above, a grievance from an ex-employee was often a very good 'tip off' that the employee was planning to take their claim to the employment tribunal.

There is no longer an extension of time to bring a claim for those employees who lodge a grievance within the first three months. Rather, there is a strict three month time limit to bring a tribunal claim (subject of course to the longstanding 'just and equitable' principles).

Secondly, the Code introduces a new 'two way' aspect to grievances whereby the employee is guided to inform the employer "how they think the grievance should be resolved". This could of course go either way for employers – for

Finally, we return to the situation where the tribunal can make a reduction to the compensatory award made to an employee in a successful claim for unfair dismissal to reflect the chance that there would have been a fair dismissal in any event.

Overlaps and transitional provisions

Employers often face the difficult situation of having a disciplinary process underway, only for the employee in question to raise a grievance. The Code makes a sensible recommendation regarding overlaps between the procedures, suggesting that if an employee raises a grievance during a disciplinary process, then that process may be suspended to deal with the grievance. However, the Code suggests that if the issues are related then they can be dealt with together. Again, the employer is being offered some discretion here.

There are complex transitional arrangements for disciplinary and grievance situations straddling 6 April 2009. Employers are best advised to continue to take advice on which regime applies.

The Code will be a welcome relief to many employers – especially those who have found themselves tangled in the rigid rule based web that was the 2004 statutory procedures. However, it remains to be seen how this more 'flexible' guidance will work in practice as there are some ambiguities present.

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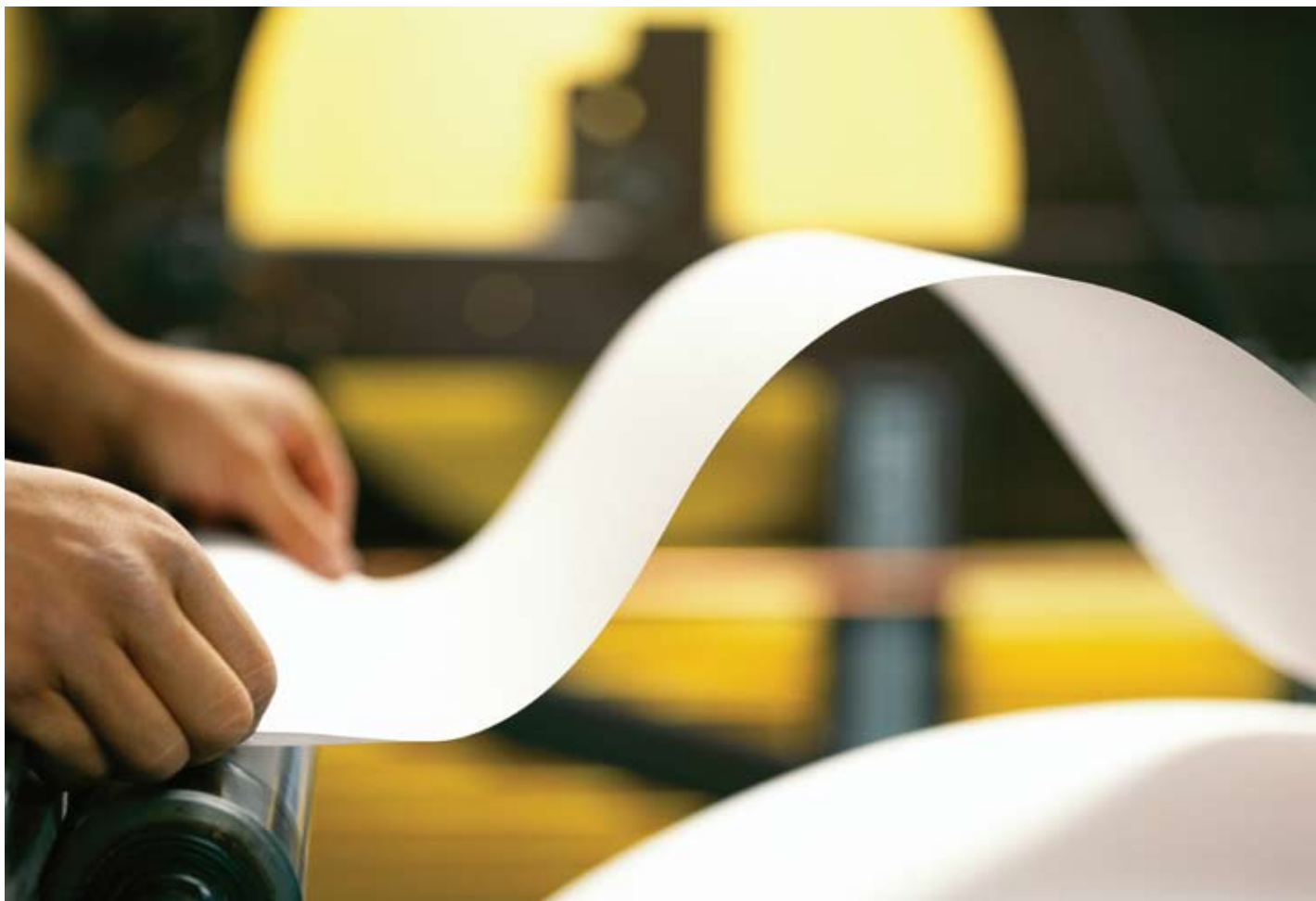
Employee reward Budget summary

Alistair Darling has delivered the Chancellor's Budget 2009. As expected, it mainly focuses on the economy, but there were some very significant issues affecting employee incentives and taxation which may have a material impact on how employees are rewarded.

PwC's employee reward summary covers restrictions to tax relief on contributions to registered pension schemes; a wide-ranging reform to corporate governance and remuneration practices in banking; HMRC approved save as you earn plans; changes to the taxation of company cars and more.

You can read the full summary by registering on PwC Plus. Other specialist summaries, full technical analysis and a Budget webcast are also available.

http://www.pwc.co.uk/common/attachments/portal/tax/at418_summary_employee_reward.pdf



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