Bargate Murray

BARGATE MURRAY - QUARTERLY EMPLOYMENT LAW REVIEW

A new Era begins...

Philip Henson, Partner in the City of London law firm **Bargate Murray** looks to how business leaders and HR practitioners should be prepared for changes to the employment law landscape starting in October 2010, and the pitfalls to look out for in the Bribery Act.

QUARTERLY EMPLOYMENT LAW REVIEW – OCTOBER 2010

1st October 2010 ushers in a new era in employment law when key elements of the Equality Act 2010 come into force. Here, we consider some important employment law decisions and key government consultations (some of which have dipped below the media radar).

We also review the main provisions of the Bribery Act 2010, a piece of legislation that all business leaders should take care to read in detail, as it contains a stringent enforcement regime.

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1. Changes on 1 October 2010

Minimum wage increase

On 1 October the principal rate of the national minimum wage will rise from £5.80 to £5.93 per hour. Many businesses may not be aware that the age from which the principal rate becomes payable will fall from 22 to 21.

The rate for workers aged between 18 and 20 will rise from £4.83 per hour to £4.92 per hour, and the rate for workers aged below 18 (who have ceased to be of compulsory school age) rises from £3.57 per hour to £3.64 per hour.

Implementation of key elements of The Equality Act 2010

The Equality Act 2010 finds is roots back in 2005 when the government initiated a discrimination law review led by the Women and Equality Unit, which is now part of the Government Equalities Office ("GEO"). Part of that review considered the opportunity to streamline the existing legislation into a single Equality Act. A consultation was published in 2007, and then in July 2008, the government published a white paper, "*The equality bill - government response to the consultation*".

The Equality Act 2010 effectively consolidates and harmonises nine main pieces of legislation: the Equal Pay Act 1970; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995; the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; the Equality Act 2006 Part 2 and the Equality Act (Sexual Orientation) Regulations 2007.

Key changes

The first wave of implementation of the Equality Act will be brought into force on 1 October pursuant to the Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provision and Revocation) Order.

The Equality Act changes the basic framework of protection against direct and indirect discrimination, harassment and victimisation in services and public functions; premises; work; education; associations; and transport. Examples of the changes include:

- Changing the definition of gender reassignment by removing the requirement for medical supervision.
- Improving protection from discrimination for people who are perceived to have, or are associated with someone who has, a protected characteristic - providing new protection for people like carers.
- Applying the European definition of indirect discrimination to all protected characteristics and extending protection from indirect discrimination to disability.
- Introducing the new concept of '*discrimination arising from disability*' to restore the protection from 'disability-related discrimination'.
- Applying the detriment model to victimisation protection.
- Harmonising the thresholds for the duty to make reasonable adjustments for disabled people.
- Extending protection from third party harassment to all protected characteristics.
- Making it more difficult for disabled people to be unfairly screened out when applying for jobs, by restricting the circumstances in which employers can ask job applicants questions about disability or health.
- Allowing hypothetical comparators for direct gender pay discrimination.
- Making pay secrecy clauses unenforceable.
- Introducing new powers for employment tribunals to make recommendations which benefit the wider workforce, and
- Harmonising provisions allowing voluntary positive action.

HR practitioners and businesses leaders should take particular note of the following:

- A change in the law regarding the grounds under which a claim for discrimination can be brought (the so called "*protected characteristics*").
- The Act's definitions of the protected characteristics.
- Definitions of other "*prohibited conduct",* harassment and victimisation.

A number of other significant provisions have not been included in the first wave of implementation. These include the definition of combined discrimination involving more than one protected characteristic, and two duties which apply to public sector bodies, which due to their wide-ranging scope, will undoubtedly be the subject of further consultation prior to their implementation, such as:

- The public sector duty regarding socio-economic inequalities, and;
- The public sector equality duty, which is discussed in further detail below.

EHRC Guidance

The Equality and Human Rights Commission ("EHRC") have published four guidance documents: for employers[1], workers, service providers, and service users explaining the provisions in further detail. Please follow the hyperlinks below to view that guidance:

- Employers
- Workers
- Service Providers
- Service Users

Further guidance for education providers and students will be published by the EHRC later this month.

Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations are due to come into force on 1 October 2010. The new Regulations:

- Introduce a 30-day cooling off period for performers (such as actors, dancers and singers) during which the work-seeker will have a right to cancel or withdraw from the contract with immediate effect;
- Require advertisements to specify whether the position is temporary or permanent. Advertisements will no longer need to include a statement confirming whether the organisation is acting as an employment agency or employment business;
- Restructure the existing regulations on obtaining work-seekers' consent to terms before providing services; and,
- Modify the suitability checks that employment businesses and employment agencies must carry out on work-seekers under regulation 19 of the 2003 Regulations.

Draft Code of Practice on Equal Pay published by EHRC

The EHRC recently published a draft Code of Practice, (the "Code") for equal pay, although we note that EHRC has recently tried to remove the Code from their web page for "*an update*". The Code is intended to ensure "*pay and other employment terms are determined without sex discrimination or bias*". In furtherance of this goal, the Code identifies a number of policies commonly used to determine levels of pay, and highlights ways in which such policies can still permit discriminatory pay practices. Whilst the pay gap between the genders is in decline, the Code suggests that further "*corrective action*" is required to reduce what the Office For National Statistics calculated as a pay gap between the genders of 16% in 2009.

Part 2 of the Code outlines a number of pay practices which if in use, could pose a risk to an employer's compliance with equal pay legislation:

[1]Please click on this link for further information: http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice/

- Lack of transparency and unnecessary secrecy over grading and pay.
- Discretionary pay systems (for example, merit pay and performance-related pay) unless they are clearly structured and based on objective criteria.
- Different non-basic pay, terms and conditions for different groups of employees (for example, attendance allowances, overtime or unsocial hours payments).
- More than one grading and pay system within the organisation.
- Long pay scales or ranges.
- Overlapping pay scales or ranges, where the maximum of the lower pay scale is higher than the minimum of the next higher scale, including 'broad-banded' structures where there are significant overlaps.
- Managerial discretion over starting salaries.
- Market-based pay systems or supplements not underpinned by job evaluation.
- Job evaluation systems which have been incorrectly implemented or not kept up to date.
- Pay protection policies.

The Code also recommends that employers conduct "*regular equal pay audits*". Such a review and evaluation process, the Code asserts, will not only help to ensure compliance with equality legislation, but also assist in the creation of a more productive and committed workforce[2].

New Court form to enforce an ACAS COT3 settlement

From 1 October 2010 a new streamlined process to allow enforcement of un-honoured settlements contained in ACAS COT3 forms will be introduced. Employees will be able to instruct a High Court Enforcement Officer to issue proceedings for a writ of Fieri Facias on their behalf, and to undertake enforcement of the writ in a similar way to the current procedure for enforcing a tribunal judgment. A new form, N471A, will be introduced for this purpose.

2. Case law review

Religious Discrimination – Amachree v Wandsworth Borough Council[3]

Mr Amachree, a Christian, had been employed by Wandsworth Council as a Homelessness Prevention Officer, during which time he had an exemplary disciplinary record. Much of his work involved interviewing applicants at risk of homelessness.

Mr Amachree interviewed a potential housing client referred to in the judgment as "Ms X". During the interview, Ms X revealed that she was suffering from an incurable disease, and Mr Amachree discussed his religious views and suggested that Ms X's "*problem was that I did not have God or faith in my life and was therefore ill as a result*".

Ms X sent a letter of complaint to Wandsworth Council, describing what Mr Amachree had said to her as a "*lecture*", funded by the tax payers of the Borough.

[2] http://www.equalityhumanrights.com/legal-and-policy/equality-act/draft-code-of-practice-on-equal-pay
[3] Mr D Amachree and Wandsworth Borough Council (Case Number: 2328606/2009) – (as yet unreported).

The next day Mr Amachree was suspended on full pay and informed that he was being investigated for a potentially major offence under Wandsworth Council's disciplinary code - that it was alleged that he "*made offensive and inappropriate comments*" to Ms X "*relating to her state of health, her religious or personal beliefs and your religious or personal beliefs*". A further charge of breach of confidentiality was also added. Following the investigation, Wandsworth Council determined Mr Amachree's conduct constituted gross misconduct, and he was dismissed.

Mr Amachree issued a claim alleging that his religion was the reason for his dismissal, and in being dismissed, he had been subjected to religious discrimination, and also unfair dismissal and wrongful dismissal.

Wandsworth Council argued that it was not Mr Amachree's religion which was the reason for his dismissal, but that he had made "*offensive and inappropriate comments*" to Ms X, contrary to their disciplinary code.

The Tribunal found that Wandsworth Council provided a convincing non-discriminatory explanation for Mr Amachree's treatment, reasoning that "*it was not on the ground of his religion that he received this treatment, but rather on the ground that he was inappropriately raising it with a service user. His religion might be the reason for his actions but it was not the reason for the actions of the Council*".

Mr Amachree's claims were therefore dismissed.

Further comments on Religious Discrimination

I have recently written a full review of the Amachree case which will be published by the Solicitors Journal. Please follow this link to my articles on religious discrimination, written for the Guardian newspaper.

Age Discrimination – Canadian Imperial Bank of Commerce v Beck[4]

Mr. Achim Beck, was employed as the head of marketing at the London office of the Canadian Imperial Bank of Commerce ("the Bank"). Mr Beck, aged 42, clashed many times with Mr. Risler, head of the Bank's equities and commodities structured products division, who was in his mid thirties. Mr Beck found Mr. Risler's approach "*too cautious*", whilst Mr. Risler thought Mr Beck "*had not adapted his approach to the new realities within banking*." The Bank evidently concluded that this issue should be resolved, and conducted a "*sham*" dismissal of Mr Beck "*purportedly by reason of redundancy*", whilst looking to recruit his replacement.

A recruitment briefing was circulated, listing the search criteria for the individual to replace Mr. Beck, which included the criterion that the candidate be "*younger*".

The Bank's argument was that seeing as Mr. Beck had been employed at the age of 41 and dismissed at the age of 42 the argument that he was dismissed by reason of age was contrary to common sense. The Bank also contended that use of the word "*younger*" in

[4]Canadian Imperial Bank of Commerce v A Beck [2010] UKEAT 0141_10_2408

the list of attributes the Bank required from its ideal candidate was meant to suggest a candidate who was a *"less "senior" individual who would be less expensive"*.

The Tribunal found that explanation to be *"unconvincing"* and stated that if it was the Bank's intention for *"younger"* to carry this meaning *"It should have said so."* Mr. Beck was found to have fitted the recruitment brief for the new role *"apart from being younger."* Consequently the Tribunal found the Bank to have failed to show that the decision to dismiss Mr. Beck *"was not significantly influenced by his age"* and Mr. Beck's claim for age discrimination succeeded. It was found to be *"irrelevant"* that the candidate hired to replace Mr Beck was 38 years old. The Bank's actions were plainly discriminatory.

Maternity and Redundancy – Simpson v Endsleigh Insurance Services Ltd[5]

Miss Simpson was an insurance consultant who worked in London. Whilst away on maternity leave, her employer restructured their business by closing down a number of retail outlets, and moving their business to call centres in Cheltenham, Burnley and Northern Ireland. Miss Simpson issued claims for unfair dismissal, automatic unfair dismissal, race discrimination and racial harassment, all of which were dismissed by the Tribunal.

Miss Simpson appealed in relation to the automatic unfair dismissal allegation, claiming her employers were in breach of Regulation 10 of the Maternity and Parental Leave Regulations 1999 ("The Regulations") by failing to offer her a suitable alternative vacancy at the Cheltenham call centre.

Endsleigh argued that they had telephoned and wrote to Miss Simpson to inform her of the proposed restructuring, and to advise her of alternative vacancies available to her and advise her to apply. All insurance consultants were guaranteed a role in one of the aforementioned call centres if they were willing to relocate. Miss Simpson did not apply for a role in one of the call centres, and was therefore made redundant.

The Employment Appeal Tribunal found that:

- Miss Simpson had expressed no willingness to relocate outside of London and take up a suitable alternative role, having only expressed an interest in an alternative role in London (which was considered unsuitable for her by the HR Department of Endsleigh, and this issue was not disputed.)
- Miss Simpson had failed to apply for a Cheltenham based job at the time, and failed to explain the Tribunal's assertion that she would have refused any offer made to her.
- As this was a case concerning automatic unfair dismissal the burden of proof fell on Miss Simpson to show that Regulation 10 had been complied with, and she had failed to discharge it.

As a result, Miss Simpson's appeal was dismissed.

HR Practitioners should note that contrary to Miss Simpson's contention that Endsleigh should have *"at the very least"* formally offered her a position at the Cheltenham office,

[5] Simpson v Endsleigh Insurance Services Ltd & Ors [2010] UKEAT 0544 09 2708

the Employment Appeal Tribunal stated that by writing to Miss Simpson and inviting her to apply, Endsleigh had complied with the Regulations and the relevant European Directives.

Employers Ability to Pay – Tao Herbs and Acupuncture Limited v Mrs Y Jin[6]

Mrs Jin was employed by Tao Herbs and Acupuncture Ltd, and experienced a "*rocky*" relationship with her employer. She was dismissed on 23 December 2008, and issued a clam for unfair dismissal.

Mrs Jin claimed she had been dismissed unfairly, as her dismissal followed her questioning whether she was being paid the national minimum wage. She was awarded £11,000 - £9,951.34 of which was comprised of a compensatory award for unfair dismissal.

Tao Herbs appealed, arguing that pursuant to section 123 of the Employment Rights Act 1996, it would not be "*just and equitable*"[7] for the award to be made as it would effectively force the company into liquidation.

The Tribunal stated that the correct approach in the calculation of an award for unfair dismissal "*does not pay attention to the ability of the employer to pay",* and directed that Tao Herbs had no grounds on which they could appeal the decision.

This decision serves as a timely reminder, when some UK businesses are still experiencing difficulties, of the consequences of an adverse finding from an employment tribunal.

Reasonableness of Dismissal – Wilson Devonald Ltd v Suckling[8]

Ms Suckling was a receptionist at a law firm, who had not been the subject of "*previous concerns or complaints about her work*" and was dismissed following one incident of misconduct.

Ms Suckling made the decision to allow two young clients of the firm, one of whom was bleeding from the hand, and both of whom were in a state of anxiety, to enter the offices and be let out of the back door, seemingly to facilitate an escape from pursuers, (allegedly the police). The firm argued that the Ms Suckling should not have allowed the clients to enter in the first place, and certainly should not have allowed them access to a part of the office which was off-limits for clients.

To compound the risks of her actions, it was known to Ms Suckling that both clients "*had the Hepatitis virus and were both rumoured to be HIV positive*" which, in view of one of them having an open wound at the time "*posed an obvious risk to staff.*" She was suspended. A disciplinary hearing was heard, and she was dismissed. The Employment Tribunal found that the dismissal of Ms Suckling was "*outside the band of reasonable responses*" available to the firm, and that her dismissal had been unfair.

The firm appealed, arguing that the Tribunal had been satisfied that Ms Suckling had been guilty of gross misconduct, but had slipped into the "*substitution mindset*"[9], substituting its

[6]Tao Herbs & Acupuncture Ltd v Jin [2010] UKEAT 1477 09 1407
[7] http://www.legislation.gov.uk/ukpga/1996/18/contents
[8] Wilson Devonald Ltd v Suckling [2010] UKEAT 0131_10_0308

views for the views of the firm, in determining whether it was reasonable for the firm to dismiss her.

On appeal, it was stated that if a reasonable employer "*might have dismissed*" an employee, then the dismissal was fair. There existed a "*band of reasonableness*", within which there was scope for two different employers to take two different views, both of which would be reasonable in the circumstances.

The Employment Appeal Tribunal allowed the firm's appeal, re-affirming the "*band*" of reasonable actions an employer has available to them following gross misconduct, which can include dismissal.

Extent of Liability for Loss – Thaine v London School of Economics[10]

Miss Thaine was employed by the London School of Economics ("LSE") as a painter and decorator in the maintenance department and was the only women amongst the department's 18 employees. She began to suffer from psychiatric health problems, which prevented her from continuing to work for LSE, and led to her dismissal.

Miss Thaine brought claims of sexual discrimination, disability discrimination and unfair dismissal against LSE, and succeeded in two of the claims of sexual discrimination. It was found that the sexually discriminatory treatment Miss Thaine had suffered at work was a "*material and effective cause*" of her psychiatric illness, and there was a sufficient "*causal link*" between the discrimination she suffered and her subsequent ill-health and loss of earnings.

When determining the amount of compensation Miss Thaine was entitled to however, there were found to be "concurrent causes" of her ill-health, which were not the result of the treatment she had suffered at work. These included her obsessive compulsive disorder, previous depressive episodes, the break-up of her relationship with her boyfriend, and her mother's ill-health.

The compensatory award Miss Thaine was entitled to was reduced by 60% to reflect the extent to which the "*concurrent causes*" of her ill-health, for which LSE were not liable, contributed to her developing her illness.

Miss Thaine unsuccessfully appealed, arguing that no such deduction should be made. The Employment Appeal Tribunal stated that LSE's conduct made it liable "*only to the extent*" to which its conduct had resulted in Miss Thaine's ill-health, and that "*common sense*" should be exercised in determining the level of reduction of the award.

Importantly for business leaders, the Employment Appeal Tribunal saw fit to state that if an employer did not raise the argument that it was liable to an employee only to the extent of its contribution to their loss, it could be found to liable in full.

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[9] As described by Mummery LJ in London Ambulance Service v Small [2009] IRLR 563
[10] Thaine v London School Of Economics [2010] UKEAT 0144_10_0707

Liability for "negative" references – Bullimore v Pothecary Witham Weld (Solicitors)[11]

Both a prospective and past employer have been found liable to a solicitor whose, job offer was retracted following the provision of a "*negative*" reference.

Miss Bullimore worked for Witham Weld Solicitors ("WW") which has since merged to become Pothecary Witham Weld Solicitors ("PWW") between 1999 and 2004. Following the termination of her employment, Miss Bullimore brought a claim against WW for unfair dismissal and sex discrimination, which was settled.

In 2008, another law firm, Sebastians offered Miss Bullimore a job "*subject to the receipt of satisfactory references*". She approached Mr Hawthorne, a partner at PWW who had managed her during her time at WW for a reference. Mr Hawthorne obliged, but gave a reference which was "*significantly influenced*" by the fact that Miss Bullimore had previously brought sex discrimination proceedings against WW.

Mr Hawthorne remarked in the reference that Miss Bullimore could "*on occasion be inflexible as to her opinions*", referred "*gratuitously*" to the claim she had brought against WW, and made other comments which gave the reference a tone that was "*negative*". Following the receipt of this reference, Sebastians revised their job offer to Miss Bullimore to include a six month probationary period. Miss Bullimore was not prepared to accept a position on these terms, and Sebastians were unwilling to further alter them. This led to the end of the job offer.

It was found that Sebastians "*were not simply responding to a negative reference*" but were influenced in their decision to withdraw their offer and replace it with one which was less favourable on Miss Bullimore's part by the knowledge that Miss Bullimore had brought sex discrimination proceedings against WW. This action was "*unlawful discrimination by way of victimisation*" in contravention of section 6(1) of the Sex Discrimination Act 1975.

This was, quite simply, "*unlawful conduct by a firm of solicitors who should have known better.*" Sebastians saw fit to pay Miss Bullimore £42,500 in settlement of her claim before the hearing to decide the extent of their liability to her.

On the appeal of Miss Bullimore, it was also decided that it would be "*most unsatisfactory if a claimant who lost the opportunity of employment as the result of such a reference were unable to recover substantial damages from his former employer.*"

The case is therefore being remitted to the original employment tribunal to consider Miss Bullimore's claim for loss of earnings against PWW, which was initially dismissed.

3. **Employment Tribunal Focus**

Tribunal claims on the increase

The amount of claims lodged at the Employment Tribunal has recently been published by the beleaguered Tribunals Service[12] for the period 1 April 2009 – 31 March 2010[13]. The

[11] Bullimore v Pothecary Witham Weld Solicitors & Anor [2010] UKEAT 0189_10_2109
[12] http://www.tribunals.gov.uk/Tribunals/Documents/Publications/TS_AnnualStatisticsReport0910.pdf

statistics show that there has been a massive **56% increase** in claims to the Employment Tribunal, from 151,000 claims for the period 2008/2009 to **236,100**[14] claims in 2009/2010. To put this figure into context it is the highest amount of claims ever received by the Employment Tribunal service.

Unfair Dismissal claims up from 52,700 to **57,400.**
Unauthorised deduction claims have increased significantly from 33,800 – **75,500.**
Redundancy pay claims up from 10,800 – **19,000**.
Breach of contract claims up from 32,800 to **42,400**.
Age discrimination claims up from 3,800 to **5,200.**
Equal pay claims down from 45,700 – **37,400**.
Redundancy – failure to inform and consult – down from 11,400 – **7,500.**

It is worthy of note that 73,000 claims were withdrawn, and 70,600 were ACAS conciliated.

ACAS/TUC mediation guide for Trade Union representatives

On an almost weekly basis we hear the foreboding news that cuts to the public sector will bring co-ordinated industrial action and civil unrest.

However, it's not all doom and gloom as a recent joint announcement by ACAS, the employment relations service, and the TUC espouses the virtues of mediation, and may point towards a new approach to resolving disputes by the union movement.

ACAS and the TUC have published a new 18 page guide[15] for trade union representatives which explains how mediation can compliment their role in helping to avoid costly disputes. The introduction points out that whilst not offered as a panacea mediation can offer a way to avoid the potentially disruptive effects of drawn out conflict.

The new guide explains:

- What happens during a mediation,
- The role of representatives in a mediation and how to support members,
- How to work with employers to set up mediation arrangements,
- How mediation fits with other workplace procedures and agreements, and,
- How Trade Union representatives can act as mediators.

A culture change?

The Chair of ACAS, Ed Sweeney, noted the change in direction, when he opined: "*In the past there has been some reluctance to use mediation within the union movement as it was seen as a possible barrier to justice. Despite some apprehension, we are increasingly seeing evidence of trade unions recognising the benefits it can bring to their members.*"

[13] The new statistics service includes claims to the Social Security and Child Support Agency, the Tribunals Service, Immigration and Asylum and the Employment Tribunal. We concentrate exclusively on the Employment Tribunal Service.
[14] Although there were many multiple claims.
[15] http://www.acas.org.uk/index.aspx?articleid=3111

Philip Henson, comments:

Whilst I am pleased that the virtues of mediation are being promoted by the TUC and ACAS, unfortunately the new guidance sends some mixed messages. The comment that "*it [mediation] can also be used to rebuild relations after a member of staff has been through a disciplinary or grievance process*", points towards mediation being seen as a tool for reconciliation after each disciplinary or grievance process. Whilst in a Utopian world that might be an ideal way to restore the relationship between the parties, mediation should not be an automatic add on to the end of the existing grievance and discipline procedures (as can be inferred) as such a proposal would bring an unjustifiable amount of pressure on management time and resources; particularly for any SME's who do not have a dedicated HR function.

I also find it difficult to reconcile the declaration that mediation can be used "*at any point in the conflict cycle*", with the comment later in the guidance that "*it [mediation] should only be used where agreed procedures have been exhausted or the parties agreed to put them in abeyance*", which appears to indicate that mediation might be seen as a process of last resort.

Furthermore the declaration that mediation is "*morally binding and has no legal status (unless the parties so desire)*", does not clearly explain the benefits of setting out the fruits of the labour of the mediation in an agreement between the parties.

The section "*can trade union representatives be mediators*?" promotes the skills of trade union representatives to employers who are looking to recruit internal mediators. It continues that where trade union representatives do act as mediators they should "*avoid mediating for individuals who they also represent*". In fact what they should clearly be stating here is that if you are a mediator and you are asked to mediate in a dispute involving an individual that you already represent then you will not be able to act as a mediator as there will be a clear conflict of interest.

Many business leaders affected by the recent Tube strikes will no doubt be watching with interest to see if the scheduled walk outs (on 3 October, 2 November and 28 November) will go ahead, or whether a new mediation focused approach will help the parties come to a workable solution.

4. BM Comment

Consultation on Court closures - Is Mediation the way Forward?

The Ministry of Justice has recently published several consultations which ask for views on whether to close 103 magistrates' and 54 county courts that are deemed to be "*underused*" and "*inadequate*". The purpose of the consultation is to "*modernise and improve the use of Courts in England and Wales*[16]". Read into that what you will.

Each consultation is divided up into separate geographical areas. The proposal for London is to merge the 28 existing Local Justice Areas into just 9, and to replace the

[16] http://www.justice.gov.uk/news/announcement230610a.htm

current 20 outer London youth panels, and the Inner City Youth Panel, to just 9 Youth Panels. The arguments set out in favour of closure highlight the state of the Court buildings themselves and explain how existing court work loads may be redistributed. For example, Acton Magistrate's Court is described as being "*104 years old and not fit for purpose*[17]", and it is recommended that it should close and its work be listed across other West London Courts. If the planned closures come to fruition then it will inevitably result in more pressure being placed on the surviving courts.

But will the proposed closures and cuts stop there? I think not. I predict that the scythe will continue to cut this year, and beyond. The Ministry of Justice has been told to save £325m, and that gargantuan sum surely indicates that the pain is going to be spread around. The Tribunal Service is an Executive Agency of the Ministry of Justice and may be the next in line. The business plan for the Tribunal Service[18] refers to an ongoing Performance and Efficiency Programme (PEP) requiring it to deliver a total of £8.2m in savings during 2009-10, rising to £12.4m in 2010-11.

I predict that a direct consequence of these cuts will be that solicitors will increasingly consider the other weapons in the dispute resolution armoury; rather than using the traditional, court or tribunal system.

As we all know many litigants become fixated on having their '*day in Court*'. Although once you have provided your client with a detailed breakdown of your likely costs (and you have explained the procrastinated time frame to even be listed for a hearing) their appetite for Court room battles may dissipate. I remain puzzled why mediation is not being embraced by more law firms and promoted to clients.

How many organisations would not jump at the chance to end a long running dispute quickly and cheaply without having to set foot into a court or tribunal? No client is going to thank you when they receive an invoice for several thousand pounds for litigation costs, if they do not obtain what they perceive as a fair result. Some workplace disputes may be resolved by getting the parties together in a room, allowing them to air their concerns/complaints and exploring their feelings; (bear in mind that this is frequently the first time that this has happened.) Consider this scenario during a workplace mediation: one party offers to apologize to the other, which is accepted, and the two parties then discuss ways in which they can work together more effectively, and their relationship is restored. No vicious personal grievance letters, no lengthy investigations into alleged misconduct, no costly litigation, just an early resolution. (Bliss!).

Mediation is especially effective if used early, before parties become entrenched in their positions. It can allow issues to be nipped in the bud. In the context of workplace disputes it can be used in any situation from a disagreement between senior managers and support staff, threatened legal action, to conflicts with third parties such as office suppliers. Mediation has a particular resonance in the workplace, and the process has already been embraced by BT plc, West Midlands Police, Salisbury Cathedral and the Ministry of Justice to name but a few.

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[17] http://www.justice.gov.uk/consultations/docs/proposal-on-the-provision-of-magistrates-and-county-court-services-london-fiinal.pdf page 15.
[18] http://www.tribunals.gov.uk/Tribunals/Documents/Publications/TS_Plan2010b.pdf, page 12.

A guide jointly produced by ACAS and CIPD[19] includes some poignant examples of how mediation has helped to resolve disputes in the work place, and indeed how it can be implemented. It is essential reading. Even cases sometimes considered to be poor candidates for mediation – such as personal injury claims - are in fact suited to it.

What is mediation and why use it?

Mediation involves a neutral third party bringing two sides together with an aim of facilitating an agreement. The process is flexible, and inexpensive when compared with litigation. The parties set out their concerns in opening statements and the mediator will then speak with each party in separate caucuses to explore the issues with the intention of reaching a solution which is acceptable to both parties. If an agreement can be reached the terms will usually be recorded in a mediation agreement, drafted by the mediator, and signed by the parties.

The influential report on the future of Civil Litigation published by Sir Rupert Jackson, in January 2010, drives home the pro mediation message when he opined that:

"Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes….ADR is, however, under-used…"[20]

At Bargate Murray we have found that mediation works in a variety of cases, from complex commercial matters (involving large sums of money) and workplace disputes, through to smaller property claims and partnership disputes.

ACAS/CIPD Guidance – Stress in the workplace

A September 2010 guidance paper jointly produced by ACAS and the CIPD[21] has been published, with the intention of providing guidance to directors, managers, and HR practitioners on the legal position, and potential liabilities created, by the failure to manage workplace stress.

The guidance suggests that businesses of all sizes will benefit from taking a positive approach to limiting workplace stress, and will reap benefits which include reduced absenteeism, improved productivity and limiting the risks of prosecution or litigation.

The guidance discusses six "*legal principles*":

1. Health and Safety at Work,
2. Protection from Harassment,
3. Equality Legislation,
4. Working Time,
5. Consultation with Employees and Safety Representatives, and,
6. Common Law Negligence.

[19] Mediation – An employer's guide: http://www.cipd.co.uk/NR/rdonlyres/18ABEE43-37D8-4845-A6A0-87ACCE435BF5/0/mediationemployersguide.pdf
[20] See Executive Summary, para 6.3, Review of Civil Litigation Costs: Final Report, Sir Rupert Jackson.
[21] http://www.cipd.co.uk/NR/rdonlyres/1B504994-F40F-4801-B93D-8FA4DE73E1FD/0/5233Stress_and_Law_guide.pdf

The guidance explains how these separate, but in some cases overlapping issues can each be factors which contribute to workplace stress.

To ensure compliance with an employer's legal obligations the guidance recommends following a 5-step risk assessment as a practical means of limiting stress related issues:

1. Identify the Hazards,
2. Decide who might be harmed and how,
3. Evaluate the risks and decide on the precautions,
4. Record your findings and implement them, and,
5. Review your assessment and update if necessary.

Whilst stating that the law does not require an employer to "*eliminate all risks*", the guidance reminds employers that they are required to protect employees as far as is "*reasonably practicable",* and highlights case law examples where employers have failed to meet the standards required and paid a significant price as a result. One famous example being the case of a Deutsche Bank employee[22] Helen Green, who was subjected to a "*2-3 year*" bullying campaign which consisted, for the most part of "*minor slights*", whose "*cumulative effect*" over that period resulted in her suffering from a depressive illness which prevented her from continuing to work for the Bank. Mr Justice Owen was critical of the Bank's failure to "*take any or any adequate steps*" to protect Ms Green, who was subsequently awarded £828,000 in damages.

BANKERS' BONUSES

If you cast your minds back to the pre coalition government era, you may have been an ardent follower of the exciting new sport of "*banker bashing*". The rules of the game appeared to be quite simple; politicians queued up to lambast the banking sector for awarding "*unacceptable*" bonuses, and then promised to take urgent and decisive action. Spectators then waited for a retort from the British Bankers Association, or a representative from the City.

Glossy election manifestos were quick to promote their banker bashing credentials. Labour declared that "*our financial institutions left to their own devices have undermined our economy*"; the Conservative manifesto proposed to empower the Bank of England to "*crack down on risky bonus arrangements";* and the Liberal Democrats even published a specific five point plan to tackle bankers' bonuses.

The coalition document continued the banker bashing theme with a bold declaration that they would bring forward detailed proposals for robust action to tackle "*unacceptable bonuses*". I am at a loss as to why this important issue – that was a central part of the debate prior to the general election – seems to have disappeared off the radar.

At Mansion House in September last year Lord Turner gave a candid speech in which he explained that British citizens will be burdened for many years with either higher taxes or cuts in public services, because of an economic crisis whose origins lay in the financial

[22] Helen Green v DB Group Services (UK) Limited [2006] EWHC 1898

system, *"a crisis cooked up in trading rooms"*. Highlighting that many people earned annual bonuses equal to a lifetime's earnings of some, he boldly called for radical change not just of regulation but also of the entire past philosophy of regulation.

Many expected the gauntlet of international reform to be picked up by the G20. The Summit Leaders statement at Pittsburgh, 3 days after Lord Turner's speech, acknowledged that excessive compensation had encouraged excessive lending and called on firms to implement sound compensation practices immediately. They endorsed the implementation standards of the Financial Stability Board ("FSB") which was given the arduous task of monitoring the implementation of compensation principles and standards.

Whilst this statement may have placated some at the time, many were disappointed by a letter from the FSB to the G20 summit in Toronto which explained that they are taking additional steps to support the development of sound industry practice standards with a follow up assessment of national implementation to take place in the second quarter of 2011.

In his TUC speech Mervyn King gave a frank review as to the causes of the financial crisis, and again acknowledged that excessive risks were taken by the bankers – by raising these issues was he calling for the financial services sector to enter into a period of quasi purgatory? Instead of leading to a new type of banker bashing Mr King's recent openness and honesty at the TUC conference may, I suspect, lead towards reconciliation with the public.

I am optimistic that under the leadership of Hector Sants (who incidentally waived his bonus last year) the transition of power from the FSA to the Bank of England will provide an impetus for positive reform, also bringing an end to the much criticised tri-partite system[23]. We need to usher in a new compensation regime with a structure that eschews risk; includes greater internal review safeguards; rewards staff responsibly (without strangling the golden goose that is our financial services industry); and includes restrained deferred compensation plans - before early precedents become the industry norm.

Next year seems to be the date in the diary for change. The European Parliament recently voted in favour of restrictions on bankers' bonuses that will take effect in 2011. The rules will cap upfront cash bonuses at 30% of the total bonus.

It is plain as a pike staff that some banks will seek to increase the base salaries of their staff in an attempt to alleviate the effect of any new bonus cap, and to perhaps soften the effect on any forthcoming financial activity remuneration tax. Could this actually be embraced as part of a new regime? It might not be a popular view but perhaps paying the bankers (and I admit that the term needs to be defined) an increased base remuneration, instead of relying on the traditional bonus method, may possibly help to prevent the 'brain drain' from the City to New York, Hong Kong, Switzerland, or Singapore.

[23] Please follow this link for my column in the City AM newspaper on this issue: http://www.cityam.com/city-focus/new-banking-body-will-not-improve.

BAA/Unite discussions and the need for further dialogue

Last month I was interviewed on Sky News commenting on the discussions between BAA and Unite the Union, which took place under the auspices of ACAS at an undisclosed location.

Many critics have opined that Unite may be taking a more militarist view on strike action, and have questioned if they are prepared to threaten strike action that could have resulted in the closure of six airports over a 1 % (or 1.5% depending on who you speak to) pay increase what will they do when the cuts to the public sector are ushered in later this year?

Was the strike threat (and notably the reluctance to confirm whether any strike action would fall over the August bank holiday weekend) perhaps part of a sophisticated strategy to demonstrate that they are a force to be reckoned with as the sword of Damocles starts to hover over the public sector? I am curious whether the strike threat was a sign that the biggest Union in the UK and Ireland was dipping it's toe into the sea of unrest to test the waters for further industrial action.

We should also question in what circumstances the public will support future industrial action. I would suggest that the majority would support Union members who propose to strike over fears about their working conditions and public safety, such as the action proposed by the RMT Transport Union over conditions on the London underground. In contrast the battle for hearts and minds may be difficult to win over a pay increase (no matter how small); especially if hardworking families who have waited to find last minute holiday deals discover that their travel plans may be hampered. It is imperative that we recognise the categories of staff who were balloted for the industrial action. We are talking about security staff, engineers, fire-fighters and support staff at BAA's six airports, and these important workers are integral to the aviation industry, specifically in relation to security, and they should be listened to.

In my view we have to be careful not to venture into the realms of Union bashing, as the Unions carry out an important role, particularly by publicizing important issues which affect their members. For example, Unite are currently promoting a campaign to try and prevent baggage handlers in the aviation industry suffering from muscular skeletal injuries, and the RMT Union are raising awareness of safety concerns on the Tube tracks.

For further comments on this issue please follow this link to my article published on politics.co.uk.

5. Government Consultations

Equality Act 2010: The public sector Equality Duty

The implementation of the so called "*public sector Equality Duty*"[24] is expected to take place in April 2011. However this may be in doubt in view of the GEO consultation published on 19 August. The proposed duty will place certain "*public bodies*" under a

[24] http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf

general duty to "*eliminate discrimination, harassment and victimisation*" in place of the current separate duties each relating to a separate aspect of discrimination. An August 2010 Government consultation exercise on the implementation of the duty recognised the important role public sector organisations play in initiating cultural reforms. The proposed implementation of this wider duty seems to be an embodiment of this principle.

The details of the operation of this duty are contained in sections 149-157 of the Equality Act 2010. Section 149 states that a public authority must "*In the exercise of its functions*" have "*due regard to the need to*":

- Eliminate unlawful discrimination, harassment and victimisation;
- Advance equality of opportunity between different groups; and
- Foster good relations between different groups.

The imposition of this duty will, it seems, pervade the vast majority of the operations of a "*public body*". As currently drafted this will include bodies such as local authorities, central government departments and management boards of higher education institutions.

In seeking to achieve its goal, the duty will place an emphasis on transparency by requiring public bodies to regularly publish data on "*how a public body is performing*" in terms of adhering to the principles of the duty.

The aforementioned consultation exercise concludes on 10 November 2010, and a summary of the results is expected to be published no later than February to May 2011. These results will ideally provide details of how the Government will expect the affected public bodies to adapt their decision-making and operational processes in accordance with the duty.

Preventing Bribery (Section 9 of the Bribery Act 2010)

The Bribery Act 2010 was passed in the last minute legislative scramble before the dissolution of the last parliament.

Most people will have a broad understanding of what constitutes bribery; the law has been in existence for a substantial period. Indeed the Magna Carta declared, "*We will sell to no man…either justice or right*[25]". The question which is screaming out to be asked is why has it taken the UK so long to reform the bribery laws in the UK?

A parliamentary research paper on the Bribery Bill which was published on 1 March 2010[26], explains that there has been pressure on the UK to update its anti-corruption legislation, which was last amended way back in 1916.

The new bribery law replaces the offences at common law and under the *Public Bodies Corrupt Practices Act 1889*, the *Prevention of Corruption Act 1906* and the *Prevention of Corruption Act 1916*. The new law also creates a discrete offence of bribery of a foreign public official and a new offence of negligent failure of commercial organisations to prevent bribery. It is the latter of which will be of particular concern to UK businesses.

[25] http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1517519
[26] http://www.parliament.uk/commons/lib/research/rp2010/rp10-019.pdf

Does this sound familiar?

Have we not heard the rhetoric about getting tough on bribery and corruption before? Yes we have. The Law Commission reviewed the bribery laws way back in 1998. A draft *Corruption Bill* was presented to Parliament in 2002 Queen's Speech, but was rejected by the Joint Committee which examined it and who also heavily criticized the Bill and recommended that the scheme of offences be restructured.

The Law Commission then published a consultation paper "*Reforming Bribery*" in November 2007. That paper argued that the distinction between bribery in the public sector and bribery in the private sector should be abolished, and also proposed a new offence of bribing a foreign public official.

Pressure to reform

In November 2008 the Law Commission published its final report on bribery[27]. The Organisation for Economic Co-operation and development (OECD) Working Group on Bribery issued a report in 2008[28]. The press release to that report stated:

"*Current UK legislation makes it very difficult for prosecutors to bring an effective case against a company for alleged bribery offences. Although the UK ratified the OECD Anti-Bribery Convention 10 years ago, it has so far failed to successfully prosecute any bribery case against a company*[29]."

Prosecutions for Bribery

A government research paper made much of the fact that the above statement was incorrect, and provided two examples:

1. Mabey & Johnson who were convicted and fined in September 2009 for trying to unlawfully influence officials in Jamaica and Ghana and also for violating the terms of the UN's 'Oil for Food' scheme in Iraq, and,

2. Balfour Beatty who agreed in 2008 to pay a fine to settle bribery allegations concerning its work to rebuild Alexandria's Library - although this was not a formal conviction.

Compliance Risk Assessment

Ignorance of the law is no defence. Employers should carry out a compliance risk assessment to ensure that they are prepared when the law comes into force, and then set out a timetable to review that policy and implement training.

Businesses should arrange training for all staff about the standards expected, both in the UK and abroad, to demonstrate that they have "*adequate procedures*" in place. A much anticipated September 2010 Government consultation exercise has provided UK

[27] http://www.lawcom.gov.uk/docs/lc313_summary.pdf
[28] http://www.oecd.org/dataoecd/23/20/41515077.pdf
[29] "OECD's Group demands rapid UK action to enact adequate anti-bribery laws" 16 October 2008 OECD http://www.oecd.org/document/8/0,3343,en_2649_34855_41515464_1_1_1_37447,00.html

businesses with some advice on how to effectively implement the "*adequate procedures*" required to shield themselves from potential section 7 liability, which the guidance has expressed as six "*principles*"[30]:

1. Risk Assessment,
2. Top level commitment,
3. Due diligence,
4. Clear, practical and accessible policies and procedures,
5. Effective implementation, and,
6. Monitoring and review.

The practical implications of these principles provide some indication of the level of commitment the Government will expect from UK businesses if they are not to breach section 7.

Although expressed as six principles, the guidance can be simplified into just two: The aforementioned risk assessment, and the mitigation of that risk.

Risk assessment

What is required will vary according to the size of an organisation, but is likely to include regular assessment by way of:

- Company audit reports,
- Internal investigation reports,
- Focus groups,
- Analysis of staff/client/customer complaints,
- Analysis of any bribery issues/risks associated with the industry sector(s) and foreign jurisdictions in which the company operates,
- Employee knowledge of potential bribery risks, and,
- The remuneration structure of the company.

Risk mitigation

The completion of risk assessment procedures will then inform the action needed to mitigate that risk. The guidance to principles 2-6 suggest this may include:

- The personal involvement of top level management (i.e. directors) in establishing a culture within their organisation where bribery is never an acceptable business practice and ensuring that this message is communicated through all levels of management;
- Adding anti-bribery measures to the due diligence procedures applied to all third parties before a transaction is conducted, including the organisation's supply chain, agents and intermediaries;
- Seeking advice of the relevant civil and criminal law governing a foreign jurisdiction in which a company may wish to conduct business;
- Formation of a strategy to implement an anti-bribery element into all relevant decision making processes;

[30] http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf

- Issuance of a code of conduct to all employees, detailing expected standards (which could potentially form part of the company's standard employment contract); and,
- Appointing a senior manager to oversee the company's adherence to anti-bribery policies.

Businesses may want to create a stand alone bribery policy to ensure that third parties (including agents and joint venture parties) – especially those in other jurisdictions as section 7 provides that it is immaterial where the conduct element of the offence occurs - do not breach any provisions of the new law on their behalf.

Many businesses are already asking suppliers to confirm that they have equal opportunity and corporate social responsibility policies in place; an anti-bribery provision may quickly be added to that list as an added seal of approval (and reassurance) for the modern business.

Local customs

The explanatory notes state at section 5 that: "*in deciding what a reasonable person in the UK would expect in relation to functions or activities the performance of which is not subject to UK laws, local practice and custom must not be taken into account unless such practice or custom is permitted or required by written law*". Therefore businesses with an associated office in another jurisdiction may want to take specific local advice as to whether a practice or custom is permitted by "*written law*".

Corporate Hospitality

Corporate hospitality was a dogged issue in the parliamentary debates. So much so that Lord Tunnicliffe (the former Government spokesperson for the Ministry of Justice) wrote a letter to Lord Henley in January this year[31] requesting "*further clarification about the treatment of Corporate hospitality*" under the then Bill[32]. That letter stated: "*We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate business purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes*".

No more gift bags?

In the entertainment industry, for example, outlandishly lavish gifts are often included in bags given to celebrities. Will they become a thing of the past?

Who will prosecute?

Section 10 of the new law provides that no proceedings under the Act can be instituted in England and Wales without the consent of (a) the Director of Public Prosecutions, (b) the Director of the Serious Fraud Office, or (c) The Director of Revenue and Customs

[31] Published on the Ministry of Justice web page.
[32] http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf.

Prosecutions. Unless under section 10 (5) the Director is "unavailable" (although it is not clear what this means!) and there is another person designated in writing to exercise such a function.

Treasury cash cow?

Putting my cynical hat on when seen in the context of the current financial malaise we may see the authorities in the future wanting to use the new law as a way to raise additional revenues. How strictly the new law will be enforced will remain to be seen. The best advice is to carry out a risk assessment of your business sooner rather than later, and to seek advice from a lawyer as to the best way of doing this.

Further Comments

For further comments please follow this link for a special bribery supplement that I contributed to which was published in the Times Newspaper[33].

FSA – Revising the Remuneration Code

In a July 2010 consultation, the FSA outlined its proposals to amend the Remuneration Code ("the Code"). The consultation contained a number of proposals which will bring more financial firms, and more highly paid employees, under its regime and seek to further promote an underlying principle of "*effective risk management*"[34] throughout the financial sector.

The consultation refers to the pending implementation of the latest amendments to the Capital Requirements Directive ("CRD3")[35], stating that although the Code in its current form is "*substantially consistent with CRD3*", the Code will require amendment "*to ensure it is fully in line with the Directive*".

In terms of domestic legislation, the consultation states that the implementation of sections 4 to 6 of the Financial Services Act 2010 which empower the FSA to require the disclosure of certain executives remuneration packages, and to regulate their remuneration "*in accordance with a remuneration policy*". These provisions will also require the FSA to "*consult on changes to the Code*."

The consultation proposes a number of alterations to the Code by way of general application to firms, staff and groups, including the following:

- **Application to firms**

The implementation of CRD3 on 1 January 2011 will require the Code to widen the definition of firms which fall under its regime to include "*all banks, building societies and*

[33] My comments can be found on page 8.
[34] http://www.fsa.gov.uk/pubs/cp/cp10_19.pdf
[35] The final text of CRD3 is expected to be published towards the end of 2010. CRD3 will amend the EU Banking Consolidation Directive (*2006/48/EC*) and Capital Adequacy Directive (*2006/49/EC*). http://www.fsa.gov.uk/pubs/cp/cp10_19.pdf

certain investment firms including asset managers." This will "*significantly increase*" the number of firms subject to the Code to "*over 2,500*".

- **Application to staff**

The definition of the staff to whom the Code will apply is also proposed to widen from the "*P8 employee*" definition to a new group referred to as "*Code staff*". This new group will include the following:

a) A person who performs a significant influence function for a firm;
b) A Senior Manager; and,
c) All staff whose total remuneration takes them into the same bracket as senior management and risk takers, whose professional activities could have a material impact on a firm's risk profile.[36]

This definition is significantly wider than the definition of "*P8 employee*", the previous definition being:

1) A person who performs a significant influence function for a firm; and,
2) An employee whose activities have, or could have, a material impact on the firm's risk profile.[37]

Under the P8 definition, the FSA "*reviewed the deferral arrangements for 4,300 P8 employees*." The widened "*Code Staff*" definition will, one would think, place more staff within the scope of the Code. The consultation also proposes that firms "*compile a list of Code staff ahead of the bonus allocation period*" and make this list available to the FSA for review.

- **Application to Groups**

The territorial scope of the Code is proposed to extend as follows:

- UK groups should apply the code globally to all their regulated and unregulated entities; and,
- UK subsidiaries of third country groups must apply the Code in relation to all entities within the subgroup, including the entities based outside the UK.

In addition to widening the scope of the Code, the consultation also proposes a new set of 12 Remuneration Principles:

1. Risk management and risk tolerance,
2. Supporting business strategy, objectives, values long term interests of the firm,
3. Avoiding conflicts of interest,
4. Governance,
5. Risk and compliance function input,
6. Remuneration and capital,
7. Exceptional government intervention,

[36] http://www.fsa.gov.uk/pubs/cp/cp10_19.pdf
[37] As defined by FSA Rule 19.3.15: http://www.fsa.gov.uk/pubs/policy/ps09_15.pdf

8. Profit based measurement and risk adjustment,
9. Enhanced discretionary pension benefits,
10. Personal Investment Strategies,
11. Avoidance of the Code, and
12. Remuneration structures.

By addressing issues such as "*risk management and governance*"[38] and "*rules on capital, government intervention, pensions, hedging and avoidance*"[39] the Code incorporates Principles which are ostensibly designed to alter the business practices of financial firms in the longer term, but it is Principle 12 which is most likely to cause concern for those expecting to continue to benefit from the now ubiquitous bonus payment. Principle 12 is accompanied by further guidance designed to reign in a firm's ability to pay cash bonuses. The guidance includes:

- Deferral of at least 40% of a bonus "*vesting over a period of at least 3 years for all Code Staff*", with a suggested 60% deferral in the case of "*particularly high*" amounts.
- A rule requiring "*at least 50%*" of a bonus to be paid by way of "*shares, share-linked instruments, or other equivalent non-cash instruments of the firm*".
- A performance adjustment provision – providing that a reduction is made to a deferred bonus award for poor performance.
- A rule preventing firms from guaranteeing bonuses of more than one year except to new employees in their first year of service, and in other exceptional circumstances.
- A de minimis provision – the Code proposes that Code staff earning less than £500,000 a year and whose bonus is less than 33% of their total remuneration would be exempt from the above provisions.

Breaching the Remuneration Principles

Section 6 of the Financial Services Act provides the FSA with "*express powers*" to:

- Prohibit a firm from remunerating its staff in a specified way;
- Render void any provision of an agreement that contravenes such a prohibition; and,
- Provide for the recovery of payments made, or properly transferred in pursuance of a void provision.

The consultation notes that these measures "*are only likely to be effective where the effect of the prohibition can be clearly ascertained in advance*." For this reason, the consultation proposes to use the section 6 provisions only in relation to deferral arrangements, and guaranteed bonuses.

The policy statement and final rules are expected to be published in mid-November 2010, with the rules expected to come into effect from 1 January 2011.

[38] Principles 1-5: http://www.fsa.gov.uk/pubs/cp/cp10_19.pdf
[39] Principles 6,7,9-11: http://www.fsa.gov.uk/pubs/cp/cp10_19.pdf

Announcement of flexible working consultation

The Department for Business Innovation and Skills (BIS) announced on 30 September 2010 that a consultation will be launched later this year looking into extending the right to request flexible working arrangements to all employees, and the design of a new system of parental leave. This proposal, announced by Employment Relations Minister Edward Davey is made with the intention of creating "*more flexible, family friendly workplaces*"[40].

Under the proposals, the right to request flexible working will be extended to include parents of children under 18 from April 2011, giving the right to a further 300,00 people.

The provision of this right to a wider group of people is also intended to alleviate the pressures some parents are subject to, in being forced to choose between their career and caring for their family. The announcement suggested that employers will also feel the benefit of this proposal, as it will allow those more experienced employees to remain at work for longer.

Fit note to sick notes

Please follow this link for my short article published on changeboard.com which explains the regime change from sick notes to fit notes.

6. The view from Europe

The end of salary sacrifice schemes? – Astra Zeneca v HMRC[41]

Astra Zeneca provided part payment of salary to some of its employees by way of retail vouchers, as it was able to acquire these vouchers at less than their face value (the Court using the example of acquiring a voucher with a face value of £10 for £9.50) in order that their employees were able to acquire the vouchers at below face value and hence receive a benefit.

Astra Zeneca claimed that it should not have to charge VAT on the provision of the vouchers to its employees because they were not a "*supply of goods or services effected for consideration*" as per Directive 2006/112/EC (the Sixth Directive), but claimed that it should receive credit for the input tax incurred in purchasing the vouchers as they were a "*business overhead*".

HMRC refused to make the input tax incurred on the vouchers tax-deductible, and argued Astra Zeneca was not entitled to credit for the input tax it incurs on buying vouchers, because the company did not use them for the purposes of any taxable transactions.

HMRC argued in the alternative, that if the input tax was recoverable it should account for VAT (the output tax) incurred on the provision of the vouchers to its employees either

[40] http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=415723&NewsAreaID=2&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+bis-news+%28BIS+News%29

[41] Astra Zeneca UK (Taxation) [2010] EUECJ C-40/09

because the vouchers are given for consideration, or because they were made available to employees for use for a purpose other than a business purpose.

On appeal to the European Court of Justice, the Advocate General found in favour of HMRC's alternative argument, that the input tax was recoverable, but that the part payment of salary in vouchers was a supply of services effected for consideration, and therefore was also subject to VAT.

This decision will be of interest to companies who until now, have claimed an input tax credit on the purchase of vouchers and not accounted for the ouput tax on the provision of the vouchers as part of a salary sacrifice scheme.

The result of this case would seem to be that the provision of a voucher by an employer to an employee will be chargeable for VAT purposes, unless it can be shown that there is no link between the provision of the voucher and a reduction in the employer's salary. The result of this is that certain salary sacrifice agreements may cease to be viewed so favourably by employers and employees alike.

Directive on equal treatment between self-employed men and women entered into force

On 4 August 2010, Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity entered into force. It improves the protection of female self-employed workers and the assisting spouses or life partners of self-employed workers, particularly also during maternity. They are granted a maternity allowance and leave of at least 14 weeks, should they choose to take it. At EU level, this is the first time a maternity allowance has been granted to self-employed workers.

The new Directive notes that although the original *Council Directive 86/613/EEC* was intended to provide equal treatment for men and women working *"in a self-employed capacity"*, it has *"not been very effective"*[42] in fulfilling this objective.

Article 5 of the Directive further provides that Member States may take "*Positive action*" to address gender inequality, for example by *"promoting entrepreneurship initiatives among women"*, at a time when one in three entrepreneurs is a woman.[43]

The Directive will no doubt be welcomed by the assisting spouses and life partners of the self-employed, particularly where their self-employed partner is the couple's sole source of income. One notable caveat of the Directive is that the validity of the life partner relationship must be recognised under national law in order to fall under the scope of the Directive. EU member states now have to implement the Directive into their national laws within two years.

[42] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:180:0001:0006:EN:PDF
[43] http://ec.europa.eu/unitedkingdom/press/press_releases/2010/pr1085_en.htm

7. HR Tips from Bargate Murray

1. **Review your Existing HR policies/contracts** – Many organisations have HR policies and employment contracts which are now out of date. These are often admitted in evidence before an employment tribunal. Are you in need of a HR health check? Have you considered the need for an anti corruption policy?

2. **Consider HR Training** – If your organisation has experienced an increase in the amount of complaints/grievances in one particular area of employment law, consider whether managers could benefit from bespoke training, to raise awareness and to address any concerns or questions they may have. Are there any areas where you, or your colleagues, would like further guidance? If so please let us know.

3. **Can a workplace dispute be nipped in the bud**? – Workplace mediation is becoming increasingly popular as a way to resolve disputes. Mediation can also allow the parties to explore underlying conflict between the parties, and rebuild relationships.

4. **Embrace social media for free legal updates** – Many lawyers, such as Bargate Murray, have embraced Twitter and LinkedIn as a way to update their business contacts about forthcoming changes in the law, and key decisions. Follow **PHBARGATEMURRAY** and **QBBARGATEMURRAY** for regular free updates and tips.

5. **Can you control your legal spend by using a monthly retainer**? – We understand that organisations of all sizes are under pressure to control their legal budget. Please speak to Bargate Murray to see if we can help you control your annual legal spend by using a monthly retainer.

8. Bargate Murray News

BM Expansion

As part of our expansion programme Bargate Murray are pleased to have recruited two more trainee solicitors, Adam Ramlugon and Sara Tinwell.

Ali Guden, qualifies as a solicitor this month, and the Partners are pleased to be able to offer him a position on qualification. Ali is a qualified (non-practicing) Attorney in Istanbul and has recently been awarded a full scholarship to complete the CEDR mediation course later this year. Upon completing the course Ali will be the only Turkish speaking mediator in the UK.

We are also pleased to announce that with effect from 1 September 2010 Anouch Sedef was promoted to Senior Associate in our superyacht team.

Superyacht -"Palladium"

Our renowned superyacht team continue to expand their international reputation, and have just returned to London after finalising the delivery to our client of "Palladium", a

substantial superyacht, launched in Hamburg. Please follow the link to an article in the Super Yacht Times covering the delivery of the magnificent "Palladium" Superyacht.

Monaco Boat Show

Bargate Murray recently sponsored the exclusive Superyacht Owners Summit that took place shortly before the Monaco Boat Show. Our team also attended the Boat Show itself.

Sponsorship of the University of Leicester Moot team

Bargate Murray were pleased to sponsor the University of Leicester Moot team in the summer. For a full review please follow this link.

Diversity and language skills at Bargate Murray

Our diverse team speak the following languages fluently: Armenian, French, Turkish, Russian, Ukrainian and also conversational Creole, and Spanish. This linguistic foundation allows us to provide yet more added value service for our clients and professional contacts. We are proud to support the Law Society Equality and Diversity scheme.

Can we help you?

Our employment team provide professional advice in all areas of employment law from day to day HR Advice; Employment Tribunal/Employment Appeal Tribunal advice; and high court injunctions.

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We would welcome your feedback on this quarterly employment law review; thank you.

October 2010

Our areas of expertise

Arbitration – Commercial - Corporate – Employment – Litigation – Mediation – Shipping – Super yachts

Disclaimer