UK Employment Law Round-up

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# Gender pay gap reporting: Mind the gap

## Background

Addressing gender inequality in the workplace is at the heart of the government's agenda for 2016, with section 78 of the Equality Act 2010 coming into effect this year. This will make it mandatory for all employers with at least 250 employees to publish information about their gender pay gap, and employers need to be ready for the changes.

The government launched a consultation last year, titled "Closing the Gender Pay Gap". On 12 February, in response to the consultation, the government issued draft regulations that it is proposing will come into effect from October 2016, subject to further consultation with stakeholders. Stakeholders have until 11 March 2016 to respond.

The government proposes that affected businesses are required to publish the following figures annually:

- mean and median gender pay gaps;
- gender bonus gaps (including the proportion of male and female employees who receive a bonus); and
- the number of men and women in each quartile of the company's pay distribution.

The draft regulations envisage that "pay" will include basic pay, paid leave, maternity pay, sick pay, area allowances, shift premium pay, bonus pay, and other variable allowances. "Bonus pay" includes payments received and earned in relation to profit sharing, productivity, performance and other bonus or incentive pay and commission; long term incentive plans or schemes; and the cash equivalent value of shares on the date of payment.

It is thought that the mean will be useful because women are often over-represented at the low earning extreme, and that the median is the best representation of the 'typical' pay difference because it is unaffected by small, extreme outliers. The objective of the quartile data is to help employers identify where women are concentrated in terms of their remuneration and whether there are any bars to their progression.

## Potential consequences

Although noticeably absent from the draft regulations, section 78 anticipates that the penalty for an employer that fails to comply with the requirement to publish gender pay information could be a criminal fine of up to £5,000 or civil enforcement measures.

Whilst it is not anticipated that there will be any particular penalties for companies and organisations failing to bridge the gender pay gap, the reputational damage and negative publicity that large employers could face is considerable. There are also likely to be knock-on effects on the business's ability to attract new talent, and on employee engagement and retention. Employers would need to be able to justify any differentials in pay in public.

Employers who are exposed as having a gender pay gap are also at risk of potentially significant employee claims for equal pay, which could be backdated as far as six years.

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In October 2012, in the "landmark case" of ***Birmingham City Council v. Abdullah and others [2012] UKSC 47***, the Supreme Court judges held that more than 170 former Birmingham City Council employees could launch pay equality compensation claims in the High Court, on the basis that they had not been eligible to receive bonuses, which male comparators in equal work had been eligible to receive. This essentially extended the time limit for bringing a claim to six years (as opposed to the six-month limit in the Employment Tribunal). The judgment resulted in around 16,000 claims against the council, and it was estimated that the total cost to the council was likely to reach about £1.2 billion.

## Preparation for the changes

It is currently expected that the gender pay gap regulations will come into force in October 2016. However, to ensure that employers have sufficient lead-in time, it is proposed that they will have about 18 months after commencement to publish the first set of data, with publishing required on an annual basis thereafter.

Notwithstanding that, large employers may wish to begin taking preparatory steps over the coming months to ensure that they have systems in place to deal with the new administrative burden and have an action plan in readiness for the changes.

We set out below some practical steps that employers can take in preparing for gender pay gap reporting.

### 1 Gathering information on pay

Guidance from the Equality and Human Rights Commission recommends that employers should begin gathering information about their pay and grading arrangements, job evaluation scheme, payroll systems, HR information systems and occupational segregation. As is clear from the draft Regulations, it is highly likely that employers will need to include variable elements of pay and other pay enhancements in this exercise. The information should be presented in the format in which it is easiest to perform a comparison exercise.

### 2 Job evaluation

The next step will be to determine which groups of employees are doing "equal work". The Equality Act 2010 defines equal work as: "like work", "work rated as equivalent", and "work of equal value". The most comprehensive way of addressing pay inequalities is through a job evaluation scheme or study (JES). A JES is an analytical procedure for grouping jobs into salary bands on a gender-blind basis.

Like work is defined as work that is the same or broadly similar. Equivalent work is where the demands of a job are determined to be equal to those of another job under a job evaluation scheme. Work of equal value is work that is different another job but of equal value in terms of the demands of the role. Recent case law has highlighted that this last category is the most problematic, and employers should give some proper thought when categorising roles as to what may be work of equal value.

### 3 Identifying pay gaps

Once an employer has identified which groups carry out equal work, it should determine whether or not there are any gaps in pay, based on the pay information gathered.

Employers should also compare the pay (basic and variable) of part-time and full-time employees, as statistics show that women are more likely to work part time than men. It is not yet clear whether employers will be required to report this level of information but it is nevertheless useful to have carried out this exercise and made any necessary adjustments to avoid claims.

### 4 Determining the cause of any pay gaps

Where any gaps are identified, the employer will need to look at the reasons behind the gaps and consider whether it may be possible to justify them.

There are a number of potentially non-discriminatory reasons behind pay gaps, such as pay progression, pay protection, performance pay, competency pay, premiums and allowances. Where these seem to apply, the employer will still need to be comfortable that gender has not played any role in determining pay.

Some differentials in benefits may be indirectly discriminatory but justified as a proportionate means of achieving a legitimate aim (e.g. the aim of retaining and recruiting women in a male-dominated workforce).

### 5 Developing an equal pay action plan

In the event that an employer does identify employees who may not have been paid equally for a reason ostensibly connected to gender (and the gaps cannot be justified), it will need to put together a plan to address the gaps in pay.

In preparing for the changes, employers should, however, be aware that, in the event an employee were to bring an equal pay claim (either before or after the new legislative provision comes into effect), the pay data collated and any job evaluation assessment are likely to be disclosable (subject to relevant redactions) unless they can be effectively protected by privilege. This will be the case even if the disclosure of the pay enhancements is not ultimately required as part of the gender pay gap reporting requirements in the final regulations. It will therefore be a commercial decision for employers to make as to the level of preparation they wish to take before the government publishes its final response paper.

# Criminal records checks "Arbitrary" and unlawful

***R (on the application of P) v. Secretary of State for Justice* [2016] All ER (D) 166 (Jan)**

The High Court has upheld a challenge by way of judicial review to the criminal records disclosure scheme used in England and Wales. It has found the scheme to be "arbitrary" and disproportionate, and it was ruled unlawful, as incompatible with Article 8 of the European Convention on Human Rights.

Under the Rehabilitation of Offenders Act 1974, convictions, cautions, reprimands and warnings become "spent" after a certain period of time. However, in certain "excepted positions" (principally those working with children or vulnerable adults) the general rule does not apply and all prior convictions must be disclosed, however old or trivial, where there has been more than one previous conviction. The focus of the challenge was on this exception.

Both claimants in the case had multiple minor historic criminal offences recorded against them – one during a period where the applicant was suffering from an undiagnosed mental health condition and the other for offences which were over 30 years old. Both claimants had no subsequent convictions but were still required to disclose their historic convictions under the current scheme. The claimants argued that this was affecting their ability to find employment and impacted on their Article 8 rights.

Article 8 provides that:

- everyone has the right to respect for his private and family life, his home and his correspondence; and
- there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The High Court found that setting the bar at any more than one single conviction is arbitrary and neither in accordance with the law nor proportionate within the second limb of the test set out in Article 8.2 (as argued by the defendants).

The Court has asked the government to make submissions to address the faults in the statutory scheme, before it makes its final order. The criminal records disclosure scheme will continue to run in its current form until this final order is made. The Home Office is considering whether there may be grounds to seek leave to appeal the decision.

Affected employers will not need to make any changes to their criminal records checks processes until the final order is made. However, they may wish to take preparatory steps in anticipation of the changes to the law, which are inevitable in light of the High Court's judgment. This may involve employers having extra regard to information on DBS certificates (particularly where convictions may be considered minor or occurred a long time ago) and making a reasonable assessment of whether a prospective employee should be discounted simply on the basis of minor past convictions.

Employers may also wish to take stock of how robust their current background checks and pre-employment processes are, and consider whether any modifications would be beneficial.

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# Injury to feelings compensation: taxable or excepted?

***Moorthy v. HMRC [2010]* UKUT 13 (TCC)**

In the long-running case of Moorthy, the Upper Tribunal has held that an injury to feelings compensation payment made in connection with a termination of employment was taxable as a termination payment under section 401 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). In doing so it has upheld the decision of the First-tier Tribunal but, controversially perhaps, disagreed with past decisions of the Employment Appeal Tribunal (EAT).

There has been some understanding previously that it is open to parties to reduce the level of tax on a sum paid to settle a claim with a discriminatory element by attributing all or part of the sum payable by the employer (above the first £30,000 of the ex gratia payment exempt from tax) to injury to feelings. However, Moorthy is an important reminder that parties may not do this where that payment is made in connection with the employee's termination.

In March 2010, Mr Moorthy, a senior employee in the local government team of an engineering contractor, was dismissed by reason of redundancy and received a statutory redundancy payment. He then commenced proceedings in the Employment Tribunal for unfair dismissal and direct age discrimination. His claim related solely to his dismissal and there were no allegations of discrimination predating his selection for redundancy. The claim was settled by an ex-gratia payment of £200,000, as compensation for loss of office and employment, and there was no apportionment between different heads of loss.

In February 2012, Mr Moorthy informed HMRC that he believed that the payment was not taxable and HMRC opened a formal enquiry. In August 2013, HMRC issued a closure notice, stating that the payment of £200,000 was taxable under section 401, save for £30,000, which fell under the statutory threshold (although it allowed a further £30,000 tax free element "by concession"). Mr Moorthy appealed HMRC's decision.

Upholding the decision of the First-tier Tribunal, the Upper Tribunal has found that the key issue to be determined is whether there is a connection between the payment and the termination of employment. If there is, then the payment will be subject to tax under section 401.

The Upper Tribunal also considered whether the payment could fall within the exception in section 406 ITEPA 2003, which excepts payments in connection with the


termination of employment by death of an employee or on account of injury to, or disability of, an employee. The Upper Tribunal, relying on the case of Horner v. Hasted [1995] STC 766, held that injury, like death and disability, means a medical condition for the purposes of the section. Accordingly, Mr Moorthy's injury to feelings in the context of the discrimination claim did not fall under the exception in section 406.

## Comment

The key point to take from this decision is that parties need to be very careful to appropriately apportion settlement payments to reflect compensation for pre-termination discrimination. If they fail to do so, it is highly likely that the whole sum (above the first tax-free £30,000) will be deemed subject to deductions for tax under section 401.

Employers should apply the Upper Tribunal's interpretation, rather than the EAT's, when deducting tax from a compensation payment, or risk HMRC seeking under-deducted tax from them directly.

Whilst the Upper Tribunal's decision on the meaning of injury is binding on the First-tier Tribunal, it is not binding on the EAT. Accordingly it is hoped that the Court of Appeal will rule on this issue to resolve the conflict.

# Early Conciliation and the Employment Tribunal's case management powers: Changes to the respondents

The two recent cases set out below highlight the flexible approach that the Employment Appeal Tribunal (EAT) seems to be taking in relation to Early Conciliation (EC) and the Employment Tribunal's (ET) powers to make case management orders at any stage of proceedings. Both cases dealt with situations in which there had been a TUPE transfer of staff.

***Mist v. Derby Community Health Services NHS Trust UKEAT/0170/15***

Mrs Mist was employed by Derby Hospitals NHS Foundation Trust (the Hospital Trust). In January 2014, the hospital decided to award the contract for the particular service on which Mrs Mist spent 80 per cent of her time to Derby Community Health Services NHS Trust (the Health Trust). Mrs Mist commenced EC against the Hospital Trust (albeit citing the wrong name) and then issued a claim against it. Although Mrs Mist only brought her claim against the Hospital Trust, the particulars of complaint made it clear that she considered that TUPE applied and that there had been a relevant service provision change transfer to the Health Trust. The ET accepted the claim despite the discrepancy between the name of the respondent on the EC certificate and the name of the respondent on the ET1.

Mrs Mist later applied to amend her claim to include the Health Trust as a second respondent and, at a preliminary hearing, the judge granted her application. However, the ET struck out the claim against the second respondent on the grounds that it was presented out of time. Mrs Mist appealed the decision on the basis that the ET had failed to properly apply the Selkent principles (as outlined below).

## The ETs case management powers

The ET has the power to allow a claimant to amend its claim under rule 29 of the Employment Tribunals Rules of Procedure 2013. Whether to allow an amendment is a matter of judicial discretion taking into account all the relevant circumstances in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial directions" (***Selkent Bus Co Ltd (t/a Stagecoach Selkent) v. Moore*** **[1996] IRLR 661).**

The EAT allowed the appeal, holding that the paramount consideration should have been the relative injustice to each party in granting or refusing the amendment, and that the fact Mrs Mist applied to add the second respondent out of time should not be determinative.

The EAT disagreed with the Health Trust's argument that a prospective claimant should be required to provide the correct name of a prospective respondent to Acas in order to protect the respondent's right to engage in the EC process. It considered this to be a fundamental misunderstanding of the EC process, pointing out that a respondent would only be contacted by Acas and given the opportunity to engage in EC if the claimant agreed.

***Drake International Systems Limited and others v. Blue Arrow Limited* UKEAT/0282/15**

Blue Arrow Limited (Blue Arrow) was a transferee that took over a contract for the management of workers. It wished to bring claims against the transferor, but the identity of the transferor was unclear. Blue Arrow undertook the EC procedure with reference to Drake International Limited (Drake). It then commenced tribunal proceedings against Drake but included in its ET1 a statement that it had not been able to determine the identity of the transferor with certainty and reserved the right to add further respondents to the claim.

In its ET3, Drake identified four wholly-owned subsidiary companies which it claimed employed the transferring employees. It sought to have the proceedings dismissed and argued that the claims against the subsidiaries would be out of time. However, an employment judge allowed Blue Arrow's application for the four subsidiary companies to be substituted for Drake.

Drake appealed, arguing that if Blue Arrow wanted to substitute a respondent, having already issued a claim, it had to first contact Acas to obtain a new EC certificate in respect of the new prospective respondents. The EAT dismissed the appeal.

## The Acas Early Conciliation procedure

Section 18A of the Employment Tribunals Act 1996 sets out the Acas EC procedure that a prospective claimant must follow before commencing relevant proceedings in any ET (unless one of the exceptions applies). Section 18A(1) states:

"Before a person ('the prospective claimant') presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to Acas prescribed information, in the prescribed manner, about that matter."

The EAT carefully considered the construction of the word "matter". It found that a "matter" can involve an event or events, different times and dates, and, crucially, different people. The EAT also considered the purpose of the EC provisions – they provide an opportunity for parties to take advantage of Acas conciliation if they want to, led by the wishes of the prospective claimant in respect of what is broadly termed a matter. In this case, the claimant had already made it clear that it did not wish to engage in EC.

The decision to allow substitution of a party is a case management decision. The ET has to have regard to the Selkent principles, as set out above, and the overriding objective.

### Comment

Both of these cases highlight the ET and the EAT's willingness to grant some leeway in compliance with the requirements of EC. They also draw out the distinction between the EC procedure and the case management of proceedings once a claim has been accepted by the ET. What has happened during the EC procedure may be relevant to, but is not determinative of, case management, which is approached in the light of existing authorities (Selkent in particular) and the overriding objective.

# TUPE: Temporary cessation of Work

***Mustafa and another v. Trek Highways Services Limited and others* UKEAT/0064/15**

There is relatively limited case law dealing with a temporary cessation of work in a TUPE context. However, in the case of Mustafa, the Employment Appeal Tribunal (EAT) considered whether there had been a business transfer or service provision change (SPC) under TUPE 2006 where a subcontractor had suspended its operations shortly before the main contract was awarded to a new contractor.

Amey Services (Amey) was appointed by Transport for London (TfL) to carry out road maintenance services. It subcontracted the traffic management element of its services to Trek Highways Services Ltd (Trek) and the claimants TUPE transferred from Amey to Trek.

In 2012, TfL carried out a re-tendering exercise and it was agreed that relevant employees would transfer from Trek to the new subcontractor. The new contracts were due to start on 1 April 2013. However, in early March 2013 a dispute arose between Amey and Trek. As a result, on or about 8 March 2013, Trek suspended its operations and sent its staff home. On 20 March 2013, the subcontract was terminated by consent.

When the claimants commenced proceedings, one of the key issues to be determined was whether they had TUPE transferred from Trek back to Amey.

## Business transfer

The Employment Tribunal (ET) concluded that there was no business transfer from Trek to Amey because there was no work being carried out by Trek under its contract with Amey during the period 8 to 21 March 2013. The EAT held that this was the wrong approach – despite the suspension of work, there were no findings that the entity did not continue to exist in the form of the dedicated staff, vehicles, equipment and the subcontract itself. The temporary cessation of activity did not have the effect of destroying the entity.

## Service provision change

In order for an SPC to occur, immediately before the transfer the following conditions set out in regulation 3(3) of TUPE 2006 must be satisfied:

- there must be an organised grouping of employees situated in Great Britain that has as its principal purpose the carrying out of the relevant activities on behalf of the client;

- the client must intend that the activities will be carried out by the contractor (or subsequent contractor) other than in connection with a single specific event or task of short-term duration; and

- the activities must not wholly or mainly consist of the supply of goods for the client's use.

The EAT found that the ET had taken the wrong approach in determining whether there had been an SPC. Applying the EAT's recent decision in ***Inex Home Improvements Ltd v. Hodgkins and others* UKEAT/0329/14**, the EAT held that there is nothing in TUPE 2006, or in any of the relevant authorities, that requires the organised grouping of employees to be actually engaged in the activity immediately before the SPC, or that suggests that a temporary cessation of activities precludes the continued existence of the organised grouping.

The ET had also suggested that the intention of the client was that Amey's involvement would be a matter of short-term duration, because of the new contracts coming into force on 1 April 2013. The EAT found that this was irrelevant. The issue that should have been addressed was whether the task in respect of which Amey was involved was intended to be short term.

### Comment

The decision in this case reinforces the EAT's comments in Inex, which cautioned against placing too much reliance on a temporary cessation. This is just one of the relevant factors that Tribunals will take into account when deciding whether a transfer has occurred.

In respect of whether an organised grouping of employees retains its identity notwithstanding a cessation, each case will turn on its facts. Tribunals must look at the length of the cessation and the reason behind it.

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