Hale and Dorr LLP

Spring 2004
Issue 4

H.R. Confidential

Legal news and views for employers and human resource professionals

So You've Not Reviewed Your Staff Handbook for Six Months–So What?

U.K. employment law moves at such a rapid pace that employers who fail to keep their employment documentation under review risk falling foul of new laws and exposing their company to penalties, litigation and even criminal prosecution. If you have not reviewed your contracts/handbook for the last six months, some of the things you might have missed include:

- Notification of a new criminal offence—driving while using a hand-held mobile telephone. Employers will be liable to prosecution if they "cause or permit" their employees to drive using hand-held devices. Therefore, employers should urgently review whether their current handbooks contain policies preventing such use. There are exclusions for certain emergency calls.
- New regulations prohibiting discrimination on grounds of sexual orientation, religion and belief that came into force in early December 2003. Your equal opportunities policies should reflect this change.
- A new requirement that work permit holders must make a separate application for entry clearance to the U.K. before they arrive here. Employers who employ people in breach of immigration control risk criminal prosecution.
- The Information Commissioner's latest set of data protection codes regulating, among other things, employers' monitoring of employee communications, including email, and the processing of health records.
- New statutory disciplinary and grievance procedures that come into force in the Spring of 2004. You need to check whether your procedures comply. Failure to adhere to the procedures will render dismissals for breach of company discipline automatically unfair.

We would be happy to review your handbooks to check if you are compliant as regards these and other recent changes in the law.

By Henry Clinton-Davis
(henry.clinton-davis@haledorr.com)

Hale and Dorr has developed an "off-the-shelf" staff handbook, updated to reflect the raft of recent employment legislation and case law in the U.K. The handbook provides HR professionals with the know-how and procedures to assist employers in maintaining compliance with the law. If you would like further details, please contact Henry Clinton-Davis (henry.clinton-davis@haledorr.com) on +44 20 7645 2507.

in this issue

Employers Beware: Unexpected Liabilities

It has become increasingly common for employers to provide employees with benefits such as permanent health insurance, life assurance and private medical insurance. These benefits are normally provided by way of the employer taking out an insurance policy. However, serious problems can arise if the employee does not qualify for cover under the terms of the insurance policy, but the employer has failed to stipulate in the employment contract that it will only provide the benefit if the employee meets the policy conditions. A recent Court of Appeal decision, *Pioneer Technology (U.K.) Ltd v. Jowitt*, highlighted this issue and emphasised the importance of carefully drafted contracts of employment where the employer provides such benefits.

In this case, the employee suffered an accident at work that left him unable to continue in his job. His contract of employment provided for the payment of a disability benefit but did not refer to an insurance policy, which the company had taken out to cover this benefit. The insurance company was not satisfied that the employee fulfilled their criteria, and so payment was refused.

The Court of Appeal held that, as the policy was not referred to in the contractual clause and the employee was unaware of its existence, it could not be implied that the employer's agreement to pay a disability benefit was subject to the conditions of the insurance policy. As a result, the contractual term entitling the employee to the payment amounted to a freestanding obligation and was enforceable.

Warning!

Employers should pay particular attention to the drafting of employees' contracts of employment to ensure that they do not become vulnerable to the situation that occurred in the Pioneer case. In addition, employers should also adhere to the decision of *Villella v. MFI Furniture Centres Ltd* [1999] IRLR 468, in which it was held that, where an insurance policy provides for significant exemptions to the payment of benefits, the employer will not be able to rely on these exemptions against the employee if the employment contract does not refer to them or the employee was not shown the policy itself, or given the opportunity to read it.

The principles of these cases will also spill over to other areas such as stock options, where it will be necessary for the employee to be made aware of the plan and any limitations on the vesting of options or the right to exercise.

By Carolyn Baines
(carolyn.baines@haledorr.com)

New Entry Requirements for Work Permit Holders

Employees who apply for a U.K. work permit are now also required to obtain prior entry clearance before travelling to the U.K.

Under the previous rules, non-visa nationals (including Canadian, Japanese and U.S. nationals) who had obtained a work permit could obtain entry clearance upon arrival. However, under new rules that came into effect on 13 November 2003, even non-visa nationals who hold work permits must now obtain prior entry clearance.

Under transitional arrangements, work permit holders arriving before 13 January 2004 were granted temporary permission to enter the U.K. for six months, at which time the temporary permission could be renewed.

However, from 13 January 2004, work permit holders who arrive without prior entry clearance are likely to be **denied entry** to the U.K.

In practice, the new rules mean an additional step in the process of transferring an employee to work in the U.K. After the employer has obtained a work permit, it will be necessary for the employee to apply for entry clearance from the local British diplomatic post where he or she lives.

These rules do not apply to non-visa nationals visiting the U.K. on business (for up to six months) or to nationals of certain countries connected with the European Economic Area.

By Daniel Pollard
(daniel.pollard@haledorr.com)

STOP PRESS: Tribunal Awards Increase

With effect from 1 February 2004, the amounts that can be claimed as compensation in the Employment Tribunal have been increased.

The principal increases are:

- The maximum cap on the compensatory award for unfair dismissal rises from £53,500 to £55,000;
- The maximum of a week's pay (used for calculating the basic award for unfair dismissal and statutory redundancy payments) rises from £260 to £270.

Purchasers Beware: Not All Pension Liabilities Are Excluded by TUPE

Purchasers of businesses need to tread very carefully: the old assumption that occupational pension benefits do not transfer under TUPE is being fast eroded. In the latest case, *Martin v. Southbank University*, the European Court of Justice (ECJ) has held that employees' rights to benefits payable on **early retirement** do transfer under TUPE. This decision will be of real concern to employers who have acquired, or plan to acquire, businesses with occupational pension schemes, particularly if the scheme offers generous early retirement benefits. It is now clear that such a purchaser will be expected to replicate early retirement rights to which employees were previously entitled from their old employer.

Background

The law in this area derives from the Acquired Rights Directive (77/187/EC), which has been applied across the EU and implemented in the U.K. by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE).

It is well known that, where TUPE applies, the employees of the transferor automatically transfer to the employment of the transferee on their existing terms and conditions of employment. However, TUPE excludes from this automatic transfer, employees' "rights to old-age, invalidity or survivors' benefits" under occupational pension schemes. These rights therefore do not transfer.

In the 1990s, in a series of test cases, the unions were unsuccessful in challenging this occupational pension exclusion—indeed, the Court of Appeal held that transferring employees are not entitled to equivalent pension benefits after a transfer; nor do future pension benefits transfer (see *Adams v. Lancashire County Council*). However, even then the exclusion was not total: public sector employers were obliged to protect pension scheme rights that crystallised at the time of transfer (*Walden Engineering v. Warrener*). Further, again in the public sector, the contracting out of services was, and for the most part still is, predicated on the government-imposed condition that the incoming contractor would provide broadly equivalent pension rights.

However, more recently, the courts have been interpreting the occupational pension exclusion very literally and holding that all manner of liabilities connected with occupational pension schemes will transfer under TUPE—even to private sector employers.

The process started with the decision of the ECJ in *Beckmann*, in which it was decided that early retirement pensions paid on redundancy were not old-age benefits, and therefore transferred under TUPE. Nonetheless, it remained unclear how far this exception would go. Many "would-be purchasers" hoped that the *Beckmann* decision would be confined to its specific facts (which were quite unusual) and would not be of general application. That hope has been dashed by the latest case.

Martin v. Southbank University

The *Martin* case involved three nursing lecturers employed by the NHS under a collective agreement, known as the Whitley Council conditions, which gave them the right to early pensions if they took voluntary early retirement. The nursing lecturers were transferred to South Bank University, which required them to join its pension scheme. The South Bank scheme did not allow for early payment on voluntary early retirement. The lecturers challenged this and the ECJ held that even though some of the nursing lecturers had later agreed to retire on less favourable terms, they were still entitled to the more generous retirement terms provided by their former occupational pension scheme.

Martin makes it clear that the principles set out in *Beckmann* are of general application. The ECJ has also provided some additional guidance:

- Any right that is contingent upon early retirement will potentially transfer.
- "Early retirement benefits" and "benefits intended to enhance the conditions of retirement" (including annual allowances and lump-sum payments to "top-up" a pension, and the early payment of a pension lump-sum) are not old-age benefits; therefore, these liabilities too will pass to the transferee. The occupational pension exclusion is to be narrowly construed.
- Employees cannot agree to forego early retirement benefits in the context of a TUPE transfer. If a purchaser has an existing pension scheme, it will need to be varied to replicate any early retirement benefits for transferring employees.
- If the transferor had a right to vary the early retirement benefit, this power will be transferred to the transferee, but such powers to vary contractual terms are narrowly construed by the U.K. courts.

The lesson for purchasers of businesses is clear: employment due diligence must be carried out with utmost care. Purchasers need to be aware of any rights contained in any occupational pension plan that do not fall within the pension exclusion, and plan how they will deal with them after the transfer. Also, bear in mind, TUPE extends to all manner of commercial transactions beyond business purchases!

By Daniel Pollard
(daniel.pollard@haledorr.com)

STOP PRESS: Tribunal Awards Increase

On 12 February 2004, the Government published its long awaited Pensions Bill, which, amongst other things, addresses the issue of pension rights on a TUPE transfer. The Bill provides specific pension protection for employees who participate in an occupational pension scheme prior to the transfer, by providing them with a right to participate in a pension arrangement with the transferee employer.

As proposed during the consultation process, the intention appears to be that transferees will have the choice between providing an occupational pension scheme (either final salary or money purchase) or a stakeholder scheme. It is expected that employers will be required to make matched contributions of up to 6% of an employee's salary to a stakeholder or money purchase scheme whilst final salary schemes will have to meet a statutory standard.

However, purchasers cannot rest easy as there will still potentially be the risk that early retirement benefits transfer automatically under TUPE. If purchasers have to replicate final salary early retirement benefits due to the application of TUPE, then this clearly undermines the "choice" provided in the Bill. The Bill itself does not amend TUPE—it provides an additional protection. This issue may be addressed in the new TUPE relations, which, according to the DTI, will "probably" take effect in October this year.

On the assumption that TUPE is changed, or interpreted by the courts, to reflect the proposals in the Bill, transactions in the private sector will certainly be simplified. However, in the public sector, employees are able to rely directly on European law and so may well argue that the U.K.'s new pension rules breach the Acquired Rights Directive, which, as mentioned above, only permits rights to old age, invalidity or survivors' benefits to be excluded. These arguments will not directly affect private sector transactions, but if successful, may necessitate further legislative change. It is unlikely that we have heard the last of *Beckmann*.

More detailed guidance on this and other aspects of the Pensions Bill will be provided in forthcoming issues of HR Confidential.

H.R. Confidential

For further information, please contact:

London
Henry Clinton-Davis
<henry.clinton-davis@haledorr.com>

Munich
Manfred Schmid
<manfred.schmid@haledorr.com>

Oxford
David Andrews
<david.andrews@haledorr.com>

Boston
+1 617 526 6000

London
+44 20 7645 2400

Munich
+49 89 24 213 0

New York
+1 212 937 7200

Oxford
+44 1235 823 000

Princeton
+1 609 750 7600

Reston
+1 703 654 7000

Waltham
+1 781 966 2000

Washington
+1 202 942 8400