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EMPLOYMENT LAW BULLETIN

OCTOBER 2022

Welcome to Wrigleys' Employment Law Bulletin, October 2022.

In our first article this month, we report on the recent Employment Appeal Tribunal case of ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust*** which highlights some pitfalls for employers carrying out redundancy exercises.

Our resident salary sacrifice expert, Sue King, provides a guide to salary sacrifice and considers how these arrangements might be used to structure benefits for employees in the current cost of living crisis.

We had strong attendance at our recent **Employment Brunch Briefing on settlement agreements on 4 October**, looking at some of the lesser known aspects of mutual agreements to terminate employment. Following the discussion in our webinar, we answer here five frequently asked questions on settlement agreements. If you missed it, you can register on our website to access the recording.

We hope you can join us for our next free virtual **Employment Law Brunch Briefing: What's new in employment law** on 6 December 2022 which will cover key employment case law decisions and legislative developments from the past year. Click below to reserve your place!
We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

6 December 2022

Wrigleys' Employment Brunch Briefing

What's new in employment law?

Speakers: Alacoque Marvin and Michael Crowther, solicitors at Wrigleys Solicitors

Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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Redundancy consultation: what should employers consult on and when?

Article published on 21 October 2022

EAT: Redundancy dismissal of fixed term employee was unfair due to lack of consultation on pooling and selection.

In these uncertain times, some employers are unfortunately having to make difficult decisions about staffing, including carrying out redundancy exercises. A recent case in the Employment Appeal Tribunal provides a timely reminder of some of the fundamental principles of a fair redundancy process.

There is no statutory guidance (such as an Acas Code of Practice) on fair redundancy processes, although Acas has published useful non-statutory guidance on redundancies. In order to understand what a tribunal might consider fair or unfair in such a process, we need to consider guidance from case law in this area. Employers should also ensure they follow any relevant redundancy policy and/or collective agreement.

Steps the tribunal will usually expect to see in a fair redundancy process

The leading case on fair redundancy processes (Williams v Compair Maxam Ltd), indicates the importance of the following steps. (Please note that there are additional statutory requirements where 20 or more dismissals are contemplated within a 90 day period.)

- Warn employees of the possibility of redundancies in good time;
- Consult on the following before making any decisions:

    a. the business case for redundancy; and
    b. the proposed timetable and process (including selection pools, selection processes and selection criteria);

- Conduct a transparent, fair, objective and non-discriminatory selection process;
- Conduct meaningful consultation with those at risk of redundancy, including consultation on any selection scoring / decisions;
- Seriously consider alternatives to redundancy, including seeking alternative employment for those who are at risk of redundancy; and
- Offer a right of appeal of any redundancy dismissal decision.

Where employers take a different approach, they will need to be able to evidence good reasons for doing so.

A recent case has highlighted the crucial role of consulting with individuals about pooling and selection criteria at a stage when consultation can still influence decision making and before selecting an employee for redundancy.

Case details: ***Mogane v Bradford Teaching Hospitals NHS Foundation Trust***

The claimant, Ms Mogane was employed as a Band 6 nurse by the NHS trust on a series of one-year fixed term contracts and she had more than two years' service. The trust decided that the number of staff in the research unit in which she worked should be reduced for financial reasons. The unit staff included another Band 6 nurse whose fixed term contract expired after that of the claimant.

The trust decided that Ms Mogane should be made redundant on the basis that her contract was due to be renewed soonest. There was no consideration of pooling Ms Mogane with the other Band

6 nurse and no selection criteria were applied. Consultation did take place after this decision was made; this was focused on seeking alternative employment for the claimant. A Band 5 role was offered to her, but Ms Mogane refused the role on the basis that it was a lower band and she did not have the particular qualification required for the post.

An employment tribunal found that the dismissal was fair but this decision was overturned by the Employment Appeal Tribunal (EAT).

Employer should have consulted on proposed pool and selection criteria

The EAT reiterated the importance of employers carrying out consultation with employees at a point where it can be meaningful; in other words when it can still influence the decision-making.

The EAT commented that the employer had made an "arbitrary choice" of redundancy pool based solely on the date on which the claimant's fixed term contract would have ended and as a consequence it had made the decision that the Claimant should be dismissed before any consultation took place.

Learning points

This case is a useful reminder that:

- Those on fixed term contracts who have two years' service can bring an ordinary unfair dismissal claim and should not be treated differently to employees on permanent contracts;
- It is important to understand that there are two steps in the selection process:

    c. the first to decide on the pool of employees from whom those at risk of redundancy will be selected; and
    d. the second to apply the selection criteria or conduct the selection process to those in the pool;

- Employers should consult on proposals for these two steps at the outset of the process and before decisions are made; and
- Consultation should always take place on the proposed pool for redundancy, even where the number of employees in the pool is one.

It may have been possible for the employer in this case to carry out a fair redundancy dismissal by pooling together the two Band 6 nurses and applying fair and non-discriminatory criteria to both in order to select one for redundancy. However, in skipping a key element of the consultation process and applying an arbitrary method of selection, the employer's decision to dismiss was found to be unfair.

Further information

This article does not cover the additional statutory collective redundancy consultation obligations of employers who are contemplating 20 or more dismissals at one establishment within a 90-day period. For more information on these obligations, you may wish to register to access our recorded webinar available on our website: Redundancy - getting the process right.

If you would like advice as an employer on any aspect of redundancy consultation and dismissal, please get in touch.

Salary Sacrifice: could it benefit both employees and employers?

Article published on 27 October 2022

Together with Nick Bustin from Haysmacintyre our employment partner Sue King explores this possibility in more detail.

Cost of living crisis, increased interest rates and a hike in utility costs for households and businesses alike. Salary sacrifice schemes may not automatically spring to mind when employers consider how they could provide additional financial support to their employees. However, there are benefits for both employee and employer to be explored.

Changes introduced in the Finance Act 2017 saw a restriction in the number of benefits available to employees through tax-efficient salary sacrifice. Almost any non-cash benefit can be provided through salary sacrifice, but the question is whether salary sacrifice remains a tax efficient mechanism for providing that benefit.

The range of benefits that can be provided tax efficiently are now limited to the following:

- Pensions
- Cycle to work
- Ultra-low emission cars
- Retraining and out-placement courses; and
- Intangibles, such as additional annual leave.

The provision of other benefits through a salary sacrifice scheme would lead to a secondary tax charge applying (through the P11D) based on the greater of;

- the salary sacrificed; and
- value of the benefit provided.

Thus, rendering any other scheme pointless from the point of view of savings on tax and National Insurance (NIC). There are other savings for employees on benefits offered by employers such as supermarket vouchers or gym membership at discounted price; however, these are purchased out of net income (after deduction of tax), and not by way of salary sacrifice. In such schemes the savings arise from the employer signing up to a national scheme in which discounts are created by economy of scale rather than through tax efficient schemes.

What is Salary Sacrifice?

The concept of salary sacrifice is very simple. It is an arrangement between the employer and the employee, whereby the employee gives up part of their salary in return for a noncash benefit which may result in a tax and/or NIC saving. The sacrifice is achieved by varying the terms and conditions of the employees' employment contract which relate to pay and in return receives an employer funded benefit. For the scheme to work future pay must be given up by the employee before it is treated as received for tax and NIC purposes.

This means that employee must have agreed, preferably in writing, to a lower salary before receiving the benefit in return. This is normally achieved by a written variation of the employment contract, or in some circumstances, for example in relation to a salary sacrifice in return for enhanced employer pension contributions, by choosing not to opt out of the proposed salary sacrifice scheme.

Employers normally have a policy and scheme rules in place to manage the salary sacrifice arrangements. It is important for employees to consider their own financial position before

sacrificing salary as the impact of the salary sacrifice scheme will vary depending on an individual's personal circumstances (see below). Employers should avoid giving financial advice to their employees, although it is a good idea to sign post staff to appropriate literature and advice about the impact of salary sacrifice on their finances.

However, it is recommended the employer provides as much information regarding the scheme, including not only the advantages but any disadvantages too! This will enable employees to make an informed decision.

How does a salary sacrifice scheme benefit both the employee and employer?

A tax efficient salary sacrifice scheme may be a valuable benefit to employees who are able to benefit from its terms. It gives the employee the opportunity to lease or purchase benefits while saving at their marginal tax rate of 20% or 40%. This means employers may find the introduction of salary sacrifice schemes may boost morale and aid retention.

There is also a financial incentive for employers to introduce salary sacrifice schemes and save the cost of employer national insurance contributions on the salary sacrificed. The money saved may be used in any way the employer sees fit – to support other benefits for employees or to provide a cash injection into an organisation facing financial difficulties.

What impact can salary sacrifice have on employees?

There are some aspects of salary sacrifice that employees need to be aware of; sacrificing salary means inevitably the employee's salary is reduced. This can impact on a range of work-related benefits paid by the employer based on average earnings over a period of time, such as statutory maternity pay, statutory paternity pay, statutory sick pay etc.

It may also impact on employees' pension contributions (both those made by the employee and the employer) and even mortgage applications as mortgage lenders may only be prepared to lend based on the reduced salary.

Employers must also be aware that salary sacrifice cannot be put in place, if it would reduce the employee's salary, below the National Minimum Wage ("NMW")/National Living Wage ("NLW"). The NLW, for workers over 25, for the period from April 2022 onwards, being £9.50 per hour and for workers aged 21-34 being £9.18 per hour. As a salary sacrifice scheme may last indefinitely the salary level for employees whose salary is close to minimum levels should be reviewed annually.

Conclusion

Whilst the changes introduced in 2017 limited the range of benefits which can be provided tax/NIC efficiently, the use of salary sacrifice can help employees with saving for their retirement. Furthermore, it is not uncommon for employers to share some of the NI savings with their employees in the form of additional pension contributions.

Employers are also using salary sacrifice to provide electric vehicles and promote their 'green agenda'.

Settlement Agreements: 5 Top Tips for an Employer

Article published on 31 October 2022

We answer five key questions to help employers avoid some common pitfalls in using settlement agreements.

Employers often see settlement agreements as an easy way to bring an employee's contract to an end however there are some hidden complexities which employers should be aware of.

1. Will discussions about termination be protected under s.111A Employment Rights Act 1996?

It is important to understand the difference between the two ways in which initial settlement discussions can be 'off the record', in other words not admitted as evidence in the employment tribunal.

S.111A of the Employment Rights Act 1996 allows an employer to have pre-termination negotiations with an employee, where there is no existing dispute, with reduced risk that those conversations could be admissible in unfair dismissal proceedings. However, this provides limited protection for an employer. For example, there is no protection if the employee complains of potential automatic unfair dismissal, such as when an employee alleges they have been dismissed for asserting a statutory right, for reasons relating to pregnancy, whistle-blowing, health and safety or acting as an employee representative. It also does not apply to other claims such as discrimination.

'Without prejudice' privilege prevents statements made by parties in a genuine attempt to settle an existing dispute from being put before a court or tribunal as evidence. This means that, in order for an employer to have discussions which are protected by without prejudice privilege, there must already be a dispute. Unlike under s.111A, without prejudice privilege will protect negotiations relating to an employee's allegation of discriminatory treatment or threatened litigation.

If there is no pre-existing dispute and the employee has not yet complained of discrimination or automatic unfair dismissal, then the employer may seek to have s.111A pre-termination negotiations. However, it is always safer to commence a formally recorded process and to provide evidence of an existing dispute as the employee may bring an automatic unfair dismissal or a discrimination claim further down the line. It is important to note that s.111A will not apply to protect communications even if allegations turn out to be unsubstantiated.

The other advantage of commencing a formal process before attempting 'off the record' discussions is that the employer can revert to their 'on the record' position if agreement is delayed or not reached.

2. Can we terminate employment through a settlement agreement rather than a carrying out a capability procedure?

There are risks in moving straight to an offer of a settlement agreement where there are performance concerns which have not been documented.

As mentioned above, if there is 'on the record' evidence of an existing dispute, for example the employer has identified performance concerns, it may be appropriate to have a without prejudice discussion with the employee. However, the employer should also be prepared to keep their options open by carrying on with the capability procedure and not present any foregone conclusions about the outcome of that process in case the without prejudice discussions are unsuccessful.

Use of a settlement agreement, to effect a negotiated exit, can help all involved avoid the time

and attention which will be required to undertake and complete a capability procedure. Avoiding the need to formalise any capability concerns can help avoid embarrassment (on the part of the individual concerned, colleagues and the employer) and can help avoid the individual leaving with a negative reference.

However, care does need to be taken to ensure the employer can satisfy its legal obligation to ensure any reference provided is accurate and not misleading (see below). Employers should also be aware of any relevant regulatory obligations governing references, which might include a requirement to include conduct and capability concerns in a reference.

3. Does an employer have to provide a reference as part of a settlement agreement?

In general terms, there is no legal obligation for an employer to provide a reference for an employee. However, references may be required in certain regulated sectors or in accordance with certain workplace policies. If an employer does decide to prepare a reference, it should be marked confidential and for the addressee only.

There is no requirement to provide an agreed reference as part of a settlement agreement. However, if wording is agreed, a failure to provide the agreed reference could be in breach of contract.

In regulated sectors, settlement agreements should make clear that none of the agreed terms prevent the employer from fulfilling its safeguarding or other reporting obligations. The settlement agreement can include a provision that the employer can refuse to give the agreed reference if new circumstances arise which would have affected their original decision to provide a reference.

There are legal duties that an employer should be aware of when providing a reference. The reference should be accurate and not misleading, otherwise the employer could be liable to the recipient for negligent misstatement or the tort of deceit. It is possible to include a disclaimer in a reference to exclude liability to the recipient for negligence. However, any such disclaimer is likely to be void unless it would be fair and reasonable in all the circumstances to rely on it. A disclaimer would not usually apply to claims brought by the employee in relation to the reference.

Also, employers should note that a refusal to provide a reference can amount to unlawful victimisation, for example where the refusal is to 'punish' the ex-employee for some perceived wrongdoing relating to their employment, such as having raised a grievance.

4. When should an employer use a reaffirmation agreement?

A reaffirmation agreement is used to waive any claims that may arise from the date an employee signs a settlement agreement to the date their employment actually ends. To be valid, the re-affirmation will need to meet the same statutory requirements for settlement agreements.

Whether an employer should use a reaffirmation agreement depends on the length of time between signing the settlement agreement and the employment termination date. Often there is only a short gap and the risks of further claims arising are low. However, if there is a substantial gap between these dates, it may be sensible to require a reaffirmation letter. Factors to consider include whether the employee is in the workplace or on garden leave during the period, the nature of any issue(s) leading to the settlement and the likelihood of claims arising before termination.

5. Should an employer pay for an employee's legal costs?

In order for a settlement agreement to be valid, the employee must have taken independent legal advice on the effect of the waiver of claims on their employment rights. There is no requirement for the employer to pay the employee's legal costs but there is a clear expectation that the employer will make at least some contribution.

Settlement agreements commonly provide for an employer to contribute a capped amount to an employee's costs for legal advice received in relation to the settlement agreement. This creates a contractual obligation on the employer and if the employer fails to meet their obligations, the employee can bring an action against them for breach of contract.

Contributions vary depending on the seniority of the employee and/or the complexity of the proposed terms or the issues leading to the agreement. Any invoices should be marked payable by the employer, but will be addressed to the employee.

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