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EMPLOYMENT LAW BULLETIN

MAY 2023

Welcome to Wrigleys' Employment Law Bulletin, May 2023.

This month our bulletin focuses on significant potential changes to employment law and statutory guidance.

In our first article, we consider ACAS's response to the Government's consultation on their draft 'fire and re-hire' Code of Practice in which ACAS raises some key concerns about the draft Code.

We also take a detailed look at recent Government proposals to make changes to employment law legislation. Possible changes include alterations to holiday leave and pay for workers without normal hours, changes to collective consultation on TUPE transfers, and a maximum time limit on non-compete clauses in employment contracts.

We are delighted to invite you to our upcoming employment law conference on the theme of 'Leading Through Change'. It will take place on June 29th, 2023 in central Leeds, and will be our first in-person conference since the pandemic. You will have the opportunity to listen to our keynote and guest speakers, as well as engaging with our employment team to explore topics such as equity, diversity and inclusion, hybrid working, whistle blowing, data protection and grievance handling. It would be great to see you there! Please click on the link below to book your place.

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

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ACAS responds to HM Government's consultation on its draft 'fire and re-hire' Code of Practice

Article published on 25 May 2023

ACAS raises concerns over key aspects of the proposed Code.

In February we wrote about the Department for Business, Energy & Industrial Strategy's draft Code of Practice on Dismissal and Re-engagement (the 'draft Code') and consultation, which lasted until 18 April. We highlighted the key principles of the draft Code and considered the impact if it were confirmed. See our article: Draft Code of Practice on dismissal and re-engagement published (available on our website).

As noted at the time, the draft Code would stop well short of banning 'fire and re-hire' activity, but instead clarified the conditions under which changes to terms and conditions may be acceptable. In addition, it was commented that the draft Code did not change the risks of losing a legal claim, but would represent a substantial increase in financial risks due to the proposal that non-compliance with the draft Code could lead to an uplift in court and tribunal awards.

ACAS has now published its response to the draft Code.

ACAS response

The response, which can be found here, is set out over 44 numbered paragraphs. Of those, it is worth noting ACAS' comments that:

- It is difficult to codify guidance around dismissal and re-engagement because any code would need to sit alongside a complex set of existing legal principles drawn from statutory obligations and common law.
- ACAS has concerns about the workability of the draft Code and its ability to achieve stated objectives and has recommended the government give further attention to:
    - communicating when in a consultation process it is reasonable for employers to raise the possibility that employees will be dismissed and offered re-engagement if they do not agree to changes to terms;
    - how far an employer must explore alternative proposals put forward by employees before dismissal and re-engagement can be safely used;
    - clarifying the scenarios in which the draft Code would apply;
    - the language of the draft Code which refers to negotiation rather than consultation and does not accurately reflect requirements on employers with non-unionised staff;
    - the order of the steps set out in the Code which do not reflect the realities of consultation and negotiation and could result in poor practice by employers particularly in relation to the provision of information to employees at too late a stage;
    - the length, complexity and legalistic language used in the draft Code which makes it inaccessible to many of its intended users; and
    - the need for greater clarity around the expectations on employers and the consequences of certain actions set out in the draft Code.

ACAS also highlights in its response that the main incentivisation of the draft Code is that employers should follow it to avoid the potential uplift to damages for non-compliance.

ACAS points out that 'fire and re-hire' may be motivated by purely financial considerations as a less costly and quicker option than a redundancy exercise or retaining existing terms. In such cases, a 25% uplift on damages may not represent sufficient motivation for employers to follow the code. ACAS suggests that additional financial disincentives to employers are made available to courts and tribunals in some circumstances.

Comment

As yet, the Government has not provided a response to the consultation, including this response from ACAS. It remains to be seen to what extent, if any, the concerns set out by ACAS will be addressed.

However, the concerns raised about accessibility and the clarity of the scope and effect of the draft Code, as well as the ordering of the steps set out in the draft Code would appear to invite further clarification and thought from the Government. Ultimately, employers will benefit from having a clear set of principles to follow when seeking to make changes to terms and conditions in compliance with employment law. Any Code of Practice on dismissal and re-engagement should be as accessible as possible to help employers to minimise the risks of claims and any potential uplift of damages where claims succeed.

Government seeks input on proposed changes to Working Time Regulations, TUPE and non-competition clauses (Part 1)

Article published on 30 May 2023

Proposals include changes to holiday leave and pay administration and collective consultation requirements.

On 10 May the Department for Business and Trade (DBT) announced an 'initial package of regulatory reform' to reduce what it labelled unnecessary regulation for businesses with the aim of cutting costs and allowing those businesses to compete.

The announcement highlighted DBT's policy paper Smarter Regulation to Grow the Economy which set out three areas for reform in the Working Time Regulations 1998 (WTR), the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and in respect of an intention to introduce legislation to limit non-compete clauses to no more than three months' post-termination to allow employees more flexibility to join competitors or start up a rival business having left their position.

Consultation launched

On 12 May, DBT launched a consultation on the proposals to amend the WTR and TUPE, alongside a more expansive paper setting out the proposed changes and seeking feedback from businesses and workers. Separately, DBT published its response paper to the 2020 consultation on measures to reform post-termination non-compete clauses.

In this article we focus on the proposed changes to the WTR. Part 2 considers the proposed changes to TUPE and non-compete clauses.

Recording working hours

The WTR includes a number of protections limiting hours of work and regulating rest periods. A 2019 European Court of Justice (ECJ) decision ruled that employers must have an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured. In addition, records must be kept in relation to various rights considering daily uninterrupted rest periods and the limit on the maximum weekly working time.

The consultation paper states that the UK government believes this requirement to be disproportionate and opines that 'we believe in many cases such an obligation on employers would

be damaging to relationships between employers and their workers'.

The paper does not set out any clear reasoning behind the government's stated views nor does it seek to explain the reasoning of the ECJ in the case referred to, which determined that these records were required in order to give effect to the Working Time Directive (WTD). Neither does the consultation paper draw attention to the fact that the WTR were brought in to give effect to the WTD in the UK and the WTR only require employers to keep 'adequate' records to show that workers are not exceeding the 48-hour maximum working week. In short, the effect of the ECJ's decision highlighted that the WTR do not fully enact the rights afforded to workers under the WTD.

Nonetheless, the consultation paper presents these changes as beneficial to employers, purporting to help them save £1bn per year, and having no impact on 'the rights that really matter to workers', even though on the face of it the benefits appear one-sided. For example, the paper does not address how workers' ability to invoke rights in respect of rest and pay might be affected by a lack of working time records.

Holiday entitlement reform

The DBT is also proposing to amend aspects of holiday leave and holiday pay provision in the UK.

Paid holiday entitlement derived from the WTD was enacted as part of a European effort to protect and preserve workers' health and safety and general welfare. Holiday entitlement in the UK is set out at regulations 13 and 13A of the WTR, which provide (for a full-time employee working five days a week) for four weeks of 'normal' holiday entitlement (derived directly from the minimum holiday entitlement under the WTD) and 1.6 weeks of 'additional leave' (which accounts for the usual bank holidays in the UK) making a total of 5.6 weeks'/ 28 days' leave a year.

As the paper highlights there are some discrepancies in the rights attaching to holidays under regulation 13 and 13A. For example, holiday under regulation 13 (i.e. that directly derived from the WTD) is paid at a worker's 'normal remuneration' which case law has determined to include commission, bonuses and overtime, whereas holiday under regulation 13A is paid at the basic rate of pay only, unless there is a contractual agreement between the worker and employer that states otherwise.

Likewise, regulation 13 holiday can only carry over to the next holiday year if the worker has not been able to use it due to being on long-term sick or maternity, paternity or parental leave. Regulation 13A holiday only carries over if there is a written agreement between the employer and employee to that effect.

The consultation proposes to combine the entitlements under regulations 13 and 13A and retain the 5.6 weeks' entitlement. In this respect there would be no loss of workers' rights on the face of it, but questions remain around what that holiday will be worth to the worker. For example, on carry-over the paper proposes to keep the same rules as apply now for the four week and 1.6 week elements (which would not appear to simplify things for either workers or employers), but the DBT have said they will use the consultation to decide on what basis the *rate of pay* for that combined holiday is paid.

Holiday pay reform

The consultation suggests that the combined 5.6 weeks' entitlement will either be based on a worker's normal remuneration, including overtime etc (i.e. how regulation 13 holiday pay is currently calculated), be paid at the basic pay rate only (in line with regulation 13A), or possibly it could be based on some other metric.

The other main area of reform on holiday pay is the DBT's proposal to permit what has become known as 'rolled-up holiday pay'. As explained in the consultation paper, when the WTR were

drafted in the later 1990s, the flexible working hours and job market that exists in Britain in 2023 (epitomised by the 'gig economy') was not envisioned.

Because of this, it is comparatively easy to calculate holiday pay for salaried employees or those on fixed hours but it can be much more difficult to calculate holiday for an 'atypical' worker whose hours vary. The 52-week reference period for calculating the average week's pay for workers with no normal hours requires robust record keeping and can be complex and confusing to administer. Where an employee's working hours for the year cannot be predicted, it is impossible to know how much leave they will accrue and how much they should be paid for it until the end of the year.

In order to administer holiday pay in real time, some employers turned to the practice of paying 'rolled-up holiday pay'. This meant employers paid workers an additional 12.07% on top of the usual rate of pay to account for the value of (as yet untaken) holiday.

In theory this was mutually beneficial – the employer avoided potentially complex and costly holiday leave and pay administration for atypical workers and the employee was effectively paid up front for their holiday whether they took it or not. However, the practice was effectively banned by judgments of the ECJ in 2006 on the basis that it disincentivised workers from taking holiday and was effectively a form of pay in lieu of untaken holiday, in contravention of the WTD.

The consultation paper only highlights the benefit of the simplicity of rolled-up holiday and refers to the 2017 Taylor Review into modern working practices, which, according to the consultation paper, recommended that rolled-up holiday pay has 'significant benefits for some workers, particularly in casual working arrangements or in the gig economy.'

The consultation paper does not cite this recommendation, but it appears to refer to page 47 of the Taylor Review where it is clearly set out that '[…] individuals *should have the choice* to be paid […] "rolled-up" holiday pay' (emphasis added) and goes on to stress that '[a]dditional safeguards would have to be built in to ensure individuals did not simply work 52 weeks a year as a result […]'.

It should also be noted that the section in which rolled-up holiday pay appears in the Taylor Review makes multiple mentions of the issues around atypical workers being able to claim holiday pay (as they are often labelled self-employed contractors by the employer or hirer) and notes that many such workers often struggle to find time to take holiday.

In a subtle but important change to the focus on employee choice in the Taylor Review, the consultation paper says the plan is to introduce rolled-up holiday pay as an option 'that *employers may choose*' for paying holiday for all workers (emphasis added). The consultation paper is silent on consideration around the impact of allowing employers to pay rolled-up holiday and makes no mention of any safeguards.

Comment

The consultation paper presents these proposed changes as part of DBT's process of identifying opportunities to reduce bureaucracy and regulation and to ensure these areas are 'fit for purpose for both businesses and workers alike' as part of the Government's wider growth agenda.

The proposals are likely to be attractive to some employers on the basis that they seek to simplify areas of considerable business administrational burden and reduce the time, and therefore cost, required to comply with the relevant regulations. The paper is keen to stress that no workers' rights are being lost in the proposals, but critics will likely point to the weakening effect of the proposals on current employment protections and particularly on the structures that help workers to understand and enforce their rights.

The consultation closes on 7 July 2023 and it remains to be seen to what extent the government will seek to address the apparent imbalance of the effect of the proposals made.

Government seeks input on proposed changes to Working Time Regulations, TUPE and non-competition clauses (Part 2)

Article published on 31 May 2023

Proposals include changes to holiday leave and pay administration and collective consultation requirements.

On 10 May the Department for Business and Trade (DBT) announced an 'initial package of regulatory reform' to reduce what it labelled unnecessary regulation for businesses with the aim of cutting costs and allowing those businesses to compete.

The announcement highlighted DBT's policy paper Smarter Regulation to Grow the Economy which set out three areas for reform in the Working Time Regulations 1998 (WTR), the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and in respect of an intention to introduce legislation to limit non-compete clauses to no more than three months' post-termination to allow employees more flexibility to join competitors or start up a rival business having left their position.

Consultation launched

On 12 May, DBT launched a consultation on the proposals to amend the WTR and TUPE, alongside a more expansive paper setting out the proposed changes and seeking feedback from businesses and workers. Separately, DBT published its response paper to the 2020 consultation on measures to reform post-termination non-compete clauses.

Part 1 of this article looked at the proposed changes to the WTR, and this article focusses on proposed changes to TUPE and non-compete clauses.

TUPE reform

The consultation paper sets out the proposal to amend the need for employers to consult with employee representatives in certain circumstances where there are not already representatives in place.

As highlighted in the paper, businesses with fewer than 10 employees are not required to consult with representatives and can consult with the employees directly. Businesses with 10 or more employees are required to arrange elections for employee representatives if none are in place when the need for consultation arises, even if the proposal is only for fewer than 10 employees to transfer via TUPE.

The proposal from DBT is to extend the freedom afforded to microbusinesses not to consult with representatives to small businesses of no more than 49 employees, as long as there are no elected representatives already in place at the time of the consultation, and for businesses of all sizes to consult directly with staff where a transfer affects fewer than 10 employees.

The paper does not set out any consideration of the effect of these changes and in line with the proposed changes to the WTR, seeks to downplay the impact that these might have on affected employees or employers. For example, no consideration of the reasoning behind the requirement to consult representatives is given (e.g. to help redress the imbalance of power between the parties when discussing any proposed measures and the legal economic and social implications of the transfer) nor does it consider that consulting representatives may help employers to streamline their consultation process and with workers 'knowing understanding and using' their rights in such

circumstances, which DBT claims is an issue with TUPE.

Non-compete clauses

In 2020 the government published a consultation on three options being considered to refresh post-employment non-compete restrictions in the UK with a view to aiding competition and innovation. Those options were as follows:

Option 1: make post-termination non-compete clauses in employment contracts permissible as long as compensation was provided for the period of restraint (using the logic that this would force employers to consider how they used such restrictions); or

Option 2: make all non-compete restrictions void and unenforceable (on the basis this would spur innovation modelled, in effect, on copying the law in places like California, which has a world-leading tech sector).

More than two years later, the government announced its response to the consultation on 12 May 2023 (also available at the link above). Despite most respondents showing support for option 1, the government concluded that it would not utilise it as it would impose a 'substantial direct cost to business […] at a critical junction in our economic recovery' and it could lead to unintended consequences such as loss of investor confidence and a reduction in the need to train employees.

Instead, the government has put forward a third option, which will see new legislation brought in to cap post-employment non-compete clauses to three months. This was announced in the Smarter Regulation to Grow the Economy paper, linked above.

Whilst this option was not set out independently, it was included as a sub-option to Option 1 in the consultation paper. Per the response, 60% of respondents were in favour of limiting non-compete clauses, but reducing this to three months was the least popular option.

It is important to note that this proposal does not affect 'non-solicitation', 'non-dealing' and 'non-poaching' clauses designed to protect an employer against a departing employee using their knowledge of the business to target the employers' clients, suppliers and staff. It has also been clarified that the changes will only apply to employee and worker contracts and will not affect other types of contract such as LLP and partnership agreements or sale and purchase agreements.

Comment

The consultation paper on proposed WTR and TUPE reforms presents these proposed changes as part of DBT's process of identifying opportunities to reduce bureaucracy and regulation and to ensure these areas are 'fit for purpose for both businesses and workers alike' as part of the Government's wider growth agenda.

The proposals are likely to be attractive to some employers on the basis that they seek to simplify areas of considerable business administrational burden and reduce the time, and therefore cost, required to comply with the relevant regulations. The paper is keen to stress that no workers' rights are being lost in the proposals, but critics will likely point to the weakening effect of the proposals on current employment protections and particularly on the structures that help worker to understand and enforce their rights.

The consultation closes on 7 July 2023 and it remains to be seen to what extent the government will seek to address the apparent imbalance of the effect of the proposals made.

The announcement on non-compete clauses is likely to see a mixed response from employers. Intriguingly, as some legal commentators have highlighted, the limiting of non-compete clauses for employment and worker contracts opens up the possibility that employers and employees may

agree to longer-term restrictions as part of a settlement agreement, which will presumably see an employee being paid additional sums of money to secure them. In this way, elements of Option 1 as originally set out in the consultation may come into practice.

The limit on non-compete clauses will require primary legislation and it remains unclear how long it will take for the government to table it. With a general election likely in 2024, there may be further reconsideration of this proposal.

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