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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or Rebecca Hardy. To unsubscribe click here.
New law

Change in Employment Tribunal award limits


As a result of the decrease in the RPI by 1.4% over the year to September, 2009, certain figures are reduced. They include the maximum unfair dismissal compensatory award, which falls from £66,200 to £65,300.

Note that the upper limit on a week’s pay (and other payments that are based on a week’s pay, such as statutory redundancy pay) is unaffected by the Order, as this figure was increased in October, 2009 and will not change again until February, 2011.

The new limits apply where the event giving rise to the entitlement to compensation or other payment occurs on or after 1st February, 2010. Previous limits are preserved in relation to cases where the relevant event was before that date.

Unions blacklisting: Regulations published

Regulations⁴ that make it unlawful to compile, use, sell or supply a “prohibited list” (a list containing details of persons who are or have been members of trade unions or persons who are taking part or have taken part in trade union activities, that has been compiled with a view to being used by employers or employment agencies for the purposes of discrimination) have been laid before Parliament.

The Regulations also create new rights for workers not to be subjected to detriment or dismissal for a reason connected to a “prohibited list”.

The Regulations are due to come into force some time between February and April, 2010. BIS has published guidance explaining how the blacklisting legislation will work.

The BIS guidance is available at www.berr.gov.uk.

ACAS code of practice on time off for trade union duties and activities

ACAS’ revised Code of Practice on time off for trade union duties and activities came into effect on 1st January, 2010. In addition, ACAS has produced 2 guides, the first to managing time off for union representatives and the second to managing time off for non-union representatives.

The ACAS Code and guides are available from the ACAS website (www.acas.org.uk).

Age discrimination cases round-up

Justified age discrimination: ECJ decisions in Wolf and Peterson

On 12th January, 2010, the ECJ gave judgment in 2 cases concerning whether age discrimination was justified.

In Wolf v. Stadt Frankfurt am Main (C-229/08) the ECJ held that a German law restricting application to the fire service to those under age 30 could be defended as a genuine occupational requirement under Article 4(1) of the EU Equal Treatment Framework directive (2000/78).

In Peterson v. Berufungsausschuss, the ECJ held that a law setting a maximum age limit of 68 for dentists to be accredited to work in the German National Health Service was potentially compatible with the directive as a national law aimed at protecting public health.

In Wolf, W applied for a job in the fire service in Frankfurt but was told his application would not be considered as he was over 30. He complained to the German courts that this was unlawful age discrimination. The German courts referred the point to the ECJ.

The ECJ considered whether the direct discrimination inherent in the age limit could be justified under Article 4(1). This provides that a difference in treatment based on the characteristic relating to age does not constitute discrimination where the characteristic is a “genuine and determining occupational requirement”, provided

¹ The Employment Relations Act 1999 (Blacklists) Regulations 2010.
that the objective is legitimate and the requirement proportionate.

The ECJ decided that the proper functioning of the emergency services was a relevant legitimate object. Furthermore, the evidence provided by the German Government showed that possession of “high physical capacities” may be regarded as a genuine determining occupational requirement to a fire-fighter.

The ECJ went on to hold that a maximum recruitment age of 30 was proportionate. It accepted that recruitment at an older age would mean that too many fire-fighters could not be assigned to the most physically demanding duties. Furthermore, fire-fighters recruited over 30 could not be assigned to those duties for a sufficiently long period. Since the ECJ decided that a maximum recruitment age of 30 was lawful under Article 4(1), it did not need to examine whether it was also justified under Article 6(1).

In Peterson, the German Government sought to rely on the exemption in Article 2(5) of the directive, which provides that the principle of equal treatment does not apply to national law that is necessary for the protection of health.

The ECJ identified 2 different objectives that might be considered to be necessary to the protection of health: ensuring the competence of dentists accredited to work in the National Health System, and ensuring the financial viability of the system. Both of these were, in the ECJ’s view, potentially legitimate aims.

The ECJ held that whether the age limit was a proportionate means of attaining those aims depended on what was the objective pursued. With regard to the protection of public health from the risk of incompetent practitioners, the rule could not be considered proportionate given that it only applied to those dentists working in the national health system. Dentists working exclusively in the private sector were not subject to the cut off age of 68. However, the ECJ thought that the age limit could potentially be justified as a means of ensuring that the national health system remained financially viable, as it gave a means of limiting the pool of dentists employed within the national health system.

The court went on to endorse the German Government’s alternative defence of the age rule under Article 6(1) as an “appropriate and necessary” means of giving younger generations the opportunity of working as national health service dentists. This might suffice as a proportionate means of achieving a legitimate aim if there were an excessive number of national health dentists, or a blatant risk of such excess occurring. Again, this would be a matter for the national court to determine.

“Redundant” banker was subject to direct age discrimination

On 21st December, 2009, an Employment Tribunal held, in Beck v. Canadian Imperial Bank of Commerce, that a 42 year old head of marketing who was dismissed for redundancy while the Bank was seeking to recruit a replacement with a “younger, entrepreneurial profile”, was unfairly dismissed and subject to unlawful age discrimination.

The Tribunals also held that B was entitled to a protective award of 90 days pay because the Bank had not engaged in any collective consultation and had provided “meaningless” information. However, “pay” for this purpose did not include any estimate of B’s anticipated discretionary bonus.

B joined the London office of the Canadian Imperial Bank of Commerce in January 2007 and became head of marketing in June, 2007. B worked closely with the trading teams and reported to a number of senior traders, including R, who was then aged about 35. B and R did not get on. In February, 2008, M, aged 40, was appointed to the new position of global head of marketing and became B’s line manager. He was based in Toronto and met B only once.

M and R presented a restructuring proposal to management in March, 2008 involving a number of redundancies, including B. On 1st April B and others were told they were “at risk” of redundancy. The Bank gave them letters purportedly containing the information required for collective redundancy consultation. They were put on garden leave and clients who called were told they no longer worked at the Bank.

In an internal email M had sent to HR, he set out as a “key priority” the recruitment of a new team head for marketing, to have a number of attributes including a “younger, entrepreneurial profile”. HR warned him that the word “younger” was inappropriate but he responded
that this referred not to age but to seniority. The wording was not altered and was included in the brief sent to the recruitment consultants.

B was informed on 5th May that his employment was terminated. He appealed, querying the selection criteria and procedure. His appeal was unsuccessful, and a letter from the Bank dated 23rd June informed him that his job was genuinely redundant and that all members of the team had been assessed against its listed criteria. It also said “we have not hired and will not be hiring any new employees for these roles (or any equivalent) in the foreseeable future”.

In the meantime, the Bank continued to recruit actively and a shortlist of possible candidates (all of whom were aged 40 or over) had been drawn up.

B brought claims for, among other things, age discrimination, race discrimination, unfair dismissal and a protective award. By the time of the Tribunal hearing, both M and R had been dismissed and R was not available as a witness.

The Tribunal upheld B’s age discrimination, unfair dismissal and protective award claims.

On unfair dismissal, despite assertions by the Bank that there was a “classic redundancy situation”, and that the Bank’s conduct should be viewed in the context of the market turmoil at the time, the Tribunal found that the plan was to replace B with another person with the same key skills and that the role was not redundant. The Tribunal referred to a series of emails which suggested a culture among senior management of concealing the fact that the Bank was actively hiring while making redundancies.

The Tribunal found that the procedure adopted was “hopelessly unfair”, doubting that the Bank had ever applied its purported selection criteria to B and finding that there had been no genuine consultation with any of the employees.

On age discrimination, B relied primarily on use of the word “younger” in the recruitment brief as evidence of direct age discrimination. He argued that he met the criteria and skill set for the new job, apart from the requirement to be “younger”.

The Bank argued that B was already 41 when recruited, so age could not be an issue, and that all the shortlisted candidates were over 40, with one being age 50.

The Tribunal found the Bank had been unable to provide a convincing explanation of its use of the word “younger” in its recruitment brief. M’s argument that younger simply meant less senior or experienced was unconvincing.

The Tribunal did not consider that the Bank’s apparent willingness, at a later date, to recruit people in their 40s was relevant, noting that priorities change depending on the available applicants. The issue was what influenced the decision to dismiss B at the time of his dismissal. The Bank had not discharged the burden of proof as showing, on the balance of probability, that the decision to dismiss was not influenced by B’s age.

Points in practice

FSA remuneration code: feedback statement

On 8th December, 2009, the FSA published a feedback statement on its Remuneration Code for large banks and building societies.

The FSA states that it has no plans to extend the code to other FSA firms at this stage but that its review of the code set for mid 2010 will consider the position further.

In the meantime, the FSA expects all firms to continue to focus on remuneration risk management.

The FSA gives 3 reasons for its decision not to extend the application of the code:

> the wide body of European work touching on remuneration which, when finalised, might necessitate amendments to its policy,

> the fact that the Walker review of corporate governance has only recently published final recommendations which the FSA is considering, and

> the introduction of the Financial Services Bill, which may give the FSA new powers on remuneration.
The statement also reminds firms subject to the code that the FSA requires them to:

> comply with the code in making remuneration awards in 2009, even though the code does not formally come into effect until 2010, and

> have the FSA’s consent to proposed 2009 awards before communicating or making them.

The feedback statement is at www.fsa.gov.uk

ABI executive remuneration guidelines and position paper

On 15th December, 2009, the ABI published an updated version of its guidelines on executive remuneration, the first update since December, 2007.

The 2009 guidelines include few amendments, mainly relating to a new acknowledgement of risk management as one of the considerations relevant to executive remuneration and incentives.

Also on 15th December, 2009, the ABI published a position paper on executive remuneration. The paper has been circulated to chairmen of FTSE 350 companies and is intended to help remuneration committees “understand how shareholders expect” companies to apply its guidelines on executive remuneration in “current conditions”. It states it is not intended to supplant the ABI guidelines, but to highlight the elements that are currently of particular relevance.

The paper’s “main conclusions” are:

> a reminder that remuneration committees should be accountable to shareholders for their decisions, especially the exercise of discretions,

> tax efficient remuneration structures should not generate additional costs or tax bills for companies and may risk harm and reputations of companies and shareholders. Remuneration policy should not aim to compensate directors for higher tax rates,

> bonus payments to directors are discouraged following an exceptional negative event. Shareholders should be consulted and proposed payments carefully justified, and

> concerns over retention are not sufficient grounds on their own to increase directors’ remuneration.

The guidelines are at www.ivis.co.uk and the position paper is at www.abi.org.uk

Bank Payroll Tax: HMRC FAQs


The answers to FAQs are intended to provide guidance on the application of the BPT to various types of employee incentive arrangement.

In particular, the FAQs deal with treatment of restricted stock units and non-binding LTIP awards and the exercise of share options. HMRC also confirms that there is no possibility of a future refund for a BPT liability which arises on a payment which is subsequently clawed back under provisions now recommended for bankers’ bonuses.

FAQ 17 confirms that bonuses in the form of employer pension contributions are capable of attracting BPT liability (although this will only be where the contributions are not made under a pre-existing contractual obligation).

In its responses to the FAQs, HMRC emphasises that the BPT treatment of any payment will depend on the particular circumstances and terms.

The FAQs are at www.hmrc.gov.uk.