SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

CHANGES TO THE RIGHT TO REQUEST FLEXIBLE WORKING

The Government has responded to its 2021 consultation on changes to the right to request flexible working under Section 80 of the Employment Rights Act 1996. The Government confirms that the right to request flexible working will apply from the first day of employment; this change will be made through regulations "when parliamentary time allows".

There will also be changes to the process for administering a request:

- Employers will not be able to refuse a flexible working application unless the employee has been consulted. (Discussing requests with employees is already recommended in the ACAS Code of Practice on handling flexible working requests.)
- Two statutory requests will be allowed in any 12-month period, instead of the current single request.
- The employer will have to make a decision on the request within two months (rather than three).
- The employee will no longer have to set out in the request how the effects of their flexible working request might be dealt with by the employer.

These changes are in the Employment Relations (Flexible Working) Bill, a Private Members' Bill with Government support which is currently going through the House of Commons. This support means that, unlike most Private Members' Bills, it is likely to complete its Parliamentary progress and become law.

The Government's response confirms that the list of business grounds for rejecting a flexible working request will be retained unamended.

The Government also plans to issue a call for evidence on encouraging employees to request temporary arrangements and informal flexibility, with a view to developing guidance for employers.

Analysis/commentary: The list of business grounds for rejecting a request are specific: the burden of additional costs; detrimental effect on quality, performance or ability to meet customer demand; inability to reorganise or to recruit additional staff for the employee's work; insufficient work during the proposed working times, or planned structural changes. Under the new regime, the employer's chosen reasons will first need to be discussed with the employee. In addition, employers need to remain aware of potential discrimination claims if a flexible working request is refused.

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PAYMENT UNDER SETTLEMENT AGREEMENT TAXED AS EMPLOYMENT INCOME

Summary: A Tax Tribunal decided that compensation paid to an employee on termination, under a settlement agreement which included confidentiality and non-disclosure obligations in relation to the employee's claim in an employment tribunal, was taxable under Section 225 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) as being in respect of restrictive undertakings. The restrictive undertaking does not have to relate to conduct or activities in the course of employment in order to fall within Section 225; the Section covers any undertaking which restricts the individual's conduct or activities and is given "in connection with" their employment (*Mrs A v HMRC*).

Key practice point: The tax treatment of payments for restrictions in a settlement agreement on the employee's future conduct is a grey area. This case indicates that it may be difficult to avoid such payments being taxed as employment income. One possibility is to allocate a sum to that undertaking, with a view to allowing more beneficial tax treatment for other parts of the termination payment. However, this is not necessarily a straightforward exercise; the sum to be allocated will be an indication of the value the employer places on the covenants and may therefore be relevant to any future claim for breach.

Background: A payment made in consideration for new restrictive undertakings is taxable as earnings under Section 225 ITEPA. Section 225 applies where the employee gives a restrictive undertaking in connection with their current, future or past employment, and a payment is made in respect of either the giving of the undertaking, or the total or partial fulfilment of the undertaking. Section 225 takes priority over the charge to tax under Sections 401 and Section 403(1) ITEPA (on payments on termination of employment, including the £30,000 tax-free threshold), as Section 401 does not apply to payments that are otherwise subject to tax.

Facts: Mrs A claimed repayment of income tax deducted on a sum of £1,055,000 paid under a settlement agreement with her employer and its owner. In the settlement agreement, Mrs A agreed to withdraw her employment tribunal claim relating to a grievance (including harassment claims) against the employer and its owner and to waive any other claims she may have had against them. She also agreed to be bound by confidentiality and non-disclosure obligations in relation to, among other things, the tribunal claim and the events that gave rise to it, and the settlement agreement itself. The sum of £1,055,000 was described in the settlement agreement as "the Compensation Sum"; the settlement agreement also included a payment of £45,000 as tribunal claim compensation and a further compensation payment of £14,083 per month.

HMRC took the view that the Compensation Sum was taxable under Section 401 and Section 403(1), or alternatively under Section 225. Mrs A contended that the sum was wholly in consideration of her agreeing to enter into the confidentiality and non-disclosure obligations and that it was not chargeable to tax under Section 225 because the undertakings did not restrict her conduct or activities in relation to employment.

Decision: The First-tier Tribunal (Tax) decided that the Compensation Sum was chargeable to tax as earnings from employment under Section 225. The restrictive undertakings were in connection with her employment. A restrictive undertaking does not have to relate to the individual's conduct or activities in the course of their employment in order for it to fall within Section 225. Any undertaking which restricts the individual's conduct or activities and is given in connection with their employment is within the scope of the Section.

Alternatively, the Tribunal found that the Compensation Sum (excluding the amount of £30,000 exempted by Section 403(1)) was taxable as employment income under Section 403. Although payment was, in part, consideration for entering into the confidentiality and non-disclosure clauses in the settlement agreement, that additional purpose did not mean that there was no connection with the termination of her employment.

Analysis/commentary: There is an HMRC Statement of Practice (3/96) on Section 225, saying that HMRC regards undertakings in termination agreements to discontinue legal proceedings relating to the employment as within Section 401 rather than Section 225, unless a specific payment was made for the promise not to pursue claims. However, the Tribunal decided to ignore the Statement of Practice on the basis that it is not binding.

PROVIDING NEW ROLE ON REDUNDANCY WITHOUT INTERVIEW WAS NOT A REASONABLE ADJUSTMENT

Summary: The Employment Appeal Tribunal (EAT) found that it was not a reasonable adjustment to slot a disabled employee into a new structure as part of a redundancy exercise. Although the employee was at a substantial disadvantage as a result of having to participate in an interview, the proposed adjustment would have had an impact on other staff in the selection process (*Hilaire v Luton Borough Council*).

Key practice point: The EAT's findings on the extent of reasonable adjustments – that the employer did not need to take steps that would disadvantage others – are helpful. However, it was the fact that the employee had told the employer that he would not have attended the interview even if not incapacitated that was fatal to his case.

Facts: The employee was disabled because of depression. He was required to attend an interview in a collective redundancy process where selection applied to 13 employees. He claimed that the employer had failed to make a reasonable adjustment under Section 20 of the Equality Act 2010. He argued that the requirement for him to participate in an interview put him at a substantial disadvantage compared to persons who were not disabled and that, to avoid that disadvantage, he should have been "slotted" into a role without interview. The Employment Tribunal found that there was no disadvantage and that the employer was not required to consider further adjustments other than delaying the interview (which the employer had done).

Decision: The EAT dismissed the employee's appeal. The Tribunal had made a mistake in assessing whether there was a "substantial" (i.e. more than minor or trivial) disadvantage for Section 20 purposes. It had decided only that the employee could take part in the interview, but the issue was not simply whether he could attend an interview but whether he could participate fully in it.

However, on the evidence, the reason he did not attend did not relate to his disability. He had chosen not to attend because of his belief that the process was merely a means of managing and disguising the reason for his dismissal. He had sent an email to the employer saying that even if he had not been off sick he still would not have attended the interview. In addition, he had participated in other meetings with the employer during his sickness absence.

The EAT went on to consider what would have amounted to reasonable adjustments if he had been able to show substantial disadvantage. The evidence pointed to a significant impairment from which recovery would be protracted. A short delay could not be considered an adjustment in the circumstances as it would not alleviate the disadvantage as required by Section 20. The Tribunal was entitled to conclude that there was no other step for the employer to have to take, including slotting in. Slotting in would have alleviated the disadvantage to the employee but would have had an impact on others in the redundancy process and would have given the employee an advantage over and above removing the particular disadvantage. If there was a vacancy, filling that role could be a reasonable adjustment but here the Tribunal was entitled to consider that, given the surrounding circumstances and impact on other employees, no step, including slotting in, would be a reasonable step for the employer to have to take.

EXISTING DISCRIMINATION CLAIM CAUGHT BY SETTLEMENT AGREEMENT

Summary: The Court of Appeal confirmed that an employee's victimisation claim against his employer, for allegedly engineering the rejection of his job application by a connected company, was precluded by a COT3 settlement agreement which settled all claims which were directly or indirectly connected to the employment and existed at the date of the settlement (*Arvunescu v Quick Release (Automotive) Ltd*).

Key practice point: This decision contrasts with a recent case where the Employment Appeal Tribunal decided that an employee's age discrimination claim could proceed even though he had signed a settlement agreement referring to age discrimination, because the agreement was signed before the circumstances giving rise to a claim had arisen (see our Employment Bulletin October 2022). The victimisation claim in *Arvunescu* clearly arose before the employee signed the settlement agreement, so the difficulty in covering future claims did not arise. However, the fact that the wording in the settlement agreement was widely drafted to cover claims arising "directly or indirectly" from employment was crucial.

Facts: Following termination of his employment, the claimant brought proceedings against his employer (QRA) for race discrimination. The claim was compromised by a COT3 settlement agreement dated 1 March 2018 which settled all

claims "*of any kind whatsoever, wheresoever and howsoever arising …. directly or indirectly out of or in connection with*" (the claimant's employment with QRA) "*its termination or otherwise and even though the claimant may be unaware of the circumstances which might give rise to it or the legal basis for such a claim*".

In early 2018, before signing the COT3, the claimant had applied for a job with a company based in Germany that was a wholly-owned subsidiary of QRA. An HR representative of QRA allegedly refused or failed to progress his request for a reference. The German company rejected the application. The claimant brought a victimisation claim against QRA under Section 112 of the Equality Act 2010 for "knowingly helping" another to discriminate. The Tribunal and EAT found that the claim was compromised by the COT3. The claimant appealed.

Decision: The Court of Appeal dismissed the appeal. The Section 112 claim was clearly caught by the wording in the COT3 agreement. While the claim did not arise directly or indirectly out of the claimant's employment with QRA, it nevertheless arose indirectly "in connection with" it. A necessary part of the claim would involve considering whether the reason for refusal of the post was because he had brought proceedings against QRA on termination. Also, the purpose of the COT3 agreement was to settle all claims connected with his employment that existed as at the date of the agreement (1 March 2018), whether or not they were known about at that date. The claim alleging a breach of Section 112 in January/February 2018 existed at the date of the settlement.

HORIZON SCANNING

What key developments in employment should be on your radar?

21 July 2022	Removal of the restriction on employment businesses supplying temporary workers to cover striking staff. A judicial review of regulations is due to be heard in March 2023
5 December 2022	Extension of ban on exclusivity clauses to lower paid workers
2023-2024	• Transport Strikes (Minimum Service Levels) Bill: minimum service levels on specified transport services Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024) • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges • Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; right to request to apply from first day of employment

31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate it into UK law (or extends sunset to no later than 23 June 2026)

Date uncertain	• Consultation on Statutory Code of Practice on "fire and rehire"
	• Legislation expected to provide for:
	  ○ Trade unions required to put employer pay offers to a member vote
	  ○ Extension of permissible break in continuous service from one week to one month
	  ○ Single enforcement body for employment rights

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)
- **Employment contracts:** *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees)
- **Redundancies:** *R (Palmer) v North Derbyshire Magistrates Court* (Court of Appeal: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies);
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours)
- **Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Rodgers v Leeds Laser Cutting Ltd* (Court of Appeal: whether dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was automatically unfair); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair)
- **Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

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