UK Employment Law Round-up

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In this issue, we consider the requirements of recent legislative changes including the new whistleblowing regime for financial institutions and the updated employment rates/limits for 2016/2017.

Hot on the heels of International Women's Day, we also explain how the spotlight on diversity continues with the release of EHRC guidance on improving diversity at senior levels of business. Another complicated area for clients can be dealing with issues surrounding PHI schemes and we analyse a recent decision in this field.

We are also proud to present our new UK Employment Hub. Find out more about our team, read our blog and keep up to date with the latest developments in UK employment law and best practice – **http://ukemploymenthub.com.**

Did you know that we also have a dedicated immigration practice? We include an article with all you need to know about the upcoming changes to the Tier 2 and Tier 5 immigration regime. Please also check out The Global Mobility Review – a blog bringing you the latest news on global immigration issues affecting the movement of employees around the world – **http://www.globalmobilityreview.com/.** To receive weekly updates, please follow the link and subscribe.

Are retirement ages in PHI schemes age discriminatory?

Mistakes by employers in relation to an employee's entitlement to PHI can be very costly. In one leading High Court case, *Aspden v. Webbs Poultry & Meat Group (Holdings) Limited* [1996] I.R.L.R. 521, an employee was awarded around three-quarters of their salary for each year up to their retirement age, in circumstances where the employer could not recover any of these payments from the insurer.

The 2012 Employment Tribunal decision in *Whitham v. Capita Insurance Services Limited* E2/2505448/112 was also costly for the losing employer. In this case, even though the insurer would no longer pay out to the employee under the PHI policy as the employee had reached the age of 55, the employer directly discriminated against the employee by refusing to make any further payments to him. The employer was unsuccessful in its attempt to justify the discrimination on the grounds of cost. Further, the Tribunal found that the employer indirectly discriminated against the employee on the grounds of age, as the employer did not transfer the employee to a PHI scheme which permitted payments up to age 65 as

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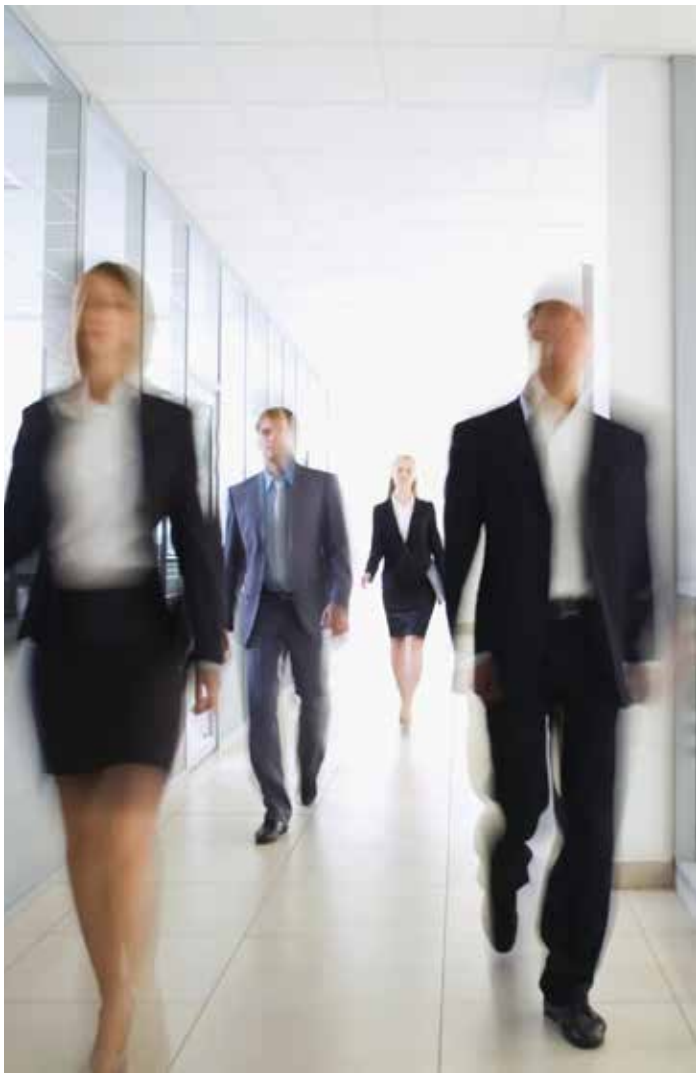

the employee was currently in receipt of benefits and not actually at work. This was costly to the employer as the quantum of a compensatory award in an employment tribunal is uncapped where the Tribunal decides that the claimant has suffered discrimination in any form.

Recently, in *Smith v. Gartner UK Limited* UKEAT/0279/15, the Employment Appeal Tribunal overhauled the approach taken in *Whitham*, the details of which we set out below. However, this decision must be approached with caution.

Ms Smith (Ms S) worked for a technology research company called Gartner UK Limited (G). In May 2003, Ms S first received a payment under G's PHI scheme because of her ill health. The terms of the PHI scheme, which were drafted by the insurer, provided that Ms S could receive PHI benefits up to the age of 60 (this was not age discriminatory under UK legislation at the time the scheme was created). The supporting documents provided to Ms S by G, advised her that "[G] *provides PHI to all employees...this insurance is provided to you at no expense" and "all benefits offered are subject to the rules in force at that time*".

In 2007, Ms S continued to be unwell and received an email from G advising her that the age limit prescribed by the PHI scheme would increase in accordance with UK legislative requirements. However, in 2014, Ms S was told that her benefits would stop at the age of 60. Ms S was unhappy because she believed that she was entitled to receive payments under the PHI scheme until she was 65. In consequence, Ms S brought claims against G for direct age discrimination and an unlawful deduction of wages.

The Employment Tribunal struck out both of Ms S's claims at a preliminary hearing on the basis of written submissions received from the parties. The applicable terms to Ms S's claims were those in force at the time that she first received PHI insurance in 2003 and on those terms there could not have been an unlawful deduction of wages. In addition, G had not directly discriminated against Ms S on the grounds of her age, as the reason not to pay her until the age of 65 had nothing to do with her age but instead was due to the terms and conditions of the PHI scheme which required her to be actively in employment before making any such insurance claim.

Ms S appealed to the Employment Appeal Tribunal and her appeal was rejected. First, the supporting documentation provided to Ms S by G about the PHI scheme was clear: G had agreed to provide insurance cover to its employees from an external provider and not to provide insurance cover itself. Further, the 2007 email did not validly vary the terms of the PHI scheme and change the age limit to 65. Second, for similar reasons, Ms S's treatment was not discriminatory. The terms of the PHI scheme were drafted by the insurer and not by G.

The Employment Appeal Tribunal also considered the issue dealt with in *Whitham*, as to whether the employee should have been entitled to be transferred to another PHI scheme which would have allowed her to receive PHI benefit until the age of 65. The Employment Appeal Tribunal held that Ms S did not have this entitlement because she did not meet the requirements of the new PHI scheme: Ms S was already claiming under the previous policy and she was not actively in employment at the time she made her claim (a key term under the new PHI scheme).

It remains unresolved whether an employer should address the fact that PHI cover taken out before a particular discrimination law came into force becomes potentially discriminatory after a new law is introduced. The case also did not address if an employer can introduce more favourable PHI for its employees that is not available to those employees who are already claiming under the previous scheme.

Learning points

- Take a fresh look at your PHI scheme wording to make sure that it is drafted appropriately or reconsider the terms of your PHI scheme arrangements with your insurance provider.
- If your business ever considers terminating the employment of an employee who is currently in receipt of PHI benefits or is in the process of making such a claim, we strongly recommend that you seek legal advice straight away.
- Please also take heed if you intend to rely on the decision in *Smith*. It is rare that an employment tribunal will strike out a discrimination claim at a preliminary hearing stage, without hearing further evidence. It may be that Ms S's claims would have been decided differently if the Tribunal had considered all the available evidence at a full hearing.

Changes to the Tier 2 and Tier 5 immigration regime

On 24 March 2016, the government responded to the Migration Advisory Committee's (MAC) review of Tier 2 policy and has announced numerous changes to Tier 2 policy going forward.

For Tier 2 (General) migrants:

- Minimum salary threshold – increase to £25,000 in autumn 2016 and £30,000 for experienced workers, whilst maintaining the current threshold of £20,800 for new entrants.
- Waiver of Resident Labour Market Test (RLMT) – where the migrant will be relocating with a high-value business to the UK or, potentially, supporting an inward investment into the UK.

For Tier 2 (Intra Company Transfer (ICT)) migrants:

- Single route for ICT migrants – all ICT migrants must qualify under a single route with a minimum salary threshold of £41,500. The Home Office will have closed the Skills Transfer and Short Term visa categories to new applications. Graduate trainees will have their own route with a lower salary threshold of £23,000 with an increased limit of 20 places per company per year.
- New Immigration Health Surcharge – from autumn 2016 the charge will be extended to all transferees.
- High earners' threshold – reduced from £155,300 to £120,000 for migrants looking to stay in the UK for a period between five and nine years.
- Migrants paid over £73,900 – from April 2017 they will not be required to have one year's experience.

For both Tier 2 (General) and Tier 2 (ICT) routes:

- New Immigration Skills Charge – employers must pay a levy to encourage them to invest in training UK employees. The levy is set at £1,000 per year per Tier 2 migrant from April 2017. A reduced rate of £364 per person per year will apply to small and charitable Sponsors.

Several other recommendations made by the MAC on 19 January 2016 will not be implemented by the government and accordingly the government has confirmed the following:

- ICT overseas service – migrants will not be required to have worked for their overseas company for 24 months, which would have been an increase from the current requirement of 12 months.
- RLMT – Tier 2 (General) in-country switching applications from Tier 4 will not be subject to the RLMT.

Finally, it should be noted that the Home Office has introduced the following changes which affect Tier 2 and Tier 5 Sponsors:

- Record-keeping duties – for new migrant employees, Sponsors must keep copies of references, DBS checks, job descriptions and qualifications.
- RLMT – where a Sponsor advertises a vacancy on Universal Jobmatch, it must take a screenshot on the date the vacancy is first advertised.
- Genuineness test – if the Home Office refuses an entry clearance or leave to remain application because it does not consider the job role to be genuine, it may suspend the Sponsor Licence to carry out further investigation.

Has your business appointed a whistleblowers' champion?

If your firm is a UK deposit-taker with assets greater than £250 million, a Prudential Regulation Authority (PRA) designated investment firm or a firm within the scope of Solvency II, you should have appointed a whistleblowers' champion in your business by 7 March 2016 (if you had not already done so)[1]. This is because on 7 March 2016, the first requirement of the Financial Conduct Authority (FCA) and the PRA new whistleblowing regime came into force. The remaining rules come into effect on 7 September 2016.

A whistleblowers' champion (the name is not obligatory) is an FCA/PRA authorised person who has senior management responsibilities within your firm for whistleblowing. This person should be an independent non-executive director who is not concerned with the day-to-day operations of the firm. Your firm should also ensure that the appointed person has access to resources (including access to independent legal advice and training) and sufficient information to carry out their role.

The duties of the whistleblowers' champion are:

a) responsibility for ensuring and overseeing the integrity, independence and effectiveness of the company's whistleblowing policies and procedures, including those intended to protect whistleblowers from victimisation because they have disclosed reportable concerns; and

b) preparing an annual report on whistleblowing (although this does not need to be prepared until 7 September 2016). The report should include, among other things, a list of any employment tribunal claims involving whistleblowing which the company has lost in the previous year and this information will also need to be reported to the FCA.

There are also further extensive requirements, which relevant firms should comply with by 7 September 2016 and firms should create, maintain and update their internal whistleblowing policies and procedures to reflect these changes.

[1]If your company is FCA - regulated and does not fall into any of the categories above, the new regime offers non-binding guidance and best practice for your company regarding handling whistleblowers.

By this date, firms should:

- establish an internal whistleblowing channel to effectively handle disclosures of reportable concerns and communicate this to employees. Firms can use a "filter" to identify genuine whistleblowing reports and redirect reports that would be better dealt with by other areas of the organisation (e.g. HR with a grievance);
- train staff manning the firm's whistleblowing channel (e.g. on how to protect confidentiality, how to assess and grade the significance of information provided by whistleblowers, how to spot trends and how to keep and maintain records of whistleblowing complaints);
- introduce new wording in its template settlement agreement and employment contracts specifying that none of their terms prevent an employee or former employee from making a protected disclosure;
- inform UK-based employees that they can blow the whistle to the FCA and PRA. Firms are prevented from instructing employees to raise concerns through their internal whistleblowing channel before contacting the FCA or PRA;
- protect whistleblowers' confidentiality and allow staff to make disclosures anonymously if they so wish (for example, by installing a whistleblowing hotline);
- ensure the firm's whistleblowing policies offer protection for whistleblowers, including where the disclosure is not a breach of FCA/PRA rules and does not qualify as a protected disclosure. Whistleblowers should not be victimised because of their disclosure; and
- provide feedback to whistleblowers where this is feasible and appropriate.

Protect whistleblowers' confidentiality and allow staff to make disclosures anonymously if they so wish (for example, by installing a whistleblowing hotline)

To waive or not to waive future claims in settlement agreements?

The decision of the Commercial Court in *Khanty-Mansiysk Recoveries Limited v. Forsters LLP* [2016] EWHC 522 (Comm) may not, at first sight, be of obvious importance to HR practitioners. However, this decision highlights important considerations for the drafting of settlement agreements in the employment sphere.

The claim

Forsters LLP (Forsters) entered into a (non-employment) settlement agreement in relation to its unpaid professional fees and a right to call on a personal guarantee which was created by a director of the company to secure the payment of those fees. The purpose of the settlement agreement, on its terms, was as follows:

"...in full and final settlement of all or any Claims which the parties have, or could have had against each other (whether in existence now or coming into existence at some time in the future, and whether or not in contemplation of the Parties...)"

The term "Claim" was defined as *"any claim, potential claim...whether known or unknown, suspected or unsuspected...however and whenever arising...arising out of or in connection with the Action or the invoice..."*.

The company went into liquidation in 2015 and a recovery company pursued Forsters for in excess of £70 million for alleged negligence in providing its legal advice. The Commercial Court was asked to consider, as a preliminary issue, whether Forsters could rely on the existence of the settlement agreement as a defence to this claim.

The Commercial Court held that on the construction of the settlement agreement, the claim was caught by its terms and Forsters was released from any potential claims.

Waiving future claims in settlement agreements

When entering into settlement agreements with your current or former employees, employers typically identify any "live" claims and alleged claims that the employee may have against the company and include a catch-all provision to the effect that, as the employee has had legal advice from his/her legal adviser, the employee has no other claims against the company or its officers, employees or shareholders, arising out of or in connection with his/her employment or its termination or otherwise. It is standard practice that certain claims are also excluded from scope i.e. future claims for loss of pension rights, any claim to enforce the terms of the settlement agreement, personal injury claims and, with the new whistleblowing regime (discussed elsewhere in this newsletter) clauses which prevent an employee from making a protected disclosure in due course.

The Court of Appeal decision in the case of *Hinton v. University of East London* [2005] IRLR 552 firmly stated that the purpose of settlement agreements is to settle specific, identifiable claims. The Court of Appeal considered that an employee is entitled to know exactly

what he/she is settling and settlement agreements should be tailored to the particular circumstances of the case. The particular claims or potential claims to be covered by a settlement agreement must be identified either by a clear generic description such as "unfair dismissal", "automatic unfair dismissal for asserting a statutory right", "sex discrimination" or by reference to the section of the statute giving rise to the claim (a reference to all claims under the ERA 1996 will not sufficiently identify the settled claim). The decision went on to say that best practice would be to specifically identify the claim being settled by including particulars of the nature of the allegations and of the statute under which they are made or the common law basis of the claim in the form of a brief factual and legal description (for example, unlawful deductions from wages under Part II of the ERA 1996, a statutory redundancy payment under section 135 of the ERA 1996 or unfair dismissal under sections 94 and 98A of the ERA 1996).

In *Hilton UK Hotels Ltd v. McNaughton* EATS/0059/04 an employee purported to settle claims which she "believed" she had against her employer in a settlement agreement. However, the EAT held that an employee is unable to settle future claims which she was unaware of when entering into the settlement agreement. Further, if an employee contracts out of a future claim, the employee must comply with the requirements of the relevant statutory provision. The difficulty is working out how much information on each potential claim should be included. In comparison with *Hinton*, this decision suggests that it may be safer to simply identify the legal basis for the claim (for example, unfair dismissal) without going into details of the basis of such a claim. However, you should be warned, therefore, that certainty can only be achieved in settling specific claims identified in this Agreement in accordance with the *Hinton* case.

As the employment cases illustrate above, while the aim of a settlement agreement is to reach full and final settlement of claims, it is not necessarily straightforward to cover off all of them in an agreement. Specific provisions may not be given much thought when entering into an agreement, particularly in reliance on the catch-all provision. However, the drafting of the waiver and release clause does need careful consideration to ensure that you are not prejudicing any future claims that your business may have against an employee or vice versa if certain employee claims are to be carved out.

We consider that this is particularly relevant in an employee competition context when you are dealing with the exit of senior employees. If a senior employee is moving to a known competitor or setting up their own business, you may not know until they are up and running in their new enterprise whether or not they may have taken your confidential information.

The clause in the *Forsters* case was extremely broad and Forsters was able, in the circumstances of their particular case, to rely on it to cover off this potential negligence claim. Employers should treat this decision as an important reminder that it is necessary to take the time to consider whether the release and waiver provisions in a settlement agreement are appropriately drafted.

EHRC supports a boost for board diversity

Board diversity is a hot topic in the City. Accordingly, it is no surprise that on 23 March 2016 the Equality and Human Rights Commission (the EHRC) shared new non-binding guidance for companies entitled: *"How to improve board diversity: a six-step guide to good practice"*. The EHRC states that this guidance is written within the ambit of the Equality Act 2010 and the Financial Reporting Council's UK Corporate Governance Code.

A copy of the EHRC guidance is available at: **http://www.equalityhumanrights.com/en/advice-and-guidance/how-improve-board-diversity-six-step-guide-good-practice**

The six steps suggested in the guidance are as follows:

1. **Defining the selection criteria for board appointments in terms of measurable skills, experience, knowledge and personal qualities**

   In accordance with the UK Corporate Governance Code, the guidance stresses the importance of having a nomination committee which makes recommendations to the board on the appointment of potential candidates. Care should also be taken by the nomination committee in preparing the role description for potential candidates. The role description should be drafted to attract the widest

possible pool of talent to encourage candidates with protected characteristics to put themselves forward and hopefully ensure that the appointment is made on merit. The nomination committee should also avoid mentioning concepts such as "chemistry" in the role description to avoid unconscious bias by the board, who may conjure up a misconception of who the best candidate would be.

2. **Reaching the widest possible candidate pool by using a range of recruitment methods and positive action**

   The EHRC recommends positive action to promote the role to potential candidates rather than relying on word of mouth and personal networks. Measures suggested include:

   - starting a women's network for senior level women looking to take the next step in their careers;
   - hiring an executive search firm which specialises in the recruitment of under-represented groups at board level or from other business sectors (including professional service firms); and
   - using potentially positive discriminatory language on adverts to encourage under-represented groups to apply for the position.

   The EHRC notes that a failure to advertise a role could be indirectly discriminatory as people with protected characteristics will not know about the new opportunity and consequently will be unable to apply for the role. Further, the EHRC says that an employer will not be able to objectively justify a failure to advertise on the grounds of cost alone unless (and exercise caution!) the hiring company is able to show that it has a genuine concern that advertising the role would cause a downturn in its share price.

3. **Provide a clear brief, including diversity targets, to your executive search firm**

   The EHRC promotes positive action by setting diversity targets to ensure a proportion of candidates from minority groups are considered so long as those measures are not discriminatory. Diversity targets could include creating a long list of candidates which includes a certain level of representation from under-represented groups. Executive search firms should also be encouraged to think outside the box when presenting suitable candidates to your business e.g. by including experienced candidates from less traditional backgrounds, candidates from sectors where women are well represented at a senior level and regularly reviewing the recruitment process to make sure that diverse candidates are not sifted out at a particular stage in the process without good reason.

4. **Assess candidates against the role specification in a consistent way throughout the process**

   The Corporate Governance Code requires the appointment of new directors to be formal, rigorous and transparent. Employers should document the recruitment process and keep this documentation for an appropriate period, as evidence in case a decision is challenged by an unsuccessful candidate. Another suggestion made by the EHRC is that employers should avoid stereotyping candidates in the interview process. For example, employers should refrain from asking female candidates about work and family life balance. Unconscious bias training for recruiting staff can help avoid stereotypical assumptions being made.

   Employers may also consider taking positive action in recruitment and promotion towards under-represented groups, as provided for in the Equality Act 2010. This provision can be used as a boost for diversity on a board by allowing a company to positively recruit or promote a person with a protected characteristic where:

   a) that person is as qualified as another candidate;

   b) the company does not have a policy of treating persons who share the protected characteristic more favourably than a person who does not share it; and

   c) it is a proportionate means of achieving the legitimate aim of enabling or encouraging those persons with a protected characteristic to overcome or minimise their disadvantage or participate in that activity.

5. **Establish clear board accountability for diversity**

   The board should seek assurances from its executive team about tackling diversity, perhaps by setting aspirational targets. Progress should be monitored and reported on in companies' annual reports (as required by the Corporate Governance Code) and in shareholder meetings.

6. **Widen diversity in your senior leadership talent pool to ensure future diversity in succession planning**

   Succession planning is extremely important to try to minimise a lack of representation from diverse talent at an executive level. Companies should review their structure to encourage a new generation of under-represented groups to succeed. Companies could consider reserving places on training and leadership courses for under-represented groups, tailoring training specifically for that minority group, offering flexible working arrangements to retain talent or providing access to internal and external support networks.

New employment rates and limits

From 6 April 2016, new employment rates and limits came into effect for 2016/17:

Limits on a week's pay	£479
Maximum basic award for unfair dismissal or statutory redundancy payment	£14,370 (30 weeks' pay)
Compensatory award for unfair dismissal	£78,962 or 52 weeks' gross pay, whichever is the lower
Statutory Sick Pay	£88.45 (no change)
Statutory Maternity Pay, Statutory Adoption Pay, Shared Parental Pay (prescribed rate)	£139.58
Statutory Paternity Pay	£139.58

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