September 2010

Review

Employment

Redundancy during maternity leave: suitable available vacancies

Employees facing redundancy whilst on maternity leave are in a stronger position than their colleagues. The law makes it quite clear that in such circumstances they are entitled to be offered (as opposed to merely having the opportunity to apply for) alternative employment if there is a "suitable available vacancy". According to the EAT's recent decision in *Simpson v Endsleigh Insurance Services Ltd*, whether or not a vacancy is "suitable" will at least partly be up to an employer, bearing in mind what it knows about the employee.

"Whether or not a vacancy is 'suitable' will at least partly be up to an employer..."

Miss Simpson worked as an insurance consultant in London. While she was on maternity leave Endsleigh closed down the outlet where Miss Simpson worked and relocated the business to call centres in Cheltenham, Burnley and Northern Ireland. It sent Miss Simpson details of alternative vacancies there and invited her to apply for them if she was interested. She did not do so and so was made redundant, but subsequently brought a claim in the Employment Tribunal. She said that she should have been offered alternative employment in Cheltenham without having to apply, and that Endsleigh's failure to do so amounted to a breach of the Maternity and Parental Leave Regulations 1999, making her dismissal automatically unfair.

Regulation 10(3) of the MPL Regulations provides not altogether helpfully that in order to be a suitable available vacancy, the work involved in the new job must be "suitable and appropriate" and that its terms and conditions, including the place of work, must not be substantially less favourable to the particular employee. Endsleigh accepted that it had not actually offered Miss Simpson any roles in the Cheltenham call centre, but argued that it was not under a legal obligation to do so because none of them were "suitable". It accepted that one of the roles may have satisfied the first limb of the test (i.e. that the work involved in the post was suitable and appropriate) but argued that it did not satisfy the second limb of the test as to place of work because Miss Simpson would have been required to relocate.

The EAT (upholding the decision of the Tribunal) confirmed that in order to be a suitable available vacancy both the tests set out in Regulation 10(3) had to be satisfied. It therefore accepted that Endsleigh was not under an obligation to offer Miss Simpson the role because although the contents of the role were essentially the same as her old job, it was substantially less favourable in terms of her place of employment.

The EAT said that at the end of the day "it is up to the employer, knowing what it does about the employee, to decide whether or not a vacancy is suitable". Probably easier said than done! It is not always going to be clear whether a vacancy satisfies the tests outlined above and must therefore be offered to the affected employee - in this case the fact that the new role was in a different location was sufficient to render it substantially less favourable, but this may not always be the case. If the new location were still commutable, or if Miss Simpson made it clear that she would relocate, the answer could have been very different. A geographical obstacle of this sort will also be much easier to establish than concerns going to the "suitable and appropriate" question. If the employer is to argue that a new role is not suitable and appropriate to offer, it will need clear evidence of why that is – hesitations about likely performance will need to be evidenced in the clearest terms, and even then employers must bear in mind that so long as the employee could do an adequate job in the alternative role, the fact that she might not be the best candidate for it is immaterial.

Clearly the safest approach will be to offer the affected employee any vacancies that are likely to satisfy the test. If this is not practicable the employer should document its reasoning in case its decision is subsequently challenged. Remember – if a vacancy meets the criteria outlined above the employer is obliged to actively offer it to the woman in question. Merely sending her a list of vacancies will not be sufficient, however much one might think that the problem should arise only if she applies and is turned down, rather than simply not expressing any interest at all!

Territorial scope of discrimination legislation: impact of the Equality Act

There has been a spate of cases this year concerning the rights of overseas employees to bring claims in the Employment Tribunal: a reflection of the increasingly globalised nature of today's workforce.

If an employee works wholly outside Great Britain he will currently only be able to bring a claim if he satisfies certain conditions, including being "ordinarily resident in Great Britain" either at any time during the course of the employment or when he applies for or is offered it. In *Neary v Service Children's Education & ors* the EAT said recently that the Courts could legitimately draw on tax case law to determine what is meant by "ordinarily resident in Great Britain" and held that it is possible to have more than one ordinary place of residence at one time.

The position is likely to become more complicated with the introduction of the Equality Act 2010, as the Act is silent as to its territorial scope. When the bulk of the discrimination provisions come into force on 1 October 2010 it will be for the Tribunals to determine whether they have jurisdiction to hear discrimination claims, depending primarily on the degree of connection between the employment relationship and Great Britain. As the discrimination provisions derive principally from European law the Tribunals will inevitably interpret the Act widely to give effect to these EU-derived rights.

The range of employment issues that arise in the context of employees working overseas will be covered in our breakfast seminar in London on 4 November 2010.

Update on the Cycle to Work Scheme – have the wheels come off?

In August we issued a client alert ("Salary sacrifice – VAT's all folks?") that included a brief note about HMRC's revised guidance on how employers should value a bicycle that is sold to an employee at the end of the hire period. A number of clients have expressed concern that the range of acceptable disposal values (up to 25% of the cost of a new bike) will significantly undermine the benefit of the scheme for their employees.

Employers may be able to mitigate the effect of the Guidance by extending the hire period beyond the initial salary sacrifice period, i.e. deferring the purchase of the bike by the employee. It could then be transferred to the employee for a lower value in line with HMRC's table of acceptable second hand values.

If you would like further details on how this arrangement would work in practice please contact your normal contact in the Employment Department or Patrick Ford at patrick.ford@hammonds.com.

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FURTHER INFORMATION

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