



The newsletter from Tobins Solicitors LLP

▶ employmentbriefing

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NHS faces up to £300m in equal pay claims: a lesson for all employers

Equal pay has been in the headlines recently. **Clare Hockney** explains the background and how employers can heed the lessons.

In March 1,500 hospital staff working for the North Cumbria Acute Hospitals NHS Trust, from clerical officers, catering assistants to domestic sewing machine assistants, porters and telephonists, succeeded in equal pay claims dating back 14 years. They are expected to receive back pay in the region of £300 million. This pay claim is likely to trigger claims by other NHS workers in Trusts around the country.

In the same month the Court of Appeal gave judgment in favour of 2,000 prison service workers who brought equal pay claims.

More recently, in May, the Court of Appeal decided that a central feature of the Equal Pay Act, the need to identify a comparator, will no longer apply to maternity related claims. This is a hugely significant change to discrimination law and it will make it significantly easier for lower paid women to bring challenges against maternity related discrimination.

Widely publicised and successful claims are likely to inspire claims in many organisations. Accordingly, it is important for all employers to review their pay systems.

Time limits

Unlike other employment claims, time limits in equal pay claims are more generous. The Equal Pay Act applies from the first day of employment regardless of the number of hours worked per week and applies equally to men and women. The employee must bring their claim either during their employment, or within 6 months of leaving. Employees can claim up to 6 years back pay. In the Cumbria case, claims were lodged in 1997, but took until 2005 to be finalised, therefore up to 14 years back pay could be claimed.

The pay gap

In 1970, when the Equal Pay Act was introduced, the pay gap between the hourly rate of pay of women and men working full time was 36%. 30 years later, the gap remains at 18%. The gap is even larger for women who work part time at 40%.



▶ cover story / continued

How unequal pay arises

Ensuring that there is equal pay for work of equal value is an issue that many employers struggle to implement. But recognising where inequalities can arise is an important step in preventing problems in the first place. An equal value claim can arise in jobs where the demands of the job are the same even though the jobs are different.

There are various points in pay systems, common to small and large organisations, where pay discrepancies often appear:

- Where there is an element of negotiation over starting salaries women often end up worse off than men starting the same job and this discrepancy tends to stay with them as they progress.
- Progression. Often women tend to be bunched at the bottom of a pay scale, usually having gone on maternity leave and returned at the same level, whilst male counterparts have progressed upwards.
- Working part time. Part timers earn considerably less than (usually male) full time workers and the wage gap usually widens each year.

A change of approach?

The government is confident that the Agenda for Change initiative will resolve pay anomalies in the NHS. However, employment lawyers wonder whether a change to the pay system, without a change in culture, will suffice.

Transparent pay systems and regular reviews can help create a happy workplace, and importantly can protect an employer from costly and lengthy equal pay claims. ■

Clare Hockney is a partner in Tobins Solicitors LLP and a solicitor for the Equal Opportunities Commission. Clare is a leading authority on discrimination issues, particularly equal pay claims. She has been involved in the following leading cases on equal pay: *Alabaster v Woolwich PLC* (now Barclays Bank PLC) and *Secretary of State for Work and Pensions, Barton v Investec Henderson Croswaile Securities Ltd, Allonby v Accrington and Rossendale College and Others, DEFRA v Robertson and Bailey v The Home Office*.

Tax and making the most of settlement payments

The taxation of settlement payments made on the termination of employment causes many practical difficulties. **Gary Tobin** explains the position and some of the misconceptions.

Employers and employees may agree to terminate a contract of contract either in line with the contract or in breach of the contract. The tax implications are different in each case and will matter particularly to highly paid employees.

Taxable payments

“Earnings” are taxable. Earnings include bonuses, accrued holiday pay, adjustments for wrongly deducted salary and salary to the end of the notice period. Taxable payments normally attract National Insurance Contributions (NICs).

Most benefits under the employment contract are taxable, e.g. the company car. If the employer writes off an outstanding loan to the employee then this is a taxable benefit.

Sickness payments are usually taxable (because they are inevitably funded by the employer). Where a contract is terminated because of the employee’s disability then any payments will not attract tax if the disability is the sole reason for the termination.

Termination payments that include payment

out of pension funds are complex and require specialist tax planning to achieve their aims.

Garden leave and restrictive covenants

If the employer requires the employee to take “garden leave” (i.e. the employee stays at home until the contract ends) then salary for the relevant period is taxable as the contract continues.

Often, in exchange for additional payment or other benefit, employees sign restrictive covenants on the termination of employment (e.g. precluding approaching clients of the employer).

Where on termination an employer pays an additional sum to an employee to affirm an existing covenant this will not be taxable. Otherwise, even if the covenant proves to be unenforceable the Inland Revenue may treat the payment as taxable. Failure to identify this payment or benefit separately in the settlement agreement could make the whole payment taxable, even hitherto exempt elements.

Informing and consulting

New regulations on informing and consulting employees came into force on 6 April 2005.

Paul Grendon explains some of the implications.

The aim of the Information and Consultation of Employees Regulations 2004 is to establish a framework of minimum standards for information and consultation. The Regulations apply from 6 April 2005 to all undertakings with 150 or more employees. They will apply to undertakings with 100 or more employees by April 2007 and to those with 50 or more employees by April 2008.



The £30,000 exemption

There is a common misconception that the first £30,000 of any settlement payment is tax free. This is not accurate. Some termination payments will be taxable in full, some payments will be taxable only if they exceed £30,000 and some payments will be tax free.

Any payment made or benefit conferred on an employee over £30,000 is taxable. Payments above this threshold are not subject to NICs.

To qualify for this exemption the payment must be made because of the termination not as a result of the employment. The most common examples are redundancy payments, payments to compensate someone for loss of employment or a payment made in settlement of a breach of contract claim. An individual may claim only one £30,000 exemption even if the qualifying payments are made in different tax years.

Payments in lieu of notice

The Inland Revenue will deem taxable any payment in respect of any notice period (under either the contract or the statutory 12 weeks maximum) except where the employer unilaterally and summarily dismisses the employee and pays compensation for a breach of contract.

Courts (and the Inland Revenue) will look back to see what the employment contract envisaged the employee would have been entitled to receive on the termination of

employment. Obviously when they agreed the contract the employee wanted to be provided with security of employment or earnings so a long notice period may have been agreed. This will restrict the room for manoeuvre in making the termination payment more tax efficient.

Damages and awards by tribunals

In the case of *Orthet Limited v Vince-Cain* the Court of Appeal found that an award of less than £30,000 for injured feelings in a sex discrimination case was not taxable and therefore did not need to be grossed up with the rest of the award to take into account any tax consequences. By implication, any injured feelings award over £30,000 (rare) would be taxable to the extent that it exceeded £30,000.

Vince-Cain also raises wider issues concerning the treatment of compensation by courts and tribunals. Loss of earnings are calculated on a net basis. However, the Inland Revenue is not bound by any decision of a court or tribunal in respect of the tax treatment of any compensation awarded. Consequently, the Inland Revenue may assess the award for tax which could leave the claimant looking to the

employer to make good any shortfall. As in *Vince-Cain* employment tribunals are increasingly willing to leave the door open to claimants to re-open cases in these circumstances. This suggests that the taxation implication on large awards should always be rigorously assessed to stop protracted litigation. ■

Gary Tobin is a partner in Tobins Solicitors LLP and was the solicitor for the successful side in *Orthet Limited v Vince Cain* at the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal.

Outline

The general outline of the Regulations is as follows.

- No action is required by the employer unless a formal request is received or management itself takes the initiative
- The formal procedure is triggered by a request to initiate negotiations to reach a settlement
- In the event of no agreement being reached certain “standard” provisions will apply forcing the employer to inform and consult

the workforce.

- A pre-existing agreement may block a formal request
- Disputes will be resolved by the Central Arbitration Committee (CAC)

Existing agreements

Employers may already have a pre-existing collective agreement, for example with a trade union. However it is still possible for a formal request to be made. This request requires the support of just 10% of the workforce.

In those circumstances the employer may ballot the workforce to determine if they endorse the request, instead of negotiating an agreement. The ballot will be at the employer’s expense.

This begs the question of whether the existing agreement meets the requirements set out in the Regulations. If it does then this will clearly lessen the likelihood of a formal request.

The requirements for pre-existing agreements

continued overleaf ►

Forthcoming legislation in the Queen's Speech

The government indicated on 17 May 2005 that the new session of Parliament will see 45 new Bills introduced and debated. A number of proposed Bills are of particular relevance to employment law.

Asylum and immigration This will introduce penalties for employers of illegal workers, and introduce an offence of knowingly employing an illegal worker.

Company law This will provide clarity on the duties of company directors.

Corporate manslaughter A new offence of corporate manslaughter will be created and a



wider range of senior management conduct will be taken into account when prosecuting organisations.

Equality This revives the bill introduced in the last session. It provides for the establishment of single body, the Commission for Equality and Human Rights, covering all areas of discrimination.

Parental rights Paid maternity leave will increase to 9 months, mothers will be given the right to transfer paid leave to the father, and the right to request flexible working will be extended. ■

► Informing and consulting / continued

are that they must;

- be in writing
- cover all the employees in the undertaking (including senior managers)
- set out how the employer is to give information to employees or their representatives and to seek their views on such information
- have been approved by the employees

Are the correct issues covered in the current agreement?

Employers should also give consideration to what issues are currently covered in the agreement. The "standard" provisions refer to information on;

- "the recent and probable development of the undertaking's activities and economic situation"
- "the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking"
- "decisions likely to lead to substantial changes in work organisation or in contractual relations"

It is therefore sensible to review any existing agreement in order to ensure that these issues are incorporated, if they are not already. This will help prevent a request from the workforce for new arrangements.

Final thoughts

The Regulations are not straightforward. They offer employees and their representatives the opportunity to challenge even pre-existing agreements. Bear in mind that the CAC has recently stated in its own guidance on the Regulations that there are 14 different applications or complaints that can be made to it. It is therefore important for employers to address the issues raised by the new Regulations sooner rather than later, despite what seems to be a generous timescale for smaller employers. ■

Paul Grendon is a partner with Tobins Solicitors LLP



Lesley Turner, Gary Tobin, Clare Hockney and Paul Grendon

About us

Tobins Solicitors LLP is a new law firm specialising exclusively in employment law.

Our experienced team provide clear, concise and cost effective advice across the full range of issues dealt with by human resource professionals. We also act on behalf of

senior employees. Our aim is to provide a high quality service whilst still being friendly and approachable.

If you would like to receive further updates from us, please contact us through our website.

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