



XpertHR Podcast

Original XpertHR podcast: 22 April 2016

Susie Munro: Hello and welcome to this week's XpertHR podcast with me, Susie Munro. Today I'm joined by Laurie Anstis, who's Director at Boyes Turner. Laurie is an employment law specialist and a regular contributor to XpertHR. Hi Laurie. Thanks for joining us.

Laurie Anstis: Hi Susie.

Susie Munro: So this week we're going to be looking at employment law developments in the public sector specifically. The Conservative Government has put forward a number of proposals that will affect HR professionals working in the public sector. Some of these proposals are expected to come in soon and others are still at a very early stage of consultation, so we're going to be looking at some of the developments that are on the cards.

So Laurie, can you briefly set out what we're going to be covering? [0:00:552.4]

Laurie Anstis: Well first of all we're going to look at something that I think many people will have heard of, which is changes in the law specifically as it applies to public-sector exit payment, some of that due to come into force in April 2016. Once we've dealt with that we're going to have a look at some of the provisions of the Trade Union Bill because there are items there that apply specifically to the public sector.

And after that we're going to just have a brief look at some of the things that may come into force in the future. We're going to look at the new public-sector English or Welsh language requirements. We're going to look at potentially some changes to the use of consultants and the tax treatments of consultants in the public sector, and also some Government plans for what they call 'closed recruitment' – that's where jobs are advertised internally only, rather than being advertised externally as well as internally.

Susie Munro: Okay. So if we start off with exit payments. So there are a number of different proposals about exit payments paid to employees in the public sector at the moment, and the first one that we're expecting to come into force is the duty to repay exit payments. Can you tell us about that first of all? [0:02:00.0]

Laurie Anstis: The whole public-sector exit payments seems to be the subject of a lot of legislation from the Government at the moment, and it's coming in really in three different slices.

So first I'm going to talk about what seems to be coming in first, and that is all about repayment of public-sector exit payments, the concept being that if you've received a redundancy payment from one part of the public sector and you go on to re-join another part of the public sector within twelve months, you have to pay back part of that redundancy payment. And the detail of this is all contained in the Repayment of Public Sector Exit Payments Regulations 2016, which are due to come into force sometime in April 2016.

And the detail of this is going to be quite important, I think, for people in the public sector, and it imposes obligations both on those who pay exit payments and on

those who might end up taking on an employee who's received one of these public-sector exit payments.

So if I can start off with what happens when the old employer decides to make an exit payment or a redundancy payment for somebody. Well where they make what's called a 'qualifying exit payment', they need to keep a record of the payment that they've made and include details about such things as the name, the date of the payment, the individual's age, length of service and so on, and they need to keep the record of that payment for three years.

So the first thing I'd say to organisations affected by this is that you have to have some sort of record-keeping process in place that will allow you to keep and retain these records for three years.

The employee themselves, if they have received one of these qualifying exit payments and re-join the public sector – and that can be either as a direct employee or as some kind of consultant – has an obligation to tell their new employer that they've received the exit payment. So the original paying employer has to keep records of the payments that they've paid, and the individual who's received the payment must tell their new employer that they've received the exit payment.

Susie Munro: And then the duty kicks in if they return to any part of the public sector within a year of receiving that payment, is that right? [0:04:15.4]

Laurie Anstis: That's right. And the new employer cannot take on this employee unless they're satisfied that part of the exit payment has been paid back to the former employer and there's a formula that says how much has to be paid back. Essentially it's a kind of sliding scale depending on how long it was since the person left. And the new employer has to make sure either that that appropriate amount of the payment has been paid back to the former employer or that the individual has made arrangements for paying it back. It seems to be that there's an idea that maybe people will make agreements to pay this back in stages.

One of the things that is going to be very important, though, is identifying what actually counts as being a qualifying exit payment, and it's only people who earn more than £80,000 a year who will be subject to these qualifying exit payments. That was going to be over £100,000 a year but the Government have recently changed it to make it apply to people who earn more than £80,000. So those are the people who are going to be affected by these new regulations and those are the people for whom the records are going to have to be kept.

Susie Munro: So you've been talking mainly about redundancy payments. What other kind of payments would be included in the amount that has to be paid back? [0:05:28.8]

Laurie Anstis: Well it's not just redundancy payments. Redundancy payments are typically the area where this is going to apply, but it's going to apply to payments made for redundancy in the strict, statutory sense, payments for voluntary redundancy, payments of the balance of a fixed-term contract, payments generally made under a settlement agreement.

But there are some exceptions. It doesn't apply to payments made, for instance, as a result of ill health or some kind of injury, and it doesn't apply to payments in lieu of notice.

Susie Munro: And there's one particular issue about payments that are made to somebody who's retired early. They might have had a payment so that they don't have a reduced pension on early retirement. But there's a potential issue that that payment would be paid possibly partly to the pension fund rather than to the individual. You could have a situation where somebody's being asked to repay something that hasn't actually been paid to them directly – it was paid to the pension fund instead. [0:06:28.6]

Laurie Anstis: That's right, because certain payments made to a pension on early retirement are going to be caught by this as well, and I know that's a particular concern within local government, where their pension scheme rules mean that it's quite likely that those kind of payments will be made. And you're right – that's the kind of thing that could be subject to this repayment, even though it's not gone directly to the employee concerned.

Susie Munro: So we haven't actually got the final regulations on this yet, have we? [0:06:54.6]

Laurie Anstis: That's right, and I know there's still some controversy over exactly how that's going to work. The Government have said they expect these regulations to come into force in April 2016, so clearly if they're going to keep to their timetable they've not got long to make any changes. But that is the kind of thing that we may see changing in some way right at the last minute.

Susie Munro: So moving onto the next bit, still about exit payments. Can you tell us a bit about the cap that's proposed on the amount of any exit payment? [0:07:22.2]

Laurie Anstis: This is a completely separate piece of legislation. It's the Public Sector Exit Payment Regulations, and what this does is it imposes an overall cap of £95,000 on the amount of an exit payment that can be made. This doesn't come into force in April. It's supposed to come into force in autumn 2016. I do like it when these kind of things seem to be governed by the seasons. It's a bit like, 'When the harvest is gathered in and the leaves have fallen from the trees, then we will put in place this particular overall cap on exit payments.' In fact, the regulations say that they won't be in force before 1st October, so I guess really what we're looking at here is sometime in October and November, and essentially saying that a public-sector body can't make an exit payment of more than £95,000 for one employee.

There are some exceptions and some, in fact, overall get-outs but they tend to require things like ministerial approval so probably not likely to apply in most cases.

Susie Munro: And that will cover the same kind of payments that the repayment duty will apply to, will it? [0:08:29.8]

Laurie Anstis: Yes. It's the same kind of payment, although oddly enough it's not identical. So for instance, payments in lieu of notice go towards this £95,000 but they don't count towards the repayment provisions and I think that's going to be one of the headaches for people dealing with this, which is that although these three different sets of reforms are coming in, they don't necessarily use the same kind of terminology or mechanisms as each other, and that's going to make it quite difficult for people to know exactly where they stand on each of these three different phases of reform.

Susie Munro: So you mentioned three different phases. Can we just move onto the third one? This is another consultation entirely. So something completely different, is it? [0:09:08.0]

Laurie Anstis: Yes, that's right. There's a third level of consultation, which is really about exactly how the public-sector exit payments – or specifically in this case redundancy payments – are calculated. Different practices have grown up in different areas of the public sector about how redundancy payments are to be calculated and what the Government is proposing is that there ought to be simply one scheme for calculating redundancy payments. This is currently out for consultation and the consultation's going to close at the start of May this year, but at the moment the Government is proposing that public-sector redundancy pay should be set at a maximum of three weeks' pay for each year of service, that the maximum amount paid (again, subject to the overall £95,000 cap) should be fifteen months' money, and that the maximum salary level that should count for this is £80,000.

So what we have here is something that comes on top of all the other changes and effectively governs the way in which public-sector redundancy payments are calculated.

There is no set time for implementation of this. The consultation closes this May and I suspect we'll be looking into next year before the Government take any steps on that.

Susie Munro:

So there's a lot for people to get their heads around just relating to exit payments and some of it is expected to come in very soon.

So shall we move onto trade unions? The Trade Union Bill, which is currently going through Parliament – there are aspects of that which will affect the public sector in particular, so do you want to tell us about that? [0:10:38.0]

Laurie Anstis:

I'd like to start, Susie, on the question of industrial action. I think it's fairly well known that the Trade Union Bill made some changes to the balloting arrangements and balloting thresholds around industrial action, the general idea being that for any industrial action you will need a majority of people who vote, voting in favour, but also that you will need a turn-out of 50%. So to take a simple example, if you've got 100 employees entitled to vote and 50 of them vote, well that's enough. That means the 50% turn-out threshold, 26 vote in favour of industrial action, well that's sufficient to get a majority and that's going to be the general rule.

But there's also going to be an additional requirement in what's called 'important public services' and again this will affect the public sector. Important public services are health services, education for people aged under 17, fire services, and there are various other requirements around transport and border security. And in those cases there's supposed to be a 40% requirement, so that means that at least 40% of those eligible to vote must be in favour of the industrial action before it can take place.

So in the example I've just given, having 26 employees vote in favour of industrial action won't be enough. You'll need at least 40 to vote in favour before the industrial action can go ahead. And that's going to be quite a significant change in those particular fields of employment, particularly health and education.

Susie Munro:

How much of a practical impact do you think that would have, requiring the 40%? Are those kind of numbers that ballots are reaching at the moment or do you think there'll be less strike action? [0:12:17.7]

Laurie Anstis:

I think it will have a practical effect, yes. This has really been brought in by the Government to deal with cases that they see where, although there's a majority in favour, it appears that a lot of people just simply didn't bother to vote. And of course one of the things we may see with this is that once people know that there's this additional requirement, they will turn out to vote in greater numbers, that it won't be enough just to sit back and let others get on and do the voting.

One point that has been controversial on this is that at the moment strike ballots typically have to take place in a very old-fashioned way, through postal voting and so on. The unions, I know, are very keen to bring things up-to-date and make it easier for people to vote through electronic means, and I know certainly the unions have a concern that at the moment the fairly cumbersome method of voting simply puts people off voting in the first place.

Susie Munro:

Yes, because it's all got to be done by post, which people aren't generally used to doing anymore.

So moving on, what other aspects of the Trade Union Bill are of particular interest to the public sector? [0:13:17.9]

Laurie Anstis:

Well there are a couple of things. The first is around what's called 'facility time' and this is essentially paid time off work granted by some organisations to trade union

officials to carry out trade union duties, and this is something that is seen at least to some extent within public-sector bodies.

The Government's really looking at this in two ways. The first thing they're doing through the Trade Union Bill is requiring organisations that grant facility time (so in other words public-sector employers in this case) to publish details of the facility time that they give to trade union representatives, and there's a set amount of details that needs to be set out in this.

The Government seemed to think that having this kind of transparency will encourage good practice in the use and granting of facility time, but they've also got a back-up provision that they can bring into force if they want to, that will put statutory limits on the amount of facility time that can be granted, so in other words the amount of paid time off that people can take for trade union duties.

Susie Munro: So that's just something that they could bring in in the future? There's no immediate plans to actually limit the amount of facility time? [0:14:25.0]

Laurie Anstis: That's right. Their idea is that when people have to publicise it and when people get to know about it, that of itself will act as some kind of limit on the amount of facility time that is granted.

The other thing that we're going to have, and that has only recently been introduced into the Trade Union Bill, is a prohibition on what's called 'check-off arrangements' in the public sector. A check-off is essentially where union subscriptions are taken off at source by the payroll and the Government are now seeking to abolish that, meaning that public-sector organisations won't be able to collect trade union subscriptions through the payroll.

Susie Munro: Those two things – the facility time and the check-off – is that something that public-sector employers have actually been asking for action on that, do you think, or has this come more from Government in the context of their relationships with the unions, rather than something that is necessarily going to be very helpful for public-sector employers? I'm just thinking that with check-off in particular, it could be quite useful to have union fees paid through the payroll, because then you know what proportion of your staff are actually in the union. [0:15:29.9]

Laurie Anstis: Yes, that's right. Certainly on check-off I'm not aware of there being a great clamour to abolish it and anybody with a payroll these days is used to taking off money for all kinds of things – charitable donations, attachment of earnings and so on. So I'm not sure that's really a great burden on employers. Clearly whenever you're dealing with the rights of trade unions, you're always dealing with something that is intensely political and where people will have different views depending on which part of the political spectrum they come from.

Susie Munro: Do you think there is any chance that there might be some kind of legal challenge from the unions, say under human rights legislation? [0:16:08.1]

Laurie Anstis: I think there are a couple of things with the Trade Union Bill, Susie. As you said, it's still going through Parliament and the Government's not having it all its own way so far as that's concerned. There have certainly been some amendments introduced in the House of Lords and it may be that the Government themselves have to make some more concessions as time goes by. But if this is implemented then yes, I'm sure we will have trade unions immediately making challenges, saying that the restrictions that the bill contains are simply not compatible with Article 11 of the European Convention on Human Rights, which gives people the right to join trade unions in order to protect their interests. And I'm sure we'll see it working through its courts as to how far these kinds of restrictions do infringe on the special protection that's given to people and to trade unions under the European Convention on Human Rights.

- Susie Munro: Okay, so moving onto language requirements. Can you tell us about this? This is still at the consultation stage, but this relates to staff in the public sector having fluency in English or Welsh. [0:17:09.6]
- Laurie Anstis: Yes, that's right. The Immigration Bill is currently going through Parliament and that contains provision for there to be a Code of Practice on English or, as you say, in Wales Welsh-speaking by what's called 'customer-facing' public-sector workers. The Government have put out a Code of Practice for consultation and the consultation's closed and the Government is, I think, at the moment in the course of revising some of the detail of that Code of Practice. Some people have said that really this doesn't make very much difference because as a general rule public-sector organisations were keen to ensure that people who are on their front line were able to speak English or Welsh fluently.
- There are a couple of things, though, that I think will be significant. Organisations are supposed to set up particular forms of complaints procedure to deal with complaints from the public about the standard of spoken English or Welsh and I think that's something that organisations are going to have to pay attention to. I do have some concerns about how this is going to work in atypical cases, for instance people who have a disability that means that they can't speak English particularly well. I think there may also be some concerns about what happens where people are employed specifically with a remit to speak in another language, so for example outreach workers and so on, as to how this might affect them. So maybe not a major issue for the majority of employees or for standard occupations, but I can see this causing some difficulties around the edges of those occupations.
- Susie Munro: And we're expecting the issues like that to be dealt with in the Code of Practice rather than legislation? [0:18:45.0]
- Laurie Anstis: That's right. This is all about the Code of Practice and there is this increasing trend that we've seen for years and years and years really, of less being spelt out actually in legislation and more being dealt with in statutory instruments or Codes of Practice.
- Susie Munro: If we deal very quickly with this question about the rules relating to IR35, the intermediaries legislation in the public sector. If you could just give us a very brief explanation of what's proposed there. [0:19:10.7]
- Laurie Anstis: Well it was announced in the budget that as from April 2016 the IR35 (those are the rules relating to employment of people via intermediaries) will change slightly in the public sector.
- What we're talking about here is the situation where the public sector might engage a consultant through their own limited company. It's become quite a common arrangement these days that rather than having a consultancy contract with Joe Blogs, you have a consultancy contract with Joe Blogs Ltd., and Joe Blogs works for Joe Blogs Ltd.
- What's going to happen when this change comes in is that the public-sector body that engages with Joe Blogs Ltd. is going to be responsible for making sure that the correct tax is paid. We don't have full details of exactly how that's going to work, but it certainly, I think, will be a disincentive to organisations which adopt that kind of arrangement and engage consultants through their own 'personal service companies'. At the very least it's going to make the paperwork more difficult.
- Susie Munro: Okay, and finally the last thing that we were going to cover is closed recruitment. So the Government is asking for evidence on this at the moment to see if it is an area of concern in the public sector. [0:20:20.7]
- Laurie Anstis: The Government has raised the question of closed recruitment and at the moment they've just put out, as you say, this call of evidence, and the call for evidence is really to see if there is actually a problem. I know there are many different schools

of thought on whether it's a good idea or not to have jobs that are advertised internally only. At one point I think that was more or less encouraged, particularly with a view to increasing diversity and allowing people to move up the ranks, but the Government seemed to have a concern that it might lead to what is effectively the same categories or classes of people ending up being appointed to the jobs. I think one example they may have given at the time was tube drivers. I think they said that tube train drivers were typically recruited internally and that they were concerned that that limited opportunities to take on that particular career. We don't know yet whether the Government's going to do anything about that, but it's certainly an area that they're looking at.

Susie Munro:

Right, so that's still very early stages. Okay, well thanks very much Laurie for taking us through all of that. There is a lot to look out for in the coming months. On XpertHR we've got sector-specific areas of the site for local authorities and for employers in the NHS, and these and other areas of the site will be kept up-to-date as these proposals progress.

So thanks again for joining us, Laurie. That's all for this week. Thanks for listening and join us again next Friday for the next XpertHR podcast.