EMPLOYMENT BULLETIN

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SLAUGHTER AND MAY HIGHLY COMMENDED AT THE INTERNATIONAL EMPLOYMENT LAWYER AWARDS

Our Employment and Incentives team were Highly Commended at the inaugural International Employment Lawyer Awards on 15 November 2023. The team were accredited in two categories: Executive Compensation Team of the Year and Transactional Team of the Year, recognising the breadth of our practice. These awards recognise the very best private practice and in-house teams from around the globe.

CHANGES TO TUPE AND TO THE WORKING TIME REGULATIONS

Following consultation earlier this year, the Government has published draft regulations to extend the ability of employers to consult directly with employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and to make changes to provisions on annual leave and employer records in the Working Time Regulations 1998.

TUPE: consulting directly with employees

Under Regulation 13A of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), businesses with fewer than 10 employees may inform and consult affected employees directly in circumstances where there are no existing appropriate representatives. Larger businesses cannot consult employees directly where they do not have employee representatives in place; instead, there is a requirement to elect new employee representatives. The Government is amending Regulation 13A, for TUPE transfers that take place on or after 1 July 2024, so that it applies to businesses employing fewer than 50 employees or where there are fewer than 10 transferring employees (regardless of the size of the employer). Direct consultation with employees will be allowed only if no existing employee representatives are in place. If employee representatives are already in place, then the employer will still be required to consult with them.

In its response to consultation, the Government also makes some general points about its approach to TUPE:

- The Government has no plans to allow employers to make changes to employees' terms and conditions following a transfer other than for economic, technical or organisational (ETO) reasons. (Dismissal of an employee, before or after a transfer, where the sole or principal reason is an ETO reason, will be potentially fair, subject to the normal legal requirements of fairness under the Employment Rights Act 1996. If there is not an ETO reason, it is sensible to assume that the dismissal will be automatically unfair.) The Government believes that the existing ETO reasons strike a careful balance between allowing employers to make changes to terms and conditions where necessary and protecting the rights of transferring employees.

- The Government is aware of the implications of *ISS Facility Services v Govaerts*, the decision of the Court of Justice of the EU that an individual's employment contract could be transferred to each of the transferees in proportion to the tasks performed, later confirmed by *McTear Contracts Ltd v Bennett* as applying to UK law (please see our *Employment Bulletin March 2021*). The Government is continuing to monitor the issues raised and will consider whether any action is required in the future.

- Given the current lack of clarity around the application of TUPE to workers, the Government says it will monitor the case law on this issue and take "any action required" to address it.

Working Time Regulations: annual leave and record keeping

The Government is making a number of amendments to the Working Time Regulations 1998 (WTR), with effect from leave years beginning on or after 1 April 2024. As with the TUPE changes described above, the proposals were set out in a consultation paper earlier this year. However, one of those proposals is not being taken forward. The Government has decided not to merge the basic (four weeks) and additional (1.6 weeks) statutory annual leave into a single entitlement; it will maintain the two existing rates of holiday pay so that workers continue to receive four weeks at normal pay and 1.6 weeks at their basic rate of pay. This is despite the Supreme Court saying in the recent *Agnew* decision that holiday should be regarded as from one composite pot rather than split between the basic and additional leave (please see our *Employment Bulletin October 2023*). However, the response notes that the Government will consider this issue as part of "*more fundamental reforms to the rate of holiday pay*".

Key amendments to the WTR are:

- **Record keeping:** Employers must keep records which are adequate to show whether the employer has complied with the limits and requirements on maximum working time and night work, but the records can be *"in such manner and format as the employer reasonably thinks fit"* and an employer need not record each worker's daily working hours if the employer is able to demonstrate compliance without doing so. The intention is to remove the effect of a decision of the European Court that it was thought imposed obligations on employers to record daily working time.

- **Irregular hours workers:** The amendments clarify the amount of paid annual leave to which irregular hours workers (those whose contractual hours are "*wholly or mostly variable*") and part-year workers are entitled. These annual leave entitlements will be able to be paid by way of an uplift to the worker's pay at the time of accrual, rather than by paying the holiday pay in the period that the leave is taken. This practice ("rolled-up holiday pay") had been ruled unlawful by a 2006 European Court case which required holiday pay to be paid at the time leave was taken. The Government has introduced an accrual method to calculate annual leave entitlement at 12.07% of hours worked in a pay period, rather than using a 52-week holiday entitlement reference period as proposed in the consultation. This will override the Supreme Court's decision in *Harpur Trust v Brazel* that a permanent part-year worker was entitled to 5.6 weeks' holiday and her entitlement should not have been pro-rated to reflect actual hours of work, even though this meant that she was entitled to proportionately more holiday than other workers.

- **Annual leave:** The Government has taken the opportunity to define some key concepts, reflecting the substantial case law on annual leave. The draft regulations set out when a worker can **carry forward** leave, due to sickness, family leave, or because they have not been able to take it due to the employer's failure to recognise the right to leave, provide a reasonable opportunity to take it, or tell the worker about loss of unused leave at the end of the year.

A week's pay, for normal pay for the statutory four weeks' leave, includes:

  - Payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract.
  - Payments for professional or personal status relating to length of service, seniority or professional qualifications.
  - Other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date.

- Covid carry over: With effect from 1 January 2024, workers will no longer be able to accrue Covid carry-over leave (of the four weeks statutory leave). Workers will however still be able to use all the Covid carry-over leave they accrued prior to 1 January 2024, provided they do so on or before 31 March 2024.

BONUS CLAWBACK PROVISION WAS NOT A RESTRAINT OF TRADE

Summary: The High Court found that bonus clawback provisions in an employment contract, which were not subject to any non-compete requirement, did not operate as an unreasonable restraint of trade and were therefore enforceable by the employer (*Steel v Spencer Road LLP*).

Key practice point: This decision provides some reassurance to employers about the validity of clauses which require forfeiture or repayment of a bonus or other incentive where an employee leaves employment. However, the effect of the clawback provision in this case was simply to prevent payments where the employee was no longer employed by the company; it served as a disincentive to resign but it did not amount to a requirement not to compete. A provision that takes away a benefit if the employee competes after the end of their employment would be seen as a restraint of trade and may therefore be unenforceable if unreasonable; it restricts the employee's freedom to choose a potential new employer. The doctrine of restraint of trade continues to be considered in new contexts, so we can expect to see more cases focussing on arrangements that act as a disincentive to resign and that could be construed as potential restraints of trade. The High Court left this argument open for future cases. In addition, the decision is a reminder that clawback provisions which are triggered by a breach of contract by the employee may be unenforceable penalty clauses; this is not the case where the trigger is the employee leaving employment without any breach of contract.

Facts: Under the terms of his 2015 employment contract, the claimant's remuneration was a basic annual salary plus a discretionary bonus scheme. The bonus was conditional on him remaining in employment for three months from the date of payment and on not giving or being given notice to terminate his employment during that period. There was no guarantee that a bonus would be paid but he received substantial bonuses in every year from 2016 to 2021. In January 2022 he was paid a bonus of £187,500, an amount almost three times his basic salary at the time. After he resigned a month later, his employer asked him to repay the bonus in accordance with the clawback provisions. When he refused to do so, the employer served a statutory demand for repayment. The claimant applied to the Insolvency and Companies Court to have the demand set aside, arguing that the clawback provisions operated as an unreasonable restraint of trade and were therefore unenforceable. His application was dismissed and he appealed to the High Court.

Decision: The High Court rejected the claimant's appeal, deciding to follow the decision in *Tullett Prebon plc v BGC Brokers LP*, the only case directly on point. In *Tullett Prebon*, the High Court had found that provisions requiring employees to repay signing-on payments and loyalty bonuses if they resigned within a certain period were not in restraint of trade because they did not restrict the employees' activities post-employment. The High Court agreed

with the analysis in *Tullett Prebon* that while there was no doubt that a bonus scheme which was conditional on the employee remaining in employment for a specified period of time operated as a disincentive to resign, that did not turn it into a restraint of trade. The employment contract did not impose any restriction on where he might work after he left employment.

The High Court also said that its decision on the effect of the clawback provisions was not affected by the fact that there were other restrictions in the contract: a three month notice period, which (when combined with the requirement to remain employed and not to be serving a period of notice for three months from the date of payment of any bonus) would mean that he would have to remain an employee for approximately six months after payment in order to retain the bonus, as well as post-termination restrictive covenants which included a 13-week restriction on working for a competitor.

Analysis/commentary: We are still waiting to hear what the Government has in mind in terms of its proposed limits on non-compete clauses, after the announcement earlier this year that it will legislate to apply a statutory limit of three months to non-compete clauses. Please see our *Employment Bulletin May 2023* for more details. The Government said that the proposed legislation will not affect the ability of employers to use notice periods or gardening leave, or to use non-solicitation or confidentiality clauses, nor will it extend to non-compete clauses in workplace contracts such as shareholder agreements, but there was no mention of clawback.

NEW EMPLOYER DUTY TO TAKE REASONABLE STEPS TO PREVENT SEXUAL HARASSMENT

The Worker Protection (Amendment of Equality Act 2010) Act 2023, which introduces a duty on employers to take reasonable steps to prevent sexual harassment of employees in the course of their employment, received Royal Assent on 26 October 2023. The main provisions will come into force one year from Royal Assent. As originally drafted, the Bill included a clause imposing liability on employers for harassment by third parties. However, amendments during the Bill's passage through Parliament removed this provision, as well as amending the duty to take steps to prevent sexual harassment so that employers will be required to take "reasonable steps", rather than "all reasonable steps". The Labour Party has indicated that, if in Government, it would reverse these amendments.

Employers are already potentially liable for discrimination (including sexual harassment) by employees in the course of their employment, unless the employer can show they have taken all reasonable steps to prevent it, but the Act introduces a proactive duty to prevent sexual harassment.

The Equality and Human Rights Commission (EHRC) will publish a statutory code of practice on workplace harassment. The EHRC published technical guidance in 2020 and described it as a draft version of the statutory code (for the key points, please see our *Employment Bulletin February 2020*). When it becomes a statutory code, tribunals will be obliged to take it into account.

Standalone breaches of the employer duty will be enforced only by the EHRC; employment tribunals will not consider individual claims for a breach of the employer duty other than in cases where a claim of sexual harassment has been upheld. Where a tribunal finds that there has been sexual harassment and that the employer duty to take all reasonable steps to prevent sexual harassment has been breached, it will be able to order an uplift to the compensation, up to a limit of 25% of the amount awarded for the sexual harassment claim.

Analysis/commentary: The Act will come into force in October 2024. In the meantime, the EHRC's technical guidance provides suggested action points for employers. What constitutes reasonable steps will depend on the specific circumstances of the employer, for example size and sector. In most cases, the employer's practices and procedures (such as grievance and reporting procedures) for preventing and dealing with sexual harassment are likely to be relevant.

OPTION TAXABLE AS EMPLOYMENT-RELATED SECURITIES OPTION

Summary: The Supreme Court found that an option granted to a director was an employment-related securities option (ERSO) for the purposes of Section 471 of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA). The director was deemed under Section 471 to have acquired the securities option because of his employment as director and the option was therefore subject to income tax, rather than capital gains tax (*Vermilion Holdings Limited v HMRC*).

Key practice point: The decision confirms the general understanding that an award of shares or options should generally be taxed as income and that the assumption that any share option or award granted to an employee or director is "employment related" for tax purposes is interpreted broadly.

Facts: N owned and was a director of a company which provided corporate advisory services to Vermilion in 2006, in return for the grant of a share option. Vermilion was subsequently in financial difficulty and appointed N as a director to oversee performance and report to investors during a rescue funding exercise. As part of the refinancing of Vermilion, the 2006 option was replaced with a 2007 option on amended terms – including that N rather than his consultancy company would be the option holder. Vermilion had an indemnity from N for any tax consequences in the event of the exercise of the share option.

Section 471(1) of ITEPA defines an ERSO as where the right or opportunity to acquire the securities option is available "by reason of employment". Section 471(3) deems a securities option "made available" by the employer to have been made available "by reason of employment" (and therefore, unless certain limited circumstances apply, an ERSO). HMRC argued that the 2007 option was deemed an ERSO under Section 471(3) because it was granted by N's employer. The case made its way to the Court of Session, which decided that the option was not an ERSO. HMRC appealed.

Decision: The Supreme Court allowed HMRC's appeal. Lord Hodge noted that Section 471(1) is a causal test and can lead to difficult judgments and different assessments. The purpose of the deeming provision in Section 471(3) is to create a "bright line rule" to avoid difficult questions. It asks who conferred the right or opportunity, not the reason why the employer conferred it. If Section 471(3) applies, there is no need to consider Section 471(1); the purpose of the deeming provision is to avoid the decision-maker having to carry out the Section 471(1) assessment. Vermilion was N's employer at the time the option was made available to his nominee and Vermilion's reason for doing so was irrelevant when Section 471(3) applied. The 2006 option was cancelled - not varied - and Vermilion conferred a new option, over a different and new class of shares. In so doing Vermilion fell within the deeming provision.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023/24	• Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023, to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Implementation of the Strikes (Minimum Service Levels) Act 2023: minimum service levels on specified services
January 2024	Amendments to Equality Act 2010 to reinstate certain interpretive effects of EU law following the changes made by the EU Law (Revocation and Reform) Act 2023

April 2024	Amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours and to allow the use of rolled-up holiday pay for irregular hours workers
April 2024	Carer's Leave Act 2023 expected to come into force: entitlement to one week's unpaid leave per year for employees caring for a dependent with a long-term care
May 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Amendment of Regulation 13A TUPE to allow employers of fewer than 50 employees, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act to come into force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Statutory Code of Practice on Dismissal and Re-engagement • Economic Crime and Corporate Transparency Act 2023: offence of failure to prevent fraud • Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption

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

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes); *Lutz v Ryanair DAC* (EAT: whether a pilot was a worker and an agency worker and not a self-employed contractor)

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly

discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees

Industrial action: *Secretary of State for Business and Trade v Mercer* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

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