SLAUGHTER AND MAY

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Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

In this issue

NEW LAW:

Modern slavery statements: implementation confirmed and guidance issued ...more

CASES ROUND-UP:

No TUPE transfer where transferor remains the employer (jointly with others) ...more

Supreme Court gives guidance on penalties doctrine ...more

Unfair dismissal: proper approach to disparity of treatment ...more

Failure to investigate false allegation did not (unusually) give rise to a detriment ...more

POINTS IN PRACTICE:

Women on boards: Five year summary report ...more

Gender pay reporting: the latest ...more

CRD IV: EU Commission consults on remuneration requirements ...more

Government response to consultation on tackling intimidation of non-striking workers ...more

To access our Pensions Bulletin click here.
This weeks's contents include:

- The Watch List
- Banning member-borne commissions in auto-enrolment "qualifying schemes": DWP consultation
- Scope for increased VAT recovery: New HMRC bulletin
- Taxation of pensions consultation: Update
- Construction of indexation rule: Dutton v FDR Limited
- Pensions Regulator's research on trustee knowledge and understanding
- Pensions Law Update Seminar

Back issues can be accessed by clicking here. To search them by keyword, click on the search button to the left.

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For details of our work in the pensions and employment field click here.

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New law

Modern slavery statements: implementation confirmed and guidance published

The requirement in section 54 of the Modern Slavery Act 2015 (MSA 2015) for commercial organisations with a total turnover of not less than £36m to produce an annual slavery and human trafficking statement has now been implemented. The requirement will apply **in respect of financial years ending on or after 31st March 2016**.

The Home Office has also published its **guidance** Transparency in supply chains: a practical guide. The key points from the guidance are:

- The requirement to "*ensure that slavery and human trafficking is not taking part in any part of its supply chain*" does not mean that the organisation must guarantee that the entire supply chain is slavery free, but that the organisation should set out in the statement all the actions it has taken to ensure its supply chain and its business is free from slavery.
- The statement should be written in simple, succinct language, with links to relevant publications, documents or policies.
- The statement should include the following (the guidance gives further details of what companies should consider under each of these headings):
  - The organisation's structure, its business and its supply chains.
  - Its policies on slavery and human trafficking.
  - Its due diligence processes relating to slavery and human trafficking in its business and supply chains.
  - The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk.
  - Its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against key performance indicators as it considers appropriate.
  - The training about slavery and human trafficking available to its staff.
- The statement must be approved by the company's board of directors and signed by a director.
- The statement should be published via a link in a prominent place on the homepage of the organisation's website.

Advice for businesses: Businesses with a year-end of 31st March 2016 will be the first required to publish a statement. Those businesses must publish statements for the 2015-16 financial year, ideally (according to the guidance) **within six months of the year end** (i.e. by **30th September 2016**), and every financial year thereafter. Those businesses should consider the following actions:

- **Start identifying key risk areas** (whether they be geographic or sectoral) within their businesses and supply chains where slavery is a greater risk.
- **Consider the principles for a corporate anti-slavery and human trafficking policy**. The policy could, for example, establish minimum standards for pay and working conditions and describe the process for vetting new entrants into the supply chain.
- **Review contractual relationships** such that supplier contracts are required to include obligations to observe the organisation's anti-slavery and human trafficking policy, to provide training to staff and sub-contractors, and the

right to monitor, audit and receive reports on the supplier's anti-slavery policies and procedures.

- **Train staff** on the new corporate policy and contractual framework, and (where appropriate) how to spot the signs of human trafficking and slavery.

If you would like any assistance in any of these respects, please speak to your usual Slaughter and May contact.

Cases round-up

No TUPE transfer where transferor remains the employer (jointly with others)

There is no TUPE transfer where an employee is initially employed by the transferor, and after the transfer is employed jointly and severally by multiple entities (including the transferor), according to a recent decision of the EAT. Although there may be a TUPE transfer to multiple transferors, there can be no such transfer where there is no change of employer (*Hyde Housing Association Ltd v Layton*).

Restructuring of employment: L was originally employed by M, a registered provider of social housing. In January 2008, M became part of the Hyde Group, as a subsidiary of HHA. M remained L's employer, although payroll was operated by HHA. The Hyde Group subsequently restructured its services, and in July 2013 L was offered a new contract under which he would be jointly and severally employed by all members of the Hyde Group (including M). L objected to the terms of the contract, specifically the loss of a bonus. The restructure took effect on 1st August 2013, from which point he worked under protest. He was ultimately terminated and re-engaged on the new terms, and lodged an unfair dismissal claim.

TUPE transfer? A preliminary issue arose as to whether there had been a TUPE transfer on 1st August 2013. The Tribunal identified an economic entity (the restructured part of the planned maintenance team in which L was employed), which retained its identity. The Tribunal also found that there had been a transfer "to another person" (the members of the Hyde Group), as required by Regulation 3(1)(a) of TUPE, as it held that this did not require the transferee to be a single entity. The Tribunal therefore found that there had been a TUPE transfer.

Transfer to multiple entities: The EAT allowed HHA's appeal, substituting a finding that there had been no TUPE transfer. It agreed with the Tribunal that the words "to another person" in Regulation 3(1)(a) did not preclude a transfer to multiple transferees. The EAT did however note that the issue will necessarily be fact specific, and that the transfer must not result in such fragmentation of the entity as to mean it loses its identity.

...but must be a change of employer: However, the EAT went on to find that the wording of TUPE assumes a difference in identity between the transferor and the transferee. The case law on TUPE has also generally assumed that a change in the identity of the employer is necessary in order for a transfer to take place. This is why TUPE will not apply to a share sale, because the identity of the employer remains the same. The EAT found this approach to be consistent with the EU Acquired Rights Directive (ARD), from which TUPE is derived, as the ARD is intended to protect employees, but only in circumstances where there is a change of employer. Since on the facts of this case M remained L's employer after the transfer (albeit jointly with others), the EAT therefore concluded that there was no TUPE transfer in this case.

Significance for housing sector: It is relatively unusual for an employee to be jointly and severally employed by several different entities. That said, these arrangements are more common in the housing sector, where this case will therefore have greater significance.

Supreme Court gives guidance on penalties doctrine

The Supreme Court has found that clauses in a share purchase agreement (SPA) which imposed financial consequences on the breach of restrictive covenants were not unenforceable penalty clauses. The Court also gave useful guidance on the proper application of the penalties doctrine (*Cavendish Square Holding BV v Talal El Makdessi*).

SPA clauses: TM agreed to sell his controlling stake in a company to CSH. The contract provided that if TM were to breach certain restrictive covenants against competing activities, TM would not be entitled to receive the final two instalments of the purchase price from CSH (clause 5.1) and could be required to sell his remaining shares to CSH at a price excluding the value of the goodwill of the business (clause 5.6). TM subsequently breached the covenants, but argued that clauses 5.1 and 5.6 were unenforceable penalty clauses. The High Court rejected TM's claim but the Court of Appeal allowed his appeal, finding that the clauses were unenforceable under the penalties doctrine.

Penalties doctrine: The Supreme Court allowed CSH's appeal, substituting a finding that the penalties doctrine did not apply and the clauses were enforceable. The Court made some general comments on the penalties doctrine, finding that it has been misinterpreted in many previous cases. It noted that concepts of 'deterrence' and "genuine pre-estimate of loss" are unhelpful. The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. Importantly, that legitimate interest may extend beyond the recovery of damages, meaning that the sums attaching to a penalty clause may be greater than the sum available in damages without rendering it unenforceable.

No penalty on the facts: The Court found that clauses 5.1 and 5.6 were legitimate price adjustment clauses. CSH bought TM's business on the terms that TM would not undermine its value by being involved in a competing business. Those terms were fundamental to the commercial basis for the deal. CSH had a legitimate interest in reducing the price if he broke those terms, even if that cost TM more than CSH could have obtained in damages. CSH was therefore entitled to agree that if TM competed with the business, the price it would be prepared to pay would be smaller. The Court was satisfied that the parties were the best judges of how this should be reflected in their agreement.

Useful guidance: This case provides useful guidance on the scope of the penalties doctrine. The judgment is particularly useful in confirming that the penalties doctrine may not necessarily be breached even if the sums attaching to the breach are in excess of any loss which the innocent party could expect to suffer (as was the case here), provided that the innocent party has some other legitimate interest in the enforcement of the primary obligation.

Unfair dismissal: proper approach to disparity of treatment

An employee who punched a colleague at a corporate event was fairly dismissed for gross misconduct, according to a recent judgment of the EAT. His dismissal was not rendered unfair by the disparity in treatment of the colleague, who was given a final written warning for sending violent threatening text messages after the event, since their circumstances were not truly comparable (*MBNA Limited v Jones*).

Gross misconduct: In November 2013, MBNA held a corporate event at Chester race course to celebrate its 20th anniversary. Staff were told that it was a work event and that normal standards of behaviour and conduct would apply. An incident occurred at the event between two of MBNA's employees (J and B), culminating in J punching B in the face. After the event, B sent J several violent threatening text messages.

Disciplinary action: MBNA brought disciplinary proceedings against both J and B. It decided to give B a final written warning, on the basis that although the text messages were wholly inappropriate, they

were made as an immediate response to J hitting B, and B did not intend to follow through on his threats. In contrast, J was summarily dismissed for gross misconduct and behaviour which had the potential to seriously impair MBNA's reputation. The Tribunal upheld J's unfair dismissal claim, on the basis that there had been an unreasonable disparity of treatment between J and B, rendering J's dismissal unfair.

Reasonableness of dismissal: The EAT allowed MBNA's appeal, substituting a finding that J's dismissal had been fair. It noted that the central question was whether it was reasonable for MBNA to dismiss J; if it was, the mere fact that MBNA was unduly lenient to B is "neither here nor there".

Disparity of treatment: The EAT confirmed that the evidence in each case must be carefully considered to establish if disparity of treatment of two employees renders the dismissal unfair. In this case, the circumstances of J and B were not sufficiently similar to justify such a finding. J punched B in the face during a corporate event in respect of which he was expressly told that MBNA's disciplinary rules would apply. B did not; his conduct later following the corporate event was plainly reprehensible, but he did not in fact carry out his threat in the workplace or anywhere else. A finding of fair dismissal was therefore substituted.

Tips for employers: This case shows the importance of having clear well-communicated policies on appropriate standards of employee behaviour, whether in the workplace, at a work social event or elsewhere. It also confirms that where an employee is guilty of gross misconduct, it will be difficult to establish that his dismissal is unfair unless there is disparity of treatment with another employee in genuinely similar circumstances.

Failure to investigate false allegation did not (unusually) give rise to a detriment

An employee who made a fabricated allegation of discrimination was unable to claim race discrimination based on the employer's failure to investigate that allegation, according to a recent judgment of the EAT (*Cordant Security Limited v Singh*).

No investigation… The case concerned an employee of Indian ethnic origin, who raised a complaint of race discrimination in response to threatened disciplinary proceedings. The employer failed to investigate the allegation, although it did investigate a linked complaint of misconduct from a white colleague.

…but no detriment: The EAT confirmed that on a direct race discrimination claim, there must be less favourable treatment because of a protected characteristic, and also detriment to the employee.

The EAT noted that in this case, if the complaint had been investigated, it would have been found to be untrue. Further, the Tribunal had found that the employee did not have any sense of grievance or injustice arising out of the failure to investigate. In those circumstances, there was no detriment, and therefore no discrimination.

Sense of grievance or injustice is key: The EAT recognised that where an entire complaint is knowingly fabricated, it may be difficult for the employee to establish that he has suffered a detriment because that complaint is not investigated. It did note, however, that it is necessary to bear in mind the range of circumstances in which complaints are made; from a complaint which turns out to be unsubstantiated (although genuinely believed in), through those complaints that are exaggerated or partially true, to those which are entirely fabricated. Whether or not a person has a real sense of grievance or injustice arising out of less favourable treatment involving the failure to investigate a particular complaint is a matter for the Tribunal to decide having regard to all the circumstances of the case. The normal inference would be that an employee suffers a sense of injustice (and therefore a detriment) where his allegations are not investigated, but this will always be fact-sensitive.

Points in practice

Women on boards: Five year summary report

Lord Davies has published Women on Boards: five year summary report, which provides the latest data on female board representation. It confirms that as at 1st October 2015:

- The FTSE 100 had reached **26.1%** female board representation, surpassing the Davies review target of 25%. The FTSE 250 was slightly lower at 19.6%.
- There were no all-male boards in the FTSE 100, and only 15 in the FTSE 250.

The report makes five next step recommendations:

1. Continuing a **voluntary approach** to improving gender equality at board level over the next five years.
2. Increasing the voluntary target for female board representation within the FTSE 350 to **33% by 2020**, with more women being appointed to the roles of Chair, SID and executive director positions.
3. FTSE 350 companies to look to fundamentally improve the representation of women in **executive** board positions (currently 9.6% within the FTSE 100).
4. Reconvening an **independent steering body** to support businesses, monitor and report on progress.
5. Steering body to publish more detailed comments on 1-4 above at the **beginning of 2016**.

The report ranks the entire FTSE 350 by female board representation. It also includes updated data from BoardEx about female board representation in other countries (as at October 2015). Norway tops the list with 35.1%, followed by Sweden (32.6%), France (32.5%), Finland (29.4%), and Belgium (28.5%). The UK is currently 6th in the list. At the bottom end are China (11.1%), India (12.1%) and Ireland (12.7%).

Gender pay reporting: the latest

The Prime Minister has issued a press release on the government's proposed measures to eradicate gender pay inequality. The press release confirms that the government is now pledging to:

- force larger employers to publish information about their **bonuses** for men and women, as part of their gender pay gap reporting; and
- extend the proposals for gender pay gap reporting beyond private and voluntary sector employers to include the **public sector**.

The press release also acknowledged the government's recent consultation on the form and content of gender pay disclosures, which closed on 6th September 2015 (see our Employment Bulletin dated 30th July 2015, available here), and states that new regulations which set out how this will work in practice will be published "in due course".

CRD IV: EU Commission consults on remuneration requirements

The European Commission has published a consultation on the CRD IV remuneration rules. In the consultation, the Commission seeks views on:

- **the impact of the maximum ratio** for remuneration under CRD IV on competitiveness, financial stability and staff in non-EEA countries; and
- **the efficiency of the CRD IV remuneration provisions** overall. The Commission requests comments on specific requirements in the CRD IV Directive, including requirements concerning assessment of performance, deferral of variable remuneration, the instruments that can be used for variable remuneration and disclosures on remuneration policy and practices.

The consultation closes on 14th January 2016.

Government response to consultation on tackling intimidation of non-striking workers

The government has published its response to its consultation on tackling intimidation of non-striking workers (see our Employment Bulletin dated 30th July 2015, available here).

The response confirms that the Government will take the following action:

- The Trade Union Bill will be amended to clarify that the entitlement to see the letter of authorisation for picketing only applies to the employer or an individual acting on behalf of the employer, such as a solicitor. As currently drafted, the Bill extends this entitlement to 'any person who reasonably asks to see it', which gave rise to data protection concerns.
- The Bill will be further amended to clarify that the letter of authorisation applies to the picketing activity (and therefore the letter does not need to include the picket supervisor's name).
- The Code of Practice on Picketing will be strengthened to set out the rights and responsibilities of parties involved in, or affected by industrial disputes, particularly on the use of social media and protests linked to industrial disputes. The updated Code will clarify the range of legal protections which already exist to protect striking and non-striking workers, and the existing legal protections against the misuse of social media.
- The government will work with the police, ACAS and other stakeholders to ensure that guidance fully reflects the practical steps necessary to ensure that picketing remains peaceful.

The government has decided not to pursue other measures included in the consultation, including creating a new criminal offence of intimidation on the picket line, an annual reporting requirement on unions in relation to picketing, a requirement on unions to publish in advance their plans for industrial action, forcing individuals on a picket line to give their names to authorities or requiring those on strike to seek police approval for tweets.

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