SLAUGHTER AND MAY

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Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

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New law

Modern Slavery disclosures: the latest

The House of Lords have recently debated the implementation of the requirement in section 54 of the Modern Slavery Act 2015 for commercial organisations with a total turnover of not less than £36m to produce an annual slavery and human trafficking statement. The key points from the debate are:

- section 54 will be brought into force in the week commencing 26th October 2015;
- the government guidance on the content of slavery and human trafficking statements will be published at the same time;
- the first slavery and human trafficking statements will be required in respect of financial years ending on or after 31st March 2016; and
- organisations will have six months from the end of their financial year to publish their statements.

Zero hours contracts: protection for workers who breach exclusivity clauses

The draft Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 have been published. The Regulations provide protection for zero hours contract (ZHC) workers who work for another employer, in breach of an exclusivity clause in that ZHC. Such clauses have already been rendered unenforceable by section 27A of the Employment Rights Act 1996.

The Regulations will create a claim of automatic unfair dismissal where an employee who works under a ZHC is dismissed for the sole or principal reason that he breached an exclusivity clause. The usual two year qualifying service period for unfair dismissal claims will not apply in these circumstances, although it seems that the normal cap on compensation for unfair dismissal claims will continue to apply.

The Regulations will also create a right for a ZHC worker not to be subjected to any detriment for the sole or principal reason that he breached an exclusivity clause.

The Regulations represent a partial implementation of the Government's response to its consultation on anti-avoidance measures in connection with the ban on exclusivity clauses (see Employment Bulletin dated 19th March 2015, available here). The Government's response also envisaged a number of other measures, including extending the ban on exclusivity clauses beyond ZHCs, to any contracts under which the worker is not guaranteed a certain level of weekly income. It remains to be seen if (and when) these additional measures are implemented.

Cases round-up

Whistleblowing: "public interest" in grievance about allocation of overtime

An employee who raised a grievance concerning the unfair allocation of overtime may have a reasonable belief that his disclosure was made "in the public interest", according to a recent judgment of the EAT. The Tribunal had wrongly held that there could be no "public interest" in a complaint by a group of employees about the terms of their employment (*Underwood v Wincanton plc*).

Grievance about overtime: U was employed by W as an HGV driver. He lodged a complaint (jointly with three other drivers) that the distribution of overtime to drivers was unfair and in breach of the implied terms of their contracts of employment. W determined that there had been two instances of drivers receiving slightly more hours, and took measures to ensure that the allocation would be subject to further procedures and scrutiny in the future. U and the other drivers accepted these findings and did not appeal.

Whistleblowing: When U was subsequently dismissed, he brought a whistleblowing claim, relying on his overtime complaint. The Tribunal struck out U's claim on the basis that since the complaint concerned

only a group of workers with a grievance about particular terms of their contracts, the claim could not meet the "public interest" test.

"Public interest": The EAT upheld U's appeal, reinstated his claim and remitted it for full hearing. It noted that the EAT's decision in *Chesterton Global Ltd v Nurmohamed* (see Employment Bulletin dated 16th April 2015, available here) made it clear that:

- the "public" for public interest purposes may be a subset of the public, even if comprised only of persons employed by the same employer on the same terms; and
- disputes about employment terms and conditions may potentially constitute matters in the public interest.

Implications for employers: This case will now be remitted to the Tribunal for determination on the facts. In the meantime, employers should be aware that they may face whistleblowing claims based on grievances about employment terms and conditions which affect a sector of the workforce. It is unclear how large the sector of the workforce needs to be before it can constitute "the public" (in Chesterton it was 100 employees; the figure was not given in the present case).

Collective redundancies: consultation obligations apply to employees of public administrative bodies

The Supreme Court has confirmed that the collective redundancy provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULR(C)A**) apply to dismissals resulting from the closure of a US army base. It rejected a challenge to the scope of TULR(C)A, which it found was not ultra vires despite going beyond the requirements of the EU Collective Redundancies Directive (the **Directive**) by applying to employees of public administrative bodies where the employer does not recognise a trade union (*United States of America v Nolan*).

Closure of base: In 2006 the USA closed a watercraft repair centre (the **Base**) in Hampshire. N had been employed at the Base as a civilian budget assistant but was dismissed for redundancy the day before it closed. N complained that the USA had failed to comply with its collective consultation obligations under TULR(C)A, since it only commenced consultation once the strategic decision to close the Base had already been taken. N succeeded before the Tribunal (which awarded a 30 days' protective award) and the EAT.

Appeal: The USA appealed on a number of grounds, arguing that:

1. TULR(C)A should be construed (consistently with the Directive) as not applying to employment by a public administrative establishment, at least as regards non-commercial activity such as the closure of a military base.

2. Alternatively, the relevant provisions of TULR(C)A were ultra vires in so far as they go further than the Directive requires by protecting workers without trade union representation employed by public administrative establishments.

TULR(C)A can exceed the Directive: The Supreme Court dismissed the appeal. On ground 1, the Court held that the Directive left it open to member states to apply more favourable laws than it required, including in areas of non-commercial activity, such as those of workers employed by public administrative bodies which were excluded from the Directive (because of its internal market focus).

No extra-territoriality: The Court also rejected the USA's argument that by applying TULR(C)A to its decision to close the Base, the UK had legislated extra-territorially. It noted that TULR(C)A regulates the procedures for collective redundancy dismissals of employees at institutions in England, Wales and Scotland. It covers proposals or decisions about domestic redundancies even where those decisions are developed or taken abroad. The Court noted that the USA could have invoked state immunity from these proceedings, but did not do so in time.

TULR(C)A is not ultra vires: On ground 2, the Court found that when TULR(C)A was extended in 1995 to cover situations where the employer does not recognise a trade union, this was done on a unified basis. Given that as originally enacted TULR(C)A applied beyond the Directive (to employees of public administrative bodies), this amendment could not be said to be ultra vires.

Trigger for collective redundancy consultation: The case will now return to the Court of Appeal for determination of an issue with wider significance for all employers; the proper trigger for collective consultation under TULR(C)A. The Court of Appeal previously made a reference to the ECJ on the question of whether the obligation to consult arose when the USA first proposed a strategic decision that would inevitably lead to redundancies, or only after that decision had been taken. The ECJ declined jurisdiction, given the Directive's exclusion for public administrative bodies (see Employment Bulletin dated 1st November 2012, available here). The Court of Appeal will therefore need to determine this issue without the ECJ's guidance. In the meantime, employers should take a cautious approach by deciding to commence collective redundancy consultation at an early stage, before any decision is taken that would inevitably result in redundancies.

Discrimination protection for corporate entities

Corporate entities may claim direct discrimination under the Equality Act 2010 (**EA 2010**), if they suffer less favourable treatment based on the protected characteristic(s) of an individual (such as a director or employee of the company), according to a recent judgment of the EAT (*EAD Solicitors LLP v Abrams*).

LLP member with service company: A was a member of an LLP (**EAD**). For tax reasons, he set up a limited company (**X**) as he approached retirement. A was the sole director of X, and X replaced A as a member of EAD; it took A's profit share, in return for which it supplied services to EAD (typically, although not necessarily, through A).

Age discrimination: EAD became concerned about A providing services to it beyond his ordinary retirement age of 62, and on that basis it objected to X continuing as an LLP member. A considered that this gave rise to direct age discrimination and sought to bring a claim under the EA 2010. The claim named X as a claimant, relying on the protection for members of LLPs in section 45(2) EA 2010.

Corporates relying on individuals' characteristics: The EAT confirmed that X could bring a direct discrimination claim on this basis. It noted that the EA 2010 identifies discrimination as treatment caused by a protected characteristic or related to it, while not necessarily requiring the victim to possess that protected characteristic themselves. This is well established by case law on 'associative' discrimination. It followed that any person (natural or legal) could suffer detrimental treatment because of an individual's protected characteristic, contrary to EA 2010.

Corporates as "persons": The EAT saw no reason why the term "person" in the EA 2010 should be restricted to an individual. The Interpretation Act 1978 makes clear that the word "person", when used in legislation, includes "a body of persons corporate or incorporate" unless the contrary intention appears. The EAT could not discern any such contrary intention in the EA 2010 (particularly given that it is accepted and familiar that corporates may be discriminators).

Implications: The EAT's judgment has potentially wide implications for corporate entities, who may now claim protection from direct discrimination. Some examples (as quoted by the EAT in its judgment) include "*a company being shunned commercially because it is seen to employ a Jewish or ethnic workforce…one that suffered treatment because of its financial support for the Conservative Party or, say, for Islamic education;… or because, let us suppose, of the openly gay stance of a chief executive.*"

Limitations: The impact of the decision will however be limited by the fact that in seems unlikely that a corporate could claim under the employment provisions of EA 2010, since it is generally accepted that a corporate cannot be "in employment" for these purposes. The impact is likely to be greater for corporate members of LLPs, corporate office holders, and trade organisations. There will also be relevance for the application of EA 2010 outside the work sphere, particularly the commercial and property spheres, in relation to the provision of goods, services or facilities, or the disposal of premises.

Points in practice

Prosecutions for failure to notify BIS of collective redundancies

It has been reported that the Insolvency Service are pursuing two prosecutions under section 194 TULR(C)A, which imposes a criminal offence where a company has failed to notify BIS of collective redundancies. The offence attracts an unlimited fine and (under separate Insolvency Service proceedings) potential disqualification for directors of up to 15 years. These are thought to be the first criminal prosecutions under section 194 TULRCA.

Although there has not been any formal announcement of the prosecutions by the Insolvency Service, it has been widely reported in the media that:

- The CEO of Sports Direct, Dave Forsey, has been charged after failing to inform BIS of collective redundancies in the pre-pack administration of wholly-owned fashion chain West Coast Capital (USC) in January this year (see FT.com report).
- Three former directors of City Link have been charged in relation to the collapse of the delivery company, which led to the loss of 3,000 jobs last Christmas (see TheGuardian.com report).

BIS guidance on zero hours contracts

BIS has published guidance for employers on zero hours contracts and how they should be used. It includes information on employment rights, appropriate use, inappropriate use, alternatives, best practice and exclusivity clauses.

BIS consultations on labour market reforms

BIS has published a number of new consultation documents on labour market reforms:

- Reforming the regulatory framework for the recruitment sector and proposal to prohibit EEA-only recruitment builds on legal reforms earlier this year which made it illegal for employment agencies and employment businesses to advertise GB vacancies in other EEA countries without first advertising them within GB and in English. The consultation now seeks views on further proposals, including banning employment agencies and businesses from recruiting (without advertising) solely from other EEA countries. The consultation closes on 23rd November 2015.
- Tackling Exploitation in the Labour Market seeks views on a number of proposals to make the enforcement of employment rights more effective. The consultation proposals include creating a new offence of an aggravated breach of labour market legislation (for example, involving a motivated intention to deprive a worker of their rights or to exploit a worker in connection with the commission of an offence), and establishing a statutory Director of Labour Market Enforcement. The consultation closes on 9th November 2015.
- Draft language requirements for public sector workers proposes a new Code of Practice to ensure that every public sector worker operating in a customer facing role must speak fluent English (or Welsh in Wales). The Code of Practice would support the language requirement contained in the Immigration Bill, which is currently before Parliament. The consultation closes on 8th December 2015.

FCA/PRA consultation on references

The FCA and PRA have published a new joint consultation, Strengthening accountability in banking and insurance: regulatory references (FCA CP15/31, PRA CP36/15), proposing changes to the way firms seek and provide references for candidates for certain roles.

The proposals in the consultation will primarily affect banks, building societies, credit unions and PRA investment firms (referred to as 'relevant authorised persons' or **RAPs**), and candidates applying for any of the specified roles. These include senior management functions and significant harm functions under the senior managers and certification regime, certain insurance controlled functions, and notified NED roles.

The main proposals are:

- Requiring firms to request regulatory references from former employers, going back six years.
- Modifying certain prescribed responsibilities for senior managers in RAPs and insurers to include compliance with the regulatory reference rules.
- Mandating that references must include any breaches of the conduct requirements of FCA Conduct Rules, PRA Conduct Rules or Conduct Standards, and Statements of Principle and Code of Practice for Approved Persons, going back six years.
- Requiring disclosures by RAPs and insurers in a standard format, including the need to confirm where there is no relevant information to disclose.
- Requiring RAPs and insurers to update previous references given in the past six years, where they become aware of matters that would cause them to draft that reference differently if they were drafting it now.

There are however proposals applicable to all authorised firms, which include prohibiting firms from entering into any arrangements or agreements that limit their ability to disclose relevant information. All firms would also be required to enhance systems and controls requirements relating to the retention of records and the policies and procedures for both requesting and providing regulatory references. The existing requirement for firms to disclose all relevant information in references remains unchanged. The FCA will consider in due course whether the specific proposals for RAPs and insurers should be extended to all authorised firms.

The consultation document contains the draft FCA and PRA rules, as well as a draft PRA supervisory statement on regulatory references and a draft template for regulatory references.

The consultation closes on 7th December 2015.

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