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 publication

Shared parental leave and pay

The new regime of shared parental leave and pay represents one of the biggest shake-ups of family friendly rights in the workplace for many years. It applies in relation to children where the expected week of childbirth began on or after 5th April 2015 (or in relation to children who are placed for adoption on or after that date).

We attach a briefing which examines the key aspects of shared parental leave and pay, and what it means for employers.

Cases round-up

Whistleblowing: "public interest" in alleged financial impropriety affecting bonuses

An employee who raised allegations of financial improprieties affecting bonus levels was found to have a reasonable belief that his disclosure was in the "public interest". This was despite the alleged financial improprieties only affecting the bonuses of around 100 fellow employees (including his own) (*Chesterton Global Ltd v Nurmohamed*).

Whistleblowing: N was employed as a director in CG's Mayfair office. He made a number of allegations to his managers that there were inaccuracies in CG's statements of profit and loss. He alleged that the deliberate misstatement of £2 to £3 million of actual costs and liabilities adversely affected the bonuses of over 100 senior managers, including his own. N was later dismissed and he claimed detrimental treatment and automatically unfair dismissal for having made a protected disclosure.

Public interest: The Tribunal upheld N's claims. It found that N's allegations amounted to protected disclosures about a breach of CG's legal obligations to the 100 senior managers in question. It also accepted that N reasonably believed that the disclosure was "in the public interest" (as is now required by the legislation), on the basis that N believed at the time that the disclosure was in the interest of the 100 senior managers (which was found to be a sufficient group of the public for these purposes).

Reasonable belief: The EAT dismissed CG's appeal. It confirmed that the test is not whether the disclosure *per se* was in the public interest, but whether the worker making the disclosure had a reasonable belief that it was. This means that the public interest test can be satisfied even where the basis of the disclosure is wrong, and/or there is in fact no public interest in the disclosure being made, provided that the worker's belief that the disclosure was made in the public interest is objectively reasonable. The EAT was satisfied that the Tribunal had properly approached the public interest test on this basis.

Personal interest not fatal: The EAT observed that the public interest test was designed to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In this case, while it recognised that the person that N was most concerned about was himself, the Tribunal was satisfied that he did have the other senior managers in mind. The public interest test was therefore satisfied.

What is "public"? The EAT confirmed that it is not necessary to show that a disclosure was of interest to the public as a whole, as it is inevitable that only a section of the public will be directly affected by any given disclosure. The EAT suggested that a relatively small group may be sufficient to satisfy the public interest test, and what is sufficient is necessarily fact-sensitive. The EAT found it irrelevant to the public interest test whether the company was public or (as in this case) a private company.

Low hurdle: This is the first appellate consideration of the "public interest" test inserted into the whistleblowing legislation in June 2013. It is

interesting that the EAT upheld the Tribunal's conclusion that the interests of 100 employees of a private company in the level of their bonus payments were sufficient to amount to a "public interest". This case appears to have set the bar quite low in terms of satisfying the public interest test, and may mean that many 'private' employment disputes may therefore continue to be litigated as whistleblowing claims, despite the public interest amendment.

Workplace stress: injury not reasonably foreseeable and no breach of duty

An employee has lost his negligence claim for damages for psychiatric illness and consequential loss caused by work-related stress. His first breakdown was found not to have been reasonably foreseeable, and there was no breach of duty in respect of the employee's attempted return to work (*Easton v B&Q plc*).

Stress claim: E was employed by B&Q to manage one of its stores, which he did very successfully until May 2010, when he was diagnosed as suffering from depression. E was signed off work and, aside from two brief unsuccessful attempts to return to work in September 2010 and January 2012, he never worked for B&Q again. E issued proceedings for damages for psychiatric illness and consequential loss caused by work-related stress.

E contended that:

(i) his initial illness had been caused by occupational stress caused by B&Q's negligence and/or breach of statutory duty;

(ii) B&Q had been in breach of duty in its management of E's return to work in September 2010. In particular, E relied on the fact that he had still been taking medication, and that B&Q's offer of a short-term placement as a manager in a different location had not accorded with the planned phased return to work (and the pressure E felt to accept this offer led to his relapse); and

(iii) there had been a lack of risk assessment in relation to stress.

Initial breakdown not foreseeable: The High Court dismissed E's claim. On point (i), it found E's claim was bound to fail on the issue of forseeability. E had had no history at all of any psychiatric or psychological problems. He had spent his ten year managerial career in charge of large retail outlets, and nothing about him had given anyone any clue that he might succumb to a psychiatric illness. Further, there was nothing about store managers in general that could have given B&Q foresight of such a risk.

No breach of duty on return to work…: On point (ii), in respect of E's relapse, the High Court acknowledged that B&Q had known that E had suffered a psychiatric illness. However, E was on his own account ready and keen to return to work. The Court also commented that the fact that E was still taking medication on his return to work was not determinative of how his future employment should have been handled. E was an experienced manager and, notwithstanding his recent illness, B&Q was entitled to act on the basis that he would be able to assess whether he wished to take up any particular opportunity. Further, the fact that the regional manager's offer had not accorded with the phased return to work plan was not sufficient to mean that making the offer had been a breach of the duty of care owed to E.

…or on lack of risk assessment: On point (iii) the evidence was that had a general risk assessment been conducted, no general risk of psychiatric injury would have been uncovered. E did not experience the signs set out in the individual risk assessment until the point at which he had been suffering from psychiatric illness. By that time it would have been too late for anything to have been done by B&Q to remedy the position. It followed that a proper risk assessment would have had no effect on the outcome.

Implications for employers: This case gives some comfort to employers when dealing with an employee who suffers from workplace stress. It suggests that no liability should arise from any initial breakdown unless it was reasonably foreseeable, and minor errors in handling the return to work should not give rise to liability for any further injury where they are not serious enough to amount to a breach of the duty of care.

Disability: scope of duty to make reasonable adjustments

An employer did not breach its duty to make reasonable adjustments for a disabled employee by dismissing the employee following her refusal to even contemplate returning to her previous role with the reasonable adjustments offered by the employer (*Makuchova v Guoman Hotel Management (UK) Ltd*).

Employee develops spinal condition: M was employed as a food and beverage supervisor at one of GHM's hotels. In March 2012 M was signed off sick and diagnosed with an incipient degenerative condition of the spine. The medical evidence was that M would struggle to return to her previous role, due to the requirement for prolonged standing and carrying heavy items. GHM gave M details of its vacancies in other roles, and she applied unsuccessfully for a number of finance and sales positions.

Employee rejects adjusted role: Following recommendations from occupational health, GHM offered M a number of adjustments to her previous role, including the opportunity of a 15 minute break every hour, no load lifting, and a phased return over three weeks. M refused to return to her previous position even with the offered adjustments, and was ultimately dismissed for lack of capability.

Claim fails: M's claim for failure to make reasonable adjustments was rejected at first instance. The Tribunal stated that it could understand M's concern that the adjustments were unrealistic in a busy restaurant and that in reality there would be no cover for her breaks. It also conceded that the plan for breaks might not have worked in practice. Nonetheless, M's failure to attempt a return to her existing role with adjustments led the Tribunal to reject M's claim.

What is "reasonable"? The EAT dismissed M's appeal. It confirmed that the nature of the obligation to make reasonable adjustments is one to do what is objectively reasonable, not necessarily to accept what the employee contends is reasonable. It therefore rejected M's argument that GHM's duty was not extinguished by her refusal to return to her previous role with the offered adjustments, and that GHM was under a duty to more proactively seek alternative employment for her.

No breach of duty: The EAT noted that the medical evidence suggested that it would have been possible for M to return to her previous role, with the adjustments which GHM had offered. M however refused to even contemplate returning to her previous role, even with those adjustments and GHM's assurances that they would be adhered to. In those circumstances, the EAT upheld the Tribunal's conclusion that there had been no breach of the duty to make reasonable adjustments.

Lessons for employers: This is a useful decision for employers, who will not necessarily be required to accept any adjustments which a disabled employee suggests in order to comply with the duty to make reasonable adjustments. The employee's refusal to engage with reasonable adjustments suggested by the employer may discharge it of its duty.

Points in practice

PIRC shareholder voting guidelines 2015: remuneration aspects

Pension & Investment Research Consultants Ltd (**PIRC**) has published the 2015 edition of its UK Shareholder Voting Guidelines. The key changes to the sections on executive remuneration are:

- **Remuneration design**: Notwithstanding the deletion of the aim to "*attract, retain and motivate*" directors from the remuneration design sections of the UK Corporate Governance Code (for reporting periods from 1st October 2014 onwards), the Guidelines nevertheless set out in some detail the pitfalls in this formulation.

- **Benchmarking**: The Guidelines also note PIRC's concern about members of a remuneration committee serving as executive directors at another listed company. Given the process of benchmarking pay against other firms, PIRC sees an inherent conflict of interest in an executive having any role in setting executive pay, even at another company.

- **CEO versus employee pay**: PIRC continues to advocate disclosure of an actual ratio between CEO and employee pay (not simply the percentage change in each case, as required by the regulations). In addition, PIRC's remuneration rating will give credit to companies with a fixed pay CEO/average employee ratio of 20:1 or less.

- **Compensation payments**: the Guidelines note that loss-of-office payments have become a device for companies to make the exit of underperforming executives less confrontational. PIRC's view is that directors are rarely deemed to be 'bad leavers', and discretion is invariably applied to the advantage of departing directors.

The PIRC Guidelines are not available online. Hard copies are available from the PIRC website.

FCA guidance consultation on risk adjustments to variable remuneration

The Financial Conduct Authority (FCA) has issued a Guidance Consultation: General guidance on the application of ex-post risk adjustment to variable remuneration (GC 15/2). The consultation sets out proposals to amend the FCA's draft guidance on the application of ex-post risk adjustment. The guidance would apply to **dual-regulated firms** for CRD IV purposes who will be within the scope of the proposed new dual-regulated Remuneration Code (SYSC 19D). Although the guidance will not apply to solo-regulated firms, the FCA suggests that these firms may wish to consider the principles of good practice set out in the guidance when applying ex-post risk adjustment.

Both the draft guidance and the proposed SYSC 19D were consulted on in a joint FCA/PRA consultation last summer (see our Employment Bulletin dated 14th August 2014, available here).

The changes to the draft guidance are designed to set out more clearly the FCA's expectations on how firms should implement the requirements of the dual-regulated Code on ex-post risk adjustment, and to share good practice observed in the 2014 remuneration round.

The revised guidance now covers only **ex-post risk adjustment**, defined as adjustments made to take account of the crystallization of specific risk events, e.g. compliance breaches, mis-selling, other risk management failures or a material downturn in financial performance (adjustments including malus and clawback). Unlike the original version of the guidance, it no longer covers ex-ante risk adjustment (defined as adjustments made to take account of intrinsic risks that are inherent in firms' business activities (e.g. the potential for future unexpected losses or weak systems and controls that could result in a risk of undetected conduct failings)).

The consultation closes on 7th May 2015. The FCA intends to produce final guidance alongside the dual-regulated Code (SYSC 19D) this summer.

Adoption leave and pay: new BIS Technical Guidance

BIS has published new Technical Guidance for Employers: Changes to adoption leave and pay from 5th April 2015. The guidance gives a detailed overview of the changes to adoption leave and pay which took effect on 5th April 2015, which are:

- Statutory adoption leave (SAL) and statutory adoption pay (SAP) are aligned with statutory maternity leave (SML) and pay (SMP). In particular, the 26 week qualifying period for SAL is revoked, and SAP becomes payable at the earnings-related level during the first six weeks.

- SAL is now available to dual-approved prospective adopters who have a child placed with them with a view to adopt, and intended parents in a surrogacy arrangement who intend to apply for a Parental Order for the child (with the other parent being eligible to take statutory paternity leave and pay).

- Adopters may also be eligible for shared parental leave (ShPL) and pay (ShPP), where the parent eligible for SAL / SAP ends it early in order to opt into the new ShPL regime.

- Adopters and their partners may now take time off to attend adoption meetings, subject to several conditions.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650