SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

10th December 2015 / Issue 21

Legal and regulatory developments in Employment/Employee Benefits

In this issue

To access our Pensions Bulletin visit the Slaughter and May website.

This weeks's contents include:

- The Watch List
- Legislative changes flowing from DC flexibility and other tidying up changes
- DC flexibility: Draft Regulator's Code of Practice published for consultation: Focus
- Consultation on draft LGPS Investment Regulations
- Autumn Statement (1): Postponement of increases in auto-enrolment contributions
- Autumn Statement (2): Rate of State Pension
- Protection against reduced annual allowance from 6th April, 2016
- Autumn Statement (3): Tax points
- Budget 2016
- Notional earnings cap for 2016/2017
- FCA market study into asset management: terms of reference published
- FCA update on pensions and retirement activities
- State Pension guidance updated
- Auto-enrolment (1): "Net pay" arrangements
- Auto-enrolment (2): NOW: Pensions introduces employer charge

Back issues can be accessed on the Slaughter and May website. To search them by keyword, click on the search button to the left.

Find out more about our pensions and employment practice on the Slaughter and May website.

Details of our work in the pensions and employment field are on the Slaughter and May website.

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or Clare Fletcher.

Cases round-up

ECJ: insourcing of services may be a relevant transfer

The ECJ has confirmed that there may be a transfer of undertaking under the Acquired Rights Directive (ARD) where a business has outsourced the provision of services, and subsequently takes those services back in house (*ADIF v Pascual*).

Insourcing of services: ADIF is a public undertaking responsible for handling transport units at the Bilbao terminal in Spain for a client. ADIF outsourced the management of that service to a sub-contractor, (A), which provided that service in ADIF's facilities, using ADIF's cranes. In June 2013, ADIF informed A that it was terminating the agreement and it would provide the service itself with its own staff. ADIF refused to take on any of A's staff who had worked on the contract, including P, who was consequently made redundant.

Transfer of employment? P brought proceedings alleging that his employment should have transferred to ADIF when it took the services back in house. The Spanish court held that there had been a transfer of undertaking from A to ADIF, since the service had continued to be provided, using the same material resources essential to its provision, for the same client and in the same facilities. The appeal court however made a reference to the ECJ in order to determine the position under the ARD.

ARD applied: The ECJ confirmed that:

- The ARD is capable of applying to a situation in which a business, having outsourced work to another provider, decides to terminate its contract with that other provider and carry out the work itself.
- In determining whether there is an economic entity which retains its identity, this test cannot be met in a sector where the activity is based essentially on manpower, but the majority of employees are not taken on by the alleged transferee.
- However, on the facts of the present case, the activity was based essentially on equipment, not manpower. ADIF put cranes and facilities (which appeared to be essential to the activity) at A's disposal. In these circumstances, ADIF's failure to take over an essential part of the staff used by A to carry out the activity was not sufficient to preclude a transfer. It would ultimately however be for the Spanish national court to determine whether a transfer took place in this case.

Relevance for UK: Although there are specific provisions of TUPE which apply to a service provision change (SPC), this case is a reminder that an insourcing may also be caught within the wider provisions of TUPE as a transfer of an undertaking. This may be important if one of the SPC conditions is not met (for example, if there is a change in the identity of the client, or the client intends that the activities are carried out in connection with a single specific event or task of short-term duration).

TUPE: client's intentions regarding "task of short-term duration"

On a service provision change (SPC), one of the exceptions to the application of TUPE is where the client intends the activities to be carried out by the transferee in connection with a task of short-term duration (Reg 3(3)(a)(ii)). When assessing this exception, events subsequent to the SPC should be taken into account if they are relevant to determining the client's intention at the time of the SPC, according to a recent EAT judgment (*ICTS UK Limited v Mahdi*).

Security services contract: M was employed by ICTS as a security guard. ICTS held a contract to provide security services at a former Middlesex University site. In 2012 the University closed the campus, and in July 2013 the site was purchased by a new owner (A), which re-tendered the security contract and appointed a new

provider (F) with effect from November 2013. A claimed that it intended to redevelop the site, and that the new security contract was only for a short period until completion of the redevelopment.

SPC? The Tribunal found that the Reg 3(3)(a)(ii) exception applied, since A's intention as at November 2013 was that the campus would remain unoccupied for only a limited period of time, probably no longer than a year, and the security of an unoccupied site was therefore "a short-term operation". The Tribunal expressly refused to consider any evidence about events after the transfer, including unchallenged evidence adduced by ICTS that as at August 2014, no planning permission had been granted for any significant building at the site, and none had taken place. The Tribunal therefore concluded that there had been no SPC and no TUPE transfer.

Subsequent events were relevant: The EAT allowed ICTS's appeal, and remitted the claim to the Tribunal for reconsideration. It found that it was an error of law not to consider events subsequent to the SPC if they were potentially relevant in deciding the client's intention at the time of the SPC. In the EAT's view, if the Tribunal had considered the evidence that no planning permission had been obtained and no building work carried out as at August 2014, that may have impacted on its decision by raising questions as to whether A could have genuinely intended that the task would be of short-term duration.

Practical impact: This case establishes that the conduct of the client after a SPC can be relevant in determining whether TUPE applies. If the Reg 3(3)(a)(ii) exception is being relied on by the service provider(s), this should be borne in mind (and perhaps addressed through appropriate contractual provisions).

Age discrimination: forfeiting LTIP benefits on retirement

The EAT has recently considered whether an employee who was forced to forfeit his LTIP benefits when retiring before the age of 55 had suffered age discrimination (*Cockram v Air Products plc*).

LTIP: AP is an international company with operations in around 50 countries. AP operated an LTIP under which unvested options were generally forfeited when the employee left, except on death, disability or retirement. "Retirement" was defined in the LTIP rules as an employee leaving on or after a "customary retirement date" [not further defined] with a fully vested right to begin receiving immediate benefits under a company pension scheme.

Pension provision: AP ran a DB pension scheme, of which C was a member, which provided for pensions from age 50. AP also ran a DC pension scheme for new employees, under which the minimum age to receive pension benefits was age 55.

Retirement and loss of LTIP options: C left AP's employment at age 50, and AP accepted that he was entitled to begin receiving his DB pension benefits. It did not however allow him to take his unvested options, which it maintained were forfeited because although he had retired, he had not reached the age of 55 (which it determined to be its customary retirement age).

Age discrimination? The Tribunal initially rejected C's direct age discrimination claim, finding that his treatment was justified by the legitimate aims of (i) intergenerational fairness and consistency; (ii) rewarding experience and loyalty; and (iii) ensuring a mix of generations and staff so as to promote the exchange of experience and new ideas. It found that the purpose of the LTIP was to strike a balance between encouraging retention up to a point, and then providing some incentive to retire, to create opportunities for younger employees. It determined that the only way to achieve those aims was to fix the age at 55, given that members of the DC scheme could not take their pensions before reaching this age, and that 55 was the lowest customary retirement age in the countries in which AP operates. It felt that reducing the age below 55 in the UK might be perceived as unfair by employees elsewhere.

Consistency was real aim: The EAT allowed C's appeal, and remitted the matter for redetermination by a fresh tribunal. It found that AP's real aim was to achieve consistency between members of the DC and DB pension schemes. This did not necessarily equate to

"intergenerational fairness", given that there was no necessary correlation between age and membership of one scheme rather than another.

Retentive effect doubted: Despite AP relying on the retentive value of the LTIP, the EAT found insufficient evidence that AP actually did pursue an aim of retaining employees who were entitled to LTIP benefits up until age 55. C maintained that the evidence which might have been expected was for example an internal policy document setting out such a goal, a redundancy scheme for employees over 55, statistical evidence of the age of the workforce and those entitled to LTIP benefits, and/or showing that those who left after age 55 were replaced by younger employees.

Lessons for employers: This decision illustrates what an employer will need to establish in order to justify any direct age discrimination in the operation of an LTIP, particularly where the retentive value of an LTIP is relied on. We would normally advise that retirement should no longer be included as a ground for "good leaver" treatment due to the risk of such a claim.

Unfair dismissal: reliance on subsequent warning

An employee's dismissal was not rendered unfair by the employer's reliance on a warning which was issued after the conduct which formed the basis for his dismissal, where the warning related to earlier misconduct. The dismissal was however rendered unfair by the employer's failure to give the employee an opportunity to make representations on the significance of the warning (*John-Charles v NHS Business Services Authority*).

Misconduct and warning: J was employed by NHSBSA as an ICT network engineer. In January 2013 he was given a first written warning for what was described as a history of failures to follow reasonable management instructions. An appeal against that warning remained unresolved at the point of J's dismissal for gross misconduct in May 2013. His dismissal was based on an incident on 24th October 2012, involving alleged misuse of computer equipment in breach of security protocols and previous management instructions.

Dismissal decision: The manager conducting the disciplinary proceedings in relation to the 24th October incident was initially inclined to impose a final written warning, but was then informed about J's January 2013 warning for failure to follow reasonable management instructions. She was also told that J had failed to attend an appeal hearing in relation to that warning, and therefore believed that his appeal had lapsed. On that basis, without reconvening the disciplinary hearing, she decided that the appropriate sanction was dismissal.

Could rely on warning… The EAT found that J's dismissal was unfair. It noted that a warning could be relevant even if given after the date of the events directly leading to the dismissal. In this case it was the substance of the matters giving rise to the warning which was relevant to the employer i.e. the failure to obey a reasonable management instruction, which was also part of the misconduct in relation to the 24th October incident. It had not therefore been unreasonable for NHSBSA to take the warning into account.

…but employee must be informed: However, the EAT nonetheless found the dismissal unfair on procedural grounds, namely that J had not been advised of the significance that the warning had assumed in the disciplinary process, once the manager became aware of it, nor given the opportunity to make representations on it.

Lessons for employers: This case shows that although there is a fair amount of flexibility for employers when relying on warnings in disciplinary processes, employees must be kept informed of any change of approach as regards those warnings, and given the opportunity to make representations, if a finding of unfair dismissal is to be avoided.

Points in practice

Statutory sick and family pay frozen for 2016/17

The government has **proposed** a freeze on various benefit and pension rates for 2016/17. This means that statutory maternity/adoption/paternity/shared parental pay will remain at £139.58 per week (or 90% of average weekly earnings, if lower) and statutory sick pay will remain at £88.45 per week.

Although there is no statutory requirement to uplift these rates every year, they normally increase each April in line with the consumer price index (CPI). As the CPI fell by 0.1% in the year to September 2015, the government is proposing that there will be no increase to the rates in 2016/17.

Apprenticeship levy: consultation response

The government has published a **consultation response** with further details of the new apprenticeship levy, as announced in the Autumn Statement 2015. The response confirms that:

- The levy will come into effect in April 2017.
- It will be payable by employers in the UK in all sectors at 0.5% of paybill (calculated based on gross employee earnings, but not other payments such as benefits in kind).
- All employers will receive an allowance of £15,000 to offset against payment of the levy, which means it will only be payable on paybill in excess of £3m a year.
- The levy will be payable through PAYE alongside income tax and NICs.
- The allowance will be put into a digital voucher account for English employers to spend on apprenticeships training in England (the provisions for the rest of the UK are yet to be determined).
- If the employer has not used its digital voucher within a certain timeframe (possibly 2 years but to be discussed further) it will expire. The expired amounts will be used by the Government to enable voucher top-ups of other employer accounts and to provide apprenticeship funding for employers who do not pay the levy and so do not have their own digital voucher account.
- There will be a connected persons rule, so employers who operate multiple payrolls will only be able to claim one allowance.
- Legislation to permit the imposition and collection of the apprenticeship levy will be introduced in Finance Bill 2016.

And finally…

Festive feature: Christmas party pitfalls

The Christmas party season is upon us once more, and employers should as usual be on their guard for inappropriate behaviour. A number of recent cases illustrate how problems may arise…

- An employee in Australia **reportedly** told his bosses to 'f*** off' and sexually harassed female colleagues at the Christmas party after drinking around 10 beers and a vodka and coke. His dismissal was found to be unfair, in part because this was judged to be an "isolated and abhorrent" incident, and there was no evidence that he had engaged in bad behaviour in the workplace. The tribunal also found that employers cannot insist on standards of conduct being maintained at parties if the alcohol flows freely, as it did at this particular party.
- The result may have been different in the UK, where the EAT recently found that an employee who drunkenly punched a co-worker in the face at a work event was fairly dismissed (the employer having made it clear that normal standards of conduct and behaviour would apply at that event, and most of the alcohol having been consumed beforehand) (see our Employment Bulletin dated 12th November 2015, available **here**).

- Employers must however ensure that there is consistency of treatment between employees involved in Christmas party misconduct, in order to avoid a finding of unfair dismissal. In the UK case noted above, it was permissible for the punched employee to escape with a final written warning (rather than dismissal) for sending violent threatening text messages to his attacker after the event, on the basis that his circumstances were not truly comparable.

- The same was not true of two London Zoo employees, who were **reportedly** involved in a love-triangle with a llama keeper. When the women clashed at the Christmas party, the meerkat keeper hit the monkey handler in the face with a wine glass after overhearing her insulting her looks earlier in the evening. The attack resulted in a cut to the monkey handler's cheek which needed stitches and left a permanent scar. Despite the meerkat keeper being convicted of assault, her dismissal was found to be unfair, on the basis that both women were equally culpable and both should have been dismissed (the meerkat keeper alleged that the monkey handler punched her in the face first, and held her over a balcony while spitting in her face).

Although these cases may somewhat dispel the Christmas spirit, employers who operate appropriate policies to deal with misconduct should be able to recapture it.

We wish all our readers a Merry Christmas and a very Happy New Year.

533219008