SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

SUPREME COURT PREVENTS REMOVAL OF PROTECTED PAY BY DISMISSAL AND RE-ENGAGEMENT

Summary: The Supreme Court has issued an injunction to prevent an employer from dismissing employees and re-engaging them on new terms. The employer had proposed the removal of an entitlement to pay protection that had been stated to be permanent. The Supreme Court decided that it was appropriate to imply a contractual term preventing the employer from exercising its right to terminate on notice for the purpose of removing or diminishing entitlement to the protected pay.

Key practice point: This was an unusual case where the unambiguous language in a collectively agreed contractual term conflicted with the employer's express right to dismiss. However, it is a significant application of the principle, established by *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd*, that an employer should be prevented from dismissing an employee in order to remove entitlement to a contractual benefit, subject to the employer's right to dismiss for "good cause". It is also a reminder that providing incentives for accepting changes to terms and conditions may present problems later.

Facts: In 2007, during a reorganisation of distribution centres, "retained pay" was negotiated by the USDAW trade union and the employer as an incentive to staff to relocate and an alternative to redundancy payments. A collective agreement, incorporated into employees' contracts, stated that retained pay would remain a "permanent feature" of an individual's contractual entitlement, subject to certain qualifications. The employer had an express right to terminate employees' contracts on notice. In 2021, it sought to remove retained pay. It offered employees a lump sum payment in return for giving up the entitlement and indicated that, if the offer was not accepted, it proposed to dismiss and re-engage on new terms excluding retained pay.

USDAW successfully applied for a High Court declaration that employees' contracts were subject to an implied term preventing the employer from exercising its contractual right to terminate and an injunction preventing it from terminating the contracts. When the Court of Appeal reversed this decision, USDAW appealed.

Decision: The Supreme Court unanimously allowed the appeal and restored the High Court injunction. The employment contracts contained an implied term to the effect that the right to terminate could not be exercised for the purpose of depriving the employees of their right to retained pay.

The express term that the entitlement would be "permanent" meant that the right to receive retained pay would continue for as long as employment in the same role continued, subject only to the qualifications within the term itself. The implied term was necessary applying a "business efficacy" test or, alternatively, on the basis that it was so obvious that it went without saying. Its existence was supported by cases on employment contracts containing permanent health insurance benefits, starting with *Aspden*. The Court found that, given that the retained pay term was an incentive for employees to undertake an otherwise unpalatable relocation, it was inconceivable that the objective mutual intention of the parties was that

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

the employer should retain a unilateral right immediately to dismiss these employees for the purpose of removing it.

However, the Court made clear that, as recognised in cases decided after *Aspden*, the employer could still exercise its power to terminate an employee's contract for "good cause" (such as genuine redundancy or gross misconduct) even though the practical effect would be to end the entitlement to retained pay.

Commentary: Changing terms and conditions by dismissal and re-engagement is set to become even more problematic under the Employment Rights Bill. The Government has said that the Bill will end "fire and rehire" and "fire and replace" by providing effective remedies and replacing the current statutory Code of Practice on dismissal and re-engagement, which came into force only a few weeks ago, on 18 July.

EMPLOYMENT RIGHTS BILL UPDATE AND HR SPOTLIGHT CONFERENCE

Over the summer break, the Government confirmed that its Employment Rights Bill will be published within 100 days of taking office – by mid-October, in other words. Meanwhile, the previous government's Workers (Predictable Terms and Conditions) Act, which included a right to request a more predictable working pattern and was scheduled to come into force this month, appears to have been dropped because of an overlap with the Bill. The Bill is to include provisions banning "exploitative" zero-hour contracts and ensuring workers have a right to a contract that reflects the number of hours regularly worked and that they receive reasonable notice of any changes in shift with proportionate compensation for any shifts cancelled or curtailed. For details of other proposed reforms to be included in the Bill, please see our Employment Bulletin July 2024.

The employment reforms will be a key feature of our **annual HR Spotlight conference** on **Thursday 10 October 2024**. This in-person seminar is designed to equip senior in-house lawyers, company secretaries and HR professionals with the latest legal and market analysis and the opportunity to share experiences, insights and ideas. The morning will begin with a networking breakfast. Our speakers will then present their thoughts on:

- **Labour's employment reforms** – what key priorities will the changing landscape bring?
- **Pay equality** – how should employers navigate recent caselaw and forthcoming legislative developments?
- **Hybrid plans** – will more UK companies follow this executive pay trend from the US?
- **Conduct and culture** – will regulatory interventions aimed at non-financial misconduct in the financial sector drive broader change?

Please register here if you would like to attend. We look forward to seeing you.

NON-FINANCIAL MISCONDUCT IN THE FINANCIAL SECTOR: DISCUSSION WITH SENIOR LEADERS

The Financial Conduct Authority is expected to finalise its proposals for a new regulatory framework on diversity and inclusion in the financial sector by the end of the year. This will include clarity on the approach to the treatment of non-financial misconduct (NFM), such as sexual harassment, as misconduct for regulatory purposes. Together with our colleagues in Financial Regulation, we recently brought together senior leaders from a range of financial sector firms to discuss how to approach NFM in an ever-evolving regulatory and social landscape. The discussion, which was conducted under the Chatham House Rule, showed that firms are encountering similar issues across the financial sector. We would be pleased to discuss any of these issues in more detail; please speak to your usual Slaughter and May contact.

EQUAL PAY DEFENCE FAILED BECAUSE DIFFERENCES IN PAY WERE NOT JUSTIFIED

Summary: The Leeds Employment Tribunal has upheld an equal pay claim by retail sales staff, who were predominantly female and had lower pay rates than warehouse operatives. The employer had failed to establish a "material factor" defence to justify differences in basic pay; the factors on which it relied to justify differences in pay (essentially "market forces") were not a legitimate aim applied proportionately because the sole intention was to reduce cost and enhance profit (*Thandi v Next Retail Limited*).

Key practice point: Although this first instance decision is not binding on future Tribunals (and the employer has said it will appeal), it is likely to encourage claims. Compensation is estimated to be in the region of £30m. The decision indicates that, to a greater extent than might have been the case previously, "paying the market rate" is risky as a defence to equal pay claims; there has to be a more compelling business reason. Another point to emerge from the case is that assumptions that jobs are different may need to be reassessed, in particular as warehouse type roles now tend to be less physical. For further comment, please see this blog by David Rintoul and Rachel Hunter.

Facts: During an 11-year period, retail sales staff received lower basic hourly pay than warehouse operatives. Women made up 77.5% of retail sales jobs; men made up 52.78% of warehouse staff. Some warehouse staff were able to earn between 40p and £3 more per hour than retail sales workers. The claimants brought equal pay claims under the Equality Act 2010 in relation to basic pay and various terms and conditions. A previous Tribunal decision had found that their work was of equal value to the warehouse operatives; this hearing concerned whether the employer had established a "material factor" defence, under Section 69 of the Equality Act 2010, to justify the pay differential.

Decision: The Tribunal upheld the claims in respect of basic pay (and some other payments), finding that the employer had not established a material factor defence.

The Tribunal accepted that the employer had not treated the claimants less favourably because of their sex. Nevertheless, they were put at a disadvantage. Although the proportion of men to women in the employer's own warehouses was not substantial, the employer had set remuneration levels by benchmarking against the predominantly male based warehouse market. This, combined with the established assumption that (because of childcare responsibilities) women are less likely to be able to accommodate flexible working patterns, was sufficient to demonstrate a disproportionate impact on the female retail staff.

The employer's aim in paying lower basic pay to retail staff (based on the market rate for such roles) was to increase its viability, resilience and successful business performance. However, the Tribunal found that this aim was solely financial; it could have afforded to pay a higher rate of basic pay to retail staff as some competitors did, but instead it prioritised keeping labour costs to a minimum. Costs saving (only) is not a legitimate aim that can be relied upon to establish the defence. Even if it had been a permissible aim, the pay differentials were not reasonably necessary to meet that aim because the business need was not sufficiently great to overcome the discriminatory effect.

By contrast, the Tribunal found that, in relation to some other terms and conditions where there was justification other than, or in addition to, cost, the material factor defence had been established. For example, the decision to pay public holiday premiums to warehouse but not retail staff was not merely about saving costs; there were different operational requirements because the warehouses functioned 24 hours a day for seven days a week. Productivity bonuses were also justified because a scheme could be adopted for warehouse workers in a way which could not be achieved within the sales environment.

POTENTIAL NEW ROLE RELEVANT TO JUSTIFICATION OF DISABLED EMPLOYEE'S DISMISSAL

Summary: The Employment Appeal Tribunal (EAT) found that, in a disability discrimination claim following a dismissal, the possibility of a new role in a pending reorganisation was relevant to justification of the dismissal and to the duty to make reasonable adjustments (*Cairns v The Royal Mail Group Limited*).

Key practice point: It is clear from case law and the Equality and Human Rights Commission's Employment Statutory Code of Practice that appointing a disabled employee to an existing vacancy (even if the employee is not the best candidate) can be a reasonable adjustment. Cases finding that creating a new role is a reasonable adjustment are rare, but there is nothing in the legislation that precludes it. A key factor in this decision was that the timing of the reorganisation (and therefore the likelihood of a suitable position) became clear between the dismissal and the appeal hearing. This meant that the basis on which the employer had taken the original decision to dismiss had changed.

Facts: The claimant was employed in a delivery role at the Hendon delivery office. Owing to disability, he became unable to perform outdoor duties and was given supernumerary indoor duties. Following confirmation that he met the criteria for ill-health retirement, he had a meeting on 14 February 2018 with his union representative and his line manager. One of the matters discussed was a projected future merger between the Hendon and Mill Hill offices. However, at the time, the manager did not know when that merger would take place. Later that month the claimant was dismissed on ill-health

grounds, by way of early retirement, with payment in lieu of notice until 25 May. His appeal against dismissal was not held until 2 May, as the meeting was rescheduled to accommodate the attendance of his representative. At that meeting, the representative again raised the issue of the merger, which was then thought likely to take place on or about 11 June. However, the appeal was unsuccessful.

The Employment Tribunal found that the dismissal was fair and also dismissed complaints under Section 15 of the Equality Act 2010 (discrimination arising from a disability) and Section 20 (the duty to make reasonable adjustments). The claimant appealed.

Decision: The EAT allowed the appeal and sent the case back to the Tribunal to be reheard. The Tribunal had failed to address the claimant's case that, as at the date of his appeal against dismissal, a merger was expected to take place within weeks under which he could have been given an indoor role, and it would have been reasonable to keep him in employment until he could take up that role (particularly as he was being paid until 25 May). Had it considered the changed circumstances, the Tribunal might have concluded that offering a new role would have been a reasonable adjustment and that the claimant's dismissal was discrimination arising from a disability because it was not proportionate or justified. The fact that the Tribunal had found the dismissal to be fair did not affect the analysis of the discrimination questions.

SUMMER CASES ROUND-UP

During the holiday period there have been three other cases of particular interest to employers:

"Same disadvantage" indirect discrimination

Summary: The Employment Appeal Tribunal (EAT) decided that "associative indirect discrimination" claims - from those who do not have the protected characteristic of the disadvantaged group, but who suffer the same disadvantage - could be made in relation to changes to terms and conditions, under the principle established by the European Court of Justice in the *CHEZ* case. The Equality Act 2010 was amended recently to codify the effect of *CHEZ* (along with some other EU law principles) in domestic law from 1 January 2024, and the EAT also confirmed the validity of that amendment *(British Airways PLC v Rollett)*.

Key practice point: The decision illustrates the scope of "same disadvantage" indirect discrimination, now enshrined in domestic law. It could potentially apply not only in scenarios (as in this case) where terms and conditions are changed, but also where a policy indirectly discriminates against employees with one protected characteristic, and those with another protected characteristic suffer the same disadvantage. As with other forms of indirect discrimination, it would then be for employer to show objective justification.

Facts: Heathrow-based cabin crew alleged that scheduling changes were a "provision, criterion or practice" (PCP) which:

- put those (predominantly non-British nationals) who commuted to Heathrow from abroad at a particular disadvantage compared to those who commuted from within the UK; and/or
- put those (predominantly women) with caring responsibilities at a particular disadvantage compared with those who did not have caring responsibilities.

Claimants who had the protected characteristics (non-British nationals and women) brought claims of "ordinary" indirect discrimination; others sought to bring claims of "associative"/"same disadvantage" indirect discrimination.

Decision: The EAT confirmed that the Tribunal had jurisdiction to consider both types of claim. Even prior to 1 January, indirect discrimination claims could be brought by employees who did not share the protected characteristic, provided they suffered the same disadvantage as a result of the employer's PCP.

Charging all workers the same fee did not breach Part-Time Workers Regulations

Summary: The EAT decided that an employer's imposition of a flat rate circuit fee on all its taxi drivers was not a breach of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR), which protect part-time

workers from less favourable treatment on the grounds of their part-time status, because part-time working was not the sole reason for the treatment (*Augustine v Data Cars Ltd*).

Key practice point: The PTWR have been the source of conflicting decisions in the past and the uncertainty looks set to continue unless this decision is appealed. If, as the EAT found in this case, part-time status has to be the sole reason, rather than the effective reason, a PTWR claim is more difficult than in other areas of discrimination. In any event, however, employers should continue to assess the effect of their policies on part-time staff in the same way as in relation to those with protected characteristics.

Facts: The employer imposed a flat rate fee for access to its database on all its drivers. This meant that the claimant, as a part-time driver (working an average of 34.8 hours a week), would forgo a higher proportion of his earnings than his full-time comparator (working an average of over 90 hours a week). The Employment Tribunal rejected a claim that the employer had treated the claimant less favourably under the PTWR; he and his comparator were treated in the same way and, in any event, any less favourable treatment was not solely on the ground that he worked part-time. The claimant appealed.

Decision: The EAT rejected the appeal. Although, on a pro rata analysis, the fee constituted less favourable treatment, that treatment was not solely on the ground that the claimant was a part-time worker. The EAT's own opinion was that part-time work had only to be the "effective and predominant" cause, but the Scottish Court of Session had decided that part-time status had to be the sole cause. Although not strictly bound by the Court of Session decision, the EAT decided to follow it, given the Britain-wide jurisdiction of the EAT.

It was not possible to say that, in this case, the charging of a flat rate fee, rather than one that took into account hours worked, was on the sole ground of part-time status. Drivers were characterised as working full-time if they worked above an average of 43.17 hours a week. Although it might be said that the claimant was treated less favourably because he worked part-time, the same would also be true of drivers who were characterised as full-time but worked fewer hours than the 90-hour comparator.

Employee's failure to exhaust grievance process not relevant to constructive dismissal claim

Summary: The EAT found that an employer's conduct in handling an employee's grievance could amount to a fundamental breach of the implied term of mutual trust and confidence, entitling the employee to resign and claim unfair constructive dismissal, despite the employee's failure to engage with the final stage of the grievance process. The fact that the claimant did not complete the process or that, had she done so, a favourable outcome might have been achieved, was irrelevant - the only conduct to be considered was that of the employer (*Nelson v Renfrewshire Council*).

Key practice point: In assessing whether there has been a fundamental breach, the focus is on the employer's conduct rather than the employee's reaction to it. Hence there is no obligation to bring a grievance in order to be able to make a constructive dismissal claim (although, under the ACAS Code of Practice on Disciplinary and Grievance Procedures, failure to do so may lead to a reduction in the amount of compensation awarded).

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2024	For TUPE transfers on or after 1 July, amendment to Reg 13A TUPE to allow employers with 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
18 July 2024	Statutory Code of Practice on Dismissal and Re-engagement in force, where prospect of dismissal and re-engagement raised with employees/reps on or after 18 July

1 October 2024	Employment (Allocation of Tips) Act 2023 and statutory Code of Practice in force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and tipping records
By mid-October 2024	Employment Rights Bill to be published to implement proposals in the Plan to Make Work Pay, including on day one rights; dismissal and re-engagement; zero hours contracts; flexible working; trade union legislation; and protection from dismissal for mothers Introduction of Draft Equality (Race and Disability) Bill, to provide full rights to equal pay for ethnic minorities and disabled people and to introduce mandatory ethnicity and disability pay reporting for larger employers, to be confirmed
26 October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 in force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Provisions in the Economic Crime and Corporate Transparency Act 2023, making failure to prevent fraud an offence for large organisations, expected to be in force
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
Uncertain	• Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government • Regulations to bring Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of crime to be unenforceable

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

Contracts of employment: *Secretary of State v Public and Commercial Services Union* (Supreme Court: whether a trade union can enforce a contractual right to check-off arrangements)

Discrimination / equal pay: *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation)

Employment status: *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker); *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

Industrial action: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement); *Morais v Ryanair DAC* (Court of Appeal: whether statutory protection from detriment connected with trade union activities protected workers participating in industrial action)

Redundancy: *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of workforce consultation)

Unfair dismissal: *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing); *Hewston v Ofsted* (Court of Appeal: whether employee was unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal)

Whistleblowing: *SPI Spirits (UK) Ltd v Zabelin* (Court of Appeal: whether whistleblowing detriment compensation could be capped by termination agreement); *William v Lewisham & Greenwich NHS Trust* (Court of Appeal: whether the motivation of another person could be brought together with the act of the decision-maker to make an employer liable for whistleblowing detriment); *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Sullivan v Isle of Wight Council* (Court of Appeal: whether an external job applicant could bring whistleblowing detriment claim; *MacLennan v British Psychological Society* (EAT: whether the definition of a "worker" for whistleblowing purposes includes charity trustees).

CONTACT

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- PHILIPPA O'MALLEY
- PARTNER
- T: +44 (0)20 7090 3796
- E:Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- SENIOR COUNSEL
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com