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Legal and regulatory developments in Employment/Employee Benefits

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Cases round-up

Overseas employee could not bring whistleblowing claim

An Italian banker working in Singapore has been denied the chance to bring a whistleblowing claim in a UK employment tribunal. The EAT confirmed that the test to determine whether a tribunal has territorial jurisdiction to hear a whistleblowing claim is the same as the test which applies for ordinary unfair dismissal claims (*Smania v Standard Chartered Bank*).

Overseas employee: S was an Italian national who both lived and worked in Singapore. He paid tax in Singapore, and his contract of employment was subject to Singapore law. The only connection his case had with Great Britain and British employment law was that SCB had its head office in GB (of which the Singaporean operation was a branch, not a separate legal entity).

Whistleblowing: S made allegations of financial malpractice, and was dismissed by SCB (in Singapore). He lodged a whistleblowing claim in the UK employment tribunal. It was accepted that S would not satisfy the ordinary unfair dismissal test, which required S's employment to have a sufficiently strong connection with GB and with British employment law. S argued however that a wider test should apply to whistleblowing claims. The Tribunal rejected his argument and struck out his claim.

No underlying EU law: The EAT dismissed S's appeal. It rejected his argument that a wider test was needed given that whistleblowing engaged the right to freedom of expression assured by Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the EU Charter of Fundamental Rights (the Charter). The EAT found that since neither the ECHR nor the Charter applied in Singapore, they could not assist S's case.

Public interest in banking disclosures not relevant: The EAT also dismissed S's argument that a wider test was needed given that his disclosures, raising issues of concern about banking practices which the Tribunal accepted could have an impact on SCB in the UK, were of public interest within the UK. The EAT found that the territorial scope of whistleblowing protection must apply consistently across all types of disclosure, and considerations of public interest in a particular sector could not therefore be relevant.

No difference from unfair dismissal claims: The EAT concluded that the territorial jurisdiction test for ordinary unfair dismissal claims should apply equally to whistleblowing claims. Although it accepted that there may be scope in principle for some other rights under the same legislation (the Employment Rights Act 1996) to have a wider territorial application, it found that there would have to be a reasoned basis for this (which there wasn't in this case).

Good news for employers: This decision will be welcomed by employers, as if S had succeeded it would have significantly extended the territorial scope of whistleblowing legislation. The EAT's decision applies the same limitation on exposure to UK employment tribunal proceedings in relation to unfair dismissal claims and whistleblowing claims.

Contractor could not claim 14 years' backdated holiday pay

A contractor who had successfully claimed unpaid holiday pay stretching back 14 years has had his claim overturned. The Tribunal had wrongly assumed that the contractor had been prevented from taking holiday, such that he should be permitted to carry his entitlement forward to subsequent years, and that there was a series of deductions from his wages (*Sash Window Workshop Ltd v King*).

Salesman's holidays: K was engaged by SWW as a commission-only salesman. Both parties operated on the basis that K was self-employed and had no entitlement to paid holidays. Accordingly, although he usually took several weeks leave each year, he did not take the full 5.6 weeks' guaranteed under the Working Time Regulations 1998 (WTR 1998), nor was he paid for any holiday which he did take. When K

was dismissed he brought various claims, including for holiday pay under the WTR 1998.

Tribunal upholds claim: The Tribunal found that K was a "worker" with the consequence that he was entitled to claim for unpaid holiday pay under the WTR 1998, including an entitlement to pay for holiday not taken in previous years. The Tribunal could see no difference in principle between a worker being unable to take paid leave through sickness (where the entitlement carries forward to subsequent years and can be claimed as a payment in lieu on termination; *NHS Leeds v Larner*) and being refused paid leave, as the Tribunal found would have been the position in this case had K asked for it (SWW wrongly thinking that K was not entitled to paid leave). It also found that such a claim could be made as a series of deductions from wages stretching back 14 years to the start of his engagement by SWW.

No evidence that K was refused holiday: The EAT allowed SWW's appeal. The Tribunal had made no findings of any restriction on K's ability or willingness (for reasons beyond his control) to take annual leave. K did in fact take some holiday in most years, and there was no evidence that K had sought to take holiday at any point but had been refused. The EAT noted that if K was not in fact prevented from taking holiday each year, his entitlement to leave (and any pay in respect of it) was lost at the end of the relevant leave year.

No series of deductions: The EAT also confirmed that while claims for non-payment of holiday pay (where holiday has actually been taken) can be pursued as unlawful deductions from wages, this is not the case for claims based on a refusal to permit a worker to take holiday. In the latter case, K would have been paid for the periods he would otherwise have taken as holiday. What he lost were not wages, but the health and safety benefits of taking holiday, for which he was entitled to just and equitable compensation under the WTR 1998. This compensation, in the EAT's view, cannot be regarded as wages for the purposes of an unlawful deductions claim.

On that basis, the EAT found that K was not entitled to rely on a "series of deductions" to extend his claim back 14 years to the beginning of his engagement. Further, the Tribunal had not at any stage addressed the requirement for a "series of deductions" (and, when it did so, the EAT directed that it would need to take account of the recent decision in *Bear Scotland Ltd v Fulton* on this issue – see our Employment Bulletin dated 5th November 2014, available here). The case was remitted to the Tribunal for rehearing.

Limit on holiday pay claims: In *Bear Scotland* the EAT found that there can be no "series of deductions" where there is more than three months between each deduction. This case provides useful guidance and further limitations on the scope of a claim for unlawful deductions from wages in the context of holiday claims.

Implied acceptance of reduced notice period under new contract

An employee who had been given a new contract, did not sign it, but then worked under it for nine years without further objection was found to have impliedly accepted it. Her wrongful dismissal claim based on the employer's failure to apply the notice provisions of her previous contract therefore failed (*Wess v Science Museum Group*).

Change of contract: W was employed by SMG, initially on civil service terms and conditions, but in 2003 was offered a new position as a Senior Curator on a new contract. One of the changes under the new contract was to reduce her notice period from six months to three months. W did not sign the contract, and although she did not voice any objection to the new notice provisions, she did successfully appeal the grading of her new position under the contract.

Redundancy: In 2011/12, SMG undertook a redundancy and restructuring exercise, part of which was to delete all its Senior Curator roles. W was therefore invited to attend a redeployment interview for a new role. W was not selected for the new role and was made redundant on three months notice. W claimed wrongful dismissal on the basis that she

had not accepted the new contract in 2003, and was therefore entitled to six months notice under her previous contract.

Implied acceptance: The EAT dismissed the appeal. It found that the change to W's notice period could be said to have a real, practical and immediate importance for an employee, for example in terms of a mortgage application. On the evidence, W knew of this change to her notice period, and continued to work to the new contract for nine years without objection. In addition, W had held a trade union role, and could be expected to have regard to the detail of the terms and conditions and to raise queries if they arose. In these circumstances, the Tribunal had been entitled to find that W had impliedly accepted the new contract.

Changing notice provisions: Although it is always preferable to secure an employee's express consent to any change to their contractual terms, this case shows that there may be implied acceptance of a change to notice provisions where the employee continues working under the new contract, even without signing it (and whilst raising other objections to other terms). It also shows that employees will need to raise any objection to a change to notice provisions fairly swiftly if they are not to have impliedly accepted the change, and cannot wait until the notice provisions are invoked to challenge them.

Points in practice

New NAPF Corporate Governance Policy and Voting Guidelines (2014/15)

The National Association of Pension Funds (NAPF) has released a new version of its Corporate Governance Policy and Voting Guidelines (2014/15). There are a number of changes from the previous version published in November 2013, and the following are the most notable points in the new Guidance from an executive remuneration perspective:

- Executive pay policies should be clearly aligned with pay policies in the company as a whole; the Guidelines note that wide pay differentials between executives and other employees are often difficult to justify credibly.
- Total remuneration should be structured to reflect the ambitions and risks inherent in the business and be mindful of both the wider economic climate and the impact on the general workforce.
- The factors which may warrant a **vote against the remuneration policy** have been expanded. They now include:
  - Insufficient alignment with shareholders (which may include, but not be limited to, a shareholding requirement of less than 200% of salary. Higher levels may be warranted commensurate with higher levels of reward).
  - Inappropriate metrics or insufficiently stretching targets for annual bonus or LTIP and/or a lack of read across between metrics used and the company's strategy.
  - An absence of clawback or malus provisions (ideally these should not be restricted solely to material misstatements of the financial statements).
  - An excessive amount of flexibility being provided for 'exceptional' circumstances.
  - A recruitment policy that is vague or provides unlimited or substantial headroom over and above existing plans.
  - Guaranteed pensionable, discretionary or 'one-off' annual bonuses or termination payments.
  - Any provision for re-testing of performance conditions.
  - Layering of new share award schemes on top of existing schemes.

- The factors which may trigger a **vote against the remuneration report** have had some more minor tweaks, and now include the following (which apply unless, apart from the first factor, there is an appropriate explanation):
  - Awards fail to reflect wider circumstances such as serious reputational issues which have arisen.
  - Discretion has been used in an upwards direction.
  - Annual increases in base salaries in excess of inflation or those awarded to the rest of the workforce.
  - Over frequent re-benchmarking.
  - 'Sign-on' bonuses without any conditionality and which pay for awards not already vested at the previous employer.
  - Ex-gratia and other non-contractual payments.
  - Change in control provisions triggering earlier and/or larger payments and rewards.
  - The absence of service contracts for executive directors.
  - Inappropriate use of discretion, for example not scaling back awards in light of how performance was achieved.
  - Insufficient disclosure on the scope of variable pay performance conditions (retrospective disclosure of performance against targets is a minimum expectation).

Shared parental leave: impact on EMI options

The introduction of shared parental leave has resulted in some minor amendments to the enterprise management incentives (EMI) provisions in paragraph 12A of Schedule 5 of the Income Tax (Earnings and Pensions) Act 2003.

With effect from 1st December 2014, employees who are on shared parental leave:

- Are regarded as meeting the minimum committed time requirement under paragraph 26 of Schedule 5 and can therefore be granted and retain EMI options without a disqualifying event occurring; but
- Are not regarded as full-time employees for the purposes of determining whether a company has 250 or fewer full-time employees.

This mirrors the position which currently applies to maternity and paternity leave.

EU consultation on possible changes to the Working Time Directive

The European Commission has launched a comprehensive review of the Working Time Directive (WTD), in light of developments in employment and the economy since its implementation. The Commission has launched a public consultation to gather insights and contributions from the public to inform possible changes to the WTD which may be necessary.

This latest consultation follows several unsuccessful attempts to review the WTD, most recently when a 2009 European Commission proposal to amend the WTD was finally abandoned in 2012. At that time the key topics of focus were the classification of on-call time and the opt-out from the maximum 48 hour week. It is not yet clear whether these same topics will be the focus of the latest consultation, or whether other topics (such as holiday pay) will also be in scope.

The consultation will run until 15th March 2015.

And finally…

Festive feature: Employment law for Christmas

What can employment law teach us about surviving the festive season? Here are our top five topical tips:

1. Clawback of presents: Are you concerned that your Christmas generosity may prove undeserved when the recipients of your gifts later turn out to be more naughty than nice? Why not do as many listed and financial sector companies are doing, and make your gifts subject to clawback? This could prove a novel but effective way of enforcing New Year's resolutions.

2. Holiday pay: Do you find yourself working overtime in the office to get everything done before Christmas, but then losing out on commission or allowances when you finally take your Christmas holidays? Fear not, as European employment law has a present for you: your holiday pay should take account of these extra payments, not just your salary.

3. Christmas is for sharing (parental leave): Is Santa bringing you a new baby in the New Year? If so, 2015 is all about sharing: the new right to shared parental leave will apply to babies expected to be born or adopted from April 2015 onwards.

4. Let it snow: A white Christmas may be looking unlikely at present, but what happens when the inevitable ice (and possible snow) play havoc with our travel arrangements for returning to work in the New Year? If you tell your employer you have concerns about driving in these conditions, you may qualify as a whistleblower, and have extra protection against detrimental treatment or dismissal.

5. Piling on the pounds: Have you succumbed to the excesses of the season and enjoyed one mince pie too many? European employment law steps in once again; hot off the presses is a decision that obesity may amount to a disability for discrimination purposes. This should provide some protection against any unfavourable treatment on this basis when you return to the office.

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

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