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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There is no Pensions Bulletin this week.

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New law

TUPE: pension protection amendments to reflect auto-enrolment

The government has published regulations to amend the pension protection requirements on a TUPE transfer, with effect from 6th April 2014.. The new regulations will apply where a transferee employer intends to use either a defined contribution scheme or a stakeholder scheme (the requirements in respect of defined benefit schemes will remain unchanged).

The changes will allow the transferee the option of matching the transferor's level of employee contributions immediately before the transfer, as an alternative to the current requirement of matching the employee's chosen contribution rate up to 6%. The changes are intended to prevent a situation where a transferee must pay a higher level of contributions than either the transferor, or that required by the auto-enrolment regime.

Children and Families Act 2014

The Children and Families Act 2014 received Royal Assent on 13th March 2014. The Act will make a number of fundamental changes to the current system of maternity/paternity leave and flexible working:

- With effect from 30th June 2014, the right to request flexible working will be extended to all employees. In addition, the current statutory right-to-request procedure will be replaced with a duty on employers to consider requests in a reasonable manner, supplemented by a statutory ACAS Code of Practice.

- With effect from 1st October 2014, fathers and partners will be able to take unpaid time off to attend up to two antenatal appointments with the pregnant woman.

- With effect from 5th April 2015, the new system of shared parental leave will be introduced, and will apply to parents of babies due or children placed for adoption on or after that date. Adopters' pay and leave entitlements will also be brought into line with those of birth parents.

Comment: These changes will require amendments to employers' family leave and flexible working policies. For more information, speak to your usual Slaughter and May contact.

Cases round-up

TUPE: meaning of client's "intention", and "assignment" of suspended employee

In **Robert Sage Ltd T/A Prestige Nursing Care Ltd & anor v O'Connell & ors**, the EAT held that transitional arrangements for a service provision did not fall within the 'tasks of short term duration' exclusion in Regulation 3(3)(a)(ii) of TUPE. Although the client hoped and wished that the transitional arrangements would be short-lived, this did not amount to an "intention" that the transitional service provider would carry them out on this basis. The EAT also held that an employee who was suspended at the time of the transfer was not assigned to the organised grouping of employees, and did not transfer under TUPE.

A group of support workers (O) were employed by A, who was contracted by the local council to provide care for a vulnerable adult (X). When A decided it was no longer willing to continue with the care, the council contracted another provider (P) to take care of X while it made an application to the Court of Protection. This was initially thought to take a few weeks, but several months later the application had still not been decided (and was ultimately withdrawn). P maintained that the change of provider from A to P fell within the exclusion in Regulation 3(3)(a)(ii)

of TUPE because the client (the council) intended that the activities (the care of X) would, following the service provision change, be carried out by P in connection with a task of short-term duration (the period pending the court application).

A further issue concerned the position of one of the workers (T), who had been suspended from her duties five months before the transfer. Although her contract specified her duties as working on the X contract, the council objected to her returning to work with X, and no replacement work had been found for her at the time of the transfer.

The Tribunal found that there had been a TUPE transfer, and that T did transfer to P.

The EAT dismissed the appeal in relation to the TUPE transfer. Although the council wished and hoped that the Court of Protection process would be of short duration, it did not have any control over the length of the process or its outcome. The EAT therefore upheld the Tribunal's decision that a hope and wish that following a service provision change activities would be carried out by a transferee in connection with a task of short term duration was not an intention that they would be so carried out. There was therefore a TUPE transfer in this case from A to P.

However, the EAT allowed the appeal in relation to T, finding that she was not assigned to the organised grouping of employees who were subject to the TUPE transfer. Even though T was contractually assigned to A's work for X, T was not permitted to return to work with X at the time of the transfer. It followed that T was not assigned to the grouping of employees subject to the relevant transfer from A to P, and her employment did not transfer to P.

Comment: This case confirms that the exception in Regulation 3(3)(a)(ii) will not apply unless the client has some reasonable prospect that the task will be short-term (which will usually require some control over its duration). Equally, transferors should be aware that employees who are suspended at the time of the transfer may not transfer, in which case they will continue in their employment, and will need to be dealt with separately.

Mothers who had babies through surrogacy arrangements not entitled to maternity leave

In **CD v ST** and **Z v A Government department & anor**, the ECJ held that mothers who had children via surrogacy arrangements were not entitled to maternity leave, as they had not been pregnant or given birth. Further, there was no sex discrimination, because a man who organised a surrogacy would be treated the same. The ECJ also held that, in the case of a woman who is unable to become pregnant because she has no uterus, this did not amount to a disability.

The case involved two women who used surrogates to give birth to a child. In one case (Z) the woman had no uterus, and could not therefore support a pregnancy. Both women were refused maternity or adoption leave by their employers. They brought proceedings alleging discrimination on the grounds of pregnancy/maternity, sex, and (in Z's case) disability. Both Tribunals made a reference to the ECJ to determine whether the refusal of maternity leave to mothers who have a baby via a surrogacy arrangement is an infringement of the Pregnant Workers' Directive, the Equal Treatment Directive (on grounds of sex) or the Equal Treatment Framework Directive (on grounds of disability).

The ECJ held that there is no right to maternity leave under the Pregnant Workers' Directive for mothers who use surrogacy arrangements, as those rights presuppose that the woman has been pregnant and given birth to a child. Further, there was no sex discrimination in these circumstances, as there had been no less favourable treatment of the women, given that their male partners were also not entitled

to equivalent leave. Finally, in relation to Z's disability claim, the ECJ did not dispute that Z's lack of a uterus constituted a limitation resulting from a physical impairment that is of a long-term nature. However, it found that the concept of 'disability' within the meaning of the Equal Treatment Framework Directive presupposes that the limitation from which the person suffers may hinder that person's full and effective participation in professional life. That was not the case here. Z's condition did not therefore constitute a 'disability' within the meaning of that Directive.

Comment: The ECJ's decision leaves mothers in the UK who use surrogacy arrangements without any current right to maternity or adoption leave. However, this may change with the introduction of the Children and Families Act 2014, as this allows the government to make regulations to extend adoption leave to employees who have a child using surrogacy arrangements, in certain circumstances.

No race discrimination against vulnerable migrant workers

In **Taiwo v Olaigbe, Onu v Akwiwu**, the Court of Appeal held that although migrant domestic workers mistreated by their employers had been discriminated against on the basis of their vulnerability as a result of their immigration status, that did not constitute race discrimination. Their mistreatment could not be said to be based on their nationality.

T and O, both Nigerian women working in the UK pursuant to migrant domestic worker visas, brought claims of race discrimination. In each case the EAT found that T and O had been mistreated not because they were Nigerian or black, but because they were vulnerable migrant workers who were reliant on their employers for continued employment and residence in the UK. The EAT held that discrimination against an employee on that basis could not constitute direct race discrimination.

The Court of Appeal upheld the EAT's decisions. The Court found there to be no such exact correspondence between immigration status and nationality. The particular ground for discrimination in these cases was that T and O were migrant domestic workers, with the peculiar dependence on their employers that was a consequence of that status. However, the Court commented that not all non-British nationals working in the UK were migrant domestic workers or shared an equivalent vulnerability. It followed that T and O's mistreatment could not therefore be said to have been on the grounds of their nationality.

Comment: This case confirms that vulnerability stemming from immigration status cannot be equated with nationality for the purposes of a race discrimination claim.

Covert recordings by employee admissible

In **Punjab National Bank (International) Ltd and others v Gosain**, the EAT held that covert recordings made by an employee (G) of both public and private deliberations during her disciplinary and grievance proceedings were admissible in evidence as part of her sex discrimination and unfair dismissal claims.

The private comments, alleged to have been recorded during a break in the grievance hearing, included the bank's managing director giving an instruction to dismiss G, as well as the manager hearing the grievance saying that he was deliberately skipping the key issues raised by G in her grievance letter, and making a sexually explicit comment about G. The Tribunal found that those comments "*fall well outside the area of legitimate consideration of the matters which fell to be considered by the grievance and disciplinary panels*".

The EAT confirmed that the Tribunal was entitled to reach this conclusion, and as such the case was distinguishable from previous case law, where covertly-recorded private deliberations during disciplinary and grievance proceedings were ruled inadmissible. The EAT confirmed that it would be for the Tribunal to assess the cogency of the recordings and their impact on the issues which it must determine as part of G's claims.

Comment: This case confirms that employers, when conducting grievance and disciplinary proceedings, should take particular care in their public and private deliberations. Having a policy which prohibits an employee making covert recordings in this context will not render any such recordings inadmissible. This is particularly true where the deliberations recorded are not part of the legitimate consideration of the matters raised in the hearing (and are in fact prejudicial to the employer's case, as happened here).

Points in practice

Budget 2014: employment aspects

Budget 2014 contained little in the way of employment measures that had not already been announced in either Budget 2013 or Autumn Statement 2013. This is in contrast to the fundamental changes announced to pension arrangements (on which see our separate email circulated on Wednesday 19th March).

The main employment-related measures included in Budget 2014 were:

- *Income tax bands*: The personal allowance will increase to £10,000 in April 2014, and to £10,500 in April 2015. In addition, the higher rate tax threshold will rise to £41,865 in April 2014, and to £42,285 in April 2015.

- *Childcare*: The government had previously announced a new scheme to be introduced from Autumn 2015 to allow working families to claim 20% of yearly childcare costs. The costs on which the support can be claimed have been increased to £10,000 a year for each child under 12, meaning that eligible parents will get support worth up to £2,000 per child each year. This new scheme may result in a significant reduction in the use of childcare vouchers.

- *Anti-avoidance measures*: As announced at Autumn Statement 2013, the Finance Bill 2014 will introduce a number of measures to prevent tax avoidance through disguised employment status. These relate to the use of employment intermediaries and dual contracts, as well as partners in limited liability partnerships.

PIRC Guidelines 2014: remuneration aspects

Pension & Investment Research Consultants Ltd (**PIRC**) has published the 2014 edition of its UK Shareholder Voting Guidelines.

The Guidelines contain fundamental changes to the section on directors remuneration, reflecting the introduction of the new executive remuneration regime. In many cases the Guidelines go beyond the requirements of the Regulations and existing guidance. The key points to note from the new Guidelines are:

Policy report

- *Disclosure of aims*: The Guidelines make it clear that simple repetition of "attract, retain and motivate" as the objectives of a remuneration policy will not be sufficient.

- *Consultation with employees*: PIRC expects companies that do not consult with employees when setting executive pay to say why they have not done so.

- *Disclosure of maximum*: The Guidelines make it clear that PIRC sees the new requirement to disclosure the maximum payable for each component of executive pay as "a major advance" from a situation where the "complex and opaque" nature of pay awards had produced a situation in which "shareholders have been effectively signing a blank cheque for executive pay".

- *Payments for loss of office*: PIRC expects full disclosure of the maximum amounts that could be payable on termination, whether or not they are for loss of office, and regardless of whether they are contractual or discretionary. In addition,

PIRC's remuneration rating will give credit to companies where grandfathered termination arrangements which exceed those available under the policy are brought into line at the point when the policy becomes effective.

- *Clawback*: PIRC considers that clawback (i.e. the recovery of sums already paid or payable) is a more transparent and preferable approach to malus (i.e. the withholding of sums to be paid).

- *Mitigation*: The remuneration report should confirm that the remuneration committee will seek to apply mitigation rigorously. PIRC supports the use of phased payments to reduce the payments on termination, and emphasises that companies have the right to enforce the duty to mitigate by negotiating over the level of compensation payable.

- *Recruitment incentives*: PIRC expects new recruits to be subject to a scheme's normal maximum limit. Explicitly buying out unvested awards to attract a new recruit and/or increasing normal award limits for recruitment purposes will be considered a breach of best practice.

Annual Remuneration Report

- *CEO versus employee pay:* PIRC regards disclosure of a ratio figure showing CEO pay as a multiple of pay elsewhere in the organisation as best practice (the requirement under Regulation 19 is simply to disclose the percentage change in the pay of the CEO versus the percentage change in pay of the wider workforce).

- *Pension contributions and entitlements*: PIRC expects disclosure of comparative pension accrual or contribution rates for executives and employees.

- *Use of discretion*: Where discretion is used to the benefit of a director or other participant in a scheme, PIRC will expect disclosure which evidences genuinely unforeseen and exceptional circumstances.

- *CEO pay versus TSR*: PIRC's remuneration rating will give credit to those companies where the percentage change in CEO pay over the last five years is aligned with the percentage change in TSR over the same period.

LTIPs

- PIRC continues to oppose the introduction of all new long term incentive plans, on the basis of its conclusion that "they are not long term and they do not incentivise". However, where such schemes are nonetheless used, PIRC expects the following features:

  - non-financial metrics should only be used when considering individual performance, and in a way which ensures that individuals are not rewarded for business unit or corporate non-financial performance;

  - on vesting scales, performance should be measured over the total performance period, rather than against the base year every year;

  - three-year performance periods are too short, and should either be extended to at least five years, or followed by a further holding period. In either case, rolling performance periods remain unacceptable; and

  - total awards under all share schemes should not exceed 10% of the issued share capital in any ten-year period (with a 5% limit on executive schemes).

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

PRA consults on contractual clawback

The Prudential Regulation Authority (PRA) has published a consultation paper which proposes to extend its Remuneration Code to require all PRA-authorised firms to amend employment contracts to be able to apply clawback to vested variable

remuneration on a group-wide basis, for up to six years after vesting.

The consultation paper is available here. The consultation closes on 13th May 2014. The proposed new rule would come into force on 1st January 2015 (and would apply to contracts concluded before that date).

And finally…

Employee dismissed for conducting 'poll' on fate of missing MH370 plane

An employee has reportedly been dismissed for conducting a poll on the fate of the missing Malaysia Airlines flight 370. The employee of a bakery store in Singapore allegedly displayed two tipping cups asking customers to vote on what had happened to the plane. One cup showed the tail of a plane diving downwards, while the other showed a jet cruising in the clouds with a caption reading "*Still alive!*". A sign next to the cups read: "*What happen 2 MH370?*".

The incident was publicised on Facebook, when a customer uploading a photo of the cups to his Facebook page, asking if other users found it "insensitive or ignorant". The customer also shared it on the Facebook page of the bakery itself, which then added a statement describing the incident as "highly insensitive and gross misconduct".

520576819

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