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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Cases round-up

Employee working remotely from Australia could bring claims in UK

An employee who had relocated to Australia where she continued to work remotely for her UK employer was permitted to pursue unfair dismissal and whistleblowing claims in a UK tribunal (*Lodge v Dignity & Choice in Dying*).

Relocation to Australia: L, an Australian citizen, was employed by DCD as its Head of Finance. Initially L lived in London and worked out of DCD's London premises. However, when L's mother became ill, she decided to return to Australia and sought DCD's consent to continue working for them remotely from her new home in Melbourne. DCD agreed and this arrangement subsisted for over four years, with L working exclusively for DCD from Australia. L subsequently lodged a grievance, resigned and lodged claims in a UK tribunal of unfair constructive dismissal and detrimental treatment on grounds of whistleblowing.

Tribunal denies jurisdiction to hear claims… The Tribunal noted that DCD had no premises in Australia, that L had taken up Australian residence and subjected herself to the Australian tax and pensions regimes, and only returned to the UK several times a year for work purposes. It therefore determined that there was not an especially strong connection with Great Britain or British employment law in her case, and she could not therefore fall within the third 'expatriate' category identified in *Lawson v Serco*. The Tribunal therefore refused jurisdiction to consider her claims.

…but EAT permits claims to proceed: The EAT upheld L's appeal, reversing the Tribunal's decision. It found that L's case fell within the first (rather than the third) 'expatriate' *Lawson v Serco* category; that of employees posted abroad by a British employer for the purposes of a business carried on in Great Britain. It was irrelevant that L was not actually 'posted' abroad by DCD, given that she requested to work remotely for personal reasons. On the facts, all the work that L did from Australia was for the benefit of DCD's London operation. It was also relevant that she had no right to bring a claim in Australia, and her grievance had been handled in London. The EAT concluded that L's claims should be permitted to proceed to substantive hearing.

Lessons for remote working overseas: This case confirms that employees who work abroad for the purposes of a UK business may well be able to bring claims in the UK. Whether those arrangements are instigated by the employer or the employee is not relevant.

Whistleblowing claim succeeded even though decision maker did not know about protected disclosure

A Tribunal was found to have wrongly dismissed a whistleblowing claim from an employee who was refused redeployment on the basis of a reference which was motivated by his protected disclosure. The fact that the decision maker on the redeployment did not know about the protected disclosure did not remove the taint on the reference which he relied on (*Ahmed v City of Bradford Metropolitan District Council*).

Protected disclosure… A was employed by BMDC. When a redundancy situation arose, A was offered an alternative post subject to a CRB check and an internal reference, both of which were regarded as formalities. However, during the course of an earlier grievance process A had made a protected disclosure, which led to an internal audit investigation.

…leads to poor reference…The manager appointed to investigate A's grievance (B) put herself forward to write the reference for A's redeployment role, even though she had no knowledge of A's work. She wrote a reference which she knew to be negative and misleading in the hope that it would force A out of BMDC's employment.

…and no redeployment: The officer appointing the new post (X) considered (wrongly) that A had misled

him about his levels of sickness absence and the internal audit investigation. B knew that X had been misled but did not disabuse him. X withdrew the offer of the new post to A, relying to a substantial degree on the reference. A was then dismissed by reason of redundancy, and lodged whistleblowing claims based on both detrimental treatment and his dismissal.

Liability for detriments but not dismissal? The Tribunal was satisfied that A suffered detriments by reason of his protected disclosures (including B's negative reference and her failure to correct misleading information about A). However, it rejected the automatic unfair dismissal claim on the basis that X had acted on the basis of his honest (if mistaken) view that he had been misled by A, and on the reference, but not on the basis of A's protected disclosure.

Decision tainted despite lack of knowledge: The EAT allowed A's appeal, and remitted the automatic unfair dismissal claim for rehearing. It found that the Tribunal had wrongly severed the relationship between B's action in writing the reference and the motivation of X in not appointing A to the new post. On the facts, there was a causal connection between the protected disclosure, the detrimental reference from B, the reliance on that reference by X and the dismissal. The fact X did not realise that he was being misled by the reference did not 'sanitise' the effect of the reference and did not absolve BMDC, as employer, from responsibility for a decision influenced (in more than a trivial sense) by the infected reference that came to exist because of A's protected disclosure.

Handling whistleblowing: This case is a reminder that a decision may be tainted if the decision maker's actions have been influenced by some other person involved in the process who has an inadmissible motivation (such as adversely reacting to a protected disclosure). In such a case the motivation of the other person could in principle be attributed to the decision maker (and to the employer). The key point is for *all* staff involved in the process to be made aware of the dangers of detrimental treatment of whistleblowers, not just the decision-makers.

Appeal decision takes effect without the employer confirming reinstatement or communicating it to the employee

The EAT has confirmed that a successful appeal against dismissal revives the employment contract without the need for the employer to take a separate decision to reinstate the employee, or for the decision to be communicated to the employee (*Salmon v Castlebeck Care (Teesdale) Limited (in administration)*).

Dismissal and appeal in TUPE context: S was originally employed by C. She was summarily dismissed for gross misconduct in July 2013. S had a contractual right to appeal, which she exercised. In September 2013, there was a TUPE transfer of C's business to a third party (D). S's appeal against her dismissal was heard shortly after the transfer by the HR director, now an employee of D. The decision was that S's dismissal was unsafe, and her appeal was successful. However, no express decision was taken to order reinstatement, and S was never told the outcome of her appeal. She lodged unfair dismissal proceedings against both C and D.

Tribunal finds appeal ineffective: The Tribunal upheld the claim against C but dismissed the claim against D on the basis that it had never been S's employer. It found that the appeal decision was not effective, since there was no separate decision to reinstate S, and the decision had not been communicated to S.

EAT finds no need for reinstatement decision…: The EAT allowed the appeal. It found no need for a separate decision on reinstatement in order for the employment contract to revive following a successful appeal (the Tribunal had misinterpreted previous cases on this issue).

…or communication to the employee: The EAT went on to find that there was no need for the appeal decision to be communicated to the employee in order to take effect (unlike the dismissal decision, which must be communicated to be effective for unfair dismissal purposes). This meant that on the facts, S's contract had revived, she was employed by C immediately before the transfer, and her employment

had transferred to D. Therefore, S's rights lay against D and not C. The claim against C was dismissed and the claim against D was upheld.

Lessons for transferees: This case illustrates that following a TUPE transfer, there is the potential for the transferee to inherit employees who would have been in scope but were dismissed before the transfer, if their appeal against dismissal is successful (they will then be treated as if they were never dismissed, and therefore became employed by the transferee). This means that although it would not be usual for the transferee to conduct the appeal (as happened in this case), it should nevertheless maintain an interest in the outcome.

Points in practice

Executive Remuneration: ISS UK & Ireland Proxy Voting Guidelines 2015

Institutional Shareholder Services (ISS) has published a new set of UK & Ireland Proxy Voting Guidelines (January 2015). The Guidelines are effective for meetings held on or after 1st February 2015, and include the following key points on remuneration:

- **Strategy and behaviour**: Companies are encouraged to use the statement by the chairman of the remuneration committee to outline how their chosen remuneration approach aligns with the company's strategic goals and KPIs. The remuneration committee should also closely examine the behaviour that the design of a remuneration package will promote.

- **Performance conditions**: Where non-financial objectives are used as part of the performance conditions, ISS expects the majority of the payout to be triggered by the financial performance conditions. ISS does not support the re-testing of performance conditions or the re-pricing of share options under any circumstances.

- **Benchmarking**: Remuneration committees are discouraged from market benchmarking for pay reviews, unless it is applied infrequently (at no more than three-to-five year intervals) and then only as one part of an assessment of the remuneration policy. Bringing a remuneration policy into line with accepted good market practice should not be used as justification for an increase in the size of the overall package.

- **Retention awards**: One-off pay awards to address concerns over the retention of an executive director are seen as ineffective and are therefore not typically supported by ISS.

- **Buy-outs**: The cost of any buy-out award should not exceed the realistic value of rewards forfeited. A remuneration policy will be opposed if the door is left open for "golden hellos" or other non-performance related awards not aligned with shareholders' interests.

- **Simplifying remuneration**: Remuneration committees are encouraged to adopt simpler remuneration structures. In particular, the introduction of new share award schemes on top of existing plans is likely to be viewed sceptically.

- **Exceptional circumstances**: Investors expect that a company will work within its remuneration policy, and only seek approval to go outside the policy in genuinely exceptional circumstances.

- **Changes to the policy**: ISS will recommend a vote against any policy which gives the remuneration committee the ability to make open-ended changes to the policy.

- **Shareholder engagement**: Engagement initiated by remuneration committees is expected to be in the form of a meaningful, timely and responsive consultation with shareholders prior to the finalisation of the remuneration package; it should not just be a statement of changes already agreed by the remuneration committee.

Right to be accompanied: ACAS amendments to Code of Practice

ACAS has published a revised draft of its Code of Practice 1: Disciplinary and Grievance Procedures. The sections of the Code dealing with the right to be accompanied have been amended in light of the EAT's decision in *Toal v GB Oils Ltd*, which held that an employee's right to choose their companion is absolute, subject only to the companion being a trade union representative/official or a colleague (as required by section 10 of the Employment Relations Act 1999).

Employers should consider whether any changes are needed to their disciplinary and grievance policies to reflect the revised Code.

The revised draft of the Code makes it clear that:

- employers must agree to an employee's request to be accompanied by any companion from one of these categories;
- employees should bear in mind the practicalities when making their choice, and 'may' (not 'must') choose a suitable willing candidate who is available on site rather than someone from a geographically remote location;
- a request to be accompanied does not have to be in writing or within a certain time frame. However, an employee should provide enough time for the employer to deal with the companion's attendance at the meeting;
- employees may alter their choice of companion if they wish; and
- if an employee's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the employee, provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.

The revised draft Code has been approved by the Secretary of State for BIS and was laid before Parliament on 15th January 2015. Following parliamentary approval, the Code will be brought into effect on a date to be specified by the Secretary of State.

Women on boards: latest EU figures

The European Commission has published new figures which show that the EU average representation of women on listed company boards had reached 20.2% in October 2014. This represents an 8% increase since 2010.

The figures also reveal that France currently has the highest representation of women on boards (at 32.4%), with Malta at the bottom end on just 2.7%. The UK is 7th (and above the EU average) on 24.2%.

The Commission also reports that the draft EU Directive introducing a target of 40% of female non-executive members on the boards of listed companies by 2020 is currently under discussion among the EU's Justice Ministers.

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