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

Former director who continued working for the company was an "employee"

A director who had retired from office but continued working for the company was found to be "in employment" for tax purposes. He was therefore entitled to entrepreneurs' relief (ER) in respect of a capital gain on the sale of his shares in the company (*Hirst v HMRC*).

Director retired but continued working: H was a significant shareholder in a company (W), and initially also held office as its business development director. When W began to experience financial difficulties, H resigned his office in order to control costs. He however continued to be involved in sourcing new business for H. It was agreed that H would receive commission in respect of new business he introduced, although this was never implemented. H retained a laptop and phone provided by W, and W continued to pay for H's home internet access.

Tax relief? When W was sold some years later, H claimed ER on the sale of his shares. HMRC refused the application, on the basis that H did not meet the requirement to be an officer or employee of W for a one year period ending with the disposal of the shares.

Not an officer… The FTT allowed H's appeal. It accepted that H was not an officer of W during the relevant period; he was not a director *de jure* following his resignation, and was neither a director *de facto* nor a shadow director, as his role was commensurate with (but limited to) that of a significant shareholder, rather than a director.

…but was an employee: However, the FTT were satisfied that H was an employee for these purposes during the period following his resignation. Applying the *Ready Mixed Concrete* test, it found that:

- H agreed to provide his skills to W, and the work he undertook following his resignation was significant. It went beyond the making of informal introductions of potential new business, as might be expected of a former director who retained a significant shareholding.
- There was consideration for H's services in the form of the agreement as to commission, and the laptop, phone and home internet contract provided to H at W's expense.
- H was under W's control, as evidenced by W's oversight of the business which it gained from H's contacts. On the facts, H reported to W, and it was W that made the appropriate decisions.
- Finally, there were no significant facts that were inconsistent with there being an employment relationship.

Take care on stepping down: This decision demonstrates the risk that a director who continues to work for the company following his resignation may be found to be an employee of the company. This could have a number of implications, particularly if a settlement sum is paid on resignation which HMRC may then seek to tax as employment income. This case turns to a certain degree on its facts, in particular that H continued to undertake work very similar to that involved in his original role. It may be distinguishable from the situation in which a director undertakes a different type of work post-retirement, and on a more limited basis.

Employer did not act negligently in instigating disciplinary proceedings

An employer was not negligent in its decision to instigate disciplinary proceedings against an employee who it believed had been complicit in the preparation of false employment references, according to a recent judgment of the Court of Appeal (*Coventry University v Mian*).

Inaccurate reference: M was employed by CU as a senior lecturer. CU was contacted by another university with concerns about a reference it had received for one of CU's former employees (J). The reference appeared to have been written and signed by M; it contained numerous inaccuracies and materially overstated J's qualifications.

Investigation reveals more: CU began an internal investigation, and a search of M's hard drive revealed three other draft references in her name for J, for other posts, which were very similar to the reference in question. M denied writing any of the references, which she claimed she had been sent by J. M said that she had instead written short references, which she had deleted from her computer (and retained no copies). M attributed this to her dislike of J and her tendency not to keep robust records.

Disciplinary charges dismissed: CU instigated disciplinary proceedings against M for alleged complicity with J in the preparation of false employment references. M was then signed off sick. Following a hearing, an independent assessor dismissed the allegations.

Negligence claim initially upheld… M left CU's employment and brought proceedings, claiming that CU was negligent (so as to have caused her psychiatric injury) in having commenced disciplinary proceedings without undertaking further enquiries. The High Court upheld M's claim, finding that, if additional enquiries had been undertaken by CU, they would have established that there was an insufficient basis for disciplinary proceedings.

…but overturned on appeal: The Court of Appeal allowed CU's appeal. In its judgment, the High Court had wrongly focused on the merits of the disciplinary charges against M, and whether the allegations had been true. It had therefore substituted its view for that of the employer. The correct test was to ask whether the decision to instigate disciplinary proceedings was unreasonable, in that it was outside the range of reasonable decisions open to an employer in the circumstances. In its view, the decision was not unreasonable, and CU was not negligent.

Employee's mental state irrelevant: The Court of Appeal also found that the High Court had wrongly taken account of the separate issue of M's mental state at the time the decision, as this was not relevant to the question of whether a charge of gross misconduct had been open to CU, or the reasonableness of the instigation of proceedings (although it accepted that it may in some circumstances be relevant to the way in which disciplinary proceedings are conducted).

Injunction against strike action where ballot authorising previous action had ceased

An employer secured an interim injunction to restrain strike action by its union as part of a pay dispute. The proposed strike action was found to fall outside the protection of the original ballot (*Westminster Kingsway College v University and College Union*).

Original ballot and strike action: The College (C) held annual negotiations with UCU over the pay of its employees. For 2013/14, C's offer of a pay increase of less than one per cent was rejected by UCU. It balloted its members, the majority of whom were in favour of strike action. A one-day strike took place in December 2013. Although there were further discussions in January 2014, negotiations were not reopened.

Subsequent pay dispute: Pay negotiations for the year 2014/15 subsequently began in March 2014, although UCU noted that the 2013/14 dispute had not been resolved. A further strike was organised for October 2014. UCU claimed the protection of the original ballot for the latest strike, on the basis that there was a series of rolling strikes, the first of which (in December 2013) took place within the requisite four weeks of the ballot. C applied for an interim injunction to prevent a proposed strike in October 2014, on the basis that it was not protected by the original ballot because the original strike called pursuant to the ballot had been substantially interrupted.

Injunction granted: The High Court granted the application for an interim injunction. It noted that a strike authorised by ballot ceased to be authorised if it was effectively discontinued. On the facts, industrial action for the year 2013/14 had stopped by February 2014, or at least by March when negotiations for the 2014/15 pay year began. This meant that, although the ballot that had authorised the strike in December 2013 might have authorised further strikes for January and February, after that, authorisation had ceased. This was

so even though the proposed October 2014 strike was also intended to target the outstanding 2013/14 pay dispute, as well as the 2014/15 pay dispute.

Ballot limits: This case is a useful example of a situation in which a trade union cannot rely on a historic ballot to continue taking fresh strike action, where the original strike action was discontinued – even if the underlying dispute is not resolved. The ability of unions to continue taking strike action on the basis of a historic ballot is one of the issues which the Conservative party has targeted in its pre-election proposals, hinting at new laws which would require that strike action must always taken place within three months after the ballot.

Points in practice

Women on boards: latest figures show an increase

BIS has published new statistics which show that women's representation on FTSE 350 boards has increased again, with many companies having already achieved (or edging closer to) the Davies Review target of 25% female board representation by 2015.

The statistics show that, as of 2nd October 2014:

- Female representation on FTSE 100 boards has increased to 22.8% (up from 20.7% in March 2014). Women now account for 27.9% of NEDs and 8.4% of executive directorships in the FTSE 100. There are 39 companies with 25% or more women on their boards, up from 36 in March 2014, and no remaining all-male boards.

- Female representation on FTSE 250 boards has increased to 17.4% (up from 15.6% in March 2014). Women now account for 22% of NEDs and 5.1% of executive directorships in the FTSE 250. There are however 28 all-male boards, the same number as in March 2014. These companies are all named in the statistics, and have all reportedly been approached by Vince Cable and Lord Davies with a view to encouraging change.

CRD IV and "role-based allowances": EBA opinion

The European Banking Authority (EBA) has published its opinion on the application of CRD IV to role-based allowances, and in particular, whether their use contravenes the CRD IV bonus cap.

The EBA's opinion is that to qualify as fixed remuneration (and thus avoid the CRD IV bonus cap), role-based allowances should be:

- permanent (i.e. maintained over time and tied to the specific role and organisational responsibilities for which they are granted);

- predetermined, in terms of condition and amount;

- non-discretionary, non-revocable (without prejudice to national law) and transparent; and

- not providing incentives to take risks.

The opinion accompanies an EBA report which reveals that most role-based allowances which were investigated by the EBA did not meet these criteria, principally because of their discretionary nature, which allowed institutions to adjust or withdraw them unilaterally, without justification.

The EBA has concluded that role-based allowances that do not meet the above criteria should be classed as variable rather than fixed remuneration for CRD IV purposes. It expects competent authorities in each jurisdiction to take all appropriate supervisory actions to ensure that financial institutions' remuneration policies are updated to ensure that these allowances are correctly classified as variable remuneration, and that payment of these allowances does not cause institutions to contravene the bonus cap. It has given a deadline of 31st December 2014 for these actions. The UK PRA/FCA have yet to respond.

The EBA is currently revising its guidelines on remuneration policies and practices to include its opinion on these allowances. It aims to consult on a revised version by the end of 2014 and finalise the revised version by the first half of 2015.

Carr Report published

The Government has published the Carr Report, which sets out the findings of Bruce Carr QC's independent review into the law governing industrial disputes. Although it was originally intended that the review would produce recommendations for reform of the law in this area, it was confirmed in August this year that due to insufficient evidence and the 'progressively politicised environment', this was no longer thought to be feasible.

The Report is therefore limited to summarising the submissions received from a number of sources about recent industrial disputes, and the calls for reform that were made as part of those submissions. An accompanying statement from Bruce Carr QC states that he believes that the Report "*…will still be a useful contribution to further debate in the area, and should assist Government or a further Review in considering the same issues at some point in the future*."

Employment law proposals at Liberal Democrat party conference

At their party conference in Glasgow, the Liberal Democrats have become the latest political party to announce proposed changes to employment law. These include 'name-blank' application forms in the public sector, in an attempt to cut discrimination; a new Workers' Rights Agency to act as a 'one stop shop' for enforcing workers' rights; more assistance for litigants in person; and increasing the national minimum wage for apprentices.

And finally…

Teleconference: a reminder

A reminder that we are hosting a teleconference on shared parental leave on **Wednesday 12th November 2014 at 8:30 am**. For further details or to book your place, please contact Helen Mulligan (by phone on 020 7090 5208, or by email: Helen.Mulligan@slaughterandmay.com).

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