SLAUGHTER AND MAY

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Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

In this issue

There is no Pensions Bulletin this week.

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New publication

Our Employment practice

At Slaughter and May we provide cutting-edge, innovative commercial advice to our clients on the most difficult and sensitive employment issues around. We are the go-to advisers for a diverse range of businesses, who rely on us to go beyond day-to-day employment law and to tackle new and complex problem areas.

We attach an overview of our Employment practice, setting out key areas of focus and our recent experience, as well as "hot topics" where forthcoming changes in employment law will be significant for employers.

New law

Small Business, Enterprise and Employment Bill: employment aspects

The Government has published the draft Small Business, Enterprise and Employment Bill. The employment aspects of the Bill are:

- a new power to require **prescribed persons to report annually** on disclosures of information made to them by **whistleblowers** (without identifying any workers or employers);
- **financial penalties** for **employers who fail to pay** any sums due under an **employment tribunal award**, or an ACAS-conciliated **settlement**. The penalty would be 50% of the unpaid amount of the outstanding sum, up to a maximum of £5,000;
- new **limits** on the number of **postponements of tribunal hearings** available to a party (and potential costs orders against those who makes a late postponement application);
- the maximum **financial penalty** on an employer who **fails to pay the National Minimum Wage** is increased to **£20,000**, for each underpaid worker;
- a **ban on exclusivity terms** in **zero hours contracts**, meaning that terms which purport to stop a zero hours worker working elsewhere will be unenforceable. There is also a power to widen the ban to other working arrangements, as an anti-avoidance measure; and
- a new power to require **repayment** of all or part of any **exit payments** made to a **public sector employee**, where the payee is re-engaged as an employee, officer or contractor of a public sector authority within a prescribed period.

The Bill had its first reading in the House of Commons on 25th June 2014. No implementation date for the Bill's measures has yet been set.

Equal pay audits

Employers who lose an equal pay claim may be forced to conduct an equal pay audit, under new draft regulations, which are intended to apply to claims presented on or after 1st October 2014. An equal pay audit will be required unless:

- an audit was carried out in the last three years;
- it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing;
- the breach gives no reason to think that there may be other breaches;
- the disadvantages of an audit outweigh the benefits; or
- the employer is a "micro-business" or a "new business" (as defined in the regulations).

The employer must be given at least three months in which to prepare and publish the audit. The audit will have to identify and explain any differences in pay between men and women doing equal work. The audit must also contain an action plan for eroding any differences in pay.

The employer must publish the audit on its website and keep it there for at least three years, and inform all persons whose gender pay information was included in the audit where they can obtain a copy. If an employer fails to comply, it may face a £5,000 fine.

Cases round-up

ECJ: pay scheme retaining age-based differential was justified

A pay scheme which was originally based on age, then later amended to remove the age criterion, while maintaining the previous age-based pay levels, was found to be prima facie age discriminatory. However, the scheme was objectively justified by the aim of protecting employees' acquired rights, according to a recent ECJ judgment (*Specht v Land Berlin*).

Age-based pay scheme: S was appointed as a civil servant under a German law which based pay grades on the employee's age at recruitment. The age-related element was removed from the pay scales in 2009. However, existing civil servants continued on their age-based pay, with further progression based on experience. As a result, S received less pay than other civil servants with similar experience, because he had started work when he was younger. He argued that this was age discrimination. The Administrative Court of Berlin made a reference to the ECJ asking whether the EU Equal Treatment Framework Directive precluded the new pay scheme which maintained the differences in pay based on age.

Legitimate to protect acquired rights: The ECJ held that the new pay scheme was not precluded by the Directive. Although it amounted to direct age discrimination, as some civil servants received lower pay than others due to their age, this could be justified. The new scheme pursued a legitimate aim, as it was designed to protect the acquired rights of existing civil servants. Any proposed scheme that failed to do this would have met with opposition from unions. Further, there was an overriding public interest in the protection of acquired rights.

The ECJ also held that the new scheme was both suitable and necessary to achieve that aim. It found that given the high number of civil servants, the diversity of their backgrounds and the periods of time involved, any transitional arrangements that entailed examining and retroactively reclassifying all existing civil servants under the new system would have been excessively complex. The ECJ therefore concluded that the pay scheme was justified.

Pay protection is justifiable: This decision is consistent with previous ECJ cases, where transitional arrangements which temporarily continued age-discriminatory pay practices were found to be justified. It gives comfort to employers that they can tackle the difficult task of removing discriminatory practices whilst maintaining employees' accrued rights.

References: disclosure of sickness records and disciplinary allegations was prohibited

An employer was prevented from providing anything more than its initial bare factual reference on a former employee, in circumstances where the employer had given an undertaking to the employee that it would only provide the bare factual reference. It could not therefore disclose sickness records and disciplinary allegations (*AB v A Chief Constable*).

Disclaimer was effective: The employer in this case had argued that its duty of care to provide an accurate reference required it to disclose the employee's sickness absences and the fact that he had been subject to disciplinary proceedings for alleged gross misconduct prior to his resignation. However,

the Court found that this duty was satisfied by the disclaimer included with the bare factual reference, which made it clear that the force was providing bare factual information only, and disclaimed any responsibility for the giving of the reference or the accuracy of the information contained within it.

Employee's legitimate expectation: The Court went on to find that the undertaking the employer had given to the employee only to provide a bare factual reference, together with the employer's policy of providing bare factual references, had created a legitimate expectation in the employee, which would be breached by disclosure of the additional information.

Data protection issues: The Court also found that disclosure of the employee's sickness records would have breached the Data Protection Act 1998, as this amounted to sensitive personal data, and the force had not shown compliance with the relevant conditions for disclosure of this type of data (one of which is that the employee must explicitly consent to the disclosure). The Court noted that the disciplinary allegations only amounted to personal (rather than sensitive personal) data, and therefore disclosure would be permitted if it was fair, lawful and in accordance with less stringent conditions. However, given the employee's legitimate expectation that this information would not be disclosed, the Court concluded that disclosure in this case would not be lawful.

Bare factual references are best option: This case illustrates the care which must be taken when giving substantive references about former employees. Bare factual references have now become far more common than substantive references, for this reason. The decision also demonstrates the importance of including a disclaimer in a bare factual reference, to avoid liability for the giving of the reference.

Whistleblowing: detriment claims

An employee who made a protected disclosure and suffered some detrimental treatment nevertheless failed in her whistleblowing claim. There was an insufficient link between the disclosure and the detriment, and the claim was also out of time (*Theatre Peckham v Browne*).

Workplace dispute and stalemate: B was employed by TP, a small theatre company, as a workshop support worker. An incident occurred involving B and a colleague (G), as a result of which both B and G raised grievances. The grievances were dealt with separately, and both were upheld. TP offered the employees the chance to attend mediation to resolve their differences, but G refused. B had been signed off work and refused to return without mediation.

Employer's response: In an attempt to resolve the stalemate, TP offered B the opportunity to leave its employment with a compensation payment. When B refused, TP saw this as a tactical ploy to get more money, and continued to press B to agree a consensual departure. B returned to work, but some months later discovered anonymous complaints about her performance. B then lodged a whistleblowing claim, relying on her grievance as the protected disclosure.

The Tribunal found that B had been subjected to detrimental treatment because TP was consciously or subconsciously motivated by B's grievance. The Tribunal held that the anonymous complaints about B's performance formed the last of a series of acts which brought the entire claim within time.

Pushing exit package was detriment: The EAT agreed that by seeking to persuade B to leave on agreed terms, TP had subjected her to detriment. In a situation of stalemate, TP had sought to persuade B to leave, when they did not do so with G. This treatment could reasonably be regarded as a detriment.

…but no causal link: However, the EAT noted that, where a dysfunctional workplace situation exists and the employer claims to have been acting to remedy it, a causal link between the disclosure and the detriment can only be established if the employer's

account was found to be false, or less than the whole story. On the facts of the present case, there had been no such finding. The required causal link had therefore not been established.

…and claim out of time: Finally, the EAT found that the anonymous complaints about B's performance had not in fact been pleaded by B. On that basis, the claim could not stand in relation to this detriment. Since this was the final act within the series which brought the rest of the claim within the time limit, the rest of the claim was therefore out of time.

Positive and negative points for employers: On the one hand, this case is a helpful restatement of the principle that employers should be able to take steps to resolve a dysfunctional workplace situation, without facing a whistleblowing claim. On the other hand however, employers need to be aware that, in other circumstances, trying to deal with a whistleblower by offering them a settlement package to leave employment may expose them to a claim.

Referee was not an employee

A football referee was not an "employee" for unfair dismissal purposes. The employer was not obliged to offer him work, and he was not obliged to accept it. There was also insufficient control, as the employer had no right to interfere in the referee's conduct of a match (*Conroy v Scottish Football Association Ltd*).

Referee's terms of engagement: C worked for the SFA as a referee in his spare time (he had full-time employment as an NHS doctor). He was engaged each year under a "letter of classification", which set out various terms and conditions. These included obligations to abide by the SFA's rules and regulations, and to maintain a certain standard of fitness and behaviour. It also expressly provided that C's relationship would be that of an independent contractor, rather than an employee, and that C would be responsible for all income tax and NICs due on the fees he was paid as a referee. C's unfair dismissal claim was struck out when the Tribunal found that he was not an "employee" for these purposes.

Personal service, but no obligation to provide or undertake work: The EAT upheld the Tribunal's decision. It accepted that C was under an obligation to provide personal service, as he was not entitled to send a substitute to referee his matches. However, the SFA was under no obligation to offer C any matches at which to officiate. Similarly, C was under no obligation to accept work from the SFA, and could withdraw from matches. The relationship between C and the SFA therefore lacked the requisite mutuality of obligation for an employment relationship.

Insufficient control: The EAT also found that the degree of control which the SFA exercised over C was also insufficient to constitute an employment relationship. The way in which C conducted the game was governed by the Laws of the Game, set by international governing bodies and applicable to all referees. The key finding was that the SFA had no contractual right of control over C sufficient to allow the SFA to issue directions during the course of a game. In these circumstances, he could not be an employee.

Topical interest: Employment status cases are always fact specific, and the facts of this case are particularly topical, given the World Cup. The Tribunal considered all the relevant factors, some of which actually supported an employment relationship (namely, that the SFA provided BUPA healthcare and insurance for C). However, these were outweighed by the factors which pointed away from employment, such as the lack of sick pay, lack of disciplinary procedures, and the fact that C provided his own flags, red and yellow cards, whistles and notebooks.

Points in practice

Whistleblowing: BIS response to call for evidence

BIS has published its response to its call for evidence on strengthening protection for whistleblowers. The response announces the following changes:

- a new non-statutory **code of conduct** and/or **best practice guide for employers** on whistleblowing policies;
- improved **guidance for individuals** on how whistleblowing works;
- reviewing the **effectiveness** of the current process for **employment tribunals to refer a case to the appropriate regulator**, which requires the claimant's consent;
- the introduction of a duty on **prescribed persons to report annually** on the number of cases they have received and whether these have been investigated. BIS has introduced provisions into the Small Business, Enterprise and Employment Bill to this effect (see above); and
- giving **additional groups** (such as **student nurses**) **whistleblowing protections**. BIS decided not to legislate in respect of other groups, such as NEDs, consultants, job applicants and volunteers, but will keep this area under review.

BIS has said that it will now begin implementing the non-legislative changes, and that legislative changes will be introduced through the Small Business, Enterprise and Employment Bill, likely by April 2015.

Zero hours contracts: Government response to consultation

The Government has published its response to its consultation on the use of zero hours contracts. The response confirms that the Government intends to take the following measures:

- **ban the use of exclusivity clauses** in zero hours contracts. It has introduced provisions into the Small Business, Enterprise and Employment Bill to enact the ban (see above). The Government estimates that 125,000 contracts are subject to an exclusivity clause. Although this is a small proportion of the estimated 1.4 million zero hours contracts in place as at April 2014, the proposal to ban exclusivity clauses received 83% support amongst the respondents to the consultation.
- a further consultation on **measures to prevent employers evading the exclusivity ban**, for example through offering one hour fixed contracts. The Small Business, Enterprise and Employment Bill also creates the power for regulations to deal with this issue (see above).
- develop a **code of practice** on the fair use of zero hours contracts, in consultation with business representatives and unions, by the end of 2014.
- work with stakeholders to **review existing guidance and improve information** available to employees and employers on using these contracts.

Call for evidence on remuneration practices

HM Treasury has issued a call for evidence on remuneration practices. It observes that taxation of remuneration is the largest single source of government revenue, and therefore understanding trends and developments in remuneration practices is important, to ensure that there is coherence in the way different forms of remuneration are taxed, and to understand the impact that current and future trends in remuneration have on the tax base in the UK.

Specifically, the government is inviting evidence on the following broad areas:

- **What** different forms of remuneration make up remuneration packages?
- **Why** are different forms of remuneration used?
- **How** are different forms of remuneration provided?
- What does the **future** of remuneration look like?
- The call for evidence closes on 9th September 2014.

522526587

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