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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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or Clare Fletcher.

Stop Press

Summer Budget 2015

The Chancellor delivered his Summer Budget on 8th July 2015. Amongst the measures that will be of interest from an employment perspective are a new national living wage for all workers aged over 25, to be set at £7.20 per hour from April 2016, rising to £9 per hour by 2020. Public sector pay rises will be limited will to 1% a year for the next four years. The personal allowance will rise to £11,000 next year, when the 40p tax threshold will also rise to £43,000. There will be a tightening up of disguised employment rules, a new apprenticeship levy for large employers, and the permanent non-dom status will be abolished – from April 2017, anyone who has lived in the UK for 15 of the past 20 years will be required to pay the same level of tax as other UK citizens. We will report further on these developments once further details become available.

New publication

Holiday pay

With the summer holiday season upon us, we attach a joint briefing on holiday pay which we have prepared with Bredin Prat and Hengeler Mueller. The briefing examines the European rules on holiday pay, and the way in which those principles are implemented in France, Germany and the UK, drawing out some key differences between the three countries.

Cases round-up

NI Court of Appeal: Holiday pay should include voluntary overtime

The Northern Ireland Court of Appeal has held that holiday pay should include voluntary overtime (*Patterson v Castlereagh Borough Council*).

Claim: The case concerned an assistant plant engineer (P) employed by CBC. P lodged an unlawful deductions from wages claim on the basis that the calculation of his holiday pay should have included pay for overtime hours that he volunteered to work. Although his contract of employment did not mention overtime, it was clear that CBC was not obliged to offer overtime, nor was P required to undertake it when it was offered.

Rejected by Tribunal: The Tribunal rejected his claim at first instance. It applied *Bear Scotland* and concluded that, since P's overtime was "voluntary overtime" and not obligatory "non-guaranteed overtime", CBC was not required to include the overtime in the calculation of his holiday pay.

Concession: Before the Court of Appeal hearing, CBC conceded that the Tribunal had erred in finding that holiday pay should not take into account voluntary overtime. It pursued the appeal simply on the basis that P had failed to establish the earnings he received for voluntary overtime.

Voluntary overtime should be included: The Northern Ireland Court of Appeal accepted the concession, and concluded that in principle there is no reason why voluntary overtime should not be included as a part of a determination of entitlement to paid annual leave. It confirmed that it will be a question of fact in each case whether or not voluntary overtime was normally carried out by the worker, and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation. This was left to the Tribunal to determine on remission.

Relevance for English cases? As a Northern Irish case, this decision is not binding on courts and tribunals in England. It is likely to be persuasive until such time as an English case raises these issues. Nonetheless, the

Court made it clear that given the lack of full argument which resulted from the concession there is a strong likelihood of further consideration of these issues. This suggests that this issue is not yet settled, and there may be scope for another court to decide differently.

Advice for employers: In the meantime, employers are advised to approach voluntary overtime on a case by case basis when calculating holiday pay. If the voluntary overtime is regularly worked, the case for including it will be far stronger than if it is sporadic.

Collective redundancies: trigger and special circumstances

The requirement to consult on collective redundancies was triggered when a school decided that it would need to close unless pupil numbers increased – not at the later point when the final decision to close the school was taken. The school was also unable to rely on the special circumstances defence to excuse its failure to consult, since the school was unaware of its consultation obligations at the relevant time (*E Ivor Hughes Educational Foundation v Morris*).

School faces closure: M was employed as a teacher at a school operated by EIHEF. In January 2013 the school bursar prepared projected pupil numbers for the 2013/14 school year, all of which would result in a budget deficit. On 27th February 2013 there was a meeting of the school governors, where possible options to enable the school to stay open were discussed. At the end of the meeting, the governors decided that the school would have to close in April unless numbers improved (which they considered unlikely).

Final closure decision: On 25th April 2013, the head teacher informed the governors that the projected pupil numbers had now dropped further. The governors therefore decided to close the school at the end of the summer term. M and the other teachers were given notice of dismissal on 29th April. No form of consultation on the redundancies was carried out.

Claims for failure to consult: M and the other teachers lodged claims for protective awards based on EIHEF's failure to inform and consult. The Tribunal upheld the claims, finding that the obligation had been triggered on 27th February, and that no special circumstances applied, resulting in protective awards of 90 days pay. EIHEF appealed on the issue of when the obligation was triggered (claiming it was not until 25th April, when the final decision to close was taken), and whether the special circumstances defence applied.

Trigger for consultation: The EAT dismissed the appeal. On the timing of the trigger, it agreed with the Tribunal that 27th February was the point at which each of the current tests laid down by case law was satisfied. It was the point at which closure of the school was "fixed as a clear, albeit provisional, intention" (*UK Coalmining v NUM*), and "when a strategic decision had been adopted which compelled the employer to contemplate or plan for collective redundancies" (*Akavan v Fujitsu*).

No special circumstances: The EAT also rejected the appeal on the special circumstances defence. EIHEF had tried to argue that consultation would have sealed the school's fate, since the possibility of closure would have leaked and parents would have removed their children from the school, and waiting until April 2013 to consult would have given the school the best chance of saving itself. The EAT agreed with the Tribunal that these were not special circumstances, and could apply to many businesses facing closure. In any event it was "artificial" for EIHEF to rely on these arguments, since it was unaware at the time that it was under any obligation to consult.

Lessons for closure scenarios: This case illustrates that the obligation to consult in a closure scenario will often be triggered before the final decision to close the business has been taken. The EAT did acknowledge that there may be particular situations, or particular types of business, in which leakage of information about a possible closure of the business might be a special circumstance justifying a failure to consult, although it gave no further indication of what situation/business this might be.

Court of Appeal: Indirect discrimination requires proof of reason for disadvantage

Indirect discrimination requires the employee to show not just that there is a provision, criterion or practice (PCP) which put those with a protected characteristic, including the claimant themselves, at a disadvantage. It also requires the employee to show *why* the PCP has disadvantaged the group (and them individually), according to a recent judgment of the Court of Appeal (*Home Office (UK Border Agency) v Essop*).

Test disadvantages BME and older employees: E was employed by UKBA as an immigration officer. The UKBA required all staff to pass a generic Core Skills Assessment (CSA) in order to be eligible for promotion. E failed the CSA and lodged claims of indirect discrimination, claiming that the CSA disadvantaged black and minority ethnic (BME) candidates, as well as those over 35. E relied on a statistical report prepared by external diversity consultants, which showed that the BME selection rate was 40.3% of the white selection rate (and there was a 0.1% chance that this could happen by chance). For candidates aged over 35 the selection rate was 37.4% of the younger rate (with again 0.1% risk that this could happen by chance). The report did not identify any reason for the differential impact.

Reason for disadvantage? The Tribunal dismissed the claim, finding that E had failed to establish the reason why BME and older candidates were disadvantaged by the requirement to pass the CSA. The EAT allowed E's appeal, finding that for indirect discrimination, it is sufficient that individuals with the protected characteristic are put at a disadvantage by the PCP, without further enquiry into why that disadvantage was suffered.

Reason IS relevant: The Court of Appeal allowed UKBA's appeal. It confirmed that in indirect discrimination claims, the claimant must show why the PCP has disadvantaged the group and the individual claimant. Otherwise, individuals who share the same protected characteristic would be able to claim indirect discrimination, even if they had failed the CSA for unrelated reasons. The Court accepted that a statistical report such as that in the present case may in principle be used to prove the requisite group disadvantage, although this would be a matter for the Tribunal. The Court also allowed that such statistical evidence may be relied on by the employee to shift the burden of proof onto the employer in relation to the individual disadvantage issue, leaving it to the employer to prove a non-discriminatory reason for the disadvantage.

Good news for employers: This decision makes it more difficult for employees to establish indirect discrimination, where (as here) it is not clear why employees with certain protected characteristics are disadvantaged, only that such a disadvantage does exist.

Points in practice

Final FCA/PRA remuneration rules

The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have published final versions of their new remuneration rules, following last year's consultation (see Employment Bulletin dated 14th August 2014, available here).

The new rules are summarised in a joint policy statement (PRA PS12/15, FCA PS15/16). They are broadly unchanged from the consultation version, although there are some changes to the details on deferral. The new rules are as follows:

- **Deferral**: Variable remuneration must be withheld following the end of the accrual period for the following deferral periods:
  - seven years for senior managers, with no vesting before the third anniversary of award, and vesting no faster than on a pro rata basis;
  - five years for PRA-designated risk managers with senior, managerial or supervisory roles, with vesting no faster than pro rata from year one; and
  - three to five years for other material risk takers (**MRTs**) (i.e. all other staff whose

actions could have a material impact on the firm), with vesting no faster than pro rata from year one.

- **Clawback**: Variable remuneration may be reclaimed in prescribed circumstances for:
  - seven years from the date of award for all MRTs; and
  - a possible three additional years (i.e. ten in total) for senior managers who are undergoing investigation at the end of the seven year period.
- **Non-executive directors**: NEDs will become subject to an express prohibition on the award of variable pay, to ensure their independence.
- **Taxpayer-supported firms**: There will be an explicit rule that no variable pay (including all discretionary payments, such as loss of office and discretionary pension payments) should be paid to the management of a firm in receipt of taxpayer support.
- There will be more effective **risk adjustment** to variable remuneration for PRA-regulated firms. The new rules regulate the profit figure used to determine the size of a bonus pool, and apply to UK firms and UK subsidiaries of overseas firms (but not branches of overseas firms). If there is a global bonus pool, the PVA adjustment must be applied to the profits of the UK entity that feed into the global bonus pool.

The new rules are fully set out in a PRA Rulebook Instrument (PRA 2015/53), a PRA Handbook Instrument (PRA 2015/52), and an FCA Handbook Instrument (FCA 2015/27).

The rules will apply to banks, building societies and PRA-designated investment firms, including UK branches of non-EEA headquartered firms. The rules apply to all MRTs at these firms, including senior managers designated under the new senior managers' regime from 2016.

The new rules on deferral and clawback will apply to variable remuneration awarded for performance periods beginning on or after 1st January 2016. The other new rules will apply from 1st July 2015.

Other publications

The PRA has also issued a supervisory statement on remuneration (SS27/15), which clarifies the PRA's expectations on how firms should comply with the requirements of the Remuneration Part of the PRA Rulebook. These relate to types of remuneration; MRTs; proportionality; firm-wide application; remuneration committees; risk management and control functions; remuneration and capital; risk adjustment; personal investment strategies; remuneration structures; and breaches of the remuneration rules. The PRA has also updated its supervisory statements on the application of proportionality (LSS8/13) and the application of malus to variable remuneration (SS2/13).

The FCA has also published:

- the final version of its General guidance on the application of ex-post risk adjustment to variable remuneration, following its recent consultation (see Employment Bulletin dated 16th April 2015, available here);
- General guidance on proportionality relating to the dual-regulated firms Remuneration Code (SYSC 19D); and
- a webpage on the dual-regulated firms Remuneration Code (SYSC 19D).

The guidance comes into force on 1st July 2015.

Finally, the FCA has published a document explaining the changes to the Remuneration Code. This document acknowledges that further changes may be required in light of the European Banking Authority's (EBA) final guidelines on sound remuneration policies, which are expected later this year. Once the final

guidelines are issued, the FCA and PRA will consider whether further changes are required.

Next steps

The PRA/FCA consultation paper also featured proposed new rules on accountability, and a number of options to address buy-outs. The PRA and FCA have said that the final rules on accountability will be published in summer 2015, and they will further explore the option of requiring buy-out rewards to be held in a form that permits them to be subject to malus by the previous employer, for example by using an escrow account.

HMRC confirms exceptions from new share scheme reporting requirements

HMRC has published its latest Employment-related Securities Bulletin (No. 20), which notes that HMRC has come across instances of companies which are unable to make online returns of reportable events, as per the new regime for registered employment-related securities schemes or arrangements. It has now confirmed that for 2014/15, returns of reportable events will not be required if all of the following apply:

- neither the company, nor any other company in the same group or under the same ownership, is registered for PAYE;
- the arrangements are not tax-advantaged schemes (that is, not SIP, SAYE, CSOP or EMI schemes); and
- the company has no obligations to operate PAYE in respect of the reportable event, or in respect of anything else it does.

The exceptions are only likely to apply to overseas companies.

Gender pay gap: ONS report and forthcoming Government consultation

The House of Commons Library has issued a note on the gender pay gap with reference to the ONS Annual Survey of Hours and Earnings. The note reveals that (as at April 2014):

- The full-time median pay gap is 9.4% overall.
- The part-time pay gap has widened to -5.5% (reflecting that women are being paid more than men).
- The full-time median pay gap is much higher for employees aged 40 to 49, at 13.6%. This increases further to 17.9% for those aged between 50 to 59.
- Likewise, the difference in pay for men and women earning at the highest levels is in the region of 20%.

Separately, the Government has also confirmed that it will shortly publish a consultation on the regulations to require gender pay gap reporting under section 78 of the Equality Act 2010.

And finally…

ACAS guidance on working in hot weather

ACAS has issued new guidance on working in hot weather. It notes that "*Although the Great British Summer often doesn't result in hot temperatures there will be times when the sun does come out and workers find themselves working in hot conditions*." The guidance is aimed at both employers and employees, and contains the following key points:

- Although there is no maximum workplace temperature in the UK, the guidance references the Health & Safety Executive (HSE) guidance, which states that "*during working hours, the temperature in all workplaces inside buildings shall be reasonable*". What is reasonable depends on the type of work being done (manual, office, etc) and the type of workplace (kitchen, air conditioned office, etc).

- Employers are not legally obliged to provide air conditioning in workplaces. Employees are encouraged to switch on any fans or air conditioners to keep workplaces comfortable and use blinds or curtains to block out sunlight, and those working outside should wear appropriate clothes and use sunscreen to protect from sunburn.

- Employers are not under any obligation to relax their uniform or dress code requirements during hot weather.

- Employers must provide staff with suitable drinking water in the workplace.

- Employers may wish to give vulnerable employees (those who are young, older, pregnant or on medication) more frequent rest breaks and ensure ventilation is adequate by providing fans, or portable air cooling units.

- Employers may help employees observing Ramadan by holding meetings in the morning or considering a temporary change in working hours.

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