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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Find out more about our pensions and employment practice by clicking here.

For details of our work in the pensions and employment field click here.

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.

New publication

Business transfers and collective agreements

We attach a joint briefing which we have prepared with Hengeler Mueller and Bredin Prat, which considers the implications of a business transfer on a collective agreement in force between the transferor and its recognised trade union. The issues are explored via a number of practical scenarios, which highlight some interesting contrasts between the position in the UK, France and Germany.

New law

ACAS early conciliation: final regulations published

The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 have been published. The Regulations (available here) contain the Early Conciliation Rules of Procedure, which prescribe how the new early conciliation process will work.

The early conciliation process will be mandatory in relation to claims presented to an employment tribunal on or after 6th May 2014, although claimants can choose to use the new regime from 6th April 2014.

In summary, the Rules of Procedure provide for the following process:

- The claimant must either present an early conciliation form to ACAS in the prescribed form (online or by post), or telephone ACAS to initiate early conciliation.
- The time limit on the tribunal claim will cease to run the day after ACAS is contacted, and will only start to run again the day after the claimant receives the certificate from ACAS (see below).
- ACAS must make reasonable attempts to contact the claimant and (if the claimant consents) the respondent.
- If ACAS is unable to make contact with the claimant or respondent, it must conclude that settlement is not possible.
- The early conciliation period starts when ACAS receive the claimant's form or phone call, and lasts for up to one calendar month from that date. During that period, ACAS must endeavour to promote a settlement between the claimant and the respondent.
- The period for early conciliation may be extended by up to 14 days if both claimant and respondent consent, and ACAS considers that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.
- ACAS must issue a certificate in the prescribed form if either the period for early conciliation (including any extension) expires, or if at any point during that period ACAS concludes that a settlement of a dispute is not possible.
- The certificate will be sent to both claimant and respondent (if ACAS made contact with the respondent), by email if possible, otherwise by post. The certificate will be deemed received on the day it is sent (if sent by email) or on the day on which it would be delivered in the ordinary course of the post.

Cases round-up

No unlawful discrimination in restriction of survivor's pension for civil partners

In **Innospec Ltd & ors v Walker**, the EAT upheld the application of paragraph 18 of Schedule 9 to the Equality Act 2010, which permits discrimination on the grounds of sexual orientation in respect of access to a benefit payable in respect of periods of service prior to 5th December 2005 (when the Civil Partnership Act 2004 came into force).

The Tribunal had previously determined that paragraph 18 was not compliant with the principle of equal treatment enshrined in the EU Equal Treatment

Directive, and paragraph 18 should therefore be interpreted so as to prevent discrimination in relation to pre-5th December 2005 periods of service.

The EAT confirmed that paragraph 18 is not incompatible with the Equal Treatment Directive, given that the Directive does not have retrospective effect. The EAT drew a comparison with a claim for previous inequality of pay, which arose before the acceptance of the right to equal pay, which is not possible under the Directive – including where that pay is deferred in the form of a pension.

The EAT went on to state that if, contrary to its primary conclusion, paragraph 18 was incompatible with the Directive, it could not in any event have been interpreted so as to permit the claim. It stated that to do so would be diametrically opposed to the clear wording of paragraph 18, to the thrust of the legislation in this particular respect and to the apparent intention of Parliament.

Comment: For further details and an analysis of the implications of this decision, see this week's Pensions Bulletin.

Discrimination: Employer not liable for acts of sub-contractor's employee

In **Kemeh v Ministry of Defence**, the Court of Appeal held that an employer could not be liable for the discriminatory acts of an employee of its subcontractor. The offending individual had not acted as the employer's agent.

K, a black man born in Ghana, was employed by the MoD as an army cook. In June 2010 he was subjected to an incident of race discrimination by an individual, A, who was a butcher employed by one of the MoD's subcontractors. K commenced proceedings against the MoD on the grounds that it was liable for the discriminatory act of A, on the basis that A was the MoD's agent. The Tribunal upheld K's claim, but its decision was overturned on appeal by the EAT.

The Court of Appeal dismissed K's appeal. It held that generally, it could not be appropriate to describe someone who was employed by a subcontractor as an agent simply on the grounds that they performed work for the benefit of a third party employer; they would no more be acting on behalf of the employer than its own employees, who would not typically be treated as agents. The Court found that even if the MoD would have the right to veto A's presence, at least for good reason, that limited degree of control came nowhere near constituting an authorisation by the MoD to allow A to act on its behalf with respect to third parties. Accordingly, the MoD could not be liable for A's act of discrimination.

Comment: The Court of Appeal commented that the fact that someone is employed by one person does not automatically prevent him being the agent of another, even in relation to the same transaction. There is therefore the possibility that an employer could be held liable for the acts of an employee of a third party. However, the Court was clear that there would need to be very cogent evidence to show that the duties an employee was obliged to do as an employee of their employer, were also being performed as an agent of the third party.

Points in practice

UK challenge to CRD IV bonus cap – application published

The text of the UK government's application to the ECJ to challenge the bonus cap under CRD IV has now been published in the Official Journal of the EU. The application has been designated as **United Kingdom of Great Britain and Northern Ireland v European Parliament, Council of the European Union (Case C-507/13)**.

The application reveals that the UK government is seeking annulment of (amongst other provisions) Article 94(1)(g) of the CRD IV Directive, which sets a limit on the variable remuneration that can be paid to certain financial sector employees.

The grounds pleaded are that:

- the relevant provisions of CRD IV have an inadequate Treaty legal base;

- they are disproportionate and/or fail to comply with the principle of subsidiarity;
- they have been brought into effect in a manner which infringes the principle of legal certainty;
- the assignment of certain tasks to the European Banking Authority and conferral of certain powers on the European Commission is ultra vires;
- the provisions regarding disclosure of details of employees' salaries offend principles of data protection and privacy under EU law; and
- to the extent the cap on variable remuneration is required to be applied to employees of non-EEA institutions, it infringes Article 3(5) of the Treaty on European Union and the principle of territoriality found in customary international law.

The application in full is available here.

Employee shareholders: HMRC publishes new capital gains guidance

HMRC has published new guidance on the capital gains tax treatment of exempt employee shareholder shares. The new guidance substantially repeats previous guidance from HMRC, including confirmation that HMRC does not anticipate challenging cases in which statutory employment rights forgone under an employee shareholder agreement are reinstated by contract.

The new guidance is available here.

Flooding: TUC guidance for employers

The TUC has published guidance for employers who have unfortunately been affected by the recent floods. The guidance contains the following suggestions:

- Employees in flood hit areas should be advised against trying to get into work unless and until it is safe to do so.
- Employees should be permitted time off to deal with problems caused by the water, and (where applicable) allowed to use showers and washing facilities at work.
- Workplaces situated within flooded areas must be deemed safe before anyone returns to work. This means checking that any affected workplace is not only dry, but has also been cleaned and disinfected. It would be unreasonable and unsafe for employers to expect staff to work until power and water supplies have been restored.

The full guidance is available here.

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