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.

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New publication

Maximum awards for unfair dismissal (from 6th April 2015)

We attach an updated version of our annual note summarising the maximum awards for unfair dismissal. This has been updated to reflect the new limits that will apply where the date of termination of employment falls on or after 6th April 2015.

Cases round-up

Reasonable investigation need not address all of employee's defences

An employee who dishonestly overclaimed his mileage expenses had not been unfairly or wrongfully dismissed, according to a recent judgment of the Court of Appeal. The employer had conducted a reasonable investigation, and was not necessarily required to investigate each and every line of the employee's defence (*Shrestha v Genesis Housing Association Ltd*).

Mileage overclaim: S was employed by GHA as a floating support worker. Part of his role required him to travel by car to visit clients at their homes, and he was entitled to claim expenses for the mileage travelled. GHA became suspicious of S's claims and checked the mileage claimed against route-finder information relating to journey distances provided by the AA and RAC. This revealed that most of the mileage claimed was almost twice the journey information from the AA.

Dismissal: At his disciplinary hearing, S claimed that the higher mileage was due to parking difficulties, road works, road closures, and one-way streets. GHA determined that this was not a plausible explanation for the discrepancies. GHA did not put every journey to S for explanation, nor did it carry out any further investigations. The disciplinary hearing resulted in a finding that S had fraudulently over-claimed mileage and was guilty of gross misconduct. He was therefore dismissed. The Tribunal rejected S's claims for unfair and wrongful dismissal, as did the EAT.

No need to investigate all defences: The Court of Appeal dismissed S's appeal. It rejected his argument that each line of defence had to be investigated unless it was manifestly false or unarguable, finding that this was too narrow an approach. The investigation should be looked at as a whole when assessing the question of reasonableness. The employer must consider any defences advanced by the employee, but whether and to what extent it was necessary to carry out specific inquiry into them would depend on the circumstances as a whole.

Employer had acted reasonably: On the facts of the present case, the Court was satisfied that it would not have been reasonable for GHA to have recreated all the journeys as S alleged they took place. It was clear that S's explanations could not fully explain the discrepancies in mileage. The Court concluded that there had been a reasonable assessment that had made it unnecessary to pursue any further inquiry into the employee's explanations.

Scope of investigations: This case helpfully establishes that an employer will not necessarily be required to investigate every line of defence put forward by an employee in the course of disciplinary proceedings, provided that the investigation overall is reasonable.

Restricting access to benefits for sick employees may constitute disability discrimination

Two recent cases have shown how employers need to carefully consider the impact of sickness absence on access to benefits, in order to avoid disability discrimination:

Case 1 (Land Registry v Houghton)

- **Bonus scheme excluded sickness warnings**: This case concerned a discretionary bonus scheme which excluded any employee who had received a

formal warning in respect of sickness absence that year from any entitlement to a bonus. Although management had a discretion to determine that a conduct-related warning would not affect entitlement to the bonus, no such discretion existed in relation to a sickness absence warning.

- **Disabled employee excluded**: A disabled employee (H) had a number of disability-related sickness absences. Despite the employer (LR) having made reasonable adjustments to the usual trigger points, H nonetheless received a warning in relation to her absences. H was therefore denied a bonus in respect of that financial year, and she lodged a claim complaining of discrimination arising from her disability.

- **Discrimination**: The Tribunal and the EAT upheld H's claim. It found there was a sufficient link between H's disability and the non-payment of the bonus. It was accepted that LR had a legitimate aim, in operating the bonus scheme, of encouraging and rewarding good performance and attendance. However, it was found that the design of the bonus scheme was not a proportionate means to achieve that aim. LR had provided no explanation for the anomaly in the discretion available to management under the scheme between different types of warning, and the lack of discretion in relation to sickness absence warnings had the effect that LR could not take account of the improvement in H's attendance following the warning. H was therefore awarded a full bonus.

Case 2 (Chawla v Hewlett Packard Ltd)

- **Communication restrictions during sick leave**: This case concerned an employee (C) on long-term sickness absence, and an employer (HP) who had a policy of shutting down access to email and the company intranet for employees on long-term sickness absence, for security reasons.

- **Sick employee missed share schemes communications**: As a result, C missed out on communications about share schemes, including the ability to exercise his share options. He only learned of this at a late stage in the process, and the stress of having to find a large sum of money on short notice to cover his tax liability had a severe adverse effect on his health. C claimed that HP had failed in its duty to make reasonable adjustments.

- **Failure to make reasonable adjustments**: The Tribunal and the EAT upheld C's claim. Although the EAT endorsed HP's security concerns, it nevertheless found that HP's policy of withdrawing C's access to the corporate email and intranet systems led to a failure to ensure that C was informed of developments to his terms and conditions of employment in a timely fashion whilst off sick. This amounted to a failure to make reasonable adjustments. Although C had suffered no financial losses, he was awarded £8,000 for personal injury and a further £5,000 for injury to feelings.

Points for employers: These cases show firstly the dangers of taking account of sickness absence for a bonus scheme (or equally a redundancy scheme) where those absences are disability-related. Employers should make sure that they reserve some discretion to discount disability-related absences. Secondly, employers must ensure that they retain open channels of communication with employees during sick leave, so that those employees do not miss out on important communications to their detriment (either financially or as regards their health).

Director who emailed pornographic images committed gross misconduct

The High Court has rejected a wrongful dismissal claim from Gwyn Williams, the former Technical Director of Leeds United FC, who was found to have emailed pornographic images to his friends and a junior colleague (*Williams v Leeds United Football Club Ltd*).

Dismissal on notice: In the summer of 2013 LUFC underwent a reorganisation, as a result of which

W was given notice of termination by reason of redundancy on 23rd July 2013. LUFC decided that it did not want to pay W throughout his 12 month notice period, and began looking for a basis on which to summarily dismiss W.

Investigation reveals pornographic emails: A week later, LUFC discovered that W had used its e-mail system in 2008 to forward an e-mail (which he had received from a friend) to Denis Wise, formerly the manager at LUFC and then at Newcastle United FC. The message in the email said "*Looks like dirty Leeds!!*" and attached several pornographic photos of naked muddy women in a shower.

Summary dismissal: LUFC determined that W's conduct amounted to gross misconduct, and he was summarily dismissed. Some months after the dismissal, it discovered that W had also forwarded the e-mail and the pornographic images to a junior female employee of LUFC, and to another friend (Gus Poyet at Tottenham Hotspur FC).

W claims wrongful dismissal: W claimed damages for his salary and benefits for the remainder of his 12 month notice period. He argued that his conduct, whilst inappropriate, did not amount to a sufficiently serious breach to entitle LUFC to terminate his contract without notice.

Claim dismissed: The High Court dismissed W's claim. It found that W's conduct had amounted to a breach of contract, as it was likely to seriously damage the relationship of trust and confidence between W and LUFC. The Court relied on the following reasons:

- W occupied a very senior management post at LUFC, and was in a role of responsibility in relation to young and impressionable players.
- The nature of the images involved was, by W's own admission, pornographic and obscene.
- The sending of those images to a junior, female employee, by a senior manager with significant influence over her career, might well have caused offence and would have left LUFC vulnerable to a claim for sexual harassment.
- The nature of LUFC's business and the potential consequences of conduct of that nature was also highly relevant. The conduct was likely to generate significant media interest and potentially negative press coverage for LUFC. That, in turn, might well adversely affect the reputation of LUFC and its ability to find or retain sponsors or supporters.

No reasonable explanation: The Court found there could be no reasonable explanation to justify a senior manager using the internal e-mail system to send pornographic images to a much more junior, female employee. This was sufficiently serious in itself to amount to gross misconduct, irrespective of the fact that he also used the LUFC e-mail system to send pornographic images to friends (actions for which there was equally no reasonable explanation).

Employer's motives irrelevant: The Court held that, as W's conduct amounted to a repudiatory breach, LUFC was entitled to rely on that as justifying the dismissal. The fact that LUFC were actively looking for evidence to justify W's dismissal did not prevent LUFC from relying on that conduct. Neither did the fact that the conduct took place over five years ago, given that LUFC had only just discovered it. Finally, it was settled law that LUFC was entitled to rely on conduct discovered after the dismissal (notably the further dissemination of the emails) in justifying the summary dismissal.

Avoiding long notice periods: This case shows how an employer may be able to defend a wrongful dismissal claim in circumstances where it sets out to find a reason justifying summary dismissal (perhaps to avoid liability for a lengthy notice period, as here), even if it only finds key parts of the evidence it needs following dismissal. Had the claim been brought as one of unfair dismissal in an employment tribunal, the outcome may well have been different.

Points in practice

Whistleblowing: PRA/FCA consultation

The Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) have launched a joint Consultation Paper on whistleblowing measures in the financial sector. The proposals are designed to create a consistent approach to whistleblowing and to ensure whistleblowers do not face personal repercussions.

The main proposals are:

- internal whistleblowing arrangements should be put in place, if not already set up;
- UK-based employees should be notified of these arrangements and of their ability to blow the whistle either to the FCA or PRA (the consultation seeks views on whether these arrangements should be available to all individuals, not just employees who are protected under PIDA);
- employment contracts and settlement agreements should include provisions clarifying that employees and ex-employees are not prevented by the agreement from making a protected disclosure;
- protection should be offered to whistleblowers, whatever their relationship to the business and whatever the details of their disclosure;
- firms should designate a 'whistleblowers' champion', with responsibility for:
  - overseeing the effectiveness of internal whistleblowing arrangements, including protection against detrimental treatment;
  - preparing an annual report to the board about their operation; and
  - reporting to the FCA in cases where an employment tribunal finds in favour of a whistleblower.

The consultation closes on 22nd May 2015. The PRA and FCA will then publish policy statements containing the final rules. The proposed measures will apply to UK banks, building societies, credit unions and PRA-designated investment firms and insurers. The FCA intends to consult separately on whether similar whistleblowing mechanisms are required in the wider selection of businesses which it regulates.

The FCA has also published a note detailing how it handles disclosures from whistleblowers, and providing an overview of the type of disclosures it received in 2014.

HMRC Employment-related securities bulletin no. 19

HMRC has published its Employment-related securities bulletin no. 19. The key points to note are:

- For employee shareholder arrangements, the Bulletin reflects BIS's previous statement that companies may use existing shares, despite the legislation requiring companies to "issue or allot" shares.
- When self-certifying tax approved schemes, those that were approved schemes before 6th April 2014 may be self-certified as meeting the requirements of the relevant schedule of ITEPA 2003, provided that no changes have been made since approval. The Bulletin confirms that changes made solely to reflect Finance Act 2014 are not treated as amendments to key features for these purposes.

Consultation on extending Prospectus Directive share schemes exemption

The European Commission has published a consultation on its review of the Prospectus Directive, which includes a proposal to extend the exemption from the requirement to issue a prospectus when making an offer of securities to employees. The exemption is currently available to companies whose head office is in the EEA, or whose shares are listed on

an EEA regulated market (or a non-EEA market if the Commission has issued an equivalence decision).

The Commission's proposal is to extend the exemption to non-EEA private companies wishing to offer their shares to employees in the EU. The Commission is concerned that the current exemption might deprive EU employees of non-EEA, non-listed companies from the opportunity to invest in their employer's securities, as their employer might refrain from launching an employee share scheme due to the administrative burden of preparing a full prospectus. The Commission's proposals seek to create a more "level playing field".

The consultation closes on 13th May 2015.

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