SLAUGHTER AND MAY

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Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

The Employment / Employee Benefits Bulletin is celebrating its 20th anniversary today. The first issue (attached) was published on 23rd September 1994. For more details, see our "And finally…" feature below.

In this 20th anniversary issue

To access our Pensions Bulletin click here.
This weeks's contents include:

- 20th Anniversary issue
- Pensions Law Update Seminar
- The Watch List
- Auto-enrolment: Lifting of constraints on NEST
- Scheme Administrators: HMRC guidance on the "fit and proper person" criteria
- Discretionary pension increases and employer's duty of good faith: Pensions Ombudsman's determination in relation to Thomson
- Abolition of short service refunds in relation to money purchase benefits: action required
- Changes to the scheme return

Back issues can be accessed by clicking here. To search them by keyword, click on the search button to the left.

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

Termination of employment in France, Germany and the UK

We attach a joint briefing which we have prepared with Bredin Prat and Hengeler Mueller on termination of employment. The briefing answers ten key questions on how the rules governing termination of employment operate in France, Germany and the UK.

New law

1st October 2014: employment law changes

A number of employment law changes will take effect on 1st October 2014. The key ones are:

- A new right for **fathers and partners to take unpaid time off to attend antenatal appointments** with the expectant mother. The right can be exercised on a maximum of two occasions, for up to six and a half hours each time. The Government has issued guidance on this new right.

- A new power for employment tribunals to order employers to carry out (and publish) **equal pay audits** if they are found to be in breach of equal pay law.

- Annual increases to the rates of the **National Minimum Wage**:

  – the adult rate (for workers aged 21 and over) will rise from £6.31 to **£6.50** an hour;

  – the youth development rate (for workers aged 18 - 20) will rise from £5.03 to **£5.13** an hour;

  – the young workers rate (for workers aged 16 - 17) will rise from £3.72 to **£3.79** an hour; and

  – the rate for apprentices will rise from £2.68 to **£2.73** an hour.

Cases round-up

No sex discrimination where no enhanced additional paternity pay

A male employee did not suffer direct or indirect sex discrimination by the application of his employer's policy of offering enhanced maternity pay, but not enhanced additional paternity pay, according to a recent employment tribunal decision (*Shuter v Ford Motor Co Ltd*).

Enhanced maternity pay: FMC operated an enhanced maternity pay policy, offering 100% of salary for the full period of maternity leave. Its rationale for the policy included its desire to remain "*the employer of choice in this area*", as well as to "*significantly enhance [FMC]'s ability to recruit and retain more female employees*". FMC hoped this policy would help to meet its target of 25% female representation in its (then overwhelmingly male) workforce.

No enhanced APP: FMC did not enhance additional paternity pay (APP). One of its male employees, S, had a baby in December 2012. When his wife returned to work after seven months' maternity leave, S took five months' additional paternity leave (APL). S was paid the statutory rate of APP during his APL. He therefore received around £18,000 less than he would have been paid if APP had been enhanced on a similar basis to maternity pay. He lodged proceedings claiming direct and indirect sex discrimination.

No direct discrimination: The Tribunal dismissed S's claim. On direct discrimination, it found that the appropriate comparator was a woman who had also taken APL, who would have been treated in the same way. There was therefore no less favourable treatment. It rejected S's attempt to compare himself with a woman on maternity leave, finding that there were substantial differences between their circumstances.

Special protection for women: Further, the Tribunal was satisfied that even if there had been a relevant difference in treatment, it would have fallen within

section 13(6)(b) of the Equality Act 2010, which allows for more favourable treatment in connection with pregnancy and childbirth.

No indirect discrimination: The Tribunal also found that although FMC's policy gave rise to a disadvantage for male employees, this was objectively justified. FMC had the legitimate aim of recruiting and retaining women, and the policy had been a proportionate means of achieving that aim. The evidence showed that although FMC had not met its diversity targets, it had increased its numbers of female employees, both overall and in senior management grades, since the policy was introduced. The indirect discrimination claim therefore failed.

Relevance to shared parental leave and pay: As APP is due to be abolished within the coming months, the most important practical impact of this case is in relation to the new regime of shared parental leave and pay. This case suggests that employers who currently offer enhanced maternity pay could decide not to extend the enhancement to shared parental pay. In those circumstances, it may be difficult for male employees to complain of sex discrimination. This approach is also in line with the Government's guidance, which takes the view that there is no requirement to extend enhanced maternity schemes to shared parental leave. For further advice on this issue, please speak to your usual Slaughter and May contact.

US employee on international assignment could not bring claims in UK

A US employee who spent around 49% of his time working in the UK was unable to bring claims of unfair dismissal and discrimination in the UK, as his ongoing ties to the US meant he had an insufficient connection with the UK (*Fuller v United Healthcare Services Inc*).

US employee on international assignment: F was employed by a subsidiary of UHG, a US group of companies. He was based in Texas, worked under a US employment contract and was paid in US dollars. F subsequently took on an "international rotation assignment" which required him to spend around 49% of his time in the UK. The assignment terminated after less than a year, F returned to the US, and was dismissed shortly afterwards. He sought to claim unfair dismissal and sexual orientation discrimination in the UK, but the Tribunal declined jurisdiction.

Close connection with US, not UK: The EAT dismissed F's appeal. It found that F's contract had an overwhelmingly close connection with the US, which endured despite the subsequent international assignment. The possibility of overseas work like that which F undertook as part of the assignment was envisaged by his original US contract, and the substantive nature of his work had not changed. Further, it was clear that F's base remained in the US, where his dismissal took place. His employment therefore had an insufficiently close connection to the UK for him to bring his claims here.

Lesson for overseas employers: This case shows that if, when sending an overseas employee to work in the UK, the employer maintains as much of the original overseas employment relationship as possible, it may mean that the employee does not accrue any statutory rights under UK law.

Single comment that "*She's Polish [and/but] very nice*" was not racial harassment

A Polish employee who overheard a colleague speak to a client about her as either "*She's Polish but very nice*" or "*She's Polish and very nice*" did not suffer racial harassment, according to a recent judgment of the EAT (*Quality Solicitors CMHT v Tunstall*).

Single comment: T, a Polish law graduate, was employed by QS as a paralegal. The evidence was that T spoke English with a heavy Polish accent. On one occasion T overheard a colleague (S) speaking to a client about her. T alleged that S described her as "*She is Polish but very nice*". S denied this, but accepted that he said "*She's Polish and very nice*". T lodged a claim of racial harassment based on S's comment.

Claim initially succeeds… The Tribunal upheld the claim of harassment. It did not find it necessary to determine which version of the comment was true,

on the basis that even simply referring to T as Polish was unnecessary and patronising. It accepted that the comment left T feeling humiliated and degraded and found that, despite being an isolated incident, it amounted to racial harassment.

…but overturned on appeal: The EAT allowed QS's appeal. It found that the Tribunal had failed to address the question of whether S's comment truly violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her – or whether it was reasonable for S's comment to have that effect. The case law on harassment has established that:

- dignity is not necessarily violated by things said or done which are trivial or transitory;
- it is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase; and
- although a single act may be so significant that its effect is to create the proscribed environment, this will not always be the case.

On this basis, the only possible conclusion on the facts was that the single comment was not such as to violate T's dignity or create the proscribed environment for her. The finding of harassment was therefore overturned.

Comments on nationality: This case is a reminder that a claim of harassment based on a single act or comment, while possible, can be difficult to establish in practice. The EAT noted that it may in some circumstances be reasonable for an employer, when introducing an employee with a strong accent, to mention the employee's nationality or race. It must follow that simply mentioning an employee's nationality or race will not always (or even usually) be sufficient to amount to racial harassment, although this will always depend on the wider factual context.

Points in practice

Updated UK Corporate Governance Code (Sept 2014): remuneration aspects

The Financial Reporting Council (FRC) has issued an updated version of the UK Corporate Governance Code (the Code). This follows the FRC's consultation on changes to the current version of the Code, which it published earlier this year (see our Employment Bulletin dated 1st May 2014).

The key changes to the Code concerning remuneration are:

- **Long-term focus**: Code Principle D.1 has been amended to read: "*Executive directors' remuneration should be designed to promote the long-term success of the company. Performance-related elements should be transparent, stretching and rigorously applied.*" Previous references to levels of remuneration being sufficient to "*attract, retain and motivate directors*" have been deleted, along with the suggestion that a "*significant proportion*" of directors' remuneration should be performance-related.
- **Clawback / malus**: Code Provision D.1.1 has been expanded to provide that performance-related remuneration schemes "*should include provisions that would enable the company to recover sums paid or withhold the payment of any sum, and specify the circumstances in which it would be appropriate to do so*". The Code does not specify the circumstances in which clawback/malus provisions should apply, leaving this for companies themselves to determine.
- **Vote outcomes**: Code Provision E.2.2 now requires that "*When, in the opinion of the board, a significant proportion of votes have been cast against a resolution at any general meeting, the company should explain when announcing the results of voting what actions it intends to take to understand the reasons behind the vote result*". This will include votes on the resolutions to pass the remuneration report and the remuneration policy. The FRC has not given any guidance on what level would be "significant" for these purposes, although it has said that votes withheld should not be included.

- **Remuneration policy design**: Schedule A of the Code has been restructured and amended, under the following headings:
  - **Balance**: this now requires that the remuneration committee should determine an appropriate balance between fixed and performance-related, immediate and deferred remuneration, and that remuneration incentives should be compatible with risk policies and systems.
  - **Shared-based remuneration**: this now requires that the remuneration committee should consider requiring directors to hold a minimum number of shares for a further period after vesting or exercise, including for a period after leaving the company.

The updated Code will apply to accounting periods beginning on or after 1st October 2014. Listed companies should consider whether any amendments are required to any aspect of their remuneration policies in order to comply with the updated Code (remembering that any changes may require the company to seek fresh shareholder approval for the policy). An alternative approach would be to provide an explanation for any non-compliance, until the remuneration policy is next revised.

Shared parental leave and pay: technical guide for employers

The Government has issued detailed technical guidance on shared parental leave and pay. The guidance covers the technical aspects of the new statutory regime, and is aimed at assisting employers when developing and implementing their new policies. It includes FAQs and a number of worked examples on key aspects of the new regime.

The introduction of shared parental leave will have a significant impact on employers. Although the regime will not take full effect until April 2015, employers need to be on top of the changes well in advance (ideally before the end of this year). For further advice on the impact of the new regime, including preparing new policies and procedures, please speak to your usual Slaughter and May contact.

And finally…

Celebrating 20 years of our Bulletins - looking back to 1994

It has been 20 years to the day since our first Pensions and Employment Bulletin was published, on 23rd September 1994 (see attachment). That inaugural Bulletin covered a number of topical updates, including protection for part-timers and proposals to introduce parental leave (to which we will return shortly).

The anniversary has caused us to cast our minds back to 1994, which is notable as the year when the Channel Tunnel opened, the National Lottery was launched, and *Four Weddings and a Funeral* was storming the box office. There are some interesting similarities between then and now; in both cases the UK was experiencing a continued economic recovery, with falling unemployment. However in other respects things could not have been more different – for a particularly stark example, only 0.5% of the UK population had access to the internet in 1994, compared with 84% in 2014.

Employment law has also changed fundamentally since 1994. Here are our top five changes:

1. **Discrimination**: in 1994, there was no concept of discrimination based on disability, age, religion or belief or sexual orientation. Part-time and fixed-term employees also had no specific protection from discrimination until 2000 and 2002 respectively.

2. **Unfair dismissal**: in order to qualify for unfair dismissal protection in 1994, an employee needed to have either two years' qualifying service (if he worked 16 hours or more per week) or five years' qualifying service (if he worked between eight and 16 hours per week). The threshold of hours worked per week was removed following a key House of Lords decision in 1994, which found

that it discriminated against part-timers, and thus indirectly against women (part-timers, as noted above, did not have their own specific protection at the time). It is interesting that although the number of years' qualifying service was reduced to one year in the intervening period (on similar grounds), it has since been raised once again to two years.

3. **Working Time**: although the original EU Working Time Directive was passed in 1993, the UK Working Time Regulations did not come into force until 1998. Thus in 1994 there was very little in terms of statutory limits on working hours or rights to paid holidays, aside from limited regulation in certain sectors (notably transport and factory workers). Sunday trading was introduced for the first time in 1994, and with it came the right for shop workers to opt out of Sunday working.

4. **Wages**: no national minimum wage existed until 1999, when the National Minimum Wage Act 1998 came into force. At that time the minimum wage for adults was set at £3.00 per hour, less than half of the rate of £6.50 per hour which will apply from 1st October 2014.

5. **Family leave**: although maternity leave existed in 1994, it had historically depended on qualifying service requirements, meaning that only about half of working women were eligible for it. Significant changes were made in 1993 as a result of the first EU Pregnant Workers Directive. By 1994, all working women were entitled to maternity leave, although there was still a distinction between those with less than two years' service (who were entitled to the minimum 14 weeks required by the Directive) and others, who were entitled to 40 weeks' leave (11 weeks before the birth, and 29 weeks after). As our inaugural Bulletin shows, the concept of unpaid parental leave was being debated at EU level in 1994, but the right was not introduced in the UK until 1999. Now in 2014, we are making further fundamental changes with the introduction of shared parental leave.

Employment law has come a long way in 20 years. It is difficult to imagine what further changes will be made in the next 20 years, by 2034. As science fiction would have it, perhaps more jobs will be replaced by robots who will undertake greater working functions, leading to mass redundancies amongst the human race. Whatever the legal landscape by then, we hope that our Bulletins will continue to inform and assist you.

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