SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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Legal and regulatory developments in Employment/Employee Benefits

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There is no Pensions Bulletin this week

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Stop press

EAT confirms holiday pay includes commission

The EAT has upheld the ET's finding that the Working Time Regulations 1998 should be read to require employers to include commission when calculating pay for the statutory four week holiday. The ET in **Lock** relied on the EAT case of Bear Scotland which held that non-guaranteed overtime pay should be included in calculating statutory holiday pay and the EAT decided that it was bound by that decision so that if Bear Scotland was wrongly decided it was for the Court of Appeal to address. From a practical perspective, this decision merely confirms that commission should be included in calculating statutory holiday pay but there is still uncertainty relating to the method of calculation such as how the reference period works and whether other forms of variable pay should be included. For employers who were waiting for the outcome of this case before addressing holiday pay calculations, this case does at least provide a decision by a UK appellate court in respect of commission and will be binding on tribunals although this may not be the end of matter because we understand British Gas intends to appeal to the Court of Appeal. Further detail will be included in our next bulletin.

Cases round-up

TUPE: Temporary cessation of work by a subcontractor did not preclude TUPE business transfer or service provision change

A temporary cessation of activities was only one factor to take into account when considering whether there was a business transfer and in this case the economic entity had retained its identity despite such a temporary cessation of work. There may also be a service provision change because an 'organised grouping' can continue to exist even though no work is actually being carried out by those employees, according to the recent judgment of the EAT (**Mustafa v Trek Highways Services Limited**).

Suspension of operations and employees sent home: A was appointed the main contractor to carry out maintenance services for the Transport for London (TfL) and entered into a subcontract with T. Shortly before A's contract was due to expire, a dispute arose between A and T and as a result T suspended operations and on 8 March 2013, T told its staff to go home. On 21 March 2013, A and T entered into an agreement to terminate the subcontract and from that date until the expiry of its contact with TfL on 1 April 2013, A carried out the maintenance services on an ad hoc basis using its own contractors. On retender, TfL awarded the maintenance contract to R and R carried out the maintenance contract from 1 April 2013. Both A and R refused to take on T's employees arguing that TUPE did not apply.

No economic entity: The ET held that because no work had been carried out by T between 8 and 21 March, there was no economic entity and therefore no business transfer.

No organised grouping of employees: The ET also found that because no work had been carried out between 8 and 21 March, there had been no organised grouping of employees employed 'immediately before' the transfer and therefore no service provision change. A also argued that even if there had been a transfer to A on 21 March, there would only be 'a task of short-term duration' as A's contract was due to expire on 1 April and so **regulation 3(3)(a)(ii) TUPE** applies which provides there is no service provision change if the activities will be carried out "in connection with a single specific event or a task of short-term duration."

A temporary cessation does not preclude TUPE transfer: The EAT allowed M's appeal and overturned the findings of the ET. The EAT held that:

(i) **Business transfer:** even though there had been a temporary cessation of work by T, this had not destroyed the economic entity. There had been dedicated staff, vehicles and equipment and indeed the subcontract (until 20 March). Although the 'activity' had ceased, the 'entity' continued to exist.

(ii) **Service provision change:** there is no requirement for a grouping of employees to be working immediately before a service provision change for there to be 'an organised grouping'. It is a question of fact and degree as to whether an organised grouping of employees retains its identity even though work has temporarily stopped. In this case there was an economic entity, including employees and resources providing traffic management services and even though work had stopped, there was still an organised grouping of employees dedicated to this service.

No 'task of short duration': The EAT also found that the ET had misunderstood the exemption in regulation 3(3)(a)(ii) of TUPE which states that TUPE does not apply to 'a task of short duration'. In this case, TfL required the services on an ongoing basis and certainly after 1 April and therefore the exemption did not apply.

Significance for employers: This case makes clear that employers should not rely too heavily on a temporary cessation when considering whether there is either a business transfer or a service provision change. This is only one factor to take into account when determining whether there is a TUPE transfer.

Laying off an employee for 5 weeks: no constructive unfair dismissal

An employee ("C") who had been laid off for around 5 weeks due to a downturn in work claimed that his employer ("B") had breached his employment contract by laying him off for an unreasonable length of time and that he was therefore entitled to resign and claim constructive unfair dismissal. The employee also claimed he was entitled to a redundancy payment. The EAT held in **Craig v Bob Lindfield** that there is no implied term of reasonableness in a layoff provision in a contract of employment and that there was no breach of contract in this case because the employer had followed the statutory procedure in circumstances where there was a genuine downturn in work.

Contractual lay-off clause: The law allows an employer to lay off employees for a short period during a temporary downturn in work where there is a contractual right to do so. B therefore sought to rely on a clause in C's contract which stated that B had a right to lay off staff for an indefinite period. B had notified C, and other employees that they would be laid off from 21 July 2014 and then kept in touch with the employees reassuring them that they were not sacked and would be in touch when work picked up. C, however, found a new job to start on 1 September and thus on 22 August claimed constructive dismissal on the basis that the lay-off had been unreasonably long.

The statutory procedure: The statutory procedure for lay-off in the Employment Rights Act 1996 aims to balance the rights between employers and employees where both parties are

affected by a downturn in business. Employees are entitled to claim statutory redundancy pay if they have been laid off for at least four consecutive weeks, by serving notice on the employer of that intention. If an employer genuinely believes there will be at least 13 weeks of work which will restart within four weeks of the date of service of the notice then the employer can resist the employee's claim for a redundancy payment by serving a counter-notice.

Does that lay-off period have to be reasonable? There had been conflicting EAT authorities as to whether there was an implied term that any contractual lay-off should be for a 'reasonable period' but the EAT in Craig v Bob Lindfield has confirmed that no such term could be implied. The EAT found that employees and employers should follow the statutory procedure before an employee is entitled to a redundancy payment when temporarily laid off. The EAT commented that if an employee could make a claim for constructive unfair dismissal after four and half weeks this would negate the purpose of the statutory scheme.

Can there ever be a constructive dismissal claim when an employee is laid off? In this case the employer had kept in touch with the employees and reassured them that they had not been dismissed and that when orders started flowing he would let them know. There was a genuine lay-off and the employer had followed the proper statutory procedure. The EAT stressed that if an employer were to manipulate the lay-off to avoid paying redundancy, to purely maximise profit or to otherwise act in manner calculated or likely to destroy or damage the relationship of trust and confidence between them and in those circumstances there may be a viable claim for constructive unfair dismissal.

Telling an employee not to speak native language at work was not direct discrimination

An employer ("C") who told its employee ("K") not to speak Russian at work did not directly discriminate against the employee nor did it harass the employee on grounds of race. The employer's instruction was reasonable and unrelated to the employee's nationality or national origins according a recent judgment of the EAT (**Kelly v Covance**).

Speaking Russian at work: C carried out animal testing and employees of C had suffered violent assaults and received threats from activists. There had also been undercover activists working in C. Shortly after K joined, C developed concerns about K's conduct and performance including the fact that she frequently had long conversations in Russian on her mobile phone in the office toilets. K's manager asked C to stop speaking Russian so that her English-speaking managers could understand her. K raised a grievance complaining of race discrimination when C instigated the capability procedure two months into the job. K was then invited to a disciplinary hearing when C found out that K had been convicted of benefit fraud and had failed to disclose her conviction to C. K resigned the day before the disciplinary hearing and claimed direct race discrimination on grounds of nationality and national origin and race harassment.

No discrimination: The EAT agreed with the ET and found that the instruction to stop speaking Russian was not direct discrimination because other employees speaking a language other than English where there were concerns about their behaviour would have been treated in the same way. The EAT also held there was no harassment because there was a reasonable explanation for the instruction which was not related to K's race or nationality. The EAT also took into account that K's manager had told other managers to ensure their employees speak English in the workplace.

A good business reason to justify a language requirement at work: Many employers will employ employees who do not speak English as

their first language. An employer will need to show that there are legitimate business reasons for imposing language requirements in the work place and that this requirement is applied to everyone and proportionate. The facts need to be considered carefully in each case and the ACAS Guide on Race Discrimination advises employers to 'be wary of prohibiting or limiting the use of other languages in the workplace unless they can justify this with a genuine business reason'.

Points in practice

Gender pay gap reporting: draft regulations and second consultation

The draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016 have been published alongside a second consultation, which will close on 11 March 2016. These Regulations will force employers in the private and voluntary sectors with 250 or more employees to publish statistics about their gender pay gaps.

Employers must publish:

- median and *mean gender* pay gap figures;
- the bonus pay gender gap for bonus payments; and
- the number of men and women working across salary quartiles.

The draft Regulations confirm that information such as a breakdown by full and part-time employees, grade or job will not be required but employers are permitted to include additional narrative to explain any pay gaps they may have. Employers can also set out what action an employer intends to take to close any pay gap found.

Timescales:

- The Regulations are expected to come into force on 1 October 2016; and
- On 30 April 2017 employers must take a preliminary snapshot of their pay data from a particular pay period (this will be the period that the employer pays the employee, e.g. a week or month). Employers then have until April 2018 to analyse and publish the required information for the first time. Gender pay gap statistics must then be published every 12 months thereafter.

Publishing pay gap information and penalties:

Employers must publish the statistics on a government-sponsored website and also publish their pay gap information on their UK websites where it should remain for 3 years. The Government has confirmed that it will build up a 'database of complying employers with examples of compliance and non-compliance identified' which has led some employers raising concerns about a culture of naming and shaming. Failure to comply may lead to a potential fine of £5,000 but for most employers, reputational risk will be the key concern.

The Government will be publishing Guidance to assist employers with reporting in different governance structures (subsidiaries and parent companies) and will also give advice on providing voluntary narratives to explain any gaps.

The Government is expected to extend pay gap reporting to the public sector and we are expecting a consultation later in the year.

Women on boards review published

As the Women on Boards Davies Review ends its five year term, it reports that the target of 25% of women directors in the FTSE 100 has been met. The Review will continue for a further period of five years to ensure increasing representation of women in the executive level of FTSE 350 companies and a fresh independent steering body with a new Chair and members has now been convened (see the announcement from BIS).

Sir Philip Hampton, Chair of GlaxoSmithKline, and former Chair of RBS and Sainsbury's, has been appointed to lead the new review and Dame Helen Alexander, Chair of UBM, will be Deputy Chair.

The Review's overall aims are to continue improving the representation of women on boards and build a "talent pipeline" for improving the representation of women in the executive layer of FTSE 350 companies.

The Sub-Committee on Education, Skills and the Economy has launched an inquiry on apprenticeships

The Government has a target of three million apprentices by 2020 and this inquiry aims to understand how the Government may achieve this, and how this may affect the 'skills gap' in the UK. The sub-Committee is also likely to look at the apprenticeship levy, the proposed Institute for Apprenticeships, and routes to achieving higher level apprenticeship qualifications.

The inquiry closes at midday on Friday 18 March 2016. If you are interested in responding to the inquiry you can access it here.

PRA and FCA make new rules on regulatory reference

The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have published a joint policy statement containing the first tranche of PRA rules on regulatory references, which will be supplemented with the PRA's full policy at a later date.

From 7 March 2016, when considering the appointment of an in-scope individual, PRA-regulated firms will be required to: (i) provide a reference to another regulated firm "as soon as reasonably practicable" upon request containing "all relevant information" of which it is aware; and (ii) take reasonable steps to obtain appropriate references covering at least the past five years of service from that person's current and previous employers, and from organisations at which that person served as, or is currently, a NED.

As under the current PRA Handbook, it is intended that the obligations to supply information in a regulatory reference should apply notwithstanding any agreement (for example, a COT 3 Agreement) or any other arrangements entered into by a firm and an employee upon termination of the employee's employment.

The PRA's rules should be read and applied in conjunction with the FCA's equivalent requirements as set out in PS16/3. The regulators' combined rules are intended to provide an appropriate regime for regulatory references, which will be supplemented where necessary to deal with any potential gaps.

New consultation on non-financial reporting

The Department for Business, Innovation & Skills (BIS) is seeking views on how to implement the requirements of EU non-financial reporting Directive into UK law.

In the UK, companies are required to produce a concise Strategic Report including the high-level information shareholders need to gain an immediate understanding of the business and a simplified Directors' Report.

The new EU Directive requires certain companies with more than 500 employees to disclose information in their management reports about their policies, environmental risks, social and employee situation, respect for human rights, anti-corruption and bribery issues and diversity in their board of directors.

The Directive is to be transposed into UK law by 6 December 2016 and will be applicable to reporting years beginning on or after 1 January 2017.

The consultation aims to seek views on Directive and will also consider reporting in the UK on a wider, strategic level.

The deadline for comments is 15 April 2016. If you wish to respond you can access it **here**.

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