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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Cases round-up

Strict policy on companions breached implied duty of trust and confidence

An employer that strictly enforced its policy on who may act as a companion for an employee at an investigatory meeting was found to have acted in breach of the implied term of trust and confidence. The employee was therefore entitled to be accompanied by his choice of companion, who did not meet the employer's criteria (*Stevens v University of Birmingham*).

Disciplinary proceedings: S was employed by the University as a clinical academic. He was suspended following allegations of breach of procedure in a drugs trial. S sought permission to be accompanied at the investigatory meeting by a representative from the MPS, a medical defence organisation. The University refused, on the basis that under its disciplinary procedure, which had been agreed with its recognised union, employees were only entitled to be accompanied by either a fellow employee or a trade union representative.

Companion issues: S argued that he could not meet the requirements of the policy. His evidence was that he had no regular contact with University employees other than members of his own laboratory (who were also involved in the trials, and would not be suitable companions). Nor was S a member of a trade union (the BMA). He argued that if he could not bring his chosen companion, he would be forced to attend the meeting unaccompanied.

Unfairness: The High Court found that on the facts of this particular case, it would be "conspicuously unfair" for the University to insist on adherence to the literal terms of its policy so as to deny S his choice of companion at the investigatory meeting. It relied on the following particular factors:

- The allegations against S were extremely serious and could potentially have had serious ramifications for S personally and professionally. The requirements of fairness were therefore even higher than usual.
- The MPS served a similar function to a union in these situations. Even if S had been a member of the BMA, the evidence was that the BMA would not have sent anyone to accompany him, due to an agreement with the MPS on representation for such matters.
- Given the technical nature of the matters to be discussed at the investigatory meeting, S needed a companion with appropriate expertise (such as an MPS representative).
- The University's disciplinary policy was drafted so as to confer on S a right to be accompanied by an employee or a trade union representative, but was not exclusive in this regard (it did not contain the word "only").
- The investigatory meeting was a crucial stage in the disciplinary process. It would not therefore be possible to "cure" any earlier defect by ensuring that S was properly represented at the disciplinary meeting.

Breach of trust and confidence: The Court therefore concluded that the University's strict adherence to its policy in these unusual circumstances amounted to a breach of the implied term of mutual trust and confidence. It also found that the University had no reasonable and proper cause for its actions. Neither its wish not to depart from the agreed policy for fear of upsetting the union, nor its fear of creating a precedent which would open the floodgates to similar requests, were held to be sufficient.

Employers must be flexible: It is well established that a failure to abide by a disciplinary policy may amount to a breach of the implied term of trust and confidence. This case now confirms that actually adhering to the terms may equally amount to such a breach, although the facts of this case were unusual. Employers must therefore be willing to be flexible in certain circumstances.

Constructive dismissal: affirmation

An employee was wrongly found to have affirmed his contract following the employer's repudiatory breach (by unilaterally reducing his workload) where he was on sick leave for much of the relevant period, and was awaiting written confirmation of the employer's conclusions on the reduction in his workload (*Adjei-Frempong v Howard Frank Limited*).

Breach and resignation: A was employed by HFL as an accounts assistant. HFL had concerns about A's performance and his absences for stress-related ill-health, and decided that his workload should be reduced by around 30%. This decision was confirmed at a meeting on 21st January 2014. A attended work for the next ten days and made no objection to working in the reduced capacity. However when a further performance issue was raised with A, he was signed off with work-related stress. A submitted his resignation on 3rd March 2014 and claimed constructive unfair dismissal.

Affirmation? The Tribunal dismissed A's claim. It found that the changes to A's job – made unilaterally and without consultation – amounted to a fundamental and repudiatory breach of contract. However, it found that the delay following the change until A's resignation on 3rd March 2014, and A's lack of protest during this six week period, meant that A had affirmed the contract and could no longer rely on the breach.

Sick leave relevant: The EAT allowed A's appeal and remitted the claim for rehearing. It found that when considering affirmation, the Tribunal had not drawn sufficient distinction between the periods when A was working and when he was on sick leave. This was despite it being established that an employee's conduct during a period of sick leave may have far less force in implying affirmation of a breach of contract than his conduct when attending work in full health.

Employer communication relevant: The EAT also noted that A's case was that he was told that he would receive written confirmation of the change to his role, although he never received this confirmation. The EAT found that this was an important part of the context which offered a potential explanation for A's failure to object before he went off sick. The Tribunal did not have sufficient regard to these issues, and its conclusion therefore could not stand.

Risks for employers: From an employer's perspective, this case shows the potential issues which can arise when unilaterally implementing changes to terms and conditions. Where (as here) the change has an immediate impact on the employee, the employer can usually expect the time limit for any objection to begin running immediately. However, where the employer fails to provide a promised confirmation of the change, and/or the employee goes off sick shortly after the change is implemented, that time limit for any objection may be delayed or disrupted. This leaves the employer less certain about whether the change has been validly implemented, and exposed to potential constructive dismissal claims.

Fair dismissal for offensive comments on Facebook

An employee who posted comments on Facebook about drinking while on standby and offensive comments about his managers was found to be fairly dismissed on that basis some two years later, according to a recent judgment of the EAT (*The British Waterways Board t/a Scottish Canals v Smith*).

Employee raises concerns: S was employed by SC to maintain its canals and reservoirs. He was part of a team which was required to be on standby for seven days one week in five (and employees were not permitted to consume alcohol during this period). S raised several grievances about the behaviour of his team leaders and numerous health and safety issues. A mediation session was arranged to address S's concerns. However, when S attended he was advised that he was instead being suspended pending an investigation into comments which one of his supervisors had recovered from his Facebook account.

Facebook comments: The Facebook entries included comments by S about how much he "*hated his work*" and describing his supervisors in very derogatory terms. They also included a comment from 2011 which stated "*on standby tonight so only going to get*

half pissed lol" and "*im on vodka and apple juice first time ive tried it no to shabby*".

Dismissal: At the disciplinary hearing S admitted to making the statements but maintained that he had not intended to offend anyone and was indulging in banter. He denied having been drinking on standby. SC decided that the comments undermined the confidence it had in S (and had the potential to undermine the confidence which other employees and the public could have in S and SC). It considered the comments to be a clear breach of SC's email and internet policy, which prohibited "*any action on the internet which might embarrass or discredit BW*". It found S to be guilty of gross misconduct and summarily dismissed him.

Unfair at first instance: The Tribunal upheld S's unfair dismissal claim. It found that the comments were offensive, although it was not satisfied that they identified SC as S's employer. It also found that SC had a potentially fair reason for dismissal (misconduct), and held a genuine belief in that misconduct on reasonable grounds following a reasonable investigation. However, the Tribunal nonetheless found that dismissal was outside the band of reasonable responses, on the basis that SC had failed to take sufficient account of the mitigatory factors, such as S's claim that his Facebook account had been hacked to make it public, the fact that SC had known of the comments for some time and taken no action until S's allegations of bullying and harassment, S's long period of otherwise unblemished service, the nature of Facebook as a forum for social banter and the fact that S had apologised for the comments.

Appeal allowed: The EAT allowed SC's appeal, substituting a finding that S had not been unfairly dismissed. It found that the Tribunal had impermissibly substituted its own view for that of the employer. The EAT also found that the Tribunal was wrong to find that SC had not taken into account the mitigatory factors, having found that it had carried out a procedurally fair investigation. In any event, the mitigatory factors had been clearly considered on the appeal, thereby curing any failure to consider these in the earlier stages of the disciplinary process.

Social media cases: The EAT's judgment also confirms that there is no need for special rules in unfair dismissal cases involving the use of Facebook, and that such cases fall to be determined in accordance with ordinary unfair dismissal cases.

Agency workers: right to information about vacancies

Agency workers have the right to be informed of any vacant posts with the hirer, under regulation 13 of the Agency Workers Regulations 2010 (AWR 2010). This has now been found not to confer any further rights, such as to have preference over existing direct employees of the end user, to have a guaranteed interview, or even to be considered on an equal footing with existing employees of the end user. Thus where the end user carried out a restructuring process, it was entitled to award a vacancy to an existing employee whose role was at risk of redundancy and had been placed in a redeployment pool – even though this meant that the agency worker lost his position (*Coles v MoD*).

Limited right: The EAT commented that the right to information in regulation 13 was a valuable right in itself – it provides the agency worker with an opportunity to find permanent employment with the end user. It does not, however, provide the agency worker with the right to secure that employment. The EAT emphasised that the AWR 2010 only guarantee equal treatment for agency workers as regards pay and working hours; this does not extend to securing permanent employment with the end user. It was therefore legitimate for the end user to give priority to its existing employees who were at risk of redundancy.

Meaning of 'vacancy': The EAT found that for regulation 13 purposes, a 'vacancy' refers to a post not currently occupied by a permanent worker. There may therefore be a 'vacancy' in a position which is occupied by an agency worker.

Guidance doubted: In the course of its judgment the EAT cast doubt on a section of the BIS Guidance on the AWR 2010, which suggests that the obligation to provide information under regulation 13 will not apply in the context of a genuine 'headcount freeze' where posts are ring fenced for redeployment purposes or internal moves which are a matter of restructuring and redeploying existing internal staff in order to prevent a redundancy situation. Assuming there are 'vacancies' in these circumstances (see above), the EAT could see no reason why regulation 13 should not apply. This aspect of the BIS Guidance should therefore be treated with caution.

Lessons for redundancy/reorganisation: This decision helpfully confirms that an employer will be free to redeploy permanent employees whose positions are put at risk of redundancy into positions filled by agency workers.

Points in practice

Termination payments: HMRC consultation on simplifying tax and NICs treatment

HMRC has published a consultation paper on simplifying the tax and NICs treatment of termination payments. The consultation seeks views on HMRC's proposals to:

- remove the distinction between contractual and non-contractual termination payments, thus making all types of PILON payments taxable as earnings;
- remove the current £30,000 exemption;
- create a new exemption from income tax and NICs. Suggestions including linking the exemption to statutory redundancy, to years of service and/or to compensation for unfair/wrongful dismissal or discrimination (and HMRC seeks views on whether these should be subject to a cap);
- align the income tax and National Insurance treatment of termination payments;
- introduce anti-avoidance provisions, to prevent salary being disguised as a termination payment; and
- remove some of the existing exemptions (in particular, those relating to legal costs and salary sacrifice) and amend others (including the foreign service exemption).

The consultation suggests that the existing exemption for payments into a registered pension scheme would be retained.

The consultation closes on 16th October 2016. The Government has said it will announce what measures it intends to take following the consultation as part of the 2015 Autumn Statement.

Executive pay: High Pay Centre report

The High Pay Centre (HPC) has published a new report on executive pay, which reveals that rates continue to climb against average employee pay. The reports findings include that:

- The average pay of a FTSE 100 CEO hit £4.964 million in 2014, up from £4.129 million in 2010. The latest figures are based on the single total figure of remuneration included in the FTSE 100 2014 annual remuneration reports.
- The top 10 highest-paid CEOs alone were paid over £156 million between them.
- FTSE 100 CEOs are now paid approximately 183 times the average UK worker (up from 160 times in 2010).

- Only a quarter of FTSE 100 companies are accredited by the Living Wage Foundation for paying the living wage to all their UK-based staff.

- The average shareholder vote against the remuneration report in 2014 was 6.4% across the FTSE 100. The same figure for votes against the remuneration policy was 5.9%.

The report also finds that the 2013 executive remuneration reforms 'appear to have virtually no effect in curbing executive pay'. This is based on its assessment that few shareholders who control shareholder votes at AGMs are concerned about the impact of excessive executive pay on the wider economy and society, and therefore that it seems highly unlikely that the gap between CEOs and other workers will close in the foreseeable future. The report also suggests that the increasing cost of executive pay could potentially be at the expense of the wider workforce, leading to 'poverty pay' at the bottom and low productivity.

New ACAS guides on workplace equality and diversity

ACAS has published three new workplace equality and diversity guides for employers:

- Equality and Discrimination: understand the basics outlines the fundamentals of what employers need to know to comply with equality law.

- Prevent discrimination: support equality explains where discrimination is most likely to arise in the workplace and how to stop it happening. It addresses matters such as recruitment and promotion policies and gives advice on day to day workplace issues, such as dress codes and religious practices.

- Discrimination: what to do if it happens is a step-by-step guide covering how an employee should raise a complaint of discrimination and how an employer should handle it.

And finally…Sex discrimination in office air conditioning?

Research published by Nature Climate Change has shown that air conditioning units are designed for the body temperature and metabolism of an 11 stone 40-year-old man. Such a man's resting metabolic rate, on average, runs up to 30% faster than a woman's, resulting in a higher body temperature. This translates to a difference of temperature preference of 4 degrees celsius, meaning in the current average air conditioning the majority of women feel cold. The authors of the research have called for a new system that takes into account gender differences, as well as age and physiological characteristics such as being lean or obese.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650