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.

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New publication

Employee involvement in the formation of Societas Europaea and Cross-Border Mergers

We have prepared a new publication with input from our European best friend firms. The briefing summarises the employee involvement arrangements which apply to the formation of Societas Europaea and Cross-Border Mergers in eight key European jurisdictions (Finland, France, Germany, Italy, Portugal, Spain, Sweden and the United Kingdom).

If you would like a copy of the briefing, please contact Lynsey Richards (020 7090 5179, lynsey.richards@slaughterandmay.com) or your usual Slaughter and May contact.

New law

Trade Union Bill 2015-16

The Government has introduced the Trade Union Bill 2015-16 into Parliament. The Bill will make the following key changes:

- a requirement for at least 50% of those who are entitled to vote in the ballot for industrial action to take part in the ballot;
- an additional threshold of 40% support for industrial action where the majority of those who are entitled to vote are normally engaged in the provision of services or ancillary activities in 'key sectors' (health, education of under 17s, fire, transport, border security and nuclear decommissioning and management of radioactive waste and spent fuel);
- increasing the notice of industrial action to be given to employers from 7 to 14 days;
- imposing a four month time limit for the completion of industrial action following the date of the ballot;
- a requirement for the ballot paper to contain a "reasonably detailed" description of the trade dispute, the type(s) of industrial action called for, and the period(s) within which they are intended to take place;
- greater information to be provided to members etc. about the result of the ballot;
- new requirements for union supervision of picketing;
- replacing the current "opt-out" process for member contributions to a trade union's political fund with an "opt-in" process; and
- a requirement for details of any industrial action taken, and of the union's political expenditure, to be included in the trade union's annual return to the Certification Officer.

The Government has also published consultations on "Tackling intimidation of non-striking workers", "Hiring agency staff during strike action: reforming regulation" and "Ballot thresholds in important public services". The consultations seek evidence on possible additional measures which may be included in the Bill. They will close on 9th September 2015.

The progress of the Bill can be tracked here.

Cases round-up

Holiday carry over due to sick leave limited to 18 months

Workers who are unable or unwilling to take holiday because they are on sick leave must be permitted to carry forward their holiday entitlement, but only for 18 months following the end of the leave year in which the holiday was accrued, according to a recent judgment of the EAT (*Plumb v Duncan Print Group Ltd*).

Holiday accrued during sick leave: P was employed by DPG as a printer. He suffered an accident at work in April 2010, as a result of which he was off work

until his employment terminated in February 2014. He did not take any holiday in the 2010, 2011 or 2012 leave years.

Request for accrued holiday denied: In August 2013 P sought to take holiday from his 2010 – 2013 entitlements (while still on sick leave). DPG paid P his salary for his 2013 holiday entitlement, but refused to pay him for the previous years. On termination of his employment, P brought a claim for unpaid holiday pay under the Working Time Regulations 1998 (WTR). The Tribunal dismissed P's claim, and he appealed

Employee need not be "unable" to take holiday: The EAT allowed P's appeal. It held that the Tribunal had been wrong to require P to prove that he was "unable" to take holiday due to his medical condition. The EAT confirmed that employees on sick leave have a choice; they can choose to take holiday, but are not required to do so – they can instead choose to take it at a later date. On the facts, the evidence suggested that P was "unwilling" to take holiday during 2010, 2011 and 2012. He therefore remained entitled to take that leave at a later date, subject to any limit on carry over.

Carry over limited to 18 months: The EAT noted that the International Labour Organisation (ILO) took the view that holiday should be taken within 18 months of the end of the year in which it accrued. This was found to be relevant to the interpretation of the Working Time Directive, which expressly provides that account should be taken of ILO principles. Further, it was clear from ECJ case law that national law is not required to permit unused holiday to be carried over indefinitely. Regulation 13(9) WTR should therefore be read as permitting carry over of holiday where the worker is unable or unwilling to take it because he was on sick leave, but only for 18 months following the end of the leave year in which it accrues.

Some carry over should have been allowed: Applying the amended Regulation 13(9) to the facts of this case, P had lost his entitlement to holiday in respect of 2010 and 2011, since his August 2013 request for holiday was more than 18 months after the end of those holiday years. He should however have been permitted to take his holiday in respect of 2012. The case was remitted to the Tribunal to determine what amount was due in respect of 2012.

Different rules for additional 1.6 weeks' holiday: The limit set by the EAT in this case only applies to the four weeks holiday under Regulation 13, and not to the additional 1.6 weeks under Regulation 13A. In respect of the latter, a relevant agreement may provide for carry over of unused holiday– the implication being that without any such agreement, there can be no carry over. However, any such agreement could only provide for carry over for 12 months, unlike the 18 months now permitted under Regulation 13(9).

ECJ: Indirect discrimination by association

The ECJ has held that the Race Discrimination Directive prohibits indirect discrimination by association. This means that an individual may claim indirect race discrimination on the basis of association with an ethnic or racial group that is disadvantaged by a provision, criterion or practice, even if he or she is not of the same ethnic or racial group. This has important implications for UK law, which does not currently provide such protection (*CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia*).

Background: Under the Race Discrimination Directive, indirect discrimination occurs "*when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*."

Discrimination against Roma people: The case was in a non-employment context, concerning the placing of electricity meters in inaccessible locations within an area of Bulgaria which was primarily (but not exclusively) populated by Roma people. CHEZ RB (the electricity supplier) maintained that the placing of the meters was justified by the increased frequency of tampering with and damage to meters, and by the numerous unlawful connections to the network in the district concerned.

Claimant not Roma: The case was brought by a non-Roma inhabitant of the area (N), who claimed that she was discriminated against by her association with the Roma people. At first instance the Bulgarian court held that N had been treated less favourably on grounds of ethnicity. The appeal court referred several questions to the ECJ asking whether CHEZ RB's practice constituted discrimination against N on ethnic grounds for the purposes of the Directive.

Indirect discrimination by association: The ECJ held that that the principle of equal treatment under the Directive applies not only to persons who have a certain ethnic origin, but also to those who, although not themselves a member of the ethnic group concerned, also suffer less favourable treatment or a particular disadvantage on account of a discriminatory measure (which it termed "collateral damage").

Important development: This is the first time that the ECJ has acknowledged the possibility of indirect discrimination by association. The ECJ first recognised direct discrimination by association back in 2008 (Coleman v Attridge Law). It is likely that the approach laid down in this case would apply to all other EU discrimination directives, which use substantively similar definitions of indirect discrimination.

Relevance for UK law: Currently, UK law does not prohibit indirect discrimination by association, as it requires the claimant to actually have the protected characteristic which is disadvantaged by the relevant provision, criterion or practice. The ECJ's judgment means that UK courts and tribunals will now need to interpret UK law consistently so as to provide this protection. For employers, this may mean that they face more indirect discrimination claims.

Ill-health early retirement was not disability discrimination

An employee who received ill-health retirement benefits under the employer's pension scheme has lost his disability discrimination claim. He was unable to establish the required unfavourable treatment, which he alleged arose from his benefits reflecting the part-time salary he earned at retirement (having reduced his hours on account of his disability). Since the ill-health retirement benefits were only available to disabled employees, the EAT found that those benefits could not give rise to disability discrimination (*The Trustees of Swansea University Pension & Assurance Scheme v Williams*).

Ill-health retirement: W was employed by the University as a technician, initially on a full-time basis. He suffered from Tourette's Syndrome, obsessive compulsive disorder, depression and unspecified allied psychological problems. The University agreed to W working half time in order to accommodate his disabilities. However, W's doctors ultimately concluded that he was permanently incapable of fulfilling his duties, and he accepted ill-health retirement in July 2013 at the age of 38.

Pension benefits: Under the University's pension scheme, W was entitled to a pension calculated as if he had worked until the retirement age of 67, payable immediately and without actuarial reduction, but based on his pensionable salary at the date of ill-health retirement. In W's case, this was his part-time salary.

Discrimination claim: W brought a claim against the University and the Trustees, claiming that as he received only half what a full-time employee would have been entitled to under the pension scheme, he had suffered unfavourable treatment in consequence of something arising from his disability (i.e. his reduced hours), contrary to section 15 of the Equality Act 2010 (EA 2010). The Tribunal upheld his claim, and the Trustees appealed.

No discrimination: The EAT allowed the appeal. It began by rejecting the Tribunal's conclusion that the pension scheme was discriminatory against disabled employees. The ill-health retirement benefits under the scheme were only available to disabled employees, and would always result in them being treated more favourably than non-disabled employees. It followed that there could be no discrimination in these circumstances.

What is "unfavourable" treatment? The EAT went on to consider the meaning of "unfavourable" treatment under section 15. It dismissed the Tribunal's approach that it should be equated with the meaning of "detriment" under the EA 2010 (which is interpreted very broadly and from the employee's perspective), since the draftsman of the EA 2010 had deliberately chosen not to use that term. The concept of "unfavourable" treatment exists elsewhere in the EA 2010, notably in section 18(2) which prohibits unfavourable treatment related to pregnancy or an associated illness. In that context it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of their protected characteristic. The EAT thought that the same meaning should be ascribed to unfavourable treatment under both sections 15 and 18 EA 2010. Although this will always require a fact-specific analysis, the EAT gave the following guidance:

- treatment which is advantageous cannot be said to be "unfavourable" merely because it could be more advantageous;
- what is unfavourable should be judged "by broad experience of life";
- persons may be said to have been unfavourably treated if they are not in as good a position as others generally would be;
- some examples may include being required to work harder, longer or for less – or a disabled person being asked to perform at a rate which he cannot achieve because of his disability, and then threatened with or subjected to discipline as a result.

Error of comparison: The EAT also held that the Tribunal had wrongly compared W with a person who had been working full-time before their ill-health retirement, such as someone who suffered a stroke. This comparison was flawed for two reasons: (i) it was to apply a "less favourable treatment" test, such as applied for direct and indirect discrimination, rather than "unfavourable" treatment; and (ii) the Tribunal wrongly assumed the comparator to be non-disabled.

Guidance for employers: This is the first EAT case to consider the meaning of "unfavourable" treatment in the section 15 claim, which was new to EA 2010. The judgment means that employers who operate ill-health retirement benefits on similar terms should be able to avoid facing this kind of claim. Had it been otherwise, employers could in effect be penalised for making reasonable adjustments, as the employer in this case had done by reducing W's hours.

For consideration of the pensions aspects of this case, please see this week's Pension's Bulletin.

Points in practice

HMRC extends deadline for share schemes annual returns

HMRC has extended the filing deadline for employee share schemes annual returns for 2014-15 from 6th July to **4th August 2015**. This is reportedly a result of technical issues which rendered the ERS online filing system unavailable from 3rd July, although these issues have now apparently been resolved.

HMRC has also alerted advisers and professional bodies by email to the fact that **customers who filed their returns on or before 3rd July** and received an on-screen acknowledgement **might need to re-submit their returns**.

HMRC have said that they are carrying out further investigations and monitoring the ERS service over the next few days to ensure it is performing normally. HMRC will publish further information in due course.

Executive Remuneration: European Parliament approves new European requirements

The European Parliament has approved proposals from the European Commission to amend the Shareholder Rights Directive. The proposals include a number of provisions relevant to executive remuneration, as follows:

- **Requirement for a remuneration policy**: Member States would need to ensure that listed companies establish a directors' remuneration policy. The content of the policy would broadly fall within current UK requirements, although there would be an additional requirement to indicate the appropriate relative proportion of the different components of fixed and variable remuneration.

- **Voting on remuneration policy**: Member States would need to enable shareholders to vote on the remuneration policy at least every three years. However, Member States would be allowed to decide whether the vote is binding or advisory (in the UK, this vote must be binding). In either case, it seems that companies would only be able to pay remuneration to directors in accordance with an approved policy.

- **Effect of negative vote**: If shareholders reject the remuneration policy, the company would be able to, while reworking the policy and for a period of no longer than one year before a new policy is adopted, pay remuneration to its directors in accordance with existing practices (where there was no previous remuneration policy) or with its existing policy (where there was one).

- **Share-based remuneration**: Member States would need to ensure that the value of shares does not play a dominant role in the financial performance criteria, and that share-based remuneration does not represent the most significant part of directors' variable remuneration (with limited exceptions).

- **Remuneration report**: Companies would also be required to produce a remuneration report (of remuneration granted to directors in the last financial year). The content of the policy would broadly fall within current UK requirements, although there would be an additional requirement to set out the change in the remuneration of executive directors over the last three financial years, its relation to the general performance of the company and to the change in the average remuneration of employees over the same period. The UK regime currently only requires a comparison between the pay of the CEO (rather than directors as a whole) and that of employees, as against the previous financial year only. The shareholder vote on the remuneration report would be advisory only (as in the UK).

Next steps: In terms of next steps, informal discussions will now take place with Member States to seek to agree the final wording of the amendments. The amended Directive must then be adopted under the ordinary legislative procedure. If approved, Member States would be required to implement the changes within 18 months.

Impact: Although the amended Directive (as currently drafted) would not have a significant impact in the UK, it may well have such an impact across the rest of Europe. According to the Commission, only 13 Member States currently give shareholders "a say on pay", either through a vote on directors' remuneration policy and/or in a report.

Gender pay reporting: Government consultation

The Government has published a consultation "Closing the Gender Pay Gap" on its proposed new regulations to require employers with at least 250 employees to publish annual gender pay information.

The consultation seeks views on the level of detail of gender pay gap information that should be required. It gives three suggested options:

- the **overall difference** between the average earnings of men and women as a percentage of men's earnings - the consultation acknowledges that although this would enable comparison

with the national data, an overall pay gap figure does not offer the level of granularity required to explain pay differences within an organisation;

- a **break down by full-time and part-time employees** – the consultation suggests this could provide more useful information than a single figure, especially for employers with large part-time workforces; or

- a **break down by grade or job type** – the consultation suggests this could help to expose discriminatory pay practices because it enables greater like-for-like comparison, and that it could also help employers target underlying causes, through talent management schemes, for example. It also notes that safeguards would be needed to preserve individual and commercial confidentiality.

The consultation also asks:

- whether employers should be required to provide additional, contextual information, explaining any pay gaps and setting out what remedial action they intend to take (or whether such information should be voluntary and covered by non-statutory guidance); and

- how often employers should be required to publish such information (the consultation suggests every one, two or three years).

The consultation closes on 6th September 2015. wThe regulations are expected to be made in the first half of 2016, although the consultation proposes that implementation should be delayed 'for an appropriate period' to give businesses time to prepare.

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