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.

New publication

Maternity and parental leave in France Germany and the UK

We attach a joint briefing which we have prepared with Bredin Prat and Hengeler Mueller on the maternity and parental rights regimes in France, Germany and the UK. The briefing provides an overview of the rights to leave and pay, as well as the wider protections which apply to parents in each jurisdiction.

New law

Shared parental leave now in force

The regulations introducing shared parental leave and pay came into force on 1st December 2014. Although the new regime only applies in relation to babies whose expected week of birth (or adoption) is on or after 5th April 2015, **employers should be taking steps now** to amend their existing family leave policies and introduce a new shared parental leave policy.

If you would like to listen to a recording of our recent teleconference on shared parental leave, or to discuss the impact of shared parental leave and pay on your business, please speak to your usual Slaughter and May contact.

Cases round-up

UK's challenge to CRD IV bonus cap is rejected (and withdrawn)

The UK's challenge to the provisions of the CRD IV Directive imposing a cap on bankers' bonuses has been rejected by an Advocate General (AG) of the ECJ (*United Kingdom v Parliament and Council*). The Government has now withdrawn the challenge, and is considering alternative methods of regulating remuneration in this sector.

CRD IV bonus provisions: The CRD IV Directive imposes a set ratio between the fixed and variable remuneration for certain individuals whose professional activities impact on the risk profile of their financial institutions. These individuals cannot be paid variable remuneration in excess of 100% of their fixed remuneration, or 200% if permitted by shareholders of the financial institution.

UK challenge: The UK Government was concerned that these provisions of CRD IV would damage the UK economic recovery. It therefore brought an action seeking their annulment, arguing that they did not have sufficient basis in the EU Treaty, and that they infringed the principles of proportionality, subsidiarity, and legal certainty. The UK also objected to related measures requiring disclosure of remuneration on the basis that they infringed the right to privacy and data protection rules.

Valid basis in Treaty: AG Jääskinen dismissed the UK's challenge. He confirmed that the CRD IV provisions were properly implemented under the EU Treaty, as they were measures aimed at promoting the stability of EU financial markets (which is directly impacted by the effect variable remuneration has on the risk profile of financial institutions). He also maintained that the CRD IV bonus provisions do not amount to a determination on the level of pay (a matter within the realm of social policy which is reserved to Member States), as there is no limit imposed on the basic salaries that variable remuneration is pegged against.

Legal certainty: The AG also rejected the UK's argument that the principle of legal certainty had been violated. Although the CRD IV bonus provisions apply to employment contracts concluded before the entry into force of CRD IV, they have no effect on rights accrued or relating to service or performance before that date. Further, the AG noted that financial institutions received notice of the provisions well in advance of the transposition dates of CRD IV, which were also extensively covered in the media. The measures should therefore have been well known by the time they took effect at the beginning of 2014.

Proportionality and subsidiarity: The UK's arguments based on an infringement of the principles of

proportionality and subsidiarity were also found to have no legitimate grounds. The AG's opinion was that the objective of creating a uniform regulatory framework of risk management could not have been better achieved by national governments as opposed to the EU.

Disclosure also valid: Finally, the AG dismissed the UK's argument that disclosure of the total remuneration for each regulated individual would be contrary to EU data protection law. The AG observed that this is a discretionary power conferred on Member States, who would be legally bound to comply with EU data protection legislation when requiring disclosure.

Challenge withdrawn: Following the AG's opinion, the UK government confirmed in a letter that it will no longer pursue its legal challenge. The letter does however suggest that the government is actively considering further measures to ensure that compensation schemes which are shifting towards fixed remuneration can still support sound risk taking. Financial sector employers should therefore expect further developments in this area.

No implied duty on NED to deliver up confidential information on termination of office

A non-executive director (NED) of a company was found to have no implied duty to delivery up the company's confidential documents on the termination of his office, where no such express obligation existed (*Eurasian Natural Resources Corporation Ltd v Judge*).

NED's terms: J was appointed as a NED of E, a diversified natural resources company. J's letter of appointment expressly required him to abide by his statutory, fiduciary and common law duties as a director, as well as preventing J disclosing any confidential information acquired during his appointment to third parties or using it for any reason other than in E's interests, either during his appointment or following termination, without prior clearance from E's chairman. It did not, however, contain any express obligation to deliver-up confidential documents on termination.

Termination of appointment: J's appointment was terminated in 2013 following concerns that he had disclosed confidential information to the press. E brought proceedings seeking delivery up of any confidential information in J's possession. E accepted that there was no express delivery-up term in J's letter of appointment, but contended that there was an implied term to that effect. J applied for summary judgment and strike out of E's claim.

No implied term: The High Court granted J's application, denying E's claim for delivery up. The Court could see no grounds for finding an implied term requiring delivery up of the confidential documents after termination of J's appointment. It noted that had it been the "obvious but unexpressed intention of the parties", as E contended, it would have expected an express term to be incorporated into the NED letter. Moreover, there was no evidence before the Court of a practice whereby directors of companies are required to deliver up documents on termination of their appointments. On that basis, the Court found it difficult to see how "business efficacy" would be achieved by an implied term to deliver up documents on termination.

Express terms did not assist: The Court also accepted J's argument that the confidentiality provisions of his NED letter clearly envisaged that documentary information might be retained, giving rise to the risk that it might be disclosed after termination. It also noted that where (as here) the parties to a contract have negotiated and agreed the terms governing how confidential information may be used, it could not in the ordinary case be argued that there was a wider obligation of confidence (embracing delivery-up) arising from the director's fiduciary duties.

Clear drafting needed: This decision is a reminder of the importance of express contractual restrictions on the delivery-up of confidential information following termination of appointment of a NED. Such provisions are included in our standard form NED appointment letter.

Suspension and withdrawal from post was breach of contract, but psychiatric injury was not reasonably foreseeable

An employer's decision to suspend an employee and withdraw him from his post (without any preliminary investigation or allowing the employee to respond to the case against him) was found to be in breach of contract. However, the employee was not entitled to damages for his depressive illness, as this was not a reasonably foreseeable result of the employer's conduct, according to a recent judgment of the Court of Appeal (*Yapp v Foreign & Commonwealth Office*).

Suspension and withdrawal: Y was appointed by the FCO as its British High Commissioner in Belize. His contract entitled the FCO to withdraw Y from his post for operational reasons, but also entitled Y to "fair treatment". In June 2008, Y was withdrawn from his post with immediate effect and suspended following allegations of misconduct involving sexual harassment of women at social events and bullying and harassment of staff members. Following the FCO's disciplinary procedures, Y's suspension was lifted. However, he had developed a depressive illness and did not undertake any other appointment in the FCO until his retirement.

Employee claims damages: Y commenced proceedings against the FCO, complaining that his withdrawal from his post, was in breach of (i) the express terms of his contract; (ii) the implied term of trust and confidence; and (iii) the duty of care which the FCO owed him at common law. The High Court upheld his claims, and found that Y was, in principle, entitled to damages for the depressive illness (in the agreed sum of £320,000). The FCO appealed.

Breach of contract: The Court of Appeal upheld the High Court's finding of breach of contract in relation to the withdrawal of Y from his post. Although the FCO had a broad discretion as to whether to withdraw a post-holder for operational reasons, and in some cases speed would be important and might preclude any effective investigation, the way that discretion had been exercised in Y's case had been unfair. It was unnecessary for the FCO to have acted as precipitately as it had, without any further inquiries of any kind and without even putting the allegations to Y. It was irrelevant that Y was subsequently treated fairly in the disciplinary process.

Same investigator and decision maker was OK: The Court of Appeal did accept that the FCO had not acted unfairly by appointing the same person to act as both fact-finder and disciplinary decision-taker. Although the ACAS Code of Practice on Disciplinary and Grievance Procedures recommends that in misconduct cases it is good practice, where possible, for different people to carry out the investigation and disciplinary hearing, the Court commented that this is not a requirement of fairness in every case. In this case, the FCO specifically decided that it was important that the same person who had interviewed the witnesses should take the disciplinary decision, and the Court of Appeal saw nothing wrong with this.

But no damages for depressive illness: However, the Court of Appeal overturned the award of damages for Y's depressive illness and the pecuniary losses that had flowed from it. It found that a psychiatric injury would not usually be foreseeable unless there had been indications, of which the FCO had been or should have been aware, of some particular problem or vulnerability of Y's. In this case, there had been nothing sufficiently egregious about the circumstances to render it foreseeable that Y's withdrawal from his post would cause him psychiatric injury. The judge should have held that the losses attributable to Y's psychiatric injury had not been reasonably foreseeable and were not therefore recoverable.

Guidance for suspension and disciplinary proceedings: This case provides useful guidance on the considerations which apply when suspending an employee and withdrawing him from his post, as well as the conduct of the associated investigation and disciplinary proceedings. It is also a useful precedent to show that employers will not generally be liable for psychiatric illnesses caused by their breach of contract or duty of care, where the breach is not sufficiently egregious and there is no prior indication of the employee having any particular vulnerability.

Points in practice

Unite will not appeal holiday pay overtime ruling

As reported in our last Bulletin (available here), the EAT recently ruled that holiday pay must include an amount in respect of compulsory overtime (*Bear Scotland v Fulton and related appeals*). One controversial aspect of that decision (although welcomed by employers) was that workers would not be able to bring historic claims for holiday pay, unless there was no more than three months between each underpayment. It had been widely expected that this aspect of the decision would be appealed.

However, it has now been reported that Unite the Union, which represented some of the workers in the litigation, will not be appealing the EAT's decision. Explaining its decision, a Unite spokesperson said:

> "*We don't want to bankrupt business; going forward it is about ensuring employees are paid their fair share and working with employers to ensure they get their house in order.*"

The implication is that the aspect of the EAT's decision limiting historic claims will now stand, unless and until another case challenges it. In the meantime, employers are largely protected from historic claims, and should focus on ensuring that holiday pay is calculated correctly going forward.

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