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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New publication

General Election 2015: Employment law implications

The General Election on 7th May 2015 is fast approaching, and the major parties have now published their manifestos. The attached publication summarises the main employment law proposals.

Employers should note that there is no legal right for employees to take time off work in order to vote.

Employers should also exercise caution in relation to political activities in the workplace. With some political beliefs (including "left-wing democratic socialism") now recognised as protected characteristics for discrimination purposes, there is a risk that discussions around the election could give rise to workplace liability, if not appropriately managed.

Cases round-up

STOP PRESS: Collective redundancies "at one establishment"

The ECJ has this morning handed down its decision in the "Woolworths" case, which has important implications for the trigger for collective redundancy consultation. The ECJ has held that it is legitimate for collective redundancy obligations to only be triggered when 20 or more redundancies are proposed "at one establishment", rather than across the employer's whole business. The term "establishment" for these purposes must be interpreted as referring to the entity to which the workers made redundant are assigned to carry out their duties (*USDAW and Wilson v WW Realisation 1 Ltd (in liquidation)*, *Ethel Austin Ltd and Secretary of State for Business, Innovation and Skills – known as 'the Woolworth case'*).

A more detailed analysis of the ECJ's decision will be included in next week's Bulletin.

Scope of collective bargaining imposed by statutory recognition of union

A trade union which secures statutory recognition has the right to collectively bargain with the employer on 'pay, hours and holidays'. This has now been found to be limited to contractual terms, meaning that an employer was not required to negotiate over non-contractual rostering arrangements, and was not prevented from announcing its intentions as regards pay increases before pay negotiations with the union took place (*British Airline Pilots Association v Jet2.com*).

Statutory recognition: BAPA sought and obtained statutory recognition by J in relation to 'pay, hours and holiday' of its pilots. The method of bargaining prevented J from varying '*the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit, unless [it] has first discussed [its] proposals with [BAPA]*.

Union alleges breach: BAPA claimed that J was in breach of its collective bargaining obligations by: (i) failing to negotiate over its rostering policy, which set out a framework for assigning work, allocating days off and ensuring adequate crewing on flights; and (ii) announcing to pilots the pay increases it was proposing in advance of the annual pay negotiation meetings.

Non-contractual changes were outside scope… The High Court dismissed BAPA's claim. On issue (i), it found that J's obligations only extended to contractual terms affecting pay, hours and holidays, and that there was no obligation to negotiate about non-contractual arrangements. It also found that the rostering policy was not, in principle, apt for incorporation into individual contracts.

…as was communicating pay intentions to employees: On issue (ii), the High Court noted that the obligation to negotiate did not require the parties to come to negotiations with a particular state of mind about any particular issue. J was simply required to discuss pay with BAPA before varying employees' contractual terms. It followed that J was not prohibited from communicating directly with its pilots about proposed pay increases before the negotiation procedure began.

Good news for employers: This is a fairly narrow interpretation of the collective bargaining requirements required by statutory trade union recognition, which will be welcomed by employers who have such arrangements imposed on them.

Unfair dismissal: Employer cannot have regard to warning issued in bad faith

The Court of Appeal has confirmed that in unfair dismissal proceedings an employer is not able to rely on or have regard to a warning if it has been issued in bad faith (*Way v Spectrum Property Care Limited*).

Disciplinary warnings: W was employed by SPC as a recruitment manager. W had received a final written warning for failing to declare his relationship to a job applicant. He did not appeal against that warning. Later, but within the term of the first warning, W was found to have sent a number of inappropriate emails.

Dismissal: SPC considered that the emails merited a final warning, but because W was already on a final warning, it dismissed him for misconduct. W appealed, claiming that the first warning had been given in bad faith (because the manager who gave the warning had covered up his own role in the recruitment process) and that W had been told that he could be dismissed if he appealed against it. SPC rejected that assertion and dismissed his appeal against dismissal.

Evidence of bad faith? The Tribunal rejected W's unfair dismissal claim. It also refused to hear evidence of the circumstances in which the first warning was given on the grounds that it was irrelevant. The EAT held that the evidence should have been admitted, but that the Tribunal's error made no difference to the outcome. It found that the first warning was valid on its face, and had not been appealed; therefore, SPC had been entitled to have regard to the first warning (even if it had been given in bad faith), and, on that basis, dismissal would almost inevitably have followed.

Warning should have been disregarded: The Court of Appeal allowed W's appeal. On the facts, the first warning had taken W a step further down the disciplinary road to dismissal; the Court of Appeal found that "highly relevant" to the reasonableness or otherwise of any subsequent decision to dismiss him. The EAT was wrong to proceed on the basis that a warning given in bad faith could be relied upon to justify a dismissal which, absent the warning, would not have occurred. The case was therefore remitted to determine if bad faith in fact existed in this case.

Employer must act reasonably: This decision is a reminder of the general principle that employers must act reasonably in treating the identified reason for dismissal as sufficient to justify dismissal. Where a dismissal is based in part on a prior disciplinary warning, the employer should satisfy itself that the warning was not imposed in bad faith.

Points in practice

EU consults on TUPE, collective redundancies and ICE Directives

The European Commission has launched a consultation into the possible consolidation of a number of EU Directives, with a view to strengthening the coherence and effectiveness of the existing EU legislation on worker information and consultation at a national level.

The legislation under consideration is:

- the Collective Redundancies Directive;
- the Acquired Rights Directive; and
- the Information and Consultation of Employees Directive.

The Commission is seeking the views of the social partners (representatives of employers and employees) on the potential direction of the legislation, particularly around definitions of 'information' and 'consultation' and the possibility of including public administration in the scope of the directives.

The consultation closes on 30th June 2015.

Shared parental pay: HMRC guidance

HMRC's latest Employer Bulletin (issue 53) contains guidance on the introduction of shared parental pay (ShPP).

The Bulletin confirms that when employers make a payment or recovery of ShPP in the tax year beginning 6th April 2015, they will be able to use the current data fields for additional statutory paternity pay (ASPP), which have been re-badged as "ASPP/ShPP". This is to allow for payments of ASPP that will still be payable during that tax year. From tax year beginning 6th April 2016, HMRC has confirmed that these fields will be amended to show ShPP only.

The Bulletin also notes that HMRC has updated its guidance and forms to reflect the introduction of ShPP, the abolition of ASPP, the change of name from ordinary statutory paternity pay (OSPP) to statutory paternity pay (SPP), the increase in statutory adoption pay for the first six weeks and the inclusion of surrogacy and foster to adopt parents.

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