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 law

Queen's Speech 2014: Employment aspects

The Queens' Speech was delivered on 4th June 2014. The key employment measures announced were:

- tougher penalties for employers who fail to pay the minimum wage and a crackdown on the abuse of zero hours contracts;
- the repeal of the existing employer-supported childcare scheme in favour of a new state-funded tax-free childcare subsidy worth up to £2,000 a year per child;
- measures to stop senior public sector employees receiving redundancy payments and then returning to the same part of the public sector; and
- measures offering extra legal protection for people (including employers) who do the right thing to protect others (including employees) by "acting heroically or in the public interest" if something goes wrong and they are subsequently sued for negligence.

Cases round-up

ECJ: Holiday pay should include commission

In **Lock v British Gas Trading Limited & ors**, the European Court of Justice (ECJ) held that the EU Working Time Directive (WTD) requires that workers must not suffer a reduction in their remuneration as a result of not earning commission during periods of annual leave. The worker in question must therefore be paid a sum representing the average amount of commission that he would have earned had he not been on holiday.

L was employed by BG as an energy sales consultant. In addition to his basic salary, L also received commission when clients agreed to buy BG's energy products. His commission was paid monthly (although several weeks in arrears), and on average it constituted around two thirds of his overall income.

L was on holiday over the Christmas and New Year period in 2011-2012. As he was not working over this period, he earned no commission. During his holiday, L received his salary and commission payments that he had earned in previous weeks. However after his holiday, his remuneration dropped to reflect the period during his holiday when he had not earned any commission. L claimed that he should have been paid the average amount of commission that he would have earned had he not been on holiday. The Tribunal made a reference to the ECJ to determine the position under the WTD.

The ECJ held that the WTD requires that workers must receive their 'normal remuneration' during periods of annual leave, on the basis that any reduction in their remuneration in respect of paid annual leave may deter them from taking that leave. It was irrelevant that the reduction in remuneration occurred in this case *after* (rather than during) the period of leave; the deterrent effect remained. The ECJ found that the commission received by L was directly linked to his work within the company, and therefore L should have been paid in respect of his period of annual leave by reference to the commission payments that he would have earned during that period, had he not taken leave. The ECJ gave no specific guidance on how this payment should be calculated, beyond stating that it should be "*on the basis of an average over a reference period which is considered to be representative*".

Comment: This case represents a change in approach under UK law, as until now commission could be excluded from the calculation of holiday pay where (as in L's case) the amount of remuneration does not vary with the amount of work done, but rather the outcome of that work. As a result of the ECJ's judgment, commission and any other payments which are "directly linked to the employee's work for

the company" should be included in the calculation of holiday pay. This will require employers to examine their pay structures and assess their exposure, given the potential for employees to bring claims for historic underpayments.

For tailored advice on the implications of this case for your business, please speak to your usual Slaughter and May contact.

Supreme Court: LLP members are "workers" and have whistleblowing protection

In **Clyde & Co LLP & anor v Bates van Winkelhof**, the Supreme Court held that an LLP member was a "worker" within the meaning of section 230(3) of the Employment Rights Act 1996 (ERA 1996). Her whistleblowing claim was therefore allowed to proceed to substantive hearing.

B was an equity member of C LLP until she was expelled from the partnership after raising money laundering allegations against the Tanzanian firm that she was seconded to work for. The Tribunal dismissed her whistleblowing claim on the basis she was not a "worker" within the meaning of section 230(3) ERA 1996, but this decision was reversed on appeal by the EAT. The Court of Appeal reinstated the Tribunal's decision, finding that the effect of section 4(4) of the Limited Liability Partnerships Act 2000 (LLPA) was that a member of an LLP, who would have been a partner in a partnership, could not be either an employee or a worker under section 230. This was on the basis that the words "employed by" in section 4(4) should extend to workers as well as employees. The Court of Appeal also held that the relationship would lack the degree of subordination which is required between a worker and the employer.

The Supreme Court unanimously allowed the appeal, holding that B was a "worker" for these purposes. In its judgment, the words "employed by" in section 4(4) cover only employees, not workers. It followed that a member of an LLP, who would not have been "employed by" a partnership, could nonetheless be a worker.

The Supreme Court also disagreed with the Court of Appeal on the requirement for subordination. It found that while subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker. It would therefore be possible for LLP members who undertake personally to work for the LLP to be workers, without any requirement for subordination. On the facts, B contractually undertook to perform personally certain work or services for C LLP, which was in no sense her client or customer. B therefore satisfied the test in section 230(3)(b) and was a "worker".

Comment: This decision reinforces the distinction between workers and employees, which had been blurred by the Court of Appeal's decision. It means that firms which operate as LLPs will need to treat their members as "workers". This not only means that they will have whistleblowing protection; it also entitles them to other rights, including annual leave and auto-enrolment into a pension scheme.

Executive remained an employee despite forfeiting her salary

In **Secretary of State for Business, Innovation and Skills v Knight**, the EAT upheld a claim for a statutory redundancy payment from the managing director and sole shareholder of an insolvent company. The fact that she had forfeited her salary for the last two years did not defeat her claim to be an employee of the company.

The director (K) was employed by her company (X) under a contract which entitled her to an annual salary of £20,000. In the last two years of trading, K forfeited her salary in an attempt to keep X afloat. Nonetheless, X eventually ceased trading and entered insolvency. K claimed a statutory redundancy payment from the National Insurance Fund. The Tribunal found that she was an employee of the company and was entitled to a statutory redundancy payment. BIS appealed, arguing that when K forfeited her entitlement to pay, she had changed her position,

and there was thereafter no consideration moving from X and no mutuality between X and K which would support the continuation of a contract of employment up to the relevant time, when X ceased trading and K became redundant.

The EAT dismissed BIS's appeal. It confirmed that the fact that an employee decides not to require her company to pay her salary as an employee does not necessarily lead to the conclusion that she must be taken to have entered into an agreed variation of the contract or a discharge of that contract. The use of the word "forfeited" by K did not have to be understood as meaning that K had agreed not to take any salary at all (even if the company's financial situation improved), or that she had brought her contract of employment to an end. The EAT was satisfied that the findings of the Tribunal justified the conclusion that there was no absence of either consideration or mutuality in this case.

Comment: This decision confirms that remuneration is not necessarily an essential ingredient of a contract of employment, provided that there is some other form of consideration. The EAT gave the example of an employer who would have to fulfil obligations which might not involve the payment of money, such as the provision of tools and equipment or the taking of reasonable care for the employee's health and safety.

Appointing a director to a subsidiary did not create a duty of care to its employees

In **Thompson v The Renwick Group plc**, the Court of Appeal held that a parent company did not owe a duty of care to the employees of a subsidiary company by virtue of having appointed a director to the board of that subsidiary company. In running the operations of the subsidiary, the director was not acting on behalf of the parent company; he was fulfilling his fiduciary duties as a director of the subsidiary. Further, the parent company had no involvement in the running of the business of the subsidiary, or in any business at all save for the holding of shares in other companies. The case was therefore distinguishable from those in which a duty of care is established by virtue of the parent company being better placed, because of its superior knowledge or expertise, to protect the employees of the subsidiary against the risk of injury.

Comment: The factual background to this case involved an employee of the subsidiary making a claim for damages for injuries sustained through exposure to asbestos, where his direct employer was not a viable respondent as it did not have insurance to cover the claim. The opposite result was reached in a similar context in **Chandler v Cape plc**, the key distinction being that in **Chandler** the parent company had taken on a direct duty to the subsidiary's employees. Without such a direct duty, **Thompson** confirms that a parent company will not usually face any liability for the employees of its subsidiary, even where it appoints a director to the subsidiary's board.

Points in practice

HMRC's 16th Employment-Related Securities Bulletin (May 2014)

HMRC has published the 16th edition of its Employment-Related Securities Bulletin. The key points from the Bulletin are:

- *Employee working time declarations for EMI options*: although these declarations are not required as part of the new online ERS notification process, they are still a requirement for employees to be eligible for EMI options. The Bulletin confirms that there is no template or model for the employee declaration, although it suggests that customers use the wording from the paper EMI1, which can be incorporated into EMI option agreements. It also confirms that the declaration can be in electronic form, provided there is adequate proof of consent to or acceptance of the declaration by the individual.

- *Finance Bill 2014 - guidance*: although the clearance procedure for tax-advantaged employee

share schemes no longer exists, guidance in the Employee Share Schemes User guide will be updated in July to reflect the new regime under Finance Bill 2014. The Bulletin also confirms that HMRC will respond to general questions of principle on the new regime, where these are not covered in published guidance. Customers submitting a query to HMRC should outline clearly the area of doubt, the point of difficulty, their view of the issue and the points they want HMRC to consider.

- *ERS service – FAQs*: the Bulletin also sets out some FAQs on the new ERS service. These cover issues including the use of PAYE reference numbers for a group scheme, registration of two or more schemes, naming schemes, correcting errors in registration, pre-implementation notifications, scheme cessation notifications, and the use of ERS agents.

The Bulletin in full is available here.

Share schemes annual returns: filing deadlines

A reminder that the following filing deadlines are approaching, in relation to the 2013-14 tax year:

- 6th July 2014:
  - Form 40 for enterprise management incentive (EMI) options.
  - Form 42 for all other arrangements involving shares or securities held by employees or directors.
- 7th July 2014:
  - Form 34 for save as you earn (SAYE) options.
  - Form 35 for company share option plans (CSOPs).
  - Form 39 for share incentive plans (SIPs)

These annual returns should be made in paper copies; the online filing system takes effect from 2014-15 onwards.

The forms can be found here.

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