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

Dismissed 'War Horse' musicians lose bid for reinstatement

In **Ashworth & ors v The Royal National Theatre**, the High Court refused to grant an order to reinstate a group of musicians who had been dismissed from their roles working on The Royal National Theatre's performance of 'War Horse'. Although the musicians had a strong breach of contract claim, the Court did not judge this to be the kind of 'exceptional case' in which specific performance of their contracts should be ordered.

A group of professional musicians were engaged to perform in The Royal National Theatre's performance of 'War Horse'. In December 2012, the theatre decided to dispense with the live music element of the show and rely wholly on recorded music. The theatre therefore informed the musicians that their contracts would be terminated, ostensibly by reason of redundancy. The musicians sought to affirm their contracts and continue to attend work, but were turned away. The musicians alleged that the theatre had acted in breach of their contracts, which only permitted termination by the theatre on the closure of the production. They sought an interim injunction, or alternatively specific performance, to require the theatre to continue to engage them in the production of 'War Horse' until the trial of their claim.

The High Court found that the musicians had a strong argument that their dismissals amounted to a breach of contract by the theatre. It nonetheless refused to grant the interim injunction or an order for specific performance, on the basis that these remedies should not be used to enforce strictly personal relationships, like that between an employer and an employee, other than in exceptional circumstances (which did not exist here). The Court determined that reinstatement would be problematic in this case, given that the producers and directors of the production no longer believed that the musicians could contribute positively to the production. Further, the move to recorded music had since been fully embedded with a new cast, the majority of whom had no experience of working with live music. The Court also considered (as a key factor) that the effect of the order sought would be to interfere with the theatre's right of artistic freedom, as the decisions of producers and artistic teams in staging plays are protected by Article 10 of the European Convention on Human Rights.

Comment: This is not the first time that specific performance of an employment contract has been litigated in the artistic sector. In **Lumley v Wagner** (a case decided in 1852), an injunction was granted to restrain W, an opera singer, from breaching her contract by performing at a rival theatre. While the injunction prevented W performing at any other theatre, the Court held that this did not amount to an order for indirect specific performance of her contract with the original theatre.

TUPE: provision of measures information by the transferee

In **Allen & ors v Morrisons Facilities Services Ltd**, the EAT confirmed that there is no obligation on a transferee to provide measures information to employees of the transferor, and no corresponding right of action for those employees if the transferee provides incomplete or inaccurate measures information.

A group of employees transferred to M under TUPE following the re-tendering of a contract for the provision of maintenance services to Leeds City Council. The employees lodged claims for failure to inform and consult against both M and their former employer, the transferor (X). The claims against X were settled, leaving only the claims against the transferee, M. The Tribunal dismissed the claims, finding that there is no individual right under TUPE for affected employees of the transferor to complain of a failure to provide information by the transferee.

The EAT dismissed the appeal. It confirmed that TUPE does not impose an obligation on a transferee to provide information to employees of the transferor. The obligation on the transferee is to provide such information *to the transferor* in order enable the transferor to provide its employee representatives with information about the measures it envisages the transferee will take in relation to affected employees who transfer. To put it another way, the obligations are "vertical" between the employer and its employees, not "horizontal".

It followed that the only option available to the employees would have been to pursue their claims against their employer at the time (X), for breach of its obligations to provide them with information. It would then be open to X to give notice to and join M as a party to the proceedings. However, the EAT acknowledged that M could only be liable to pay compensation under this route if the tribunal found that X was in breach of its obligations and that it was not reasonably practicable for X to have performed that duty because M had been in breach of its obligation to give X information. Since the employees' claims against X had been settled, that route was not available in this case.

Comment: This case mean that tribunals will be more ready to uphold a claim against the transferor by its employees for failure to inform and consult, where the transferee has failed to comply with its obligations by providing incomplete, misleading or inaccurate information to the transferor. This will be the only way to bring the transferee in to play, where the real fault lies with its provision of information. It is therefore important for transferors to get as much measures information as possible from the transferee, and (so far as possible) satisfy themselves that the information is accurate. In a business purchase context, an important safeguard will be the indemnity protection that is usually sought by transferors against liability caused by the transferee's failure to provide accurate measures information.

Remedies for breach of restrictive covenants

Three recent High Court cases have considered the potential remedies available to an employer in proceedings to enforce restrictive covenants against former employees:

- In **Merlin Financial Consultants Ltd v Cooper**, *compensation* was awarded for breach of a 12 month non-compete covenant restrictive covenant by a financial adviser, who had left to set up a competing company. The Court awarded compensation for the former employer's losses for the 12 month period of the restriction, on the basis of its estimation that 70% of the clients lost would have stayed for that period. It also awarded compensation for a further 12 month period, on the basis of its estimate that 40% of the clients lost would have stayed for that period. The Court rejected an argument that the former employer had failed to mitigate its loss by taking steps such as putting the adviser on garden leave, taking away his lap top and mobile phone, and applying for an injunction to restrain the adviser's competitive activities. The Court doubted that these steps would have helped the former employer's position, and accepted its concerns about causing further damage to client relationships.

- In **Warm Zones v Thurley**, an *injunction* was granted for *inspection and imaging of ex-employees' computers*. The evidence suggested that the ex-employees had taken information from a confidential customer database to their new employer (a competitor), in breach of express post-termination provisions in their contracts. The Court was satisfied that the balance of convenience lay in favour of the injunction, as damages would be an inadequate remedy for the former employer (who would be undertaking the inspection and imaging at its own expense, and who had also given a cross-undertaking in damages).

- Finally in **Capgemini India Private Ltd v Krishnan**, an application for an *interim injunction* to enforce a six month non-dealing covenant was *rejected*. The employees in question had given *undertakings* to observe the restrictive covenant in question (although they subsequently withdrew those undertakings and claimed that the covenant was in restraint of trade and unenforceable). The Court held that the giving of the undertakings did not create "an unassailable bar" preventing the employees from contesting the enforceability of the covenants. On the facts, an interim injunction was judged to serve no real or useful purpose, since the client for whom the employees were working had re-tendered their contract to the new employer (without any apparent wrongdoing on any side), and there was no chance of it being recovered by the old employer. The Court concluded that an interim injunction would be a disproportionate response to the "limited" breach of the covenant, which was due to expire shortly in any event.

Comment: The **Merlin** case is an interesting example of how damages may be calculated in breach of covenant cases, and also provides useful guidance on the limits of the employer's duty to mitigate its loss. **Warm Zones** is a rare example of a case in which an injunction of that sort was granted. Finally, **Capgemini** represents a departure from previous case law in which injunctions were granted to enforce restrictions which employees had specifically undertaken to observe, often as part of settlement discussions. The facts of **Capgemini** were unusually weighted in the employee's favour, which seemed to help them achieve the opposite result.

Tax avoidance where bonuses paid in restricted shares

In **HMRC v UBS AG and DB Services (UK) Limited**, the Court of Appeal held that two bonus schemes run by UBS and Deutsche Bank, with the aim of using 'restricted securities' under Chapter 2 of Part 7 of ITEPA 2003, did in fact fall within that regime. The bonuses could therefore be paid to employees without any liability to income tax or NICs.

The Upper Tier Tax Tribunal (UTT) had found that the UBS scheme constituted a successful tax avoidance arrangement, but that the Deutsche Bank scheme did not (see Employment Bulletin 11th October 2012, available here). HMRC appealed the finding in relation to the UBS scheme, and Deutsche Bank appealed the finding in relation to its scheme.

The Court of Appeal dismissed HMRC's appeal. It accepted that the UBS scheme had been specifically designed as a tax avoidance scheme. Nonetheless, HMRC's challenge that the scheme had no commercial purpose was rejected. The UBS scheme was found to have satisfied all the requirements of the legislation.

However, the Court of Appeal allowed Deutsche Bank's appeal. It held that the UTT had fallen into error in having found that Deutsche Bank had had control over the company which issued the restricted securities. The UTT had misinterpreted the First Tier Tribunal's findings. Further, the UTT's conclusion that Deutsche Bank had been in control of the investment manager had been a "remarkable" one that was "obviously wrong".

Comment: The Court of Appeal did agree with the UTT in rejecting the application of the **Ramsay** principle to either scheme (which involves looking beyond the individual components of tax-avoidance arrangements, so that where some components serve no commercial purpose other than to avoid tax, the proper approach is to apply the legislation to the effect of the arrangements as a whole, not to each individual component).

Points in practice

Executive remuneration: proposed amendments to the UK Corporate Governance Code

The Financial Reporting Council (FRC) has published a second consultation on proposed amendments to the UK Corporate Governance Code, to address a number of executive remuneration issues. This follows the initial consultation which was published in October 2013 (see Employment Bulletin 17th October 2013, available here).

The latest consultation builds on the proposals made in the first consultation, as follows:

- **Clawback and malus arrangements**: the FRC is proposing to amend Code Provision D.1.1 to provide that performance-related remuneration schemes "*should include provisions that would enable the company to recover sums paid or withhold the payment of any sum, and specify the circumstances in which the committee considers it would be appropriate to do so.*" The proposed new provision would not specify in detail the mechanism or conditions which should be used for such arrangements.

- **Votes against the remuneration resolution**: the FRC has expanded its original proposal, so that companies should engage with shareholders and report to the market on the outcome in the event that they receive a significant vote against *any* resolution, including the resolutions on remuneration. Code Provision E.2.2 will be amended to provide that "*When, in the opinion of the board, a significant proportion of shareholders have opposed a resolution at any general meeting, the company should explain when announcing the results of voting what actions it intends to take to understand the reasons behind the vote result.*" The FRC's intention is that companies should set out how they intend to go about engaging with shareholders in order to assess their concerns, rather than setting out how they intend to respond to those concerns (which the FRC accepts could not realistically be done so soon after the AGM).

- **Remuneration Committee membership**: the FRC has dropped its original proposal to prevent non-executive directors who are also executive directors in other companies sitting on the remuneration committee. There was "virtually no support" for this proposal following the initial consultation.

- **Performance-related remuneration and share retention**: the latest consultation also makes a number of new proposals, which include amendments to the principles of performance-related remuneration in Schedule A of the Code, to encourage a more long-term approach through greater use of deferred remuneration. Another proposed addition is that companies should consider requiring directors to continue to hold at least some shares for a period after leaving the company.

The consultation paper is available here. The consultation closes on 27th June 2014, with any changes to the Code expected to take effect for accounting periods beginning on or after 1st October 2014.

Bankers bonuses: PRA issues guidance on increasing 1:1 bonus cap

The Prudential Regulation Authority (PRA) has issued a letter to clarify a number of procedural points for firms who are considering seeking shareholder approval to increase the permitted ratio of fixed to variable remuneration above the 1:1 basic limit.

The letter confirms that:

1. The percentage thresholds for shareholder approval (50% / 66% / 75%) should all be calculated by reference to the voting rights capable of being cast on the relevant resolution, which attach to the shares or ownership rights in the firm. Although the relevant provisions of CRD IV and the PRA Remuneration Code both refer to "shareholders", the PRA's view is that CRD IV clearly requires the percentages to be counted by reference to share or ownership voting rights, *not* the number of individual shareholders or owners.

2. The 75% threshold (which applies when fewer than 50% of shares are represented in the vote) and the 66% threshold (which applies when at least 50% of shares are represented), are percentages of the share or ownership voting rights represented, not of the firm's whole issued share capital or ownership rights.

3. The concept of shares or ownership rights being "represented" is not clearly defined for these purposes in EU or UK law, and may depend on the legal nature of the firm in question. The letter provides some guidance for how firms should approach this issue.

4. Staff who are directly concerned by the higher maximum levels of variable remuneration are not permitted to exercise any voting rights they may have. Accordingly, their voting rights should be disregarded when calculating the percentages.

The letter is available here.

HMRC's 15th Employment-Related Securities Bulletin (April 2014)

HMRC has published the 15th edition of its Employment-Related Securities Bulletin. The Bulletin provides further information about the commencement and transitional provisions for the new self-certification and registration regime for share schemes. Amongst other things, the Bulletin confirms that:

- There is no requirement for any company to amend the rules of a previously approved SIP, SAYE or CSOP to remove references to HMRC approval or agreement of any scheme feature. From 6th April 2014, the rules of the relevant scheme may be read as if any such references have been removed.

- *However*, the current requirement on a company to obtain HMRC agreement of the market value of shares subject to an exchange of options will remain in place.

- Companies with SIP, SAYE or CSOP schemes approved by HMRC prior to 6th April 2014 are not required to immediately amend their scheme rules to reflect the new 'purpose' requirements for these schemes. A requirement to amend these rules only applies as and when that company makes an alteration to a key feature of their scheme (or the plan trust in the case of a Schedule 2 SIP) after 6th April 2014.

- EMI options granted before 6th April 2014 should be notified to HMRC on form EMI1, which will continue to be available for download from the HMRC website. This is a correction of the position stated in the 14th edition of the Bulletin, which suggested that all EMI option notifications should be made online following 6th April 2014. HMRC have now clarified that online notification of grants only applies to options granted on or after 6th April 2014.

The Bulletin is available here.

And finally…

David Moyes dismissed from Manchester United

It was announced last week that David Moyes had been dismissed as manager of Manchester United Football Club after only ten months in the role. What are the employment law implications of his dismissal?

Moyes departed with insufficient qualifying service to claim unfair dismissal. The fairness of Manchester United's decision therefore goes untested, despite some media suggestions that "the Chosen One" was unjustly made the scapegoat (a factor which may have helped him to show that his dismissal was indeed unfair). Other reports suggest that Moyes made too many mistakes and simply could not adapt to the significant promotion that the move from Everton entailed. His 'lack of capability' could therefore have justified his dismissal. Given the cap on unfair dismissal compensation (currently £76,574), these issues would unlikely have troubled the Manchester United board, even if an unfair dismissal claim would have been possible.

The contractual aspects of Moyes' departure, on the other hand, would have been pivotal. Fixed-term contracts are common in this sector, and it has been reported that Moyes' contract was for a 6 year term. The dismissal of Henning Berg by Blackburn Rovers FC last year demonstrated how costly such early terminations can be; Berg won a multi-million payout representing his salary for the entire 2.5 year term of his contract, despite being sacked after only 57 days.

It has been reported that Moyes' contract contained a clause which permitted termination if Manchester United failed to finish in the top four, with compensation limited to a year's salary (£4.5 million). This may have influenced the timing of his dismissal. Had Moyes been dismissed when there was still a chance of finishing in the top four, he reportedly could have been entitled to compensation of at least £9 million.

A settlement has apparently been reached between the parties, although the exact terms are unlikely to be made public.

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