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

Obesity may be a disability

Morbid obesity may amount to a 'disability' for discrimination purposes, if it is of such a degree as to hinder full participation in professional life on an equal footing with other employees, according to an opinion of the EU Advocate General (*Kaltoft v Municipality of Billund*)

Obese child-minder dismissed: K was employed by the MoB in Denmark as a child-minder. Throughout his employment K never weighed less than 160kg, and with a BMI of 54 he was classified as obese. He had been working for the MoB for 15 years when his employment was terminated, ostensibly on the grounds of a decline in the number of children (although no express reason was given for selecting K for dismissal). K's obesity was discussed at his dismissal hearing, but the MoB denied that it formed part of its decision to dismiss. K however claimed that his dismissal was an act of unlawful discrimination against him due to his weight. The Danish Court made a reference to the ECJ to determine if EU law prohibits discrimination on the grounds of obesity.

No general prohibition on discrimination… The AG's opinion was that there is no self-standing prohibition on discrimination on the grounds of obesity under EU law. This would only be possible if there were a general prohibition on discrimination on non-specified grounds, such as appearance or size, psychological characteristics such as temperament or character, or social factors such as class or status. The AG rejected this possibility, emphasising that EU law prohibits discriminatory conduct on specific grounds, rather than in a generalised manner.

…but obesity may be a 'disability': However, the AG went on to consider whether obesity could amount to a disability, and therefore fall within the protection from disability discrimination under the EU Equal Treatment Framework Directive. He concluded that it could, if the obesity has reached such a degree that it hinders participation in professional life, due to the physical or psychological limitations it entails. He found that it is irrelevant whether the employee has contributed to the acquisition of his disability through "self-inflicted" excessive energy intake, or whether it results from a psychological or metabolic problem, or as a side effect of mediation. Although it would be for national courts to determine whether an obese employee is disabled, the AG's view was that only "extreme, severe or morbid obesity" (i.e. a BMI of over 40) could suffice to create limitations, such as problems of mobility, endurance and mood, to amount to a 'disability'.

Implications for UK employers: The case will now proceed to full hearing before the ECJ, which is likely (although not bound) to follow the AG's opinion. At present, UK law has not yet recognised obesity as a disability in itself, although it may make it more likely that an employee has an impairment which amounts to a disability. For example, in Walker v Sita Information Networking Computing Ltd, the EAT held that while obesity is not itself a disability, an obese man who suffered from a myriad of conditions including asthma, diabetes, high blood pressure, bowel problems and depression, which were compounded by his obesity, was disabled. According to WHO statistics, the UK has one of the highest rates of obesity amongst adults (29.6%), so these authorities may have significant implications for employers.

No right to increase disciplinary sanction on appeal

Where an employee appeals against a disciplinary sanction (such as a warning), the employer will have no right to impose an increased sanction (such as dismissal) on appeal, unless it has reserved an express right to do so, according to a recent judgment of the Court of Appeal (*McMillan v Airedale NHS Foundation Trust*).

Warning, or dismissal? M was issued with a final written warning by the Trust following findings of misconduct. The Trust's disciplinary code included provisions which stated that there was a right to "appeal against a written warning or dismissal", and that there was then "no further right of appeal". The

code contained no express power to increase sanction on appeal. M's appeal against the misconduct finding was dismissed, and the appeal panel decided that it would reconvene to consider the appropriate sanction. When it became apparent that the Trust was considering dismissing M, she withdrew her appeal. The High Court granted M's application for an injunction to restrain the panel from reconvening and increasing the disciplinary sanction against her.

Appeal is for employee's benefit… The Court of Appeal dismissed the Trust's appeal, upholding the injunction. It found that an appeal is aimed at demonstrating that the employer was wrong to warn or dismiss an employee; it is for the employee's benefit, not the employer's. It is not intended to be a continuation of the disciplinary process, leaving all options open, and should not therefore result in an increased sanction.

…and not for employer's: The Court also noted that, given that the Trust's code provided for no further right of appeal, to allow an increase of sanction on appeal would permit an employee who is issued with a final warning at first instance to be dismissed on appeal, with no right of appeal against that more serious sanction. This in the Court's view would be a surprising result, and would in effect give the employer a right of appeal, which was not recognised in the code.

Need for express power to increase sanction on appeal: This judgment confirms the generally recognised principle (also found in the ACAS guidance on disciplinary and grievance procedures) that an appeal should not result in an increase in sanction. Whether the appeal is conducted as a review or rehearing is immaterial for these purposes, as the Court in this case recognised. That said, the Court of Appeal also confirmed that it is possible to reserve a right to increase sanction on appeal, but the employer must do so expressly.

Restrictive covenants: Ineffective drafting

A restrictive covenant which purported to prevent competitive activity, in fact only prevented such activity in relation to the former employer's products (which no other company supplied). This was the normal interpretation of the drafting, and was upheld as such, even though it meant that the covenant had little practical effect. (*Prophet plc v Huggett*).

Competition in computer software products: H was employed as a sales manager by P, a company which developed and sold computer software for use in the fresh produce industry. H's employment contract contained a post-termination restrictive covenant stipulating that he would not, for a period of 12 months, engage in any business which was similar to or competed with P "*in connection with any products in, or on, which he … was involved whilst employed*". H left P and was employed by K to promote a computer software product which K had developed specifically for the fresh produce sector. P sought an injunction preventing H from working for K, in accordance with the covenant.

Covenant initially re-written… The High Court initially granted the injunction. It noted that H had only been involved with two products whilst employed by P, and if the covenant were read literally, it would give P no protection because P was the only company which provided those products. The Court therefore found that it was necessary to cure the mistake in the drafting by adding the words "***or similar thereto***", so that the covenant would cover products similar to those which H had been involved with at P.

…but original drafting upheld: The Court of Appeal allowed H's appeal, lifting the injunction. It found that the natural meaning of the words in the covenant was that they were simply referring to those products with which H had been involved whilst employed by P. This was not a situation where the language of the covenant was truly ambiguous, with one interpretation leading to an apparent absurdity and the other to a commercially sensible solution. The approach adopted by the High Court had therefore been wrong. It followed that H's proposed activities with K, which did not provide either of the restricted products, would involve no breach of the restrictive covenant. The injunction was therefore lifted.

Careful drafting needed: This case emphasises the need for careful drafting of restrictive covenants. In this case the Court of Appeal found that although nothing had gone wrong in the drafting of the covenant, what *had* gone wrong was that the draftsman had failed to consider what the effect of the covenant would be in practice, if H departed for a rival company. This demonstrates that is always worthwhile "testing" draft covenants against a number of possible scenarios, to make sure that they offer adequate protection.

Points in practice

Women on boards: EHRC guidance

The Equality and Human Rights Commission (EHRC) has published new guidance on "Appointments to Boards and Equality Law", aimed at providing guidance to companies and nominations committees on the equality law framework within which board appointments must be made.

The key points from the guidance are:

- Appointments must be made on merit, demonstrated through fair and transparent criteria and procedures.
- All-female shortlists are unlawful, unless this was not the pre-determined objective and all the best candidates are women.
- Targets for gender participation, which compliment an open and fair recruitment process, are permissible. In contrast, quotas (and any steps taken to reach them) run the risk of unlawful discrimination.
- Individuals responsible for board appointments must avoid unwarranted assumptions which result in one gender being favoured over another for appointment.
- The law does provides some scope for 'positive action' i.e. for companies to address any disadvantage or disproportionately low participation on boards by enabling or encouraging applications from a particular gender, provided selection is made on merit.
- Selecting a candidate on the basis of gender is only lawful (under section 159 of the Equality Act 2010) when the individual is objectively assessed as being equally qualified as a candidate of the opposite gender, when the individual's gender is under-represented on the board and a number of other conditions are satisfied. The guidance provides some pointers on how the positive action in recruitment permitted may operate in practice.

Executive remuneration: latest recommendations from the High Pay Centre

The High Pay Centre has published a report outlining new proposed policies to tackle excessive executive pay.

The headline recommendation is that the Government should introduce a cap on executive pay at a fixed multiple of the company's lowest-paid employee. The report notes that since the late 1990's executive pay has grown from a multiple of 60 times that of the average UK worker to a multiple of nearly 180. It also notes that some companies such as John Lewis and TSB have already adopted a 75:1 ratio, and that polling suggests that 78% of the public would support a similar form of cap.

The report also proposes:

- representation for workers on company boards and remuneration committees that set executive pay, as well as on city pay regulators; and
- compulsory profit-sharing, so that if a company does well and the CEO receives a large bonus payment, ordinary workers also receive a windfall.

HMRC's 17th Employment-related Shares and Securities Bulletin

HMRC has published its 17th Employment-related Shares and Securities Bulletin. This latest Bulletin includes information about:

- *Employee share schemes annual returns*: The Bulletin confirms that an employer who submits an incorrect or incomplete annual return must submit a full amended return.

- *Online registration and reporting*: The Bulletin confirms that if a company failed to meet the reporting deadline for the grant of an EMI option because of recent technical problems with HMRC's online services, this will be considered a reasonable excuse. Nonetheless, companies are requested to register their share schemes well before 6th July 2015.

- *Updates to the Employee Share Schemes User Manual*: The Manual has been updated to reflect changes to the legislation governing tax-advantaged share schemes as a result of Finance Act 2014. The updated Manual includes information on HMRC's view of serious and less serious errors for the purposes of the new penalty regime, exercising CSOP and SAYE options prior to a change of control, and HMRC's view of what a "mechanism" is for the purposes of new paragraph 21A of Schedule 4 of the Income Tax (Earnings and Pensions) Act 2003 (which provides for option terms to be amended by way of a mechanism that is stated at grant).

HMRC consultations on marketable securities and employee shareholding vehicle

Two recently-published HMRC consultations have proposed changes of relevance to employee share schemes:

- A consultation on introducing the concept of 'marketable security' into the tax rules for employment-related securities (as first announced in Budget 2014). This would change the basis of taxation for employment-related securities, such as employee shares, so that individuals could choose whether the tax charge on these securities arises at the time they are acquired or (if different) at the time at which they can be sold for cash (when they become 'marketable').

- A consultation on introducing a new employee shareholding vehicle, to make it easier for companies wishing to manage their employee share arrangements and create a market for employees' shares. HMRC believes that this would allow shares in unquoted companies in particular to be held and traded on behalf of their employees more easily and at reduced cost, without the perceived hurdles for existing employee benefit trusts (EBTs).

Both consultations close on 10th October 2014.

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