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.

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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.

Teleconference replay

Collective redundancies – where are we now?

As you will be aware from previous editions of our Bulletin, we hosted a teleconference on Tuesday 2nd June 2015 on the topic of "Collective redundancies – where are we now?". The teleconference considered the practical issues which employers commonly come across when facing the prospect of making collective redundancies, and the implications of the recent ECJ decision in the 'Woolworths' case.

If you would like to listen to a replay of the teleconference, this will be available until Tuesday 26th June 2015 by **dialling +44 20 8196 1998** and entering the **access pin 2769426#**. Copies of the slides to accompany the teleconference are available from lynsey.richards@slaughterandmay.com.

Cases round-up

TUPE: subcontracted services – who is the "client"?

In order for there to be a service provision change (SPC) for TUPE purposes, the client must remain the same both before and after the change of service provider. Where the client's original contractor has used a sub-contractor, and the services are then insourced by the client, is this test satisfied? This has been considered by a recent decision of the EAT (*Jinks v London Borough of Havering*).

Services subcontracted, then insourced: LBH owned a site in its district comprising the Romford Ice Rink and an associated car park. It contracted-out the management of this site to a leisure company (S), which then subcontracted management of the car park to a parking company (R). The ice rink closed in April 2013, and S gave up operation of the site. LBH then took control of the site, including management of the car park.

Employee claims transfer: J claimed that he was initially employed by S, but transferred to R in April 2013, and then to LBH when it began operating the car park. When LBH refused to accept him as its employee, he claimed constructive unfair dismissal.

Was there an SPC? The Tribunal struck out J's claim at a preliminary hearing, finding that there had been no SPC from R to LBH. It noted that the "client" must be the same both before and after the transfer. In this case, the "client" which engaged R was S, but the "client" on the insourcing was LBH. Therefore, there could be no SPC, and J's claim must fail.

Approach too narrow: The EAT allowed J's appeal, remitting the case back to the Tribunal for reconsideration. It found that the Tribunal had taken too narrow an approach by insisting that only S, as the entity to which R was legally bound, could be R's client. It will always be a question of fact on whose behalf a subcontractor carries out activities (and who is the "client" for these purposes, whether it be the immediate contractor or the ultimate client).

Question of fact: The EAT in this case reached a different conclusion to that in *Horizon Security Services Ltd v Ndeze* (see our Employment Bulletin dated 14th August 2014, available here), where the EAT found that there had been no SPC when a contract for security services was retendered, and the client under the new contract was the 'ultimate' client, whereas under the previous contract, it was the ultimate client's subcontractor. It means that where services have been subcontracted, TUPE may still apply to a change of service provider, since there may be an argument that the "client" of the sub-contractor is not necessarily the immediate contractor, but is the ultimate client. The presence (or absence) of direct contractual relationships will not be determinative.

Payment to settle discrimination claim was not taxable as earnings

A £600,000 settlement payment to a former trader who made allegations of race discrimination has been found not to be taxable as earnings under section 62 ITEPA 2003. The payment was properly characterised as compensation for discrimination, and the fact that it was based on alleged loss of earnings was not sufficient to categorise it as earnings (*A v HMRC*).

Remuneration complaints: A was employed by a European bank (X) as a Managing Director. A's nationality is described as "non-European", whereas X's Executive Committee was made up entirely of one European nationality. From 2004 to 2007 A raised concerns about the level of his bonus, which he viewed as unjustifiably low given the profits he had generated for X. A also alleged that other Managing Directors of X were receiving higher bonuses, and that they all received salary increases (which A did not).

Discrimination allegations: A was subsequently put at risk of redundancy, and lodged a grievance about his selection for redundancy, his bonuses and lack of salary increase, suggesting that he had been less favourably treated because of his nationality. X rejected the grievance in all but one respect; it accepted that A's 2006 bonus was too low, although maintained that this was due to a simple error rather than any discrimination. A then instructed solicitors, who submitted a race discrimination questionnaire under the (now repealed) statutory procedure.

Dismissal and settlement: X confirmed that A's role was redundant, and offered him an enhanced package if he signed a settlement agreement (which A did). The agreement provided for payment of statutory redundancy pay at £1,650, an ex-gratia redundancy payment of £48,898, and a further sum of £600,000.

HMRC challenge: HMRC contacted X for further information in relation to the £600,000 payment. X's response was that it was a global settlement sum, although when pressed for figures on the underpayment of bonuses and salary, the figures provided by X equated roughly to £600,000. HMRC took the view that the £600,000 payment should have been taxable as earnings under section 62 ITEPA 2003, since it related to underpayment of salary and bonuses. It therefore amended A's 2008-9 tax return to this effect. A appealed.

Payment not "earnings": The First-tier Tax Tribunal (FTT) allowed A's appeal. It rejected HMRC's argument that because the £600,000 sum was calculated by reference to loss of earnings, it was taxable as earnings. Instead, the FTT accepted A's argument that a sum paid in settlement of a threatened claim should be taxed on the same basis as compensation awarded by a tribunal if that claim were successful. It noted that compensation for discrimination could not be classed as earnings simply because it was calculated by reference to loss of earnings. A had received it not in return for his services, but because he was a victim of discrimination. The sum was therefore not "earnings".

Payment related to discrimination allegations: The FTT was satisfied that X had been motivated by A's discrimination allegations to make the payment. It wasn't necessary for A to prove his allegations. Whilst the FTT found no relevance in the fact that discrimination was amongst the list of claims settled by the settlement agreement (since the list included many other claims which A had not raised or even intimated), nor X's failure to respond to the race discrimination questionnaire (since the provisions allowing an adverse inference were primarily directed at employment tribunals), it found sufficient evidence to support its conclusions. This included that X made the offer of the £600,000 payment shortly after receiving A's discrimination questionnaire, and had dealt with A's redundancy via separate payments.

Payment not a termination payment: Although the £600,000 payment was made under a settlement agreement under which A's employment terminated, it was not argued that the payment should be taxable as a termination payment under section 401 ITEPA 2003. It was clear on the facts that the £600,000 related to issues pre-dating his termination. This shows the importance of carefully analysing the nature of each payment made to a departing employee, in order to determine the appropriate tax treatment.

Dress code prohibiting "trip hazard" was not indirect discrimination against Muslim women

A requirement for employees not to wear garments to work that may constitute a "trip hazard" did not amount to indirect religious discrimination against a

Muslim job applicant who sought to wear a full-length jilbab to work, according to a recent judgment of the EAT (*Begum v Pedagogy Auras UK Ltd t/a Barley Lane Montessori Day Nursery*).

Muslim wearing jilbab: B was offered an apprenticeship as a trainee nursery assistant at PA's nursery. B was an observant Muslim whose religious belief required her to wear a jilbab, a flowing garment which reached from her neck to her ankles. At the relevant time PA employed four other Muslim women, at least one of whom wore a full-length jilbab.

Health and safety concerns: The manager of the nursery (J) noticed that B's jilbab covered her shoes and touched the floor when she was seated. J considered that this could be a health and safety risk, as it could constitute a trip hazard to the wearer, her colleagues or the children. J therefore asked B whether she might wear a shorter jilbab to work, and B said that she would discuss this with her family. B did not indicate at the time that she was offended by the proposal, but subsequently refused to accept the post. She then commenced proceedings against PA claiming that she had suffered a detriment by reason of the manifestation of her religious belief.

No discrimination: The EAT upheld the Tribunal's decision to dismiss B's claim. It found that B had not been instructed that she could not wear a full-length jilbab; she was simply asked if she could wear a shorter one than she wore to the interview. PA had applied a policy that staff should not wear any garments that might constitute a tripping hazard to themselves or the children in their care. This policy applied equally to staff of all religions, and did not put Muslim women at a particular disadvantage since they could still wear a full-length jilbab as long it did not represent a trip hazard i.e. was not so long it covered their shoes. The EAT also commented that merely asking B if she would consider wearing a shorter jilbab could not amount to a detriment. Finally, even if policy could be said put some Muslim women at a particular disadvantage, any indirect discrimination was justified as being a proportionate means of achieving a legitimate aim: i.e. protecting the health and safety of staff and children.

Requirements of Islam: The extract of the Qu'aran quoted in the Tribunal proceedings referred to a requirement that the garment stipulated for Muslim women to wear should cover their bodies "from neck to ankle". This was used to support the Tribunal's conclusion that a Muslim woman could wear a jilbab reaching to her ankle (but not beyond), and could therefore comply with PA's dress code.

Points in practice

FCA letter on malus expectations

The Financial Conduct Authority (FCA) has published a letter to Remuneration Committee chairmen of regulated firms within proportionality level 1. The letter sets out the FCA's expectations on the application of malus.

The letter confirms that as with last year, the application of malus will be the FCA's primary focus during the 2014/15 remuneration round. The FCA will also however be looking to see compliance in all areas of the Remuneration Code, including how firms have taken into account the risk of misconduct in setting current year awards. The FCA will also be particularly interested to see how firms have updated their approach to take account of changes arising from CRD IV such as the bonus cap and the identification of material risk takers.

The letter also reiterates the key learning points which were set out for consultation in CP14/14 Appendix 6 '*General guidance on the application of malus to variable remuneration and ex-ante risk adjustments*'. Although this proposed guidance has since been revised in GC15/2, and still remains in draft, the letter stresses that it provides a clear indication of the FCA's

expectations on the application of malus. It is broken down into seven areas:

- *Scope* – Application to an appropriate range of individuals including those who were not directly involved in the misconduct such as those who failed to act, or those who by virtue of their seniority could be deemed indirectly responsible or accountable.

- *Expectations in relation to the application of malus* – Staff in firms are clear on the fully discretionary nature of their variable remuneration and appropriately sized reductions are robustly applied, including taking account of any fines.

- *Timing in the consideration of malus* – Events are considered early on and reductions applied as soon as reasonably possible.

- *Procedure for considering malus* – Events are considered using a clearly defined, robust and well documented process that considers a range of relevant factors.

- *Transparency in the consideration of malus* – The process clearly shows the difference between awards pre and post application of malus and is clearly communicated to employees.

- *Ex-ante risk adjustments* – Firms take into account the risk of conduct failings which have not yet crystallised when setting the size of the bonus pool, making larger adjustments where they believe these risks have increased.

- *Co-operation with the FCA* – Information is provided in sufficient detail and at an early enough point to facilitate the process of reaching agreement on bonus plans.

High Pay Centre calls for abolition of LTIPs

The High Pay Centre has issued a report on performance-related pay, which calls for the abolition of LTIPs. The report states that LTIPs have increased executive pay to needless levels without also raising company performance. It found very little link between high LTIP payments and shareholder returns, noting that payments to the top 350 business directors increased by over 250% between 2000 and 2013, five times as fast as shareholder returns.

The report also suggests that:

- bonus payments should be made in cash, not shares, to prevent executives benefitting from sudden share price increases;

- 'golden hello' payments to entice executives to the company should not be given unless the position has been advertised openly; and

- the remuneration committee should be diversified, to ensure a wider range of professional backgrounds.

Trends from the 2015 reporting and AGM season – remuneration aspects

PLC has published a report which provides an overview of trends emerging from the 2015 reporting season. In relation to directors' remuneration policies, the report notes that:

- Of the 208 FTSE 350 companies reviewed so far this year, 56 companies (13 FTSE 100 and 43 FTSE 250) have proposed a resolution to approve the directors' remuneration policy either for the first time or to seek approval to amendments to the policy. This includes the seven FTSE 350 who did not propose such a resolution last year, either because their financial year ends fell before 1 October 2013 (meaning they were not yet required to do so) or because they were non-UK incorporated companies and not, therefore, subject to the Companies Act 2006.

- Of the 56 companies that have proposed a resolution so far this year, 43 companies have proposed a resolution to seek approval of the directors' remuneration policy at their AGM for a second consecutive year.

- One company had decided to implement a one year remuneration policy period and have two votes for shareholders each year: one in respect of the policy section and one in respect of the annual report on remuneration.

- Of the 52 companies that proposed a resolution and have held their 2015 AGM, five companies have received a substantial vote (being between 10% and 49.9%) against the resolution.

- The company with the largest vote against issued a statement explaining that it had made changes to the remuneration policy to provide the Board with additional flexibility to reward any higher levels of future performance at an appropriate level, taking account of the competitive dynamic of the particular industry within which the company operates. It also confirmed that the company had engaged (and would continue to engage) with shareholders, and would take account of their views in the coming year.

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