SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

16 December 2016 / Issue 17

Legal and regulatory developments in Employment/Employee Benefits

In this issue

Cases round up

Company not liable for director's assault on employee following work Christmas party ...more

Temporary incapacity may be a disability if it is 'long-term' ...more

Points in Practice

Proposed increases to SSP, SMP, SPP, ShPP and SAP ...more

Publication of the final draft Gender Pay Gap Regulations ...more

The Government consults on corporate governance reform ...more

FCA letter to major financial services firms on 2016/17 remuneration round ...more

To access our Pensions Bulletin visit the Slaughter and May website.

Contents include:

- DWP consultation on GMP equalisation and contracting-out
- Work and Pensions Select Committee evidence given by Richard Harrington
- Pension scams consultation – includes blocking transfers
- Pension Schemes Bill progress
- General levy consultation
- FCA Asset Management Market Study – interim report
- FCA consultation on shopping around for an annuity
- Overseas schemes requirements – consultation

Back issues

More about our pensions and employment practice

Details of our work in the pensions and employment field

For more information, or if you have a query in relation to any of the above items, please contact the person with whom your normally deal at Slaughter and May or Bridget Murphy

Cases Round-up

Company not liable for director's assault on employee following work Christmas party

The High Court ('HC') has held that 'impromptu drinks' following a work Christmas party did not occur in the 'course of employment' and therefore the company was not vicariously liable for an assault by a director on an employee which took place at those impromptu drinks. Even though the disagreement concerned a work matter, the HC distinguished between a work party and 'impromptu drinks' finding that the later did not occur in the 'course of employment'. (Bellman ('B') v Northampton Recruitment Limited (the 'Company')).

Impromptu drinks: The Company's Christmas party was held for all employees and their partners at a golf club. Following the party the majority of the guests, including B and the Company's Managing Director ('M'), went to a hotel where some of the guests were staying and they continued to drink.

Assault: Whilst at the hotel there was an argument between M and B about work matters and M punched B twice and knocked him over. B hit his head on a marble floor and suffered brain damage. B brought a claim against the Company on the basis that it was vicariously liable for the actions of M.

Managing Director was not just an attendee: The HC considered M's role and concluded that his responsibilities were wide and things were done 'his way'. The HC also noted that M viewed the motivation of employees as part of his role and this included organising a Christmas party at the Company's expense. M was able to take decisions as to the Company's expenditure and the drinks (subject to a financial limit behind the bar), the hotel accommodation and the taxis to and from the Christmas party were paid for by the Company. The HC concluded that M would have seen it as part of his job to oversee the smooth running of the Christmas party and that he was not just an attendee.

Managing Director not always on duty: The HC stressed that despite his wide ranging duties and the fact that he worked long hours, M could not always be considered to be on, or potentially, on duty solely because he was in the company of other employees regardless of circumstances.

Incident as a result of voluntary and personal choices to engage in heavy drinking: The HC considered the extent to which the employment relationship put B at risk of injury and noted that the actual Christmas party occurred with no incident. The HC concluded that alcohol is usually consumed at Christmas parties and can be enjoyed in moderation and that the incident happened as a result of voluntary and personal choices to engage in heavy drinking and therefore the Company could not be held vicariously liable for the assault.

Company not vicariously liable: Considering the connection between M's employment and his wrongful conduct, the HC held that the following factors pointed away from a finding of vicarious liability:

- The assault was committed after and not during an organised work social event; the HC noted that although there was no contractual obligation to attend the work Christmas party it would have probably been frowned upon if an employee had not attended especially as it was a small company. However, the organised event at the golf club had ended and as result the expectation or obligation on any employee to participate had ended. As a result the HC held that 'a line could be drawn under the evening's event'.

- Although the taxis back to the hotel were organised and probably paid for by the Company, the expectation was that the Company would pick up the tab for taxis home at the end of the evening and so this was no more than part and parcel of the obligations arising from the Christmas party as guests at the hotel would have had to return there in any event.

- The 'impromptu drinks' could not be seen as *'a seamless extension'* of the Christmas party because what remained were hotel guests, some being the Company's employees and some not, having a very late drink with some visitors.

- Arguing about a work-related topic does not automatically mean the interaction occurs *'in the course of employment'*. The HC concluded that upon return to the hotel for a significant period of time the conversation was about social topics and not about work. Only after that and as the group narrowed did the conversation turn to work matters.

Advice for employers: Employers should be cautious as this case does not establish that employers will never be vicariously liable for incidents which occur at post-Christmas drink events. However, whereas a work Christmas party is likely to be regarded as 'closely connected to employment', especially where there is an expectation to attend, an unplanned employee gathering occurring after a formal work Christmas party is less likely to be found to be 'closely connected to employment'. However, each case will be determined on its own facts and it is difficult to determine what emphasis the court will put on the various strands of the close connection test. In this case, the HC put less emphasis on the fact that the incident took place during a heated discussion between colleagues about work-related matters and more emphasis on the time and place of the incident which in this case was at an unplanned post-party drink rather than at the 'formal' Christmas party.

Temporary incapacity may be a disability if it is 'long-term'

The Court of Justice of the European Union (CJEU) held that a worker who is temporarily incapacitated for an indefinite period, can be disabled within the EU Equal Treatment Framework Directive (No.2000/78) (the 'Directive') if the worker's incapacity is 'long-term'. Whether the condition is long-term will be a question of fact for the national court to determine (Daouidi ('D') v Bootes Plus SL ('BP')).

Dismissal following accident at work: D slipped at work and dislocated his elbow. Two weeks after the accident BP enquired about D's health and D informed his employer that he was unable to come back to work immediately. The following month, BP dismissed D, allegedly on grounds of poor performance. D claimed unfair dismissal and disability discrimination in the Barcelona Social Court.

Prognosis uncertain: D's claim was heard 6 months after the accident and at that time D's arm was in plaster, he was claiming incapacity benefits under the Spanish social security system and D's prognosis was described as uncertain. The Barcelona Social Court referred a question to the CJEU to ask whether the Directive had to be interpreted as meaning that the fact that a person found himself temporarily unable to work for an indeterminate period of time by reason of an accident at work implied, by itself, that the limitation of that person's capacity could be defined as 'long-term', within the meaning of 'disability' under the Directive.

'Long-term' under UK law: Under the Equality Act 2010 (EqA), the effect of an impairment is 'long-term' if it has lasted or is likely to last for at least 12 months. The CJEU held that whether or not an impairment is 'long-term' is a question of fact and therefore a question for the national courts.

'Indeterminate incapacity' does not necessarily mean 'long-term': The CJEU concluded that the fact that a person finds himself incapacitated for an indeterminate amount of time does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term'. The CJEU made clear that the national court must base its decision on all the objective evidence in its possession, in particular, current medical and scientific knowledge and data and documents relating to the person's actual condition.

Tips for employers: It can be difficult for an employer to know how to deal with an employee's future employment where an employer suffers from an impairment and the medical prognosis is uncertain. Often occupational physicians are reluctant to provide advice about an employee's prognosis which can leave an employer feeling uncertain about how to manage the employee's absence and without medical advice it can be difficult to determine whether an impairment is long term. This is often the case if employees are off work with stress because medical experts can be reluctant to give an expected return date in the context of mental health.

This case makes clear that if an employee's condition is for an indeterminate length of time, it will not automatically be determined to be 'long-term'. Whether or not a condition is 'long-term' (and therefore comes within the definition of disability under the EqA) is a matter of fact and a Tribunal will look at all the objective medical evidence in its possession to make that decision.

In practice, a Tribunal will expect an employer to have sought medical advice about an employee's prognosis and may seek to rely on that evidence to determine whether an impairment is long term. Employers should specifically ask the medical expert or occupational physician to advise on the short and long-term prognosis of the employee's condition. If the medical adviser is unwilling or unable to give a prognosis then it would be reasonable for an employer to ask for an explanation as to why a prognosis cannot be given and in some cases to ask for a second opinion.

Points in Practice

Proposed increases to SSP, SMP, SPP, ShPP and SAP

In a Written Ministerial Statement from the Department for Work and Pensions, the government has announced the following proposed increases to statutory benefit payments:

- The weekly rate of statutory sick pay (SSP) will be £89.35 (up from £88.45).
- The weekly rate of statutory maternity pay (SMP) and (maternity allowance) will be £140.98 (up from £139.58).
- The weekly rate of statutory paternity pay (SPP) will be £140.98 (up from £139.58).
- The weekly rate of statutory shared parental pay (ShPP) will be £140.98 (up from £139.58).
- The weekly rate of statutory adoption pay (SAP) will be £140.98 (up from £139.58).

The increase normally occurs on the first Sunday in April, which would be 2 April 2017, although in the statement it is suggested that the increases will take effect from 10 April 2017.

Publication of the final draft Gender Pay Gap Regulations

The final draft of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the 'Regulations') has been published. The following key changes have been made following the consultation on the previous draft published in February 2016:

- **The introduction of the concept of a "*full-pay relevant employee*", primarily to exclude those on sick leave or maternity leave from the hourly pay comparison.** F*ull-pay relevant employees'* are defined as employees who are not, during the relevant pay period, being paid at a reduced rate or nil as a result of being on leave. *'Leave'* is stated to include annual leave, maternity, paternity, adoption or shared parental leave, sick leave and special leave.
- **An express exclusion of partners or LLP members from the definition of relevant employee**.
- **A change in the "snapshot date" from 30 April to 5 April each year, starting with 5th April 2017.** Therefore, employers will be required to publish their first gender pay gap reports in respect of the 2017 statistics by 4 April 2018.
- **The Regulations set out in detail the method by which employers must calculate employees' gross hourly pay**, using an employee's normal working hours where applicable, and adopting a 12-week reference period for employees whose working hours vary from week to week.
- **A clearer definition of bonus pay.** The definition of *'bonus pay'* has been amended, to make clear that elements of bonus that are awarded as securities, securities options and interests in securities are to be treated as paid at the point in time when they would give rise to taxable earnings or taxable specific income under S.10 of the Income Tax (Earnings and Pensions) Act 2003).

- **An additional requirement to report the difference in median bonus pay** (as well as mean bonus pay).

- Only a portion of the bonus payment that is proportionate to the relevant pay period should be included in the calculation of an employee's gross hourly pay for the purposes of determining the employer's mean and median gender pay gap.

- The calculation of quartile pay bands has been clarified with a new definition. The new definition makes clear that the proportion of male or female employees in each quartile will be calculated by dividing the number of male or female employees in the quartile by the total number of employees in the quartile, and multiplying by 100 so that each quartile should contain the same number of employees.

- The Regulations provide an exception from the reporting duty in relation to workers in respect of whom the employer does not have, and it is not reasonably practicable for the employer to obtain, the relevant data.

Supporting non-statutory guidance to help employers meet the regulatory requirements will be published after Parliament has approved the Regulations. The Regulations are expected to come into force on 6 April 2017.

The Government consults on corporate governance reform

A Green Paper, published on 29 November 2016, sets out the Government's proposals and asks for views on executive pay; strengthening the employee, customer and wider stakeholder voice; and corporate governance in large privately-held businesses. The government is seeking views on whether the 2013 executive pay reforms (requiring a binding vote at least every three years on remuneration policy) require further refinement. The consultation encompasses shareholder voting and other rights; shareholder engagement on pay; proposals for an "advisory role" for worker representatives on remuneration committees; and the mandatory publication of pay ratios. The Financial Reporting Council has welcomed the consultation and recently made recommendations to the BEIS Select Committee corporate governance inquiry, including on directors' duties under s.172 of the Companies Act 2006; developing the role of remuneration committees; and what happens when there are significant votes against the remuneration report.

FCA letter to major financial services firms on 2016/17 remuneration round

The FCA has published a letter sent to major financial services firms on the 2016/17 remuneration round. The letter, dated 14 September 2016, was sent to UK banks, building societies and investment firms with relevant total assets exceeding £50bn, outlining the FCA's approach to the 2016/17 remuneration round. The FCA intends to concentrate on the potential risk that firms may be incentivising behaviours that are not in the interests of consumers, market integrity or competition. The FCA will chiefly focus on material risk takers; bonus pools and individual performance assessment; ex-post risk adjustment; and policy changes.

If you would like further information on these issues or to discuss their impact on your business, please speak to your usual Slaughter and May contact.

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn or your usual Slaughter and May adviser.