SLAUGHTER AND MAY

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ISSUE 11

Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

In this issue

To access our Pensions Bulletin click here.

This weeks's contents include:

- Time is running out ….
  - to take steps to seek to avoid the loss of VAT recovery on fees charged for (i) investment management and (ii) pension administration services
  - to consider steps to mitigate additional costs arising from the abolition of DB contracting-out
  - for schemes with GMPs to request to use HMRC's GMP reconciliation service
- DB funding Code of Practice and annual funding statement published
- Knowledge and understanding for trustees of DC Schemes: reminder
- Client Seminar: Packs available

Back issues can be accessed by clicking here. To search them by keyword, click on the search button to the left.

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.

New publication

European best friends' publication: "Information and consultation obligations on corporate transactions"

We have prepared a new publication together with our European best friend firms. The joint briefing summarises the legal and regulatory framework which governs information and consultation obligations on corporate transactions in nine key European jurisdictions (Finland, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and the UK). The briefing focuses on asset transactions and covers the following areas:

- Is there an obligation to inform / consult and when is it triggered?
- Who must the company inform / consult?
- What information must be provided?
- What is the consultation process?
- How long will the process take and when should it be completed?
- What are the sanctions / penalties for non-compliance?
- What is the position on a share sale?

If you would like a copy of the briefing, please ask your usual Slaughter and May contact.

New law

Flexible working changes with effect from 30th June 2014

A number of changes to the law surrounding flexible working come in to effect on 30th June 2014. Employers will need to **revise and update their flexible working policies** to take account of these changes.

The two key changes are:

- The right to request flexible working is extended to **all employees** with at least 26 weeks' continuous employment (currently, the right only applies to parents and carers).
- The statutory right to request procedure is abolished (this currently requires employers to follow a prescribed process of meetings and notifications within a prescribed timeframe). Instead, employers will simply be required to **deal with flexible working applications "in a reasonable manner"**, subject to a code of practice and guidance published by ACAS.

The changes will apply to any flexible working application made on or after 30th June 2014.

For tailored advice on the impact of the changes on your business, and assistance in revising your policies, please speak to your usual Slaughter and May contact.

Cases round-up

ECJ: Holiday pay on death of a worker

The death of a worker does not extinguish his right to paid annual leave, according to a recent judgment of the ECJ (*Gülay Bollacke v K+K Klaas & Kock B.V. & Co. KG*).

Worker dies with outstanding holiday: B worked for the retailer K+K until his death in November 2010. B had been seriously ill and off work since 2009, and on the date of his death he had accumulated 140.5 days of outstanding annual leave. B's widow submitted an application to K+K for an allowance in lieu of her husband's outstanding leave entitlement. Her application was rejected, as K+K doubted that an inheritable entitlement could exist. The German Higher Labour Court referred the case to the ECJ.

Holiday pay due despite death: The ECJ noted that the right to paid annual leave is a particularly important principle of EU law. Further, EU law

precludes requires the payment of an allowance in lieu of untaken holiday at the end of the employment relationship; this is important in order to ensure the effectiveness of the entitlement to leave. The ECJ concluded that the unintended occurrence of the worker's death must not retroactively lead to a total loss of the entitlement to paid annual leave. It also confirmed that the allowance does not depend on a prior application by the interested party.

Application in the UK: There is a regime for certain proceedings (including unfair dismissal or a claim for a redundancy payment) to be brought by personal representatives of a deceased employee. It is likely that tribunals would extend this regime to claims for outstanding holiday pay, in order to implement the ECJ's judgment.

No employment contract without agreement on remuneration

There was no contract of employment where there was no agreement as to remuneration (and therefore no consideration), according to a recent judgment of the EAT (*Ajar-Tec Ltd v Stack*).

Director worked without remuneration: S was a director and shareholder of A-T, and worked full-time for the business without remuneration. Although it was always intended that S would be an employee drawing a salary of £5,000 per month, and a draft contract was prepared to this effect, it was never signed. Relations between S and the other directors deteriorated amidst arguments about money, and S subsequently claimed constructive unfair dismissal and unlawful deductions from wages. The Tribunal found that S was an employee, on the basis that there was an express agreement that S would work for A-T.

No employment: The EAT allowed A-T's appeal. It held that an express agreement that S would work for A-T did not amount to a binding contract if there was no consideration. It was important that the Tribunal had not found that A-T had agreed to remunerate S. This meant that there was no agreed consideration, and therefore no binding contract. The Tribunal did not adequately consider whether it was necessary to imply a contract of employment in these circumstances, so the case was remitted.

Importance of proper documentation: This case is a reminder of the importance of formalising and properly documenting employment relationships wherever possible. It also provides an interesting contrast to the decision reported in our last Bulletin (available here), in which the EAT decided that managing director and sole shareholder was an employee despite forfeiting her salary for the last two years of her employment. The difference in that case was that the director was contractually entitled to receive a salary; this provided the consideration for her employment contract, and her temporary decision to forfeit her salary was not sufficient to discharge it (*Secretary of State for Business, Innovation and Skills v Knight*)

Managing disabled employees in the workplace: when can this amount to harassment?

Measures taken by employers to deal with an employee's reduced capabilities could amount to disability-related harassment, where that reduced capability is caused by advancing symptoms of a disability, according to a recent judgment of the EAT (*Betsi Cadwaladr University Health Board v Hughes*).

Employee suffering from Parkinson's: H was a longstanding employee of BCU, first as a nurse, and later in a more senior post as a sister. She was diagnosed with Parkinson's disease and from 2005 could no longer physically work as a sister.

Employer's response: BCU found her an alternate role, with her salary preserved, which initially was a meaningful role. However, over the next few years the meaningful aspects of the role were removed, leaving her with only menial tasks. BCU also wrote to its consultants stating that ""*...as you are aware the health of [H] has deteriorated over the past few months. Because of this [H] is no longer able to undertake direct patient care tasks. She will remain in the Imaging Department, putting her skills to good use in a supporting role*" H further objected when on several

occasions she was referred to occupational health, at times when her condition was actually improving. H was eventually dismissed. The Tribunal upheld H's claim of harassment by unwanted conduct related to her disability, and BCU appealed.

Letter was not harassment: The EAT allowed the appeal in part. It accepted BCU's argument that the letter to consultants was well-intentioned, as BCU wished to spare H the embarrassment of being approached to assist with procedures she could no longer undertake. The Tribunal was wrong to treat this as harassment, despite the upset it caused H, as it was "*an entirely unobjectionable letter in the context of employment relations*" and could not (objectively) be said to have violated H's dignity or created a degrading environment.

Occupational health referrals were not harassment: The EAT reached a similar conclusion in relation to the referrals to occupational health. It noted that referrals to occupational health are universally seen in industry as positive; they could not therefore have the negative effect required in order to constitute harassment.

Move to menial role (and unwarranted performance management) were harassment: However, the EAT nonetheless upheld the claim of harassment. It emphasised in particular the deterioration in H's position from a meaningful to a menial one. It was also critical of BCU's decision (which the Tribunal found to be unwarranted) to performance manage H. It commented that "*performance management is taken very seriously in the workplace. It involves a scrutiny of performance in the knowledge that the end result might well be dismissal. It is, in effect, the top of a slippery slope towards it*." The EAT concluded that the Tribunal was fully entitled to conclude that the conduct of BCU (albeit unwittingly) had "*in the full force of the word, violated her dignity*".

Employers beware: This case vividly illustrates the difficulties which an employer may face in dealing with a disabled employee with failing capabilities. Employers must be very clear about what tasks a disabled employee can and can't do, before implementing any changes to their role. They should also consider very carefully whether a performance management process is warranted in each case.

Withholding notice money was not a penalty

A contractual provision allowing the employer to deduct salary for any period of notice not worked by the employee was recently held by the EAT to be enforceable, and not a penalty clause. The provision represented a genuine pre-estimate of the loss that the employer would suffer in having to recruit a replacement for the employee to cover the outstanding period of notice (*Li v First Marine Solutions Ltd*).

Highly-skilled employee leaves without notice: L was employed by FMS, and was the principal engineer responsible for its most important contract. L's contract provided that if L did not work her one month notice period, FMS would deduct a sum equal to the salary to be paid during the shortfall in the period of notice.

Following a dispute with L's manager, she resigned and claimed constructive dismissal. She initially refused to work her notice period as she thought (wrongly) she had outstanding holiday. When L changed her position a week after her resignation and informed her manager that she was willing to work her notice, the manager refused on the basis that he had already engaged (at considerable cost) a consultant to replace her on the contract. FMS therefore deducted a full month's salary from money otherwise due to L. She challenged this on the grounds that the clause in her contract operated as a penalty.

The Tribunal dismissed L's claim, finding that the clause was not a penalty, but was a genuine pre-estimate of the losses that might be incurred if at short notice a senior professional such as a project engineer had to be recruited to fill an important gap.

Deduction was enforceable: The EAT dismissed L's appeal. It distinguished previous cases in which a similar provision was struck down as a penalty, as here the employer was required to engage, as a matter of

urgency, a highly skilled, qualified and experienced replacement to fulfil a pivotal role in the employer's most important contract.

The EAT was also satisfied that the provision was a genuine pre-estimate of the loss likely to flow from any breach. It was relevant that the more notice L worked, the smaller the amount of the deduction, which reflected the lower costs which FMS would incur in replacing L. Equally, £5,000 (the value of the deduction) was not seen to be 'extravagant and unconscionable'. It was therefore not a penalty clause designed to secure performance of the contract or to deter breach of contract.

No general rule: The EAT was keen to stress that this case should not operate as authority that in every similar case the clause will be seen to operate as a genuine pre-estimate of damage. The penalties doctrine therefore remains a risk to be considered when drafting withholding or repayment provisions such as these.

Dismissal for taking part in trade union activities: *manner* of taking part not relevant

An employee is automatically unfairly dismissed if the sole or principal reason is his participation in trade union activities. The objectionable *manner* in which those activities were carried out was not relevant and did not justify his dismissal, according to a recent judgment of the EAT (*Mihaj v Sodexho Ltd*).

Union rep dismissed: M was employed by S, and was also a representative of the RMT union. M was summarily dismissed on the basis of two incidents, both of which related to him acting as a representative for colleagues involved in disciplinary and grievance proceedings with S. The first incident involved M sending a WhatsApp message to about 20 co-workers to generate support for the colleague that he was representing in a dispute with another co-worker. The second incident involved a colleague who complained that he felt harassed and bullied by M, and that M was putting pressure on him to raise a grievance about his managers.

M claimed automatic unfair dismissal on the basis that the reason for his dismissal was that he had taken part in trade union activities by representing the two colleagues. M also applied for interim relief (i.e. to be temporarily re-instated pending the hearing). The Tribunal dismissed M's application for interim relief, on the basis that the substantive hearing was likely to find that it was the improper and oppressive manner in which M conducted himself, rather than his trade union activities themselves, which was the reason for his dismissal.

Manner of acting irrelevant: The EAT allowed the appeal, on the basis that the Tribunal had been wrong to focus on the manner in which M carried out his trade union activities. This would only be relevant if the activities were carried out dishonestly, or in bad faith, or for extraneous reasons, or in such a way as to take the actions out of the scope of categorisation as trade union activities. The case was therefore remitted for re-hearing.

Employers beware: This case illustrates the frustration which may exist for employers when dealing with union representatives who carry out their activities in an obstructive or oppressive manner. Despite M's activities in this case leading to complaints against him in relation to both incidents, the EAT did not feel able to separate M's objectionable behaviour from the protection he enjoyed through acting as a trade union representative.

Points in practice

Latest Tribunal statistics show continued drop in claims

The Ministry of Justice has published the latest set of Tribunal statistics, covering the period from January to March 2014. The statistics show a continued drop in the number of employment tribunal claims lodged in this period, which were down by 59% from the levels seen in the same quarter of 2013. The drop in claims

has been widely attributed to the introduction of tribunal fees in July 2013.

Of claims disposed of in this period, working time cases were the most popular (37%), followed by unfair dismissal (19%), equal pay (10%) and other types of discrimination (8%).

ACAS guidance on World Cup 2014

ACAS has published guidance for employers to follow during the 2014 World Cup tournament in Brazil. It promises to help businesses and managers get the best from their "team" while avoiding unnecessary "penalties".

The guidance suggests that employers should consider a flexible working system to accommodate requests for time off or permit staff to listen to the radio or watch the television at work. It also encourages companies to follow their sickness policy for those who call in sick in order to watch matches or deal with hangovers, and to remind employees of the company's policy on monitoring the use of websites and social media at work.

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