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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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.

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New publication

Maximum awards for unfair dismissal (from 6th April 2014)

We attach an updated version of our annual note summarising the maximum awards for unfair dismissal. This has been updated to reflect the new limits that will apply where the date of termination of employment falls on or after 6th April 2014.

Cases round-up

Post-employment victimisation IS prohibited by the Equality Act 2010

In **Jessemey v Rowstock Lyd & anor**, the Court of Appeal confirmed that victimisation which takes place following termination of employment is prohibited by the Equality Act 2010 (EA 2010).

J was dismissed by R just before his 66th birthday, ostensibly by way of compulsory retirement, and brought an age discrimination claim. J subsequently discovered while looking for a new job that R had provided an unfavourable reference to his recruitment agency. J therefore added a claim of victimisation.

The Tribunal upheld J's age discrimination claim. However, despite finding that the poor reference was due to J pursuing tribunal proceedings, it found (and the EAT agreed) that the victimisation claim must fail. This was on the basis that section 108 EA 2010 (which prohibits post-employment acts of discrimination) does not apply to victimisation, by virtue of the exclusion in section 108(7).

The Court of Appeal allowed J's appeal, reversing the decisions of the Tribunal and the EAT. It held that the apparent failure of the EA 2010 to prohibit post-termination victimisation was a drafting error. At the time the EA 2010 was drafted, it was well-established that post-employment victimisation was unlawful, and the Court found no indication that the Government intended to change the law by withdrawing the protection from victimisation previously enjoyed by former employees (an outcome that would put the UK in breach of its obligations under EU law). The Court therefore concluded that section 108 must be interpreted as prohibiting post-employment victimisation.

Comment: This decision resolves a conflict in the case law at EAT level as to whether post-termination victimisation is prohibited under the EA 2010. It confirms that employers' actions post-termination of employment (notably, in the provision of references) could amount to victimisation, if those actions are taken because of the employee's prior complaint of discrimination.

Whistleblowing: disclosure of "information" and causation

In **Western Union Payment Services UK Ltd v Anastasiou**, the EAT held that an employee's disclosure (in the course of the employer's investigation into a colleague) was of information, not merely opinion. However, the EAT nonetheless dismissed the whistleblowing claim on the basis that there was no causal link between the disclosure and the detrimental treatment of the employee.

A was employed by WUPS in a senior sales role. He was part of a team that was tasked with expanding WUPS's European operations, by securing 10,000 new agent locations by the end of 2010. In early 2010 two conference calls took place with senior management of WUPS as well as potential investors, in which WUPS represented that it was making good progress towards meeting the 10,000 target. A's immediate boss (H) then lodged a complaint with WUPD, alleging that the 10,000 target was unrealistic. When WUPS sought to move him to a different position, he claimed that he was being exited for raising concerns about the accuracy of the information being disclosed to investors about the European initiative. WUPS commenced an investigation into H's allegations, as part of which A was interviewed. A supported H's position, stating that in his view the 10,000 target was unlikely to be achieved without a change of approach.

A alleged that as a result he was subjected to detrimental treatment, including being sidelined in respect of key accounts, and being subjected to disciplinary proceedings on the basis of his expense claims and other alleged financial irregularities. A was subsequently dismissed, and he lodged complaints of automatic unfair dismissal and detrimental treatment on the grounds of his protected disclosures. The Tribunal dismissed A's unfair dismissal claim, but upheld his detriment claim. It found that A had disclosed information (namely that when the conference calls were made, it was in fact unlikely that the 10,000 target would be achieved), and that he suffered detrimental treatment as a result. WUPS appealed.

The EAT upheld the Tribunal's decision on the existence of a protected disclosure. It rejected WUPS's argument that A was simply expressing his personal opinion on a business strategy. It found that although A was to some extent being asked to provide his opinion, it was not just on whether he thought the statements in the conference calls should have been made, but also as to the actual sales position as he understood it. Therefore, A had provided information (obviously derived from his experience and knowledge of what was happening) as to the likelihood of meeting the sales targets. Further, A had not been required to spell out what legal obligation he alleged was being breached. The nature of the investigation was clear to all involved; it was to establish whether WUPS had breached its obligation to accurately describe its prospects to investors and potential investors.

However, the EAT nonetheless allowed the appeal on the causation point. In this case there had been no finding of fact that any of the perpetrators of the detriments had any knowledge of the protected disclosure. The investigator had only disclosed his report to a limited number of people, who did not include the perpetrators. It followed that A's disclosure did not "materially influence" the decision to subject him to detrimental treatment, and his claim must therefore fail.

Comment: The EAT accepted that hypothetically there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure, but where it nevertheless still materially influenced his treatment of the complainant. This however had not been shown to be such a case. This highlights the need for protected disclosures to be kept confidential within as small a group of people as possible. This was ultimately what saved the employer in this case.

Part-time workers rights only accrue from 7th April 2000

In **Ministry of Justice v O'Brien**, the EAT confirmed that part-time workers are only protected against less favourable treatment on the grounds of their part-time status in respect of service from 7th April 2000, the date on which the UK was required to implement the Part-Time Workers Directive.

The Tribunal had previously held that a part-time judge could claim a pro-rata pension based on all of his service from March 1978. The EAT overturned that decision, holding that where a discrimination claim is based on pension entitlements, the period of service taken into account when calculating the level of pension payable begins at the earliest on the date when such discrimination became unlawful.

Comment: This decision is consistent with that reached by the EAT in **Innospec Ltd and ors v Walker** (see the last edition of our Employment Bulletin, available here), which reached a similar conclusion in the context of sexual orientation discrimination in the provision of pension benefits. For further details and analysis of this case, see this week's Pensions Bulletin.

"Flights of escapism" which led to inappropriate internet use did not amount to a disability

In **Hickford v Commissioners for HMRC**, the EAT confirmed that an employee who had been dismissed

for gross misconduct after accessing inappropriate sexually explicit websites while at work could not claim that his dismissal was an act of disability discrimination. His claims to be suffering from a mental impairment which led to "flights of escapism" and therefore to him using those internet sites were not supported by sufficient medical evidence to amount to a disability.

H was dismissed for gross misconduct having on various occasions misused HMRC's electronic communications system by accessing inappropriate internet sites, some featuring sexually explicit material. HMRC's investigations revealed that H spent nearly 60 hours accessing non-work related internet sites during working hours. H admitted the misconduct, but claimed that he had suffered with depression intermittently for almost 20 years, and that at the time he was suffering from a mental impairment which led to "flights of escapism" and therefore to him using those internet sites. Following his dismissal H claimed disability discrimination. The Tribunal dismissed his claim, finding at a PHR that H was not disabled. H appealed.

The EAT dismissed H's appeal. The medical evidence before the Tribunal had consisted of H's GP records, an occupational health report from 2007, and two letters from H's GP. H had also produced a witness statement on the impact of his claimed disability on his normal day-to-day activities, which the EAT described as merely H's "anecdotal account or retrospective self-diagnosis". It also found contradictions between H's witness statement and the medical evidence. Fundamentally however, the medical evidence did not support H's claims to have suffered from depression for almost 20 years, nor did it expressly identify any risk of recurrence of H's symptoms. In the absence of such evidence, the Tribunal could not have found that H had a condition that was likely to recur, and therefore had a substantial adverse effect on his ability to carry out normal day-to-day activities.

Points in practice

Shared parental leave: draft regulations published

BIS has published three draft sets of regulations to implement the new right to shared parental leave (SPL). The regulations will be issued under the Children and Families Bill 2013-14, which is expected to receive Royal Assent on 21st March 2014. The new right to SPL will apply to parents of babies where the expected week of childbirth (EWC) begins on or after 5th April 2015, or to children placed for adoption on or after that date.

The draft regulations comprise:

- The Draft Shared Parental Leave Regulations 2014 (available here). These are the substantive regulations which cover eligibility for SPL, the amount of SPL which may be taken by each parent, and the (complex) notification requirements. They also cover terms and conditions during leave, the right to return to work, rights on redundancy, and protection from detriment and dismissal – all of which are similar to the current provisions on maternity, adoption and paternity leave (although keeping-in-touch (KIT) days will be increased to a maximum of 20 per employee).

- The Draft Statutory Shared Parental Pay (General) Regulations 2014 (available here). These set out the eligibility conditions for either parent to claim shared parental pay (SPP), and the notifications that must be given to the employer in order to qualify – both of which are similar to the current provisions on statutory maternity and adoption pay.

- The Draft Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014 (available here). These set out the process for curtailing maternity or adoption leave, which is a pre-requisite to the right to SPL arising.

BIS has invited comments on the draft regulations (although without setting any deadline). The final versions will then be laid before Parliament, and are intended to come into force on 1st October 2014.

Comment: Employers will need to be reviewing and amending their policies to deal with SPL in the coming months, as the first requests for SPL may be made before the end of this year. Please speak to your usual Slaughter and May contact for advice on what changes may be needed.

Statutory discrimination questionnaires to be abolished from 6th April 2014

It has now been confirmed that section 66 of the Enterprise and Regulatory Reform Act 2013, which abolishes the statutory discrimination questionnaires contained in section 138 of the Equality Act 2010, will come into force on 6th April 2014. This means that the statutory discrimination questionnaire procedure will no longer be available in respect of acts of discrimination occurring on or after 6th April 2014.

Employee shareholder status: BIS guidance updated

BIS has issued an updated version of its guidance on employee shareholder status, which was initially published in September 2013 (see Employment Bulletin dated 12th September 2013, available here). The updated guidance includes more details about the actions companies should take if considering offering employee shareholder status, in relation to the shares that will be offered. The updated guidance is available here.

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