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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## New law

### October 2015 changes in employment law

A number of changes relevant to employment law come into force in October 2015. The key ones are:

- **National Minimum Wage increases**: with effect from 1st October 2015, the NMW rates increased as follows:
  - Adult rate: £6.70 per hour (increase of 20p)
  - 18 to 20 year olds: £5.30 per hour (increase of 17p)
  - 16 to 17 year olds: £3.87 per hour (increase of 8p)
  - Apprentice rate: £3.30 per hour (increase of 57p)

The National Living Wage will be introduced in April 2016, at an initial rate of £7.20 (for workers over 25 only).

- **Wider recommendations abolished**: from 1st October 2015, the power for tribunals to make wider recommendations in discrimination claims (i.e. affecting the wider workforce, not just the claimant) is repealed.

- **Modern Slavery Statements**: under section 54 of the Modern Slavery Act 2015, employers with an annual turnover of at least £36 million will have to publish a modern slavery statement every year. This measure has a provisional implementation date of "October 2015", although the Government has not yet finalised its guidance (and has promised transitional provisions for businesses whose year end is around October). For further details see our previous Employment Bulletin, available here.

## Cases round-up

### Limited backdating of pension rights for part-time workers and same-sex spouses

Protection against discrimination based on part-time status or sexual orientation is not retrospective i.e. it does not pre-date the point at which such protection is required under European law, according to a recent judgment of the Court of Appeal (*O'Brien v Ministry of Justice and Walker v Innospec Ltd*).

It followed that, in claims relating to pension entitlements, the relevant Directives could not affect pension entitlements accrued in relation to service completed before their date of transposition. In particular:

- there could be no such claim where the employee retired before the Framework Directive came into force (*Walker*) – the Court of Appeal upheld the Equality Act 2010 exemption restricting access to pension benefits attributable to pensionable service before 5th December 2005 for surviving civil partners; and

- where a claim succeeded, the pension granted as a result should only be calculated from the date on which the Part-Time Workers Directive prohibiting that discrimination should have been transposed into UK law, not from the beginning of their employment (*O'Brien*).

For further details, see this week's Pensions Bulletin, available here.

### Data protection: ECJ votes down US Safe Harbour for transfer of personal data

The ECJ has recently declared invalid an EU Commission determination that the US Safe Harbour satisfied the requirements of the EU Data Protection Directive for transfers of personal data to

US companies participating in the scheme (*Schrems v Data Protection Commissioner*).

Although not determined in an employment context, this decision could have significant implications for companies that transfer their employee data out of the EEA to the US in reliance on the Safe Harbour.

This briefing, The Harbour is no longer safe... considers the implications of the ECJ decision for global businesses and the steps they should be taking in response.

### TUPE: Employees may transfer despite temporary lay off

A temporary cessation of work (during which employees are laid off) does not of itself prevent those employees transferring under a service provision change (SPC) for TUPE purposes, according to a recent judgment of the EAT (*INEX Home Improvements Limited v Hodgkins*).

**Temporary lay-off**: H was part of a group employed by INEX to work on a refurbishment contract. The works were subcontracted to INEX by a contractor (TV), which released the work in tranches. During November 2012 INEX completed the latest tranche of work, and it was not anticipated that the next tranche would be issued until January 2013. H and the others were therefore laid off (in accordance with their contractual terms) pending the next tranche of work.

**Change of provider**: However, after a falling out with INEX, TV issued the next tranche of work to a new provider (L) in January 2013. The work was substantially the same as that which had been carried out by INEX. INEX asserted that this resulted in a TUPE transfer to L, which L disputed. The Tribunal concluded that although there had been a SPC from INEX to L, the employment of H and the others did not transfer, since their lay-off meant that there was no organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client.

**Organised grouping**: The EAT allowed INEX's appeal and remitted the case for re-hearing. It held that a temporary absence from work, or cessation of work, did not in itself deprive employees who had been involved in the relevant activities of their status as an organised grouping of employees. Whether or not this was the case was a straightforward question of fact. The purpose, nature and length of the cessation will be relevant in determining whether or not the organised grouping continued in existence. However, it maintained that there was no strict need for the organised grouping of employees to be physically carrying out the activities at the relevant time in order for a SPC to occur.

**Wider relevance**: Although this case will be particularly relevant where employees are laid off (which is common in certain sectors, such as construction), its principles will apply equally to other types of temporary cessation of work, including for the purpose of holidays, sickness etc. Where a SPC takes place during such a period, there will need to be an analysis of whether there is an organised grouping of employees (taking into account the purpose, nature and length of the cessation, and all other relevant facts), in order to determine if TUPE applies to transfer their employment.

### Unfair dismissal: inappropriate involvement of HR

Improper influence by HR in the disciplinary process, i.e. where their advice extends beyond matters of law and procedure, may render a dismissal unfair, as demonstrated by a recent judgment of the EAT (*Ramphal v Department for Transport*).

**Misconduct charges**: R was employed by the DoT as an Aviation Security Compliance Inspector. A random audit of R's travel and subsistence claims revealed concerns about what seemed to be excessive petrol consumption and the possible use of hire cars for personal reasons. The DoT therefore appointed one of its heads of compliance, G, to carry out the investigation and subsequent disciplinary proceedings on a charge of gross misconduct. G had no previous experience of conducting disciplinary proceedings.

**HR involvement**: Throughout the investigation and disciplinary proceedings there was significant interaction between G and the DoT's HR department. G's initial draft report contained a number of findings favourable to R, and recommended a finding of misconduct (rather than gross misconduct) and a sanction of a final written warning. However, following the interactions with HR, the favourable findings were removed from G's report, the finding was substituted for one of gross misconduct and R was summarily dismissed.

**Fairness to employee**: Although the Tribunal rejected R's unfair dismissal claim, the EAT allowed his appeal and remitted the claim for reconsideration. It noted that there is an implied term that the report of an investigating officer for disciplinary purposes must be his own product. The EAT also found that an employee facing disciplinary charges is entitled to assume that the decision will be taken by the appropriate officer, without being lobbied by other parties as to the findings he should make on culpability. The employee should be given notice of any changes in the case he has to meet so that he can deal with them, and also given notice of representations made by others to the dismissing officer that go beyond legal advice and advice on matters of process and procedure.

**Proper involvement of HR**: The EAT found that an investigating officer is entitled to call for advice from HR, but that HR must be very careful to limit advice essentially to questions of law and procedure and process, and to avoid straying into areas of culpability. It was not for HR to advise whether the finding should be one of simple misconduct or gross misconduct, or on the appropriate sanction, beyond addressing issues of consistency.

**On the facts**… the EAT found it "*disturbing*" to note the "*dramatic change*" in G's approach after intervention by HR. This extended to inviting changes to G's findings on both culpability and credibility, which should have been reserved for G. It noted that there did not appear to be any fresh evidence to justify G's change of heart. The changes were so striking that they gave rise to an inference of improper influence.

**Lessons for management and HR**: This case serves as a warning both to investigators/dismissing officers and HR about observing the proper boundaries of their roles. Investigating officers should ideally have sufficient experience to conduct an investigation without significant recourse to HR. Where such advice is sought, HR should ensure that it is limited to matters of law and procedure, and does not stray into the substantive merits of the case or the appropriate sanction.

## Points in practice

NAPF 2015 AGM season report

The NAPF has published its 2015 AGM Season Report. From an executive remuneration perspective, the key points are:

- The NAPF notes that few regulatory changes, in conjunction with this being a general election year, resulted in a further year of pay restraint and limited shareholder rebellion.
- That said, the report identifies 12 companies within the FTSE 350 for whom a significant proportion of their shareholders have for a successive year expressed discontent with particular aspects of their governance arrangements (see pages 9 and 10 of the report for more details).
- The report also highlights the top five remuneration rebellions in the FTSE 100, and the top ten in the FTSE 250 (see pages 13 – 15 of the report for more details).
- In terms of overall voting levels, the report summarises these as follows:

| | | |
|---|---|---|
| FTSE 350 dissent – remuneration report | 2014 | 8.9% |
| | **2015** | **7.9%** |
| FTSE 350 dissent – remuneration policy | 2014 | 7.5% |
| | **2015** | **6.9%** |
| FTSE 350 dissent – share plans | 2014 | 3.9% |
| | **2015** | **3.4%** |

### Whistleblowing: new FCA/PRA rules

The FCA and PRA have issued new rules on whistleblowing, following their joint consultation earlier this year (see our Employment Bulletin dated 5th March 2015, available here). The final rules contain only minor changes from the consultation proposals.

The new rules are contained in FCA policy statement (PS15/24) and PRA policy statement (PS24/15). They require relevant firms (i.e. PRA-designated investment firms, and certain insurance and reinsurance firms and larger deposit takers) to:

- appoint a senior manager as their "Whistleblowers' Champion" with responsibility for overseeing the effectiveness of internal whistleblowing policies and procedures, and preparing an annual report to the board about their operation. The Whistleblowers' Champion must be a senior manager or director (typically a NED), who is subject to the Senior Managers Regime;
- put in place internal whistleblowing arrangements to handle all types of disclosure from any person (not just employees);
- ensure that wording in employment contracts and settlement agreements does not deter staff from whistleblowing;
- inform the FCA if it loses an employment tribunal whistleblowing claim;
- inform UK-based employees about the FCA and PRA whistleblowing services; and
- make its appointed representatives and tied agents tell their UK-based employees about the FCA whistleblowing service.

Alongside the policy statement, the PRA has also published:

- a supervisory statement "Whistleblowing in deposit-takers, PRA-designated investment firms and insurers (SS39/15)", which sets out the PRA's expectations in relation to whistleblowing procedures, training, and the Whistleblowers' Champion; and
- the Handbook (Whistleblowing) Instrument 2015 containing the new rules (along with separate instruments for CRR firms and Solvency II firms).

Relevant firms have until 7th September 2016 to comply with the new rules. The requirement to assign responsibilities to a Whistleblowers' Champion will take effect on the same date as the rest of the Senior Managers Regime, 7th March 2016. Between 7th March 2016 and 7th September 2016, the Whistleblowers' Champion will be responsible for overseeing the steps the firm takes to prepare for the new regime.

The FCA and PRA plan to consult separately on applying the new rules to UK branches of overseas banks, and will consider whether similar requirements should be applied to other regulated firms, such as stockbrokers, mortgage brokers, insurance brokers, investment firms and consumer credit firms.

### ERS online: HMRC issues warning re annual returns

HMRC has issued a warning to companies who have registered their share schemes with the ERS online service, to make sure than an annual return is also submitted for each scheme for the 2014/15 financial year. HMRC is apparently concerned that in a number of instances companies have registered schemes without submitting annual returns. Companies have been advised to check their filings on the ERS service to ensure that all the correct registrations and annual returns have been submitted.

## Shared parental leave and pay to be extended to working grandparents

The Chancellor has announced that shared parental leave and pay will be extended to working grandparents. There will be a consultation on the details of the change in the first half of 2016, with the aim of bringing forward legislation to implement it by 2018.

The statistics quoted in the announcement reveal that:

- more than half of mothers rely on grandparents for childcare when they first go back to work after maternity leave;
- over 60% of working grandparents (approximately seven million) with grandchildren aged under 16 provide some childcare;
- nearly 2 million grandparents have given up work, reduced their hours or have taken time off work to help families who cannot afford childcare costs; and
- of working grandparents who have never taken time off work to care for grandchildren under 16, around 1 in 10 have not been able to do so because they have either been refused time off by their employer, or simply felt that they weren't able to ask.

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