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.

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New teleconference

Collective redundancies - where are we now?

We attach an invitation to our latest teleconference, on the topic of "Collective redundancies - where are we now?". The teleconference will take place on **Tuesday 2nd June 2015 at 8:30 am**, and will consider the practical issues which employers commonly come across when facing the prospect of making collective redundancies. The teleconference will also explore the implications of the recent 'Woolworths' ECJ decision (see below).

Details of how to book your place on the teleconference are contained in the attached invitation.

New law

General Election 2015: what does a Conservative government mean for employment law?

The 2015 General Election produced a result which few people anticipated; the Conservative Party won a majority with 331 seats, and has formed a new government.

What does this mean for employment law? Based on the Conservative manifesto proposals, we can expect to see the following developments:

- *Zero hours contracts*: the ban on exclusivity clauses will be implemented, but no further measures are likely.
- *Industrial action*: there will be a new threshold of 50% turnout to vote for strike action, measures to tackle intimidation of non-striking workers, and a repeal of the ban on using agency workers to cover striking workers.
- *National minimum wage*: the NMW is to rise to £6.70 this autumn, and to more than £8 by 2020. The NMW will become tax-free for those working 30 hours a week by 2020.
- *Gender equality*: the requirement on companies with more than 250 employees to publish gender pay gap information will be implemented. There may also be further measures to help boost the numbers of female FTSE 100 board members.
- *Human Rights*: the Human Rights Act 1998 will be repealed in favour of a British Bill of Rights.
- *Europe*: we can expect an in-out referendum on Britain's membership of the EU before the end of 2017. If Britain were to leave the EU, this could have profound consequences for employment law.
- *Other*: there will be a new entitlement to paid volunteering leave for three days a year, for employees of large companies and the public sector.

Areas in which we are unlikely to see further developments include employment tribunal fees and family-friendly rights, where the Conservatives have not made any commitments for change.

Cases round-up

ECJ: Collective redundancies "at one establishment"

The ECJ has confirmed that the term "establishment" for collective redundancy purposes means the entity to which the workers made redundant are assigned to carry out their duties. Importantly, the ECJ found that the EU Collective Redundancies Directive does not require that dismissals are aggregated across the employer's entire undertaking, in order to determine if collective redundancy consultation obligations are triggered, and therefore the UK legislation is not incompatible with the Directive (*USDAW and Wilson v WW Realisation 1 Ltd (in liquidation), Ethel Austin Ltd and Secretary of State for Business, Innovation and Skills (commonly known as the 'Woolworths' case)*).

Redundancies across multiple sites: The case involved the insolvency of two retail businesses (Woolworths and Ethel Austin), each with many stores across the UK. In each case, redundant employees who worked at stores with fewer than 20 employees were not treated as falling within the collective redundancies regime, as each store was deemed a separate "establishment". Claims were lodged on behalf of the employees alleging that the "at one establishment" qualification in section 188(1) TULR(C)A 1992 failed to comply with the Directive. That argument was upheld in a controversial judgment by the EAT (see Employment Bulletin 4th July 2013, available here). The Court of Appeal made a reference to the ECJ.

Meaning of "establishment": The ECJ made it clear that "establishment" for these purposes means the entity to which the workers made redundant are assigned to carry out their duties. An 'establishment' may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks. The entity in question need not have any legal, economic, financial, administrative or technological autonomy, in order to be regarded as an "establishment". The ECJ did however leave it to the Court of Appeal to establish whether the stores in this case could be classified as separate "establishments", applying this test.

"Establishment" is just part of whole undertaking: The ECJ found that an "establishment" will usually be just a part of the employer's whole undertaking. This was consistent with the Directive's focus on the socio-economic effects of collective redundancies in a local context. Although applying the trigger across the employer's whole undertaking would result in more workers benefitting from collective consultation, the ECJ found it would be contrary to the Directive's other aims of ensuring comparable protection for workers' rights in the different Member States, and harmonising the costs which such protective rules entail for EU undertakings.

UK legislation not incompatible with Directive: It followed that the Directive requires the dismissals effected in each establishment to be considered separately. This meant that section 188(1) TULR(C)A 1992 was not incompatible with the Directive, by only requiring collective consultation where 20 or more redundancies are proposed "at one establishment" within a period of 90 days or less.

A welcome reversal: The ECJ's decision confirms that the EAT's controversial decision that the words "*at one establishment*" must be deleted from section 188(1) TULR(C)A 1992 (thereby significantly widening its scope) was wrong. It means that the traditional approach to collective redundancy consultation has been restored, and thus employers will need to assess the position at each "establishment", rather than across their whole business, when deciding whether the obligation to collectively consult has been triggered.

This decision and its implications will be considered further in our forthcoming teleconference (see above).

No jurisdiction for claims where employee deliberately avoided UK connections

A Danish employee who worked internationally (including in the UK) and was based in Switzerland has been denied the right to claim whistleblowing, unfair dismissal and bonus/notice pay in the UK. The employee was found to have deliberately structured his working arrangements so as to distance himself as far as he properly could from UK law, largely for tax purposes (*Olsen v Gearbulk Services Ltd*).

Employee rejects UK employment: O was a Danish national living in Switzerland. GSL was part of a worldwide shipping business, with GSL itself being incorporated in Bermuda. O was recruited in London through another group company (GSUK), which was incorporated in the UK. O was originally offered employment with GSUK, on a UK contract. However, having taken advice on his tax position, and mindful of both financial and family reasons

(his future wife did not want to move to the UK), he instead signed a contract with GSL. The contract was governed by Bermudian law, and gave jurisdiction to the Bermudian courts. It engaged O as a Strategy and Business Development Director, to be based in Switzerland but with international responsibilities. He managed around 100 employees internationally, around 15-20 of these being in the UK. O was paid in sterling (by his choice) but his salary and expenses were processed in Bermuda.

International and UK work: O worked from a number of international offices, and spent more of his working time in the UK than any other single jurisdiction. However, he still worked for less than 90 days in the UK (so as to avoid becoming subject to UK tax on his earnings). O made use of rental accommodation provided by GSL while working in the UK, but did not want this to be taken in his personal name – again, so as to distance himself from having any permanence in the UK.

Dismissal and claims: O was ultimately dismissed, ostensibly for performance reasons. He sought to bring claims in a UK tribunal for unfair dismissal (including automatic unfair dismissal on grounds of whistleblowing) and a contractual claim for his bonus and notice pay. The Tribunal declined jurisdiction to hear O's claims, and he appealed.

No jurisdiction for statutory claims: The EAT dismissed O's appeal. On unfair dismissal and whistleblowing, the parties agreed that O should be treated as a peripatetic employee, meaning that the UK tribunal would only have jurisdiction if O's base was in the UK. However, on the facts O was clearly based in Switzerland. Further, O's connections with the UK were not sufficiently strong for it to be said that Parliament would have regarded it as appropriate for the Tribunal to hear his claims.

Deliberate avoidance of UK connections was relevant: The EAT also found that it was right to take account of how and where O's tax affairs were organised. It found it highly relevant that O had freely decided to structure his working arrangements and the amount of time he spent in the UK so that he did not become subject to the British tax regime. O operated autonomously and was able to freely negotiate his own contract. In those circumstances, the EAT found that the free choice of law and jurisdiction made in that contract should generally be respected.

No jurisdiction for contractual claims: The EAT also declined jurisdiction to hear O's contractual claims. They did not arise out of the operation of a UK branch, agency or other establishment under the Brussels Regulation (since GSUK could not meet this test). Equally, the Rome Regulation did not confer jurisdiction in this case, since the parties had expressly chosen Bermudian law to govern the contract, and O could not be said to habitually carry out his work in or from the UK.

In for a penny… This decision turns to a large extent on its particular facts, in particular the high degree of autonomy which O enjoyed in structuring his working arrangements (which would not necessarily apply to the majority of employees). Nonetheless it is a useful example of how this sort of employee cannot 'have his cake and eat it' by seeking to avoid UK tax but benefit from UK employment rights.

Whistleblowing: instruction not to contact ICO was legitimate

An employee who reported concerns about potential breaches of the Data Protection Act 1998 (DPA) to the Information Commissioner's Office (ICO), without first reporting his concerns internally, has lost his whistleblowing claim. The employee's dismissal for refusing to obey an instruction not to contact the ICO without approval of a line manager was found to be fair (*Barton v Royal Borough of Greenwich*).

Disclosure to ICO: B was employed by RBG as a tenancy relations officer. B was told by a work

colleague (O) that O's line manager had emailed a large number of documents containing confidential or personal data to her personal email account, which O thought was not part of a secure system. B considered that this was a significant breach of the DPA. Rather than using RBG's whistleblowing policy, B reported his concerns by email first to the ICO, and only then to his line managers.

Instruction not to contact ICO: RBG's response was to commence its own investigation into O's concerns. B was specifically instructed not to contact the ICO or other external bodies in relation to the matter without the prior authority of his line manager. Nonetheless B decided to telephone the ICO to seek advice as to what he should do about the instruction. Meanwhile, RBG's investigation revealed that the information B had provided to the ICO was wholly inaccurate. The line manager had emailed 11 documents to her home email, which was password protected, and none of the documents were regarded as inappropriate for her to have sent.

Dismissal and claim: RBG regarded B's action in contacting the ICO despite having been instructed not to do so as a serious breach of duty. Given that B was at the time subject to a final written warning, as well as a separate finding of gross misconduct, he was dismissed. B claimed that he had been unfairly dismissed for whistleblowing. He relied on his email to the ICO and the subsequent telephone call as both constituting protected disclosures. The Tribunal rejected his claim, and he appealed.

Email was not a "protected" disclosure: The EAT dismissed the appeal. It upheld the Tribunal's finding that the email to the ICO was not a protected disclosure, since B was found not to hold the requisite reasonable belief that the information he disclosed was substantially true. The EAT found that B had 'jumped the gun' in circumstances where there was time to seek some verification of O's allegations.

Telephone call was not "qualifying" or "protected" disclosure: The EAT also held that the subsequent telephone call to the ICO was not a qualifying disclosure, since there was no disclosure of information (B was instead seeking advice). Further, B did not have a reasonable belief that RBG did not have the power to issue the instruction, since he had not taken any steps (such as seeking advice from his union or employment law sources) to evaluate the legality of the instruction. Finally, even if the telephone call had been a qualifying disclosure, it could not have been a protected disclosure, since the ICO was only a prescribed person in respect of disclosures about DPA compliance, not employment law advice.

Instruction was not unlawful: The EAT also found that RBG's instruction to B not to contact the ICO without approval from a line manager was not unlawful. It stressed that the instruction was not an absolute prohibition on contacting the ICO, it simply required B to seek the authority of a line manager first (and there was no evidence to suggest that a request from B would have been refused). The EAT also noted that the instruction was made at a point when B had already provided the information to the ICO, and when RBG itself was conducting an inquiry into the matter. The EAT did not consider that the instruction would have prevented B from speaking to the ICO if it was the ICO who initiated contact.

Dismissal was fair: In those circumstances, the EAT was satisfied that RBG had reasonable grounds for the belief that B had breached a legitimate and reasonable instruction, and therefore had reasonable grounds for dismissal. It noted that B had made serious and wholly inaccurate allegations which were potentially highly damaging to RBG, and went straight to the ICO without having taken the trouble to check the accuracy of the allegations, when there was no reason why he could not have drawn the matters to the attention of his superiors before going to the ICO.

Points in practice

Holiday pay: latest judgment on commission to be appealed

British Gas has reportedly lodged an appeal against the employment tribunal's decision in *Lock v British Gas*, which found that the Working Time Regulations 1998 (WTR) can be interpreted consistently with the ECJ's judgment that holiday pay should include commission.

British Gas is reportedly appealing on two grounds:

- that commission and non-guaranteed overtime are dealt with under different provisions and use different language, and the tribunal was therefore wrong to decide that *Bear Scotland*, a case about overtime, had any bearing on the outcome of *Lock*; and
- that the EAT in *Bear Scotland* was wrong to find that the WTR could be interpreted purposively to give effect to EU law.

The appeal is not expected to be heard until the end of this year. In the meantime, it will prolong the uncertainty for employers about the correct calculation of holiday pay. The tribunal was shortly due to determine the outstanding issues in *Lock*, including (importantly) the correct reference period for calculating holiday pay to include commission. These issues will now likely be stayed pending the EAT's decision.

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