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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Cases round-up

TUPE: harmonisation of terms results in unfair dismissal

In **Hazel & anor v The Manchester College**, the Court of Appeal confirmed that the dismissal of two employees following a TUPE transfer (because of their refusal to agree to reduced terms) was automatically unfair.

The case involved two employees (H) who were employed at HMP Elmley as academic staff. They transferred under TUPE to M when it was awarded the Offender Learner contracts in respect of their region. Shortly after the transfer took place, M determined that it needed to make cost savings, and rationalise the 37 different types of employment contracts it had inherited. It therefore formulated a proposal for redundancies and a review of terms and conditions of employment (in that order). The redundancy process concluded with H being informed that their positions were safe. However, in the subsequent harmonisation process, H were asked to accept pay cuts. When they refused, M terminated their contracts, although in due course H agreed to continue working for M "under protest" on the new terms.

H then commenced proceedings for automatic unfair dismissal, seeking reinstatement on their old terms and conditions. The Tribunal and the EAT both upheld their claims, finding that the reason for their dismissal was connected to the transfer, and although there was an ETO reason, it did not entail a change in the workforce.

The Court of Appeal dismissed M's further appeal. It confirmed that whether a dismissal is for an ETO reason "entailing changes in the workforce" must be judged on an individual basis for each dismissed employee. It was therefore not sufficient for M to argue that the dismissals took place as part of a wider reorganisation and redundancy exercise, when H had not been put at risk of redundancy. There was no "change in the workforce" as concerned H; they were dismissed solely because they refused to agree to new harmonised terms. The Court of Appeal therefore upheld the re-engagement of H on their original terms.

Comment: This case confirms that despite the recent extension of the definition of "changes in the workforce" to include a change in location, there are still circumstances where this requirement will cause difficulties (notably, on a harmonisation of terms without a change in headcount, functions or location of employees, as was the case here).

Tapering exit compensation: appropriate comparator for age discrimination claim

In **Smith v Budgen & ors**, the EAT held that older employees whose exit compensation was reduced to reflect their eligibility for a full pension were entitled to compare themselves with younger employees who were not eligible for a full pension (and whose compensation was higher). The Tribunal had been wrong to conclude that the two sets of employees were in materially different circumstances.

S was employed as a civil servant, and was a member of the Principal Civil Service Pension Scheme. The employer operated a compensation scheme whereby a lump sum was payable in respect of loss of office to employees who left their posts on a voluntary basis. The amount payable depended on whether the employees (as at the date of termination) were eligible to take their pension with no actuarial reduction. If so, the sum payable was six months salary. If not, the sum payable would be up to a maximum of 21 months salary, and was tapered depending on the length of time between termination and their entitlement to full pension. S left employment after reaching the age of 60, when he was entitled to a full pension, and therefore received only six months salary as compensation. He brought proceedings for age discrimination, and sought to compare himself to other departing employees who were younger, and were not entitled to full pensions,

and so received higher compensation payments. The Tribunal rejected this comparison, deciding that S's chosen comparators were in materially different circumstances to S.

The EAT allowed S's appeal. It held that there was no material difference in the circumstances of S and his comparators other than their age (or factors intrinsically linked to their age, such as their entitlement to pension benefits). The EAT confirmed that age, as the protected characteristic, cannot form the basis of a material difference between a claimant and his comparator. The case was therefore remitted to the Tribunal to determine whether the prima facie discrimination of S was objectively justified.

Comment: This case confirms that older employees will usually be able to establish a prima facie case of discrimination, based on a comparison with younger employees whose pension entitlements (and thus exit compensation amounts) are different. The key issue in these cases will therefore be whether the difference in treatment is objectively justified.

Whistleblowing: complaints about driving in the snow could be a protected disclosure

In **Norbrook Laboratories (GB) v Shaw**, the EAT held that a series of emails from an employee raising concerns about driving in the snow could, taken together, amount to a protected disclosure for whistleblowing purposes.

S was employed by NL to manage a sales team, who regularly drove to customers to obtain sales. During the winter of 2010, S e-mailed NL's health and safety manager asking whether NL had a policy concerning driving in the snow and whether it had done a risk assessment. When S received negative responses to both questions, he sent a follow-up e-mail to the same manager asking for formal guidance, stating that his team was under a lot of pressure to keep on the roads and that it was dangerous. Several days later, S e-mailed a member of NL's HR department asking whether they would be paid if they were unable to attend appointments because of the snow. S also stated that he had driven on the roads himself, knew how dangerous they could be, and that he had a duty of care towards his team.

S subsequently brought claims of automatic unfair dismissal and unlawful detriment on the basis that these emails amounted to a qualifying disclosure, relying in particular on the disclosure of information which tends to show that the health or safety of an individual has been, is being or is likely to be endangered (section 43B(1)(d) ERA 1996). The Tribunal determined that S's communications did amount to a qualifying disclosure.

The EAT dismissed NL's appeal. It confirmed that:

- S's three e-mails taken together could amount to a qualifying disclosure. This was despite the fact that (i) they were not sent to the same recipient, and (ii) taken separately each e-mail was not sufficient to amount to a qualifying disclosure.
- Although S was expressing an opinion, which would not amount to a qualifying disclosure, he was also informing his employer that the road conditions were so dangerous that the health and safety of his team was being placed at risk. This amounted to a disclosure of information.
- It was not possible on the facts (or in any event necessary from a legal perspective) for S to provide additional information as to which territories or members of his team were affected by the bad weather, given that this changed on a daily basis.

Comment: This is a good example of the sort of case that may still be actionable, despite the amendments to whistleblowing legislation which took effect in April 2013. Under section 43B (as amended), the worker must now have a reasonable belief that the disclosure is made in the public interest. It seems at least arguable that an employee could establish a reasonable belief that there is a public interest in preventing driving in dangerous conditions.

Judicial review of employment tribunal fees fails

In **R (on the application of Unison) v Lord Chancellor**, the High Court has rejected a judicial review challenge to the introduction of employment tribunal fees, which took effect from 29th July 2013.

The Court found no breach of the EU principle of effectiveness (i.e. that tribunal fees did not makes it 'virtually impossible, or excessively difficult' to exercise rights conferred by EU law). There was insufficient evidence (at this early stage) that the fee regime was prohibiting claims, as opposed to making them merely more difficult or daunting.

Similarly, the Court found no breach of the principle of equivalence (which requires that rules for the exercise of rights derived from EU law are no less favourable than those governing similar domestic actions), given that an employee bringing a contract claim in the country court would face a similar level of fee in the tribunal.

Finally, the Court rejected the argument that the fees system involves indirect discrimination against women, ethnic minorities and disabled people, on the basis that there was insufficient evidence at this stage of what disadvantage these groups had suffered.

The challenge therefore failed, although the Court's judgment leaves the door open for a similar challenge at a later stage, once there is more evidence about the impact of tribunal fees on claims.

Points in practice

Annual increases to statutory payments

The new rates of statutory payments for the tax year 2013-14 have been published:

- Statutory sick pay (**SSP**) will increase from £86.70 to **£87.55**.
- Statutory maternity pay (**SMP**), statutory adoption pay (**SAP**) and statutory paternity pay (**SPP**) will increase from £136.78 to **£138.18**.

The increases will take effect on 6th April 2014.

Employee shareholders: HMRC publishes share valuation form

HMRC has published a new valuation form, VAL 232, for companies to request a valuation of employee shareholder shares. The valuation is important, as it is only if the employee receives shares worth at least £2,000 that employee shareholder status will be validly granted.

Form VAL 232 is available here.

And finally…

Love at Work

With Valentines Day upon us once more, is love really all around us, including in the workplace? A recent survey[1] found that it is. In particular:

- Two out of five employees said that they were looking for love in the workplace.
- Half of UK workers admitted to having had a relationship with a colleague.
- The west of the UK had the highest proportion of office romances (83% of employees), with London at the other end of the scale.
- Sector-wise, the most romances blossomed in media and marketing, whereas in construction, "Cupid's arrow" struck far less often.
- A third of employees admitted to daily 'eFlirting', whilst the same proportion of male employees said that they would take a job based on the attractiveness of the workforce.

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[1] Jobsite.co.uk (February 2012), see http://www.jobsite.co.uk/worklife/valentines-day-belong-work-10886/.

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