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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New law

Two year limit for holiday pay and other unlawful deductions claims

The Government has made new regulations which will introduce a two year limit on unlawful deductions from wages claims. The regulations will prevent any claims relating to any deductions which date back more than two years from the date of presentation of the claim.

The two year limit will apply to most unlawful deductions claims (although not to claims based on various statutory payments such as sick pay and maternity pay). It will apply to claims based on salary, fee, bonus, commission, other emoluments (contractual or otherwise) – and, most importantly, holiday pay.

The regulations are part of the Government's response to the potential for large backdated holiday pay claims, which was limited (but not extinguished) following the EAT's recent judgment in *Bear Scotland Ltd v Fulton & ors*. The Government's taskforce is continuing to work on limiting the impact of this judgment on employers, so further developments in this area are likely.

The regulations also clarify that the Working Time Regulations 1998 create only a statutory right to holiday pay, not a contractual one. This is designed to prevent any statutory holiday pay claims being brought as breach of contract claims, for which there is a six year limitation period.

The regulations come into force on 8th January 2015, but there will be a six month transition period, as the new limit will only apply to complaints presented to an Employment Tribunal on or after 1st July 2015. This means that claims which have already accrued and which are presented before 1st July 2015 can go back more than two years, provided that (as per *Bear Scotland*) there is not more than three months between each deduction.

Cases round-up

ECJ: Obesity may amount to a disability

The ECJ has held that obesity may constitute a 'disability' for discrimination purposes, if it "hinders the full and effective participation of the person concerned in professional life on an equal basis with other workers" (*FOA (on behalf of Karsten Kaltoft) v KL (on behalf of the Municipality of Billund)*).

Our Danish best friend firm Gorrissen Federspiel conducted the case on behalf of FOA. We attach a briefing prepared by Gorrisen Federspiel which provides further details of the case and its implications.

Practical impact for UK employers:

- UK law has not previously recognised obesity as a disability in itself. A 2013 case rejected this concept, whilst accepting that obesity may make it more likely that someone has an impairment which amounts to a disability, and may impact on the length of time for which any impairment is suffered (*Walker v Sita Information Networking Computing Ltd*). The ECJ's decision therefore extends UK law in this respect.

- This case means that employers of obese employees will need to consider whether those employees may qualify as 'disabled' for

discrimination purposes. This will not always be the case, as it will depend on the facts of each situation. It will not however depend on whether the obesity is self-inflicted (in the sense that it results from the employee's lifestyle choices) or is the result of an underlying medical condition. The focus must be on the impact of the obesity rather than its cause, and whether it has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. Specialist advice may be needed in appropriate cases.

Dismissal for offensive tweets

An employee who posted allegedly offensive and abusive tweets on his Twitter account has had his unfair dismissal finding overturned. The EAT, while declining to lay down specific guidance for unfair dismissal cases involving misuse of social media, found that the Tribunal in this case had substituted its own views and reached perverse conclusions (*Game Retail Limited v Laws*).

Twitter for work and personal use: L was employed by GRL as its risk and loss prevention investigator, with responsibility for approximately 100 of GRL's stores in the north of England. The stores all had their own Twitter profiles and feeds, which were used for marketing and communications with customers. L used his own Twitter account to begin following the stores for which he was responsible, in order to monitor their tweets and detect inappropriate activity. A manager of one of the stores posted a tweet encouraging other stores to follow L, which 65 duly did. L also used his Twitter account for personal purposes, and did not apply any restrictions to the account (meaning that all his tweets were public).

Inappropriate tweets: In July 2013 a store manager notified GRL about certain tweets posted in L's Twitter feed. Following an investigation, GRL discovered 28 tweets in L's account which it identified as offensive, in particular to groups of people including '*dentists, caravan drivers, golfers, the A&E department, Newcastle supporters, the police and disabled people*'. It determined that L was guilty of gross misconduct and should be summarily dismissed. The Tribunal upheld his unfair dismissal claim for three main reasons:

A. the 'private-usage' reason: L had not registered on Twitter as part of his job, but principally for personal use. Further, L had only engaged in tweeting the offensive material in his own time and not work time;

B. the 'offence' reason: GRL had not established that any customer or other employee had seen the tweets or was offended by them; and

C. the 'content' reason: L had not tweeted any reference to GRL or to his work in any way.

Unfair dismissal overturned: The EAT allowed GRL's appeal, overturning the finding of unfair dismissal. Its findings on each of the Tribunal's three reasons were as follows:

A. The Tribunal had not properly tested the question of whether L's usage of his Twitter account should in truth be described as private. He had not made use of the restriction settings on the account, and knew full well that he was being followed by 65 of GRL's stores. The Tribunal had substituted its own view for that of the reasonable employer or, alternatively, had reached a conclusion that was perverse.

B. The conclusion on the 'offence' reason was inconsistent with the Tribunal's earlier finding that at least one other employee had seen L's tweets and was sufficiently offended by them to report L to GRL. The Tribunal had again impermissibly substituted its view on this point, rather than asking whether GRL had been entitled to conclude that the tweets might have caused offence.

C. There was clearly a link between L and GRL, by virtue of the 65 stores who were following him (and the encouragement to others to do so). Further, it was not simply a question of whether L's tweets were derogatory of GRL, but whether they were of their nature offensive and might be seen by GRL's other employees, customers

or potential customers who had been alerted to follow L (either because GRL's stores were following him or because of the encouragement for others to do so).

The claim was therefore remitted to a fresh Tribunal to determine whether dismissal was within the range of reasonable responses.

No general guidance for social media cases: The EAT declined to provide general guidance on unfair dismissal in social media cases, this being the first such case to come before the EAT (all other reported cases have so far been at Tribunal level). The EAT commented that some points would be relevant in many cases (for example, whether the employer has an IT or social media policy; the nature and seriousness of the alleged misuse; any previous warnings for similar misconduct in the past; actual or potential damage done to customer relationships etc). However, it confirmed that the range of reasonable responses test is sufficiently flexible to cater for social media cases (which are bound to be fact-specific in any event) without any further gloss.

TUPE: Whether employees assigned to the organised grouping

The EAT has overturned a decision that three manager-level employees of a family business were assigned to the organised grouping of employees which were the subject of a TUPE transfer. The Tribunal had failed to consider the organisational structure of the family business and the employees' managerial roles and contractual obligations (*London Borough of Hillingdon v Gormanley*).

Family business loses contract: A family-run business (RGL) provided services to LBH, carrying out repair and maintenance work on their housing stock. A husband, wife and son team (together G) were employed by RGL in managerial roles. Although RGL had previously had other clients, from 2008 onwards LBH was its only client. In 2012, LBH terminated its arrangements with RGL. LBH denied that TUPE applied and refused to take on any of the 17 employees of RGL (including G). All the employees presented claims against LBH, which settled all but the claims from G.

TUPE transfer to client: The Tribunal found that there was a TUPE transfer when LBH terminated its arrangements with RGL, as LBH then carried out those services itself. It also found that there was an organised grouping of employees within RGL which had as its principal purpose the carrying out of housing maintenance for LBH. The Tribunal went on to find that G were assigned to the organised grouping, as they worked almost exclusively for LBH, and their other tasks were negligible. It therefore awarded G compensation for unfair and wrongful dismissal.

Who was "assigned"?: The EAT allowed LBH's appeal. It found that the Tribunal failed to make findings of fact relevant to the assignment issue. In particular, it had failed to consider the contractual duties of each employee and their role in the organisational framework of RGL. The Tribunal did not consider whether a distinction was to be drawn between managerial staff like G and the tradesmen who were only engaged on work for LBH.

Contractual duties relevant: The EAT noted that an important source of information on an employee's role in an organisation is likely to be their contract of employment, and the job description or statement of duties is likely to inform a decision as to whether their duties are confined to certain activities or whether they include more general duties. The 'assignment' issue requires consideration of what duties the employees could be called upon to perform under their contracts, not just those which they were actually performing at a particular moment in time.

What if more than one client?: The EAT also found that the Tribunal should have considered how G's work would be organised if RGL had more than one client (as it had in the past). There was evidence to suggest that G's employment would have continued if there were other clients, and they would have had duties beyond working work on the LBH contract.

The Tribunal's decision was therefore set aside, and the case was remitted to a different Tribunal to determine whether G were assigned to the organised grouping of employees.

Assignment is more than time spent: This case confirms that the assignment question is not simply determined by the amount of time spent working within the particular undertaking or on the particular services (even where there is only one client). Although this might be relevant, other factors including the terms of the contract showing what the employee can be required to do are also relevant – and this is not just limited to what the employees are in fact doing at the relevant time.

Points in practice

Executive Remuneration: GC100 and Investor Group 2014 Statement

The GC100 and Investor Group has released a 2014 Statement on its Directors' Remuneration Reporting Guidance (the Guidance). It follows a review of remuneration reporting in the 2014 AGM season and clarifies and emphasises certain aspects of the Guidance. The key points are:

- **Linking remuneration to company strategy**: Companies are already required to show how each component of remuneration supports the company's long and short term strategic objectives in their remuneration policies, but the 2014 Statement states that investors also expect companies to make disclosures on this in their annual remuneration report. The 2014 Statement also flags the requirements of the Strategic Report and states that "*The need to explain the link between remuneration and strategy in the remuneration report thus invites cross referencing and alignment between these two reports*".

- **Discretion**: The Group finds the assurances provided by companies after the publication of remuneration policies to be "*generally undesirable*". It states that "*broad discretion to address those [unexpected developments] will be more likely to be approved if it is drafted and explained to make investors confident that it will be used only if and as genuinely required, and within an acceptable maximum (either the general, or a higher exceptional, maximum)*".

- **Assurances regarding remuneration policies**: Any assurances that were provided after the publication of the remuneration policies should be published on the section of the company's website dealing with accounts and reports. The assurances should also be set out in the remuneration reports in the following years of the policy's term.

- **Impact of the Corporate Governance Code changes**: The 2014 Statement considers the different ways a company may wish to extend the withholding and recovery provisions in response to the revised Code, in consultation with investors.

- **Information about the approved policy in subsequent reports**: Although it is not necessary to include the entire policy in subsequent remuneration reports, sufficient information should be included to help shareholders easily assess the reported remuneration in the context of relevant aspects of the policy – and the policy table should be included as a minimum.

- **Performance targets and the commercial sensitivity carve-out**: The Group emphasises that it expects retrospective disclosure once commercial sensitivity no longer applies.

- **Remuneration component maxima**: Notwithstanding the uncertainty in the market as to whether a maximum has to be disclosed at an individual level, the Group states that it "*believes the regulations clearly set an expectation that a maximum level of remuneration should be disclosed for each executive director, including the maximum possible level of bonus*".

- **Directors' shareholding requirements**: The 2014 Statement emphasises that how the remuneration committee enforces compliance with any shareholding requirements or guidelines should be disclosed in accordance with the Guidance.

- **Improving clarity**: Remuneration committees are encouraged to continue to focus on clarity and conciseness, and the 2014 Statement provides some examples of how it could do this.

And finally…

Employment law: What to expect in 2015

What can we expect from employment law in 2015? Here are some of the key topics we expect to see in the coming months:

- The introduction of **shared parental leave** will likely be the biggest employment law development of 2015. It will require employers to get to grips with a whole new approach to family leave, and has the potential to create a significant new administrative burden. In particular, the scope for discontinuous periods of leave, and the tricky issue of enhanced payments, require careful consideration.

- Other legislative developments are likely to be affected by the general election. The Small Business, Enterprise and Employment Bill 2014-15 is progressing through Parliament, but its measures are unlikely to be implemented until October 2015, following the election. The current draft of the Bill will **ban exclusivity clauses in zero-hours contracts**, require **annual reporting of whistleblowing disclosures** by prescribed persons, and introduce **clawback of certain public sector exit payments**, amongst other measures.

- The outcome of the **general election** will dictate the direction of employment law from the second half of 2015 onwards. Depending on the result, we may see tighter regulation of trade unions and a challenge to the supremacy of EU law, or a boost for minimum wages and greater rights for parents. We may also (finally) see the government tackle the Working Time Regulations 1998 in order to bring them into line with EU law, a task that is now nearly five years overdue.

- In terms of cases, the scope of **collective redundancy consultation** will be examined by the ECJ in *USDAW v Ethel Austin Ltd (in administration)* and *Lyttle v Bluebird UK Bidco Ltd*, and by the Court of Appeal in *USA v Nolan*. The judgments will give vital guidance to employers on the circumstances in which the obligation to collectively consult is triggered.

- **Executive remuneration** has been an area of significant reform in the past few years, and we are certainly set to see more developments. The pressure for companies to introduce **clawback** mechanisms is steadily increasing, with the PRA introducing new requirements for financial sector firms and the UK Corporate Governance Code introducing a new comply or explain obligation on all UK listed companies. Shareholders are also demanding **greater engagement** on executive pay more generally, and there are increasingly

insistent calls from some quarters for **more transparent comparisons between executive pay and average employee wages** across the rest of the organisation.

- The **gender gap** is also likely to remain a hot topic. Large-scale equal pay claims are spilling over into the private sector, with those facing ASDA just one high-profile example. We will also learn if the FTSE 100 can meet Lord Davies' target of at least 25% female representation on their boards by 2015 (the figure was at 22.8% in October 2014). The prospect of quotas for 40% female non-executive directors under EU law is also looming on the horizon.
- Finally, the fundamental concept of "**who is an employee**" is set for a shake-up. The government is currently undertaking an employment status review, with the aim of exploring the options for streamlining and clarifying this area of employment law, and for extending some employment rights to more people. With this cornerstone of employment law under the microscope, the scene is set for another busy year in employment law.

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