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.

New law

April 2015 changes to employment law

A number of employment law changes are taking effect in April 2015. These are:

- The new right for eligible parents to take **shared parental leave** applies in respect of babies expected to be born or adopted on or after 5th April 2015. A number of associated changes are also made in relation to adoption leave and pay, paternity leave and pay, and unpaid parental leave.

- The annual increase on the **maximum awards for unfair dismissal** takes effect. The note circulated with our last Employment Bulletin summarises the new rates, which apply where the date of termination falls on or after 6th April 2015.

- The new rates of **statutory payments** for the tax year 2015/16 are:

  – with effect from 5th April 2015, statutory maternity, adoption, paternity and shared parental pay will increase to **£139.58** a week (up from £138.18).

  – with effect from 6th April 2015, statutory sick pay will increase to **£88.45** a week (up from £87.55).

- The **National Minimum Wage Regulations 2015** will come into force on 6th April 2015, consolidating and replacing the National Minimum Wage Regulations 1999 and subsequent amending regulations.

- The power for **employment tribunals to make wider recommendations** in discrimination cases under section 124(3)(b) of the Equality Act 2010 is set be **repealed** with effect from 6th April 2015.

Employers should ensure that their policies are updated to reflect these changes. If you require any assistance in this regard, please speak to your usual Slaughter and May contact.

Gender pay reporting may become law in 2016

The Government has tabled an amendment to the Small Business, Enterprise and Employment Bill 2014-2015 which could introduce mandatory gender pay reporting. The amendment would implement a power under section 78 of the Equality Act 2010, which could **require employers with at least 250 employees to publish information about their gender pay gap**. The amendment will require regulations under section 78 to be made within 12 months of the Bill coming into force. The regulations would require reports to be made at least annually, with failure to comply being a criminal offence.

Although it remains to be seen whether the amendment to the Bill will become law, and what form any implementing regulations may take, employers who would be in scope of the change should consider what impact this may have on them, and whether it may be prudent to take measures now to address any potential gender pay gap issues.

Cases round-up

TUPE: Service Provision Change involving multiple contracts and clients

A Service Provision Change (SPC) under TUPE may occur where the activities are provided to more than one client, and under more than one contract, according to a recent decision of the EAT. This is provided that the clients retain their identity before and after the SPC, and are sufficiently linked to permit a common intention to be ascertained for TUPE purposes (*Ottimo Property Services Limited v Duncan*).

Property management contracts: D was employed by OPS as a Site Maintenance Manager. OPS held

contracts for the maintenance of an estate called Britannia Village (BV). BV comprised different blocks of residential housing (BV1, BV2 etc), and each block had a separate residents' management company. There was also a general management company (BVG) which dealt with the common parts of the estate.

Retendering of contracts: In the period May to August 2012, another provider (W) was awarded the property management contracts for BVs 1, 3, 5, 6 and 7. W denied that TUPE applied, and engaged its own personnel to work on those contracts. D was dismissed by OPS, which took that view that he should have transferred under TUPE to W.

Was there an SPC? The Tribunal found that there had been no SPC under TUPE, taking the view that the "client" for these purposes must be one single legal entity. Therefore in this case, the existence of a number of legal entities as clients (i.e. the separate residents' management companies) meant that there could be no SPC. This in turn meant that liability for D's unfair dismissal claim lay with OPS.

SPC may involve multiple clients… The EAT allowed OPS's appeal. It found no reason in principle why "the client" must be a single legal entity for SPC purposes. Provided that the identity of the clients remains the same before and after, it held that there may be an SPC involving a contract for the provision of particular services to a group of persons who are collectively defined as "the client" under that contract.

…and multiple contracts: The EAT went on to find that there may be an SPC involving multiple clients, even if there is not one single contract. It found that there would however need to be some way of discerning the common intention of the clients as to the provision of the services for TUPE purposes. Whilst this commonality would be easier to discern where a single umbrella contract was in place, this would not necessarily be required. The case was therefore remitted back to the Tribunal to determine whether there was an SPC following this approach.

Significance for property management contracts: The decision is potentially significant for transfers of property management services, where separate management companies are a common feature. It remains to be seen whether on remission the Tribunal finds that there was an SPC in this case. The commonality point is likely to be crucial, given the absence of an umbrella contract and the fact that W took on only six of the 12 BV contracts. W also argued that each contract was separate and covered a range of activities, and was terminated separately.

Age discrimination: severance payments and entitlement to pension

Employers may withhold severance payments from departing employees who are entitled to receive a full state retirement pension on termination of employment, according to a recent decision of the ECJ. There would be no unlawful age discrimination even if the eligible employee chose to continue working elsewhere rather than take his pension (*Ingeniørforeningen i Danmark v Tekniq*).

Severance payments: Under Danish law, salaried employees with 12, 15 or 18 years service in the same undertaking were entitled to a severance payment on termination of employment, of one, two or three months salary respectively. There would however be no entitlement to a severance payment if on termination the employee was entitled to a state retirement pension or an old age pension from the employer.

Employee dismissed: A Danish employee (L) was employed as an engineer. He had 12 years service when he was dismissed. At age 67 he would have been entitled to a state retirement pension, but he had previously postponed his entitlement so as to increase his pension. Notwithstanding the postponement, L was denied a severance payment. Following his termination, L commenced employment with a new employer as a sprinkler engineer. He brought proceedings claiming a severance payment.

The Danish Court stayed the proceedings and made a reference to the ECJ to determine whether the applicable Danish law was compatible with the Equal Treatment Framework Directive.

No age discrimination: The ECJ found that the Danish law clearly involved a difference of treatment on grounds of age. It also found that the law pursued the legitimate aim of protecting older long-serving employees and helping them move into new employment. The law was also found to be appropriate and necessary to achieve that aim, given that the restriction was designed to ensure that departing employees did not get paid twice.

Irrelevant whether pension actually taken: The ECJ noted that the Danish law treated those who actually received a state retirement pension in the same way as those who (like L) were eligible for one, but did not in fact receive it. The ECJ found that this did not render the law disproportionate, as in this case L was not at risk of a reduction in his pension entitlement on taking early retirement (and was not therefore forced to accept that reduced entitlement by the denial of a severance payment). It was also relevant that the denial of the one to three month payments in this case did not appear to the ECJ as capable of causing a significant loss of income to the departing employee in the long term.

Lessons for severance schemes: This decision suggests that employers may operate severance schemes that withhold payments simply on the basis of entitlement to a pension, regardless of whether the employee actually chooses to take their pension. This is on the basis that the scheme can be objectively justified; for example, it is important that the withholding will not force an employee to accept a reduced pension (if it would do so, a payment may have to be made).

Age discrimination: timing redundancy to save pension costs

An employee who was made redundant 11 days before her 55th birthday (when she would have been entitled to take an immediate full pension) lost her age discrimination claim at first instance. However, she won her appeal to the EAT, which criticised the Tribunal's approach to whether the timing of her dismissal was discriminatory, and whether the employer's actions were justified (*Sturmey v The Weymouth and Portland Borough Council*).

Redundancy: S transferred to WP's employment in 2010 as part of a shared service partnership which was put in place between two borough councils. Shortly afterwards, WP instigated a reorganisation and redundancy process, as a result of which S was put at risk of redundancy. She was placed into the redeployment pool in May 2012, but no suitable vacancies were identified and by August 2012 she was signed off with stress. The evidence from occupational health was that S's health would not improve until the redundancy process had concluded.

Timing of dismissal: In the meantime, managers within WP had realised that S was approaching her 55th birthday, when she would become entitled to an immediate full pension on her redundancy (at significant cost to WP). S was given notice of dismissal on 6th September, and her three month notice period expired on 9th December, 11 days before her 55th birthday. S lodged claims of unfair dismissal and age discrimination.

Claim initially dismissed… The Tribunal dismissed S's claim, finding that the reason for her dismissal was redundancy, not her age, and that even if the timing of the dismissal was potentially discriminatory, her redundancy provided a legitimate aim. Although WP had used costs as a factor in their decision to dismiss, it had also relied on S's health remaining in jeopardy while the process continued, and the lack of any prospects of suitable alternative employment after four months in the redeployment pool.

…but appeal succeeds: The EAT allowed the appeal, and remitted the claim for rehearing. It found that the Tribunal did not give sufficient reasons for its conclusions on age discrimination. In the EAT's view, there was substantial material tending to indicate that

the timing of WP's decision to dismiss S was wholly or partly because of her age (including evidence of seven or eight other employees who had been in the redeployment pool for longer periods), and that she was treated less favourably in this respect than WP would treat others.

No general principle: The EAT also found that the Tribunal had placed too much reliance on the previous case of *Woodcock v Cumbria Primary Health Care Trust*, where a dismissal on similar facts was found not to be age discriminatory. The EAT stressed that Woodcock was not intended to lay down any general principle as to whether omitting or eliding stages in a redundancy or redeployment process to save pension costs (and thereby acting because of an employee's age) will always pursue a legitimate aim or will always be a proportionate means of doing so.

Take care on timing of redundancy: This case is a reminder that employers should not assume that eliding a redundancy process in order to avoid pension costs will always be justifiable (and never amount to unlawful age discrimination). There must be a careful consideration of the facts in each case.

Points in practice

Executive remuneration: BIS research paper

BIS has published a research paper on how companies and shareholders have responded to the new executive remuneration regime. The paper examines the level of compliance with the Regulations amongst a selection of UK incorporated companies listed on the London Stock Exchange.

Overall the research found that the level of compliance has been very good, particularly amongst larger companies (i.e. those which are not designated as SMEs). A number of instances of non-compliance related to situations in which BIS found it likely that the company had no relevant information to disclosure. The paper therefore recommends that companies in this situation provide a positive confirmation that there is no relevant information to disclose.

However, the research found a significant level of non-compliance with the requirement to specify clearly, in monetary terms or otherwise, the maximum future salary that may be paid under the remuneration policy. The paper reports that 93% of the companies examined did not state an absolute limit on potential salary increases for the lifetime of the policy. The paper recommends that the guidance should be adjusted to make it clear that the maximum amount must be explained, irrespective of additional disclosure of any considerations the remuneration committee takes into account in determining proposed increases during the policy period.

Zero-hours contracts: Government response to consultation on anti-avoidance of ban on exclusivity clauses

The Government has published its response to the consultation on measures to prevent employers evading the ban on exclusivity clauses in zero-hours contracts, which is due to be introduced via the Small Business, Enterprise and Employment Bill 2014-15 (for details of the consultation, see our Employment Bulletin dated 4th September 2014, available here).

The response reveals that 83% of respondents thought it likely or very likely that employers would seek to avoid a ban on exclusivity clauses, either by offering a minimal number of guaranteed hours (such as one hour a week) or restricting the work opportunities of the individual because they have taken on work elsewhere.

The response therefore sets out the following next steps:

- Draft anti-avoidance regulations will be considered during the passage of the Bill through

Parliament (the draft Zero Hours Workers (Exclusivity Terms) Regulations 2015 are annexed to the response).

- The regulations will include the right for zero-hours contract workers not to suffer detrimental treatment on the grounds that they have done work under another contract or arrangement. Claims would lie to the Employment Tribunal and attract both compensation for the worker and the potential for civil penalties of up to £5,000 on the employer.

- The regulations will also extend the ban on exclusivity clauses beyond zero-hours contracts, to 'prescribed contracts', defined as all contracts under which the worker is not guaranteed a certain level of weekly income (set by multiplying the agreed number of hours by the national minimum wage). There would be an exception if the worker is paid at least £20 per hour.

Whistleblowing: Government response to consultation on reporting by prescribed persons

The Government has published its response to the consultation on the power to require prescribed persons to produce an annual report on disclosures of information made to them by whistleblowers. This power is due to be introduced via the Small Business, Enterprise and Employment Bill 2014-15.

The response confirms that the report which must be produced by prescribed persons will be much more light touch and flexible than had originally been intended, to help accommodate the varying roles and remits of prescribed persons. The regulations will only require a certain amount of specific content within the reports, with the option to include additional information. For additional flexibility, prescribed persons will be able to choose whether they publish the information within existing reports or as a stand-alone report, and there will also be some flexibility around the timing of the report. The regulations will however require the reports to be made available online for maximum accessibility, and to be laid before Parliament as well as published on individual organisations websites, as a further mechanism for transparency.

The response annexes the draft regulations, which the Government says it will continue to develop in parallel to the Bill's passage through Parliament. The Government also intends to publish new guidance for whistleblowers, employers and prescribed persons, as well as a non-statutory code of practice for employers, by the end of March 2015.

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