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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This weeks's contents include:

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Find out more about our pensions and employment practice by clicking here.

For details of our work in the pensions and employment field click here.

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.
To unsubscribe click here.

New publication

"Whistleblowing: tackling the moving goalposts"

We attach a publication that we recently produced for the Tolley's Employment Law Newsletter examining the key elements of a whistleblowing claim, in light of the latest legal developments, and providing practical tips for handling disclosures and avoiding claims.

New video

Using social media checks to vet candidates

Rob Sumroy, one of our partners specialising in technology and data protection issues, was recently featured on Sky News as part of their weekly technology programme, "Swipe". Rob discussed the options and pitfalls for employers when using social media to vet candidates. You can view the video via our website.

Cases round-up

TUPE: no service provision change where no continuity of client

The retendering of a security contract did not result in a service provision change under TUPE, where the client under the new contract was the 'ultimate' client, whereas under the previous contract, it was the client's subcontractor. The removal of the subcontractor amounted to a change of client, preventing a TUPE transfer, according to a recent decision of the EAT (*Horizon Security Services Limited v Ndeze*).

Provision of security services: N was employed by PCS to work as a security guard at the Alpha Business Centre (ABC), which provided rental office space for small and medium-sized businesses. ABC was owned by the London Borough of Waltham Forest (LBWF), but was managed through a separate entity, Workspace Plc (W). W had awarded the contract for security services to PCS.

Re-tendering: In January 2013, W notified PCS that ABC was to be demolished to make way for a Morrisons supermarket, that W would no longer be providing a management service for ABC on behalf of LBWF, and that PCS's contract was terminated. LBWF then decided that it would need to continue the security service on a short-term basis pending the demolition. It awarded a new contract to a new provider (H), who provided security services at the site in much the same way as PCS had.

TUPE transfer? N was told by PCS that under TUPE he was now employed by H, but H denied that TUPE applied or that he was employed by them. N therefore issued proceedings for unfair dismissal against PCS and H. The Tribunal found that there had been a service provision change from PCS to H, as the activities carried out by PCS, and subsequently H, were carried out for the same client, LBWF.

Change of client: The EAT allowed H's appeal. It confirmed that in order for TUPE to apply to a service provision change, there must be no change in the identity of the client. However on the facts of the present case, the client had changed: PCS had been engaged to provide security by W, whereas H was engaged by LBWF. PCS had had no relevant relationship with LBWF. The EAT therefore concluded that there had been no TUPE transfer from PCS to H.

Practical impact: This decision shows that it may be possible to avoid the application of TUPE where there is a change in the contracting entity at the client end, even where the ultimate client remains the same. In these circumstances, employees will remain with the transferor, unless the transferee agrees to take them on.

TUPE: date of transfer – when does transferee "assume responsibility as employer"?

A TUPE transfer did not take place on the date when the transferee consulted employees and reassured them that they would be offered employment. This did not amount to the transferee "assuming responsibility as employer", according to a recent decision of the EAT (*Housing Maintenance Solutions Ltd v McAteer*).

Delayed insourcing: N was employed by K, a company which provided repair and maintenance services to LMH, a housing association. LMH decided to set up another company, HMS, to undertake the work itself. K went into administration on 9th June 2011, and its contract with LMH terminated on the same day. At that point HMS was not yet ready to 'go live', but it reassured the employees (including N) that it would employ them. It also continued consultations with the trade union representatives 'with renewed vigour'. The employees were made redundant by K's administrators, and were taken on in stages by HMS, the last (including N) on 1st July. HMS then continued to provide the repair and maintenance services to LMH in much the same way that K had done.

Date of transfer? N brought claims of unfair dismissal, unlawful deduction from wages for the period between 9th June and 30th June 2011, and a declaration of the identity of his employer within that period. The issue therefore arose as to the date of the TUPE transfer from K to HMS. The Tribunal found that it took place on 9th June, when HMS consulted employees and reassured them that they would be offered employment. HMS appealed, claiming that a 'future commitment to being a transferee' is not sufficient to amount to a TUPE transfer, as at the date when the commitment was given.

Transferee's actions irrelevant: The EAT allowed the appeal. It held that the date of a TUPE transfer is determined by the date on which responsibility for the transferring business entity (or service provision) passed from the transferor to the transferee. The reference to "assuming responsibility as employer" (from the ECJ's decision in *Celtec v Astley*) is to responsibility as employer by operation of TUPE, not by the actions or intentions of the parties. The date of the transfer dictates the date when the contracts of employment transfer (by operation of law), not vice versa. The case was remitted for re-hearing, including to determine whether the transfer in this case had in fact taken place in stages.

Good news for transferees: This decision confirms that the date of a TUPE transfer is not determined by the transferee's actions towards its future employees. Transferees will therefore be able to conduct pre-transfer consultation and give assurances to transferring employees about their future employment, without bringing forward the date of the transfer.

Unpaid notice period enforced against departing employee

A broker who sought to leave his employment without notice was held to his contract until the end of his notice period – without pay, unless he returned to work (*Sunrise Brokers LLP v Rodgers*).

Broker's contract: R was employed by SB as a derivatives broker. His contract of employment was terminable by SB with three months' notice, but not terminable at all by R until an initial period of three years had passed, and thereafter with twelve months' notice. His contract also contained restrictions on R undertaking any other work during his employment, as well as six month post-termination non-competition, non-solicitation and non-dealing covenants.

Broker leaves for competitor: R became disenchanted with his job at SB, and accepted a position with a competitor company (E). Some weeks later, R told SB that he was leaving immediately to work for E. SB tried and failed to change R's mind. SB then stopped R's pay, but told him that they did not accept his purported resignation and considered him still bound by his contract of employment, as he had not given proper notice (he was still within the initial three year fixed term). SB subsequently offered to accept a shorter notice period of six months. R maintained that his employment had already terminated or, alternatively, SB's ceasing to pay

him was a repudiatory breach of contract which he accepted, thus terminating his employment.

Injunction sought: SB sought an injunction declaring that R remained in its employment and preventing him from doing any work for anyone else during his notice period, or working in competition with SB for a further six months after the termination of his employment (in accordance with the restrictive covenants).

Employment continued… The High Court upheld SB's claim. It noted that SB had the option to affirm R's contract and keep it alive, and that it had good reason to do so, given its desire (at the relevant time) to retain R in its employment.

…despite failure to pay The Court then held that SB had not lost its right to affirm the contract by ceasing to pay R. It found that the obligations of the employee to work and the employer to pay were concurrent conditions. Non-performance of one obligation did not bring the contract to an end, but merely suspended the other obligation until the first was performed.

Unpaid notice enforced: The Court therefore made a declaration that R remained employed by SB until the expiry of the shorter six month period of notice agreed by SB, and could not work for E or any similar competitor during that time. However, given that R had not been placed on garden leave, the Court declined to order that R must be paid during this period, unless he chose to return and work out his notice with SB.

Modified restrictive covenants enforced: Finally, the Court noted that the period of R's post-termination restrictive covenants would have been offset by any period spent on garden leave. This indicated that the maximum period of restraint which SB reasonably required for the protection of its legitimate interests was six months from R's last *client contact* (rather than from the end of his employment). However, it also took into account the fact that R had purported to leave early in breach of contract. The Court therefore ordered that the injunction to prevent R from working for a competitor should expire ten months after his last client contact.

Tactical considerations: This case shows that when key employee purports to resign in breach of contract to join a competitor, it can be a useful tactic for the outgoing employer to ensure that it has the option of enforcing the notice period. This will not require it to continue paying the employee, if he refuses to attend work, although it will require it to avoid taking any other steps which could be interpreted as accepting the breach and terminating the contract. However, in practice it would be more usual to place the employee on garden leave.

No age discrimination in arrangements for offering early retirement on redundancy

An employee did not suffer age discrimination when she was not permitted to revisit her options as part of a redundancy exercise. There was no less favourable treatment as the employee's chosen comparators were in materially different circumstances; they were eligible to be offered early retirement (albeit that this was due to their age), whereas she was not (*Palmer v The Royal Bank of Scotland plc*).

Early retirement scheme: P was employed by RBS in its specialist advice division. RBS operated a Voluntary Early Retirement ("VER") scheme, which allowed employees aged 50 and over to be offered voluntary early retirement terms which included payment of a pension without any actuarial reduction for early receipt. In June 2012, RBS decided to scale back its VER scheme, so that it would only be available to those aged 55 and over at the date of leaving employment.

Redundancies: RBS then decided to restructure P's division. Employees at risk of redundancy, including P, were given the choice of accepting voluntary redundancy (with an enhanced payment) or being redeployed if this were possible. VER was initially only offered as a third option to those who would be over 55 at dismissal (in accordance with the revised VER scheme). However, RBS then decided to delay the amendment to the VER scheme until after the

restructuring was complete. It therefore allowed those aged 50 - 54 to revisit their options, with VER now being made available to them.

Disadvantage to younger employee: P was 49, and would have turned 50 just ten days after her projected dismissal date. She was therefore not offered VER, and not permitted to revisit her options. P complained that this amounted to unlawful age discrimination. She maintained that those aged 50-54 were in comparable circumstances to her (other than age). Her case was that if permitted to do so, she would have changed her original choice of voluntary redundancy to redeployment, as her expectation was that the search for an alternative position would take her past her 50th birthday, at which point if no position was found, she would be old enough to qualify for VER.

No valid comparison: The Tribunal dismissed P's claim, finding that she was not in a comparable position to those between 50 and 55, since (a) she was 49; and (b) her route to gaining VER would be different (P would have chosen redeployment, with a view to eventually being offered VER, whereas her comparators opted straight for VER).

..and no discrimination: The EAT dismissed P's appeal. It rejected part (a) of the Tribunal's conclusion, on the basis that a difference in age cannot be used to justify discrimination between comparators in otherwise like circumstances. However, it upheld part (b) of the Tribunal's conclusion, which amounted to a material difference in circumstances between P and her comparators. P could not have been offered VER at her age, as there was a statutory prohibition against such offers being made to anyone under 50. The same did not apply to her chosen comparators. There was therefore no less favourable treatment, and her discrimination claim failed.

No need to ensure early retirement benefits: The employee's complaint in this case seems to be based on the fact that she was unable to delay her dismissal until such time as she would be eligible for VER. This has echoes of *Woodcock v Cumbria Primary Care Trust*, where the Court of Appeal dismissed an age discrimination claim from an employee whose dismissal for redundancy took place just before he accrued an entitlement to an enhanced early retirement pension.

Points in practice

PRA/FCA consultations on new accountability and remuneration rules

The Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) have published two joint consultation papers aimed at improving individual responsibility and accountability in the banking sector. The proposed changes would affect UK-regulated banks and building societies as well as the nine PRA-designated investment firms which are regulated by both the FCA and PRA.

Accountability

In the first joint consultation paper, Strengthening accountability in banks: a new regulatory framework for individuals (CP14/14), the PRA and FCA proposals include introducing:

- a new Senior Managers Regime for individuals who will be subject to regulatory approval. The regime which will clarify the lines of responsibility at the top of banks, enhance the regulators' ability to hold senior individuals in banks to account and require banks to regularly vet their senior managers for fitness and propriety;
- a Certification Regime requiring firms to assess fitness and propriety of staff in positions where the decisions they make who could pose significant harm to the bank or any of its customers; and
- a new set of Conduct Rules, which take the form of brief statements of high level principle, setting out the standards of behaviour for bank employees.

Remuneration

In the second joint consultation paper Strengthening the Alignment of Risk and Reward: New Remuneration Rules (CP15/14), the PRA and FCA proposals include:

- increasing the alignment between risk and reward over the longer term, by introducing a **two-level approach to deferral** of variable remuneration, requiring deferral for a minimum of **seven years** for senior managers and **five years** for other material risk takers, with a phased approach to vesting;

- further enhancing the ability of firms to **clawback** variable remuneration, by introducing a minimum clawback period of **seven years**, with a possible extension of a **further three years** for senior managers if there are outstanding investigations underway at the end of the seven year period;

- options to address the problem that employees can sometimes evade the application of malus by changing firms and receiving **buy-out awards**. The options include: (i) an outright ban on buy-out awards; (ii) requiring the former employer to continue to honour unvested awards; (iii) a discretionary power for the regulator to apply malus to buy-out awards; and (iv) reliance on clawback;

- introducing new **risk adjustment provisions**, including a requirement for firms to calculate **profit for bonus pool purposes** by deducting a prudential valuation adjustment from fair value accounting profit, and a **prohibition on using revenue-based metrics** such as EPS and TSR to determine variable remuneration at individual or aggregate level, except as part of a balanced and risk-adjusted scorecard;

- codifying the existing expectation that **non-executive directors** should not receive any variable remuneration in respect of their non-executive role; and

- strengthening the existing presumption against any discretionary payments where banks have been **bailed out**.

Clawback

The PRA has also published a policy statement Clawback (PS7/14), which sets out the PRA's response to its consultation on clawback (CP6/14), which closed on 13th May (see Employment Bulletin 26th March 2014).

The policy statement contains the PRA's final rules on clawback. These confirm that there will be a **seven-year** minimum period for clawback **from the date of award** (rather than the six years from the point of vesting, which was suggested in the consultation). The **grounds** for applying clawback have also been narrowed compared with the existing grounds for malus, and will exclude a material downturn in financial performance. This is on the basis of the PRA's view that clawback is most appropriate in cases where the individual has some responsibility or culpability for the circumstances giving rise to the grounds for action.

The final rule also clarifies that firms are able to take a proportionate approach to the enforcement of clawback based on the assessment of individual cases. Firms' approach to clawback, and the way in which they intend to apply the flexibility which the final rules provide, should be included within firms' internal policies so as to inform the regulator of the implementation of clawback policies.

The PRA has also published a handbook instrument (PRA2014/22) containing the amendments to the PRA Handbook to implement the new clawback rules. These rules will come into force on 1st January 2015 and will apply to awards made on or after that date (not to awards made prior to 1st January 2015, but which vest after that date, as had been suggested in the consultation).

Next steps

Both consultations close on 31st October 2014. The PRA and the FCA will each publish a policy statement outlining their final rules by the end of 2014. A technical consultation paper will be launched later this year.

Firms should consider amending their variable remuneration schemes so that they comply with the new clawback regime for awards made from 1st January 2015 onwards.

HMRC FAQs on ERS online filing service

HMRC has published 33 FAQs on the employment-related securities (ERS) online reporting service, which was introduced in April this year for the registration and reporting of employee share schemes. The FAQs cover questions relation to EMIs (option grant notifications), PAYE, registrations, ERS agents, ceased schemes and currency converters.

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