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

Royal Assent for last employment laws before the General Election

The Small Business, Enterprise and Employment Act 2015 (SBBE 2015) received Royal Assent on 26th March 2015. Amongst other measures, the SBBE 2015 will:

- require new regulations in 2016 to increase gender pay transparency;
- render exclusivity clauses in zero hours contracts unenforceable;
- increase the maximum financial penalty for underpayment of national minimum wage to £20,000 per worker;
- require prescribed persons to produce annual reports on the disclosures made to them by whistleblowers;
- introduce new restrictions on postponements of employment tribunal hearings, and financial penalties on employers who fail to pay sums ordered by an employment tribunal or agreed as part of an ACAS-conciliated settlement; and
- require the repayment of some or all of a qualifying public sector exit payment in certain circumstances.

The Deregulation Act 2015 (DA 2015) also received Royal Assent on 26th March 2015. Amongst other measures, the DA 2015 will remove the power of employment tribunals to make wider recommendations in discrimination cases, with effect from 1st October 2015.

Cases round-up

Holiday pay: WTR 1998 can be read to include commission

An employment tribunal has confirmed that the Working Time Regulations 1998 (WTR 1998) can be interpreted consistently with the requirements of the Working Time Directive (WTD), and in particular the ECJ's judgment that holiday pay should include commission (*Lock v British Gas Trading Limited*).

Salesman earned commission: L was employed by BG as an energy sales consultant. In addition to his basic salary, L received commission when customers agreed to buy BG's energy products. His commission was paid monthly (although several weeks in arrears) and on average constituted around two thirds of his overall income.

…but not during holiday: L was on holiday over the Christmas period at the end of 2011. As he was not working during this period, he received no commission. During his holiday, L received his salary and commission that he had earned in previous weeks. However after his holiday, his remuneration dropped to reflect the period during his holiday when he had not earned any commission.

ECJ: holiday pay must include commission: The ECJ ruled that the WTD requires that workers must not suffer a reduction in their remuneration as a result of not earning commission during periods of annual leave, and that the worker in question must therefore be paid a sum representing the average amount of commission that he would have earned had he not been on holiday (see Employment Bulletin 5th June 2014, available here).

Tribunal: WTR 1998 can be read consistently: On remission to the employment tribunal, it decided that the WTR 1998 could be interpreted so as to give effect to the ECJ's decision. It ruled that Regulation 16(3) WTR 1998 should be interpreted as if the following paragraph had been added to it:

> "*(e) as if, in the case of the entitlement under Regulation 13, a worker with normal working hours whose remuneration includes commission or similar payment shall be deemed to have remuneration*

which varies with the amount of work done for the purpose of section 221".

What are "similar payments?": The wording read into Regulation 16(3) applies to workers whose remuneration includes "*commission or similar payment*". The Tribunal did not give any guidance on what a "similar payment" would be for these purposes, beyond confirming that it would include compulsory overtime (as per the recent **Bear Scotland** case). This means that the same approach should be taken to the calculation of holiday pay as regards commission and compulsory overtime. What remains unclear for now is the approach for other types of payments, such as allowances and voluntary overtime.

Outstanding issues: However, a number of other issues remain outstanding, and will be determined at future hearings. These are:

- what is the correct reference period for determination in the calculation of such holiday pay (the Tribunal's decision suggests, but does not confirm, that a 12 week reference period should apply);

- whether BG's commission scheme operated in such a way that it effectively compensated employees for periods of annual leave so that, even if such a scheme is now unlawful, no further money is due to L; and

- if not, what amount is due to L.

We will report further once the Tribunal's subsequent decision is available.

Unfair dismissal: relevance of admissions

An employee was dismissed following his admission that he allowed a procedure involving serious breaches of health and safety to be carried out by staff under his supervision. His unfair dismissal claim was successful at first instance but the EAT allowed the employer's appeal, finding that the Tribunal had failed to address the significance of the employee's admissions (*CRO Ports London Ltd v Wiltshire*).

Lifting incident: W was employed by CRO as a supervisor, and had over 20 years service and a clean disciplinary record. However, on 21st January 2013 he supervised the lifting of a shipping container where the team had used a process known as "packing" to secure the locks of the lifting equipment onto the container. W's evidence was that packing was condoned by CRO and had been operated for many years without incident. On this occasion, the container fell from the crane when it was about 20 feet off the ground, damaging it very badly.

Admission and dismissal: W was suspended but took that view that, in light of his long blameless service, he would not be dismissed. He therefore took full responsibility for the incident, and admitted that he had previously supervised packing practices, knowing it was dangerous and in breach of health and safety rules. He did not seek to rely on the long history of packing and its being condoned by supervisors. CRO determined that W was guilty of gross misconduct and summarily dismissed him. W's appeal was dismissed, and he lodged proceedings for unfair dismissal.

Tribunal finds dismissal unfair: The Tribunal upheld W's claim. It found that CRO had failed to carry out a reasonable investigation, as it failed to identify the pressures of work which W and his team worked under, and the absence of any specific health and safety advice on dealing with problems lifting containers. It concluded that W had been "scape-goated" and that his dismissal was unfair.

Relevance of admissions: The EAT allowed CRO's appeal, overturning the finding of unfair dismissal and remitting the claim for rehearing. It found that the Tribunal had failed to apply the correct legal test in light of W's admissions. W had accepted full responsibility for the incident, and volunteered that he knew how serious it had been. CRO was not thereby required to investigate further into the practice

(although when it did so after W's dismissal, the evidence did not support W's case).

Implications for investigations: This decision is helpful for employers, in confirming that when faced with admissions by an employee in the course of disciplinary proceedings, it may rely on them and will not necessarily be required to investigate further. That said, the EAT noted that an admission may still leave relevant issues unresolved which reasonably require investigation, and each case must therefore be assessed on its own facts.

Diet-controlled type 2 diabetes is not a disability

An employee who suffered from type 2 diabetes has been found not to be disabled for the purposes of the Equality Act 2010. The need to avoid sugary drinks (in order to control his condition) did not amount to a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (*Metroline Travel Limited v Stoute*).

Bus driver dismissed: S, who suffers from type 2 diabetes, was employed by MTL as a bus driver. The judgment notes that he had a "*somewhat chequered employment history including…diverting his bus so he could go and buy some chicken kebabs*". On the day in question, S arrived late claiming to have been suffering from diarrhoea (an alleged side effect of his Metformin) and with an urgent need to use the WC. He was dismissed for gross misconduct and raised a number of disability discrimination claims.

Diabetic diet: The Tribunal found that S was disabled. It noted that S followed a diabetic diet by avoiding for example sugary drinks. It classified this as a "treatment or correction", the effect of which, under the statutory guidance on the definition of disability, is to be ignored when judging whether the condition has a substantial adverse effect. Although S's substantive claims were ultimately dismissed, MTL appealed the finding that S was disabled.

No disability: The EAT allowed MTL's appeal, substituting a finding that S was not disabled. It found it difficult to see how a "perfectly normal" abstention from sugary drinks could be regarded as a medical treatment or correction for this purpose. It also rejected the idea that abstaining from Coca-Cola and fruit juice could be an impairment in relation to ordinary day-to-day activities. The Tribunal had also failed to have regard to other sections of the statutory guidance, which make it clear that account should be taken of how far a person can reasonably be expected to modify his behaviour. It also gave the example of someone with an allergy needing to avoid certain foods, but having done so, the impairment ceasing to have a substantial adverse effect on their normal day-to-day activities.

Wider relevance: MTL reportedly decided to pursue this issue due to a number of other employees in its workforce suffering from type 2 diabetes. The EAT was keen to avoid any suggestion that type 2 diabetes per se will always amount to a disability. It noted that had this been the case, it would also mean that people with other conditions such as nut allergies or an intolerance to lactose would also be regarded as disabled.

No discrimination or harassment based on "left-wing democratic socialist" beliefs

A GMB employee whose actions caused some political embarrassment for Ed Miliband was found to be fairly dismissed for misconduct. The EAT also dismissed his claims that he was subjected to discrimination or harassment related to his protected "left-wing democratic socialist" beliefs (*GMB v Henderson*).

Picketing incident: H was employed by the GMB as a Regional Organiser. He was an advocate of left-wing democratic socialism and a Labour Party activist. In November 2011, H was tasked with organising a picket line at the House of Commons as part of strike action by staff who were GMB members. H publicised the picket to the media, and stated that Labour MPs were expected not to cross the picket line. This was raised in Prime Minister's Questions and resulted in the Labour leader Ed Miliband being given a difficult time by David Cameron about his stance on Labour

MPs crossing the picket line, and facing accusations that he was 'controlled by the unions'. When Mr Miliband's office raised this with the General Secretary of the GMB, he telephoned H and 'shouted' at him, saying that his actions had been 'over the top' and 'too left wing'. This was referred to as the 'picketing' incident.

Further incidents: Subsequently, H claimed that he was subjected to a hostile work environment. In particular:

- H was threatened with disciplinary action when he refused to retract a statement he had made to his local Labour Party about his 'extremely onerous workload', which the GMB viewed as untrue and reflecting badly on it. This was referred to as the 'workload' incident.

- H was refused permission to work from the Chelmsford office during the London Olympics, ostensibly due to a lack of computer facilities at that office (an explanation which was later found to be untrue). This was referred to as the 'Olympics' incident.

Dismissal: Ultimately, H was summarily dismissed following disciplinary proceedings which found him guilty of gross misconduct by challenging the authority of line management and the Regional Secretary, and making serious allegations of collusion between the GMB and the Labour Party (in respect of H's suspension from the Labour Party).

Tribunal finds discrimination: The Tribunal rejected H's unfair dismissal claim, finding that he was fairly dismissed for gross misconduct. However it held that his dismissal did amount to unlawful discrimination on grounds of his protected "left-wing democratic socialist" beliefs, since these formed a substantial part of the reasoning for his dismissal. It also upheld H's harassment claim, finding that the three incidents outlined above were related to his protected beliefs and had the purpose of creating an intimidating, hostile or humiliating environment for him.

Fair dismissal may be discriminatory: The EAT dismissed H's appeal in relation to his unfair dismissal claim, which was based on the contention that it must be an error of law to find a dismissal to be both fair and discriminatory. The EAT found that although this may appear contradictory, there is no reason in principle why such a conclusion cannot stand. The two statutory tests are different: unfair dismissal focusing on the reason or principal reason, whereas discrimination need only be more than a trivial reason or ground for the dismissal.

No discrimination: However, the EAT allowed the GMB's appeal in relation to the discrimination finding, which it found was based on assumptions which were unsupported by the evidence. The EAT did not accept that challenging the authority of line management or making unsubstantiated allegations of collusion had anything to do with left-wing democratic socialism.

No harassment: The EAT also found nothing in either the 'workload' incident nor the 'Olympics' incident to suggest that either had anything to do with H's protected beliefs. It viewed both incidents as "quite obviously trivial". The EAT accepted that the 'picketing' incident did involve a direct link to H's protected belief (in the comment that he was being "too left-wing"). Nonetheless, it found that the Tribunal had failed to consider the context of the telephone call, which was the high profile political difficulties H's actions were perceived to have caused Ed Miliband. It concluded that this isolated incident did not reach the degree of seriousness required to amount to harassment.

Politically-charged actions: This decision is relatively topical, as the run-up to the General Election may see more employees expressing their political views in the workplace. Whilst such views may amount to protected beliefs for discrimination purposes, as this case shows, this will not necessarily prevent employers taking action on the basis of an employee's misconduct, rather than his beliefs.

Points in practice

Women on boards: Fourth annual progress report

Lord Davies has published his fourth annual progress report Women on boards (2015). The report reveals that as at 1st March 2015, women accounted for **23.5% of FTSE 100** and 18% of FTSE 250 board positions, an increase from 12.5% and 7.8% respectively in February 2011 when the initiative began. The report also notes that there are no remaining all-male boards in the FTSE 100 (although 23 remain in the FTSE 250), and that in order to reach the target of 25% female board representation by the end of 2015, only 17 more women need to be appointed to FTSE 100 boards.

The report also sets out the following focus points for 2015:

- All FTSE 350 companies currently below target to progress towards 25%
- Remaining all-male boards to appoint at least one woman to their board in 2015
- Supporting the appointment of more women Chairmen and Senior Independent Directors
- FTSE 350 companies to encourage internal initiatives aimed at re-stocking their executive pipeline of women and highlight female talent through sharing case studies/career insights to inspire women further down in their organisations
- FTSE 250 companies to improve disclosures and meaningful reporting on gender diversity

The report also calls for greater unity and consistency of approach from the investor community on board diversity, and suggests the development of best practice guidelines.

Whistleblowing: BIS guidance and code of practice

BIS has released a new publication Whistleblowing: Guidance for Employers and Code of Practice (March 2015). The Guidance sets out best practice for employers in handling whistleblowing, including formulating a whistleblowing policy (and what it should contain), communicating and training employees on the policy, disclosures versus grievances, dealing with disclosures, confidentiality and external disclosures. This is then summarised in the short Code of Practice annexed to the back of the Guidance.

Collective redundancy consultation: Insolvency Service call for evidence

The Insolvency Service has launched a Call for Evidence: Collective Redundancy Consultation for Employers facing Insolvency (March 2015). The call for evidence seeks to understand what happens in consultation with employees when businesses are imminently facing, or have moved into, formal insolvency, and what suggestions there are for how outcomes for both employees and businesses might be improved. It invites evidence and views on:

- general understanding of the current requirements, their purpose and benefits;
- factors that facilitate and/or inhibit effective consultation;
- the role of directors and insolvency practitioners; and
- ensuring timely notification and effective consultation

The document states that while the current system generally works well, recent employment tribunal findings have highlighted that there could be further improvements (neither the findings nor the improvements are further specified).

The call for evidence closes on 12th June 2015. The responses will then be considered and a decision made as to whether or not any policy changes are necessary.

In a related development, a report has been jointly published by Parliament's Scottish Affairs and Business, Innovation and Skills Committees into the closure of City Link, which went into administration in December 2014. The report finds that under the current rules it is clearly in the financial interest of a company to ignore the statutory redundancy consultation period, if the fine for doing so is less than the cost of continuing to trade, especially since this fine will be paid by the taxpayer. The report makes a number of recommendations, calling on the incoming government to:

- support dialogue between unions, employers and insolvency professionals to develop best practice guidance for the sharing of information with employees and unions when an administration order is under consideration;
- review and clarify the requirements for consultation on redundancies during an administration so that employees understand what they can expect and company directors and insolvency professionals have a clear understanding of their responsibility to employees; and
- update the order of payments in the Insolvency Act 1986 to give preference to all of a company's workers, regardless of whether or not they are directly employed, and give consideration as to how best to deal with the employees of small sub-contractors and suppliers.

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