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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

### New rates of statutory payments from April 2015

The Government has confirmed that the rates of various statutory payments will increase by 1% for the tax year 2015-2016:

- 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).

## Cases round-up

### AG Opinion on collective redundancies "at one establishment"

The Advocate General (AG) of the ECJ has given his Opinion in an important case concerning the trigger for collective redundancy consultation. In his Opinion, the concept of an "establishment" has a uniform meaning for these purposes under the Collective Redundancies Directive (i.e. "*the unit to which the workers made redundant are assigned to carry out their duties*"). Importantly, he determined that the Directive does not require that dismissals are aggregated across the employer's entire undertaking in order to determine if collective redundancy consultation obligations are triggered (*Lyttle v Bluebird UK Bidco 2 Ltd*; *Cañas v Nexea Gestión Documental SA, Fondo de Garantía Salarial*; and *USDAW v WW Realisation 1 Ltd (in liquidation) – known as 'the Woolworths case'*).

**Background**: Article 1(1)(a) of the Directive provides for two alternative triggers for collective redundancy consultation obligations; both of which relate to a set number of dismissals at an "establishment" within a certain time period. The UK has chosen to implement part (ii), which is "*over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question*." This is implemented via section 188(1) TULR(C)A 1992, which applies "*where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less*".

**Redundancies in retail businesses**: The joined cases involved large-scale redundancies in retail businesses (including Woolworths). In each case, stores with less than 20 employees were excluded from the collective redundancy regime, as each store was treated as a separate "establishment". This meant that employees of those stores were not included in the collective consultation process, and did not receive protective awards for the employer's failure to fully comply with that process.

**Tribunal claims**: Claims were lodged on behalf of those employees alleging that the "*at one establishment*" qualification in section 188(1) TULR(C)A 1992 failed to comply with the Directive. That argument was upheld by the EAT, which held that the words "*at one establishment*" should be treated as deleted from section 188(1) (see Employment Bulletin 4th July 2013, available here). The Court of Appeal made a reference to the ECJ to determine the correct position under the Directive.

**Meaning of "establishment"**: The AG's Opinion was that the concept of "establishment" should have the same meaning under both triggers in part (i) and part (ii) of Article 1(1)(a) of the Directive – namely "*the unit to which the workers made redundant are assigned to carry out their duties*". His view was that a coherent interpretation of the concept was necessary to facilitate the uniform application of EU law, to enhance legal certainty, and to increase transparency and forseeability for employers who decide to restructure their businesses.

**No need to consider whole undertaking**: The AG's view was that the Directive does not require aggregating the number of dismissals in all the employer's establishments for the purposes of verifying whether the thresholds in parts (i) and (ii) of Article 1(1)(a) are met.

**Local focus**: The AG stressed that the socio-economic effects of collective redundancies are most keenly felt in a local context. Even if the aggregate number of dismissals effected in a restructuring process is high on a national scale, this does not say anything about how those effects are felt locally (when in fact a few local jobseekers may be more readily reabsorbed into the employment market). This in his view contradicted the idea that collective redundancies must be considered across the employer's whole undertaking.

**Employee protection not paramount**: The AG noted that although the Directive aims to provide minimum protection with regard to the information and consultation of workers in the event of collective redundancies, it does not contemplate as a starting point full protection for all, given the numeral and temporal thresholds which exist in both parts (i) and (ii). He stated that it was always intended by the EU legislature that those parts would provide protection for different sets of employees in different circumstances.

**Where are we now?** Although the AG's Opinion is helpful for employers, it does not overturn the EAT's decision, which remains binding for now. It is also possible (although not likely) that the ECJ may take a different approach when it delivers its judgment later this year. For the time being, the safest approach is for employers to continue to assume that collective redundancy consultation will be required whenever 20 or more dismissals are proposed within 90 days or less, across the employer's entire business.

## Changing terms and conditions: unilateral changes by the employer

Two recent cases have found (on similar facts) that the employer did not have the right to make unilateral changes to terms and conditions incorporated into employment contracts from staff handbooks. The contractual flexibility provisions in both cases were found to be insufficient to create a right to make the unilateral changes.

*Case 1 (Norman v National Audit Office)*

- **Sick pay and privilege leave**: This case concerned provisions of an HR manual which entitled employees to sick pay (at six months full pay and six months half pay) and 'privilege leave' (of two and a half days). Each employee's letter of appointment incorporated the provisions of the HR manual, which (at clause 2 of the letter) were stated to be "…*subject to amendment; any significant changes affecting staff in general will be notified by [circulars or orders], while changes affecting your particular terms and conditions will be notified separately to you*".
- **Unilateral changes…** The NAO, following failed negotiations with the recognised trade union, made unilateral changes to reduce the amounts of sick pay and privilege leave, which it then notified to affected employees. N sought a declaration that the purported variation was ineffective and his original terms continued to apply. The Tribunal refused the application, finding that clause 2 gave the NAO a unilateral power to vary. N appealed.
- **…were not permitted**: The EAT allowed N's appeal. It held that clear and unambiguous language is needed to create a right to vary a contract unilaterally. In this case, the wording of clause 2 was insufficient. It did no more than acknowledge that changes to the HR manual might be made, and that employees would be informed of any changes. It did not establish what the mechanism of amendment might be, much less establish a right for the employer to make unilateral changes. The EAT therefore granted a declaration that N's original terms remained valid.

*Case 2 (Sparks v Department for Transport)*

- **Sickness absence procedure**: This case concerned provisions of a staff handbook which contained a sickness absence management process. This provided (at clause 10.1.18) that where sickness absences exceeded 21 days in any 12

month period, this would activate a disciplinary procedure. The contracts of employment expressly incorporated the staff handbook.

- **Unilateral changes**: The DoT unilaterally introduced a new sickness absence management process, with reduced triggers (after five days' absence rather than 21). S, one of the affected employees, applied for a declaration that the original sickness absence management process continued to apply on the basis that it was not validly amended.

- **Procedure was contractual**: The High Court granted the declaration. It began by confirming that the sickness absence management process was apt for incorporation into individual contracts. Although this would not usually be the case for a sickness absence management process (particularly where it contained mere guidance as to the initial stages, and no triggers for further action), the contents of clause 10.1.18 were clearly and precisely set out, dealt with a later stage of the process, and included triggers. It was therefore found to be contractual.

- **Changes were not permitted**: The Court went on to find that clause 1.3.1 of the handbook gave the DoT the right to make unilateral changes, but only if they were not detrimental to employees, and if the changes had first been the subject of consultation with the recognised trade union. On the facts of this case, the Court was clear that the changes would be seen as detrimental by any reasonable worker, given that the trigger points had been brought forward, and in its view could lead to employees being less willing to take necessary sickness absences in an effort to not trigger the disciplinary procedure. As the change was detrimental, it had not been permitted by clause 1.3.1, and the Court granted the declaration that the original terms remained in force.

**Clear drafting required**: The lesson from these cases is that clear drafting is needed if a unilateral right to amend contractual terms is to be effective. It is now clear that simply providing that changes will be notified to employees will not be sufficient. One successful example of a clause which permitted unilateral variations is: "*The company reserves the right to revise, revise, amend or replace the content of this handbook*" (*Bateman v ASDA*).

### No age discrimination in changes to terms and conditions following TUPE transfer

An employer's decision to impose new terms and conditions following a TUPE transfer did not amount to unlawful age discrimination, according to a recent decision of the EAT. Although the decision did put employees in the age group 38-64 at a particular disadvantage, it was justified as a proportionate means of achieving the employer's aim of reducing staff costs to ensure its future viability and having in place a market-competitive, non-discriminatory set of terms and conditions (*Braithwaite v HCL Insurance BPO Services Ltd*).

**Multiple t&c's following TUPE transfers**: A group of employees (together B) were originally employed by an insurance company (L). Many of L's employees had previously transferred to it under TUPE, and therefore numerous different terms and conditions were in place. When L transferred its business to HIBS, B's employment transferred to HIBS under TUPE. As a result, HIBS inherited employees whose terms and conditions differed substantially from others in its workforce.

**Harmonising terms to save costs**: As HIBS was incurring multi-million pound losses, it decided to introduce standardised terms and conditions for all employees, which would remove a number of benefits previously enjoyed by B. These included contractual entitlements to private health insurance, carer days and enhanced redundancy payments, and amending their working hours to 37 hours per week (an increase in most cases) and annual leave to 25 days a year (a decrease in most cases). The changes were made following consultation with employees, but ultimately

all employees were informed that they would be dismissed if they did not agree to the new terms. Some agreed and began working under the new terms; others refused and were dismissed. B claimed that the imposition of the new terms amounted to indirect age discrimination.

**Disadvantage to older employees**: The Tribunal found that the HIBS had applied a PCP that if its employees wished to remain employed, they were required to enter into a new contract (in B's case with reduced terms). It held that this PCP put older workers in the age band 38-64 at a particular disadvantage, because they had built up greater entitlements through longer service. However, the Tribunal accepted HIBS's argument that the PCP was a proportionate means of achieving its legitimate aim: to reduce staff costs to ensure the business's future viability and to have in place market-competitive, non-discriminatory terms and conditions.

**Changes were justified**: The EAT dismissed B's appeal. It found that the legitimate aim identified by the Tribunal was not solely based on cost (which would not be permitted), as saving cost was an inevitable consequence of the aim to ensure its future viability with market competitive non-discriminatory terms and conditions. In considering proportionality, the Tribunal had properly considered the alternative options available to HIBS (such as seeking voluntary redundancies, reducing rather than eliminating the benefits, reducing salaries, relying on a further bail-out from the parent company and staggering implementation over a three year period). The Tribunal had concluded that none of the alternatives would have achieved the necessary cost savings nor addressed the anomalies in terms and conditions. It was therefore proportionate for HIBS to implement the changes in the way it did; the process was carefully planned and implemented. The EAT was satisfied that the Tribunal had carried out the necessary balancing exercise between the needs of HIBS and the discriminatory effect on B. Therefore, the finding of objective justification was upheld.

**Good news for employers**: This decision is useful for employers seeking to make changes to terms and conditions following a TUPE transfer. If such changes run the risk of being discriminatory due to the age profile of the affected employees, the employer may be able to justify its actions based on a need to maintain its future viability with market competitive non-discriminatory terms and conditions.

## Points in practice

### Reminder: registration and self-certification of share schemes

A reminder that a new registration regime now exists for all share schemes, as well as a new regime of self-certification for tax-advantaged schemes (i.e. Share Incentive Plans (SIP), Save As You Earn option schemes (SAYE), Company Share Option Plan schemes (CSOP) and Enterprise Management Incentives (EMI)). This self-certification regime replaces the previous HMRC scheme approvals process.

This means that:

- existing schemes established before 6th April 2014 must be registered (and self-certified, if applicable) by 6th July 2015.
- new schemes established on or after 6th April 2014 must be registered (and self-certified, if applicable) by 6th July following the end of the tax year in which the first awards were made. Therefore, if awards have been made in the 2014-15 tax year, the deadline is 6th July 2015.

If the deadlines are not met, the tax advantages may be lost, in relation to SIP or SAYE awards or exercises made on or after 6th April 2014, as well as

any outstanding CSOP options (regardless of when these were granted). For further details, see our Employment Bulletin 16th April 2014, available here.

If you have not already registered and self-certified your schemes (perhaps it was one New Year's Resolution you haven't quite got round to yet), you should aim to do so as soon as possible. If you require any assistance with this process, please speak to your usual Slaughter and May contact.

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