SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

13 January 2017 / Issue 1

Legal and regulatory developments in Employment/Employee Benefits

In this issue

To access our Pensions Bulletin visit the Slaughter and May website.

Contents include:

Back issues

More about our pensions and employment practice

Details of our work in the pensions and employment field

For more information, or if you have a query in relation to any of the above items, please contact the person with whom your normally deal at Slaughter and May or Clare Fletcher.

New Law

What to expect in employment law in 2017

2017 will see a number of key developments in employment law. The most significant to note at present are:

1. **Gender pay gap reporting:** With effect from this April, employers with more than 250 employees will be required to capture and report specific gender pay gap data. In summary, affected employers must analyse their gender pay gap each April (using a relevant pay period which includes the 'snapshot' date of 5th April), and publish a report within 12 months. 'Pay' for these purposes includes basic pay and bonuses, as well as allowances and shift premiums, but excludes overtime, expenses and benefits in kind. Employers must divide their employees into four quartiles and calculate both mean and median hourly pay for the men and women in each quartile. They must also disclose the proportion of male and female employees who received a bonus in the previous 12 months. Employers will be able (but not required) to publish a narrative explaining their data and any gender pay gap it reveals.

2. **Employment status** will continue to be a hot topic in 2017, with a number of further cases expected in the "gig economy" (see the *CitySprint* case below). The Taylor Review launched by BEIS at the end of 2016 is expected to conclude in July 2017, and will consider the implications of new models of working on the rights and responsibilities of workers, as well as on employer freedoms and obligations.

3. The implications of **Brexit** for employment law will hopefully become clearer in 2017. The government has so far refused to guarantee employment protections post-Brexit, stating only that the Great Repeal Bill would convert existing EU law into domestic law "wherever practical". The continuing effect of ECJ judgments, and EU law itself, on cases involving domestic legislation originating from EU law after Brexit is another area of uncertainty.

4. **The Trade Union Act 2016** will introduce, among other measures, significant changes to the balloting rules for industrial action.

5. A number of reforms will affect **the financial services sector**, including new rules on regulatory references, buy-outs of variable remuneration for PRA-regulated firms, and the possible extension of the new senior managers and certification regime to all persons authorised under FSMA.

6. Finally, we anticipate key case law developments in relation to **holiday pay** and **whistleblowing**, among other areas.

For further information or advice on how these developments may affect your business, please speak to your usual Slaughter and May contact.

Cases Round-up

CitySprint courier was a "worker" not self-employed

An employment tribunal has found that a cycle courier working for delivery firm CitySprint should be classified as a "worker", and as such was entitled to receive holiday pay (*Dewhurst v Citysprint UK Ltd*).

The courier: D is a cycle courier. She has worked for C since October 2014, usually four days a week, within central London. Each courier carries an electronic "Citytrakker" device which tracks their whereabouts and helps to manage their jobs. Couriers log in to the device at the start of the day and stay logged in until the end of the day. Work allocation is determined by C's "controllers", who are in regular contact with the couriers by phone and radio. Couriers are provided with a uniform, bag, Citytrakker device and ID, in return for a weekly deduction from their pay.

The contract: C's standard contract with its couriers is described as a "Confirmation of Tender to Supply Courier Services"; it characterises couriers as "contractors" providing courier services, and requires them to agree and warrant that they are self-employed and are not employees or workers.

Claim succeeded: The Tribunal had little hesitation in upholding D's claim to be a worker. It found that the contract did not reflect the reality of the relationship between the parties in a number of key respects, including:

- the provision stating that the couriers had discretion over the manner in which the services were performed. This was not the case in reality (save for the route, which the couriers could determine). C exercised significant control over the couriers, for example by requiring them to "smile with their greeting" and dictating what should be done if a parcel could not be delivered;
- the suggestion that couriers could pick and choose jobs and undertake work for others when "on circuit"; this was simply not the case in practice; and
- the supposed right of substitution in the contract was so prescribed as to only enable a courier to ask for a job to be reallocated to another of C's couriers (and there was no evidence that any other form of substitution had ever taken place).

Courier was integrated: The Tribunal found that D was contracted to provide personal service, and to do so as an integrated part of C's business. There was no real question of C being a customer of any business undertaken by D, since D had little autonomy to determine the manner in which her services were performed, and no chance at all to dictate its terms. Significantly, C kept records of when D worked and paid her accordingly (subject to certain deductions). This, the Tribunal found, was a payslip in all but name, and a far cry from the invoices typically submitted by self-employed contractors.

Only a worker when "on circuit": Finally, the Tribunal concluded that D was only a "worker" during the time when she was "on circuit" (i.e. from the moment she turned on the Citytrakker in the morning until she signed off at night). Having reached this decision, it noted that if (as the evidence suggested) some couriers log in to the Citytrakker when at home, C may need to put in place rules which tell its "workers" not to log on until they are ready to work.

Wider relevance: The Tribunal was at pains to stress that this was an individual claim by one courier. Nevertheless it acknowledged that "it may have implications for her colleagues", namely the approximately 3,200 other couriers currently working for CitySprint in the UK. Employment status in the gig economy looks set to remain a hot topic for 2017, with a number of similar cases pending in the coming months against Addison Lee, eCourier and Excel. Uber is also seeking leave to appeal its tribunal judgment from November last year (see our Employment Bulletin dated 4th November 2016).

More generally, the judgement is a reminder that a contract may be set aside where it does not correspond with practical reality. Businesses should regularly review their contracts to ensure that the contractual terms reflect what actually happens in practice. A finding of this nature can have serious implications for employers who may, for example, unexpectedly become liable for paid holiday and minimum wages of their 'workers'.

Unfair dismissal: relevance of expired warnings

An employer may rely on the employee's disciplinary record when deciding whether to dismiss, even (in some cases) if there are no live disciplinary warnings at the time of dismissal, according to a recent EAT decision (*Stratford v Auto Trail VR Limited*).

Disciplinary record: The case involved an employee with a poor disciplinary record (consisting of 17 items spanning the entire period of his employment), who was then seen with his mobile phone on the factory floor, in contravention of a strict prohibition on such conduct in the employee handbook. There were no live disciplinary warnings on his file at this point.

Employer's determination: The employer determined that the offence did not amount to gross misconduct and would warrant a final

written warning, but that given the employee's record and the employer's belief that there would inevitably continue to be further disciplinary incidents in the future, it took the view that he should be dismissed with pay in lieu of notice.

Fair dismissal: The EAT dismissed the employee's appeal against the finding of fair dismissal. It confirmed that an employer may rely on expired disciplinary warnings when deciding whether to dismiss, albeit that the expiry as well as the warnings themselves would be relevant factors when determining the fairness of the dismissal.

Practical lessons for employers: This case does not establish that it will always be fair for an employer to take account of expired warnings, only that it may be fair to do so, depending on the other circumstances of the case (including the nature of each instance of misconduct, and any mitigating factors).

The decision does highlight the importance of an employer imposing warnings appropriately. In this case the last warning the employee received was for three months. Had it been imposed as a final warning for 12 months (as the ACAS Guide envisages), it would still have been live at the time of dismissal, and would have made it easier for the employer to dismiss fairly.

Disability discrimination: employer's knowledge

Employers who know that an employee has a disability must consider what the consequences and effects of that disability might be. This is because they may be liable under section 15 of the Equality Act 2016 for any unfavourable treatment because of something arising in consequence of the disability, even if the employer is not aware of that consequence, according to a recent EAT decision (*City of York Council v Grosset*).

Cystic fibrosis impedes workload: G was employed by CYC as Head of English at a secondary school. He suffered from cystic fibrosis, and CYC accepted that that he was a disabled person. In 2013 a new Head Teacher (C) was appointed at the school, and G was required to take on additional workload and other pressures. G raised concerns that he could not cope with these, given the difficulties arising from his disability, but his concerns were not fully accepted or addressed by C. G's health deteriorated until he was signed off at the end of November 2013.

Misconduct and dismissal: C then discovered that some weeks earlier G had shown the film *Halloween* (which was 18 rated) to a group of vulnerable 15 and 16 year old students in one of his lessons. G accepted that this had been inappropriate and regrettable, but argued that he had been affected by stress, contributed to by his cystic fibrosis. G was summarily dismissed and his appeal was rejected.

Discrimination during employment: The Tribunal found that imposing the additional workload and other pressures on G amounted to discrimination arising from disability and failure to make reasonable adjustments. It found that, as a consequence of his disability, G was required to spend up to three hours a day in a punishing regime of physical exercise to clear his lungs. This severely restricted the time and energy available to enable him to adapt to sudden or significant increases in workload. In turn, the additional stress exacerbated G's medical condition and left him unable to cope with the very significant additional workload.

Dismissal also amounted to discrimination: The Tribunal also found that G's subsequent dismissal also amounted to discrimination for the purposes of section 15 – a finding that was upheld by the EAT. The key factor was the medical evidence before the Tribunal – which was fuller and more relevant than that which CYC had when making its decision. The evidence showed that G had shown the film while suffering from an impaired mental state such that errors of judgement might be anticipated. It also showed that his impaired mental state was more likely than not caused by the stress that he was under, and, in very large part, that stress arose from his cystic fibrosis.

Causal link is loose: The EAT stressed that the causal link under section 15 is relatively loose; it was sufficient in this case that G's misconduct was caused by his impaired mental state, which in turn was caused by the stress which was related to his disability. The fact that CYC did not have the medical evidence to make this link

at the time of dismissal was immaterial; it was an objective test for the Tribunal to answer on the evidence before it. An employer only escapes liability under section 15 if he does not know (and could not reasonably be expected to know) that the employee is disabled. In this case CYC knew of the disability and were considered to be 'on notice' of the potential difficulties that he might suffer.

Warning for employers: This case illustrates the pitfalls awaiting employers who are aware of an employee's disability, but not of the full effects and consequences of that disability. This is an area in which an occupational health referral can be of real assistance to employers. In this case G was only referred to occupational health when he was already on sick leave, which did not assist CYC when it came to the decision to dismiss. Although CYC was not criticised for not having obtained the evidence which the Tribunal later relied on, this evidence was pivotal to the claim. Employers should therefore ensure that they seek appropriate medical evidence in a timely fashion. Once they are on notice of a disability, they will be exposed to liability for any unfavourable treatment even if the link between that and the disability is not immediately apparent.

Disability discrimination: stress versus depression

An employee on long-term sickness absence with stress was found not to be "disabled" for discrimination purposes, in a decision which gives helpful guidance on the distinction between depression and stress for these purposes (*Herry v Dudley Metropolitan Council*).

Employee on long-term sick leave with stress: H was employed by DMC as a Design & Technology teacher. H was diagnosed as suffering from dyslexia, but did not mention this to DMC or his colleagues or ask for any adjustments. H had high levels of sickness absence, and his sickness certificates for his continuous absence from October 2013 onwards exclusively referred to "stress at work" "work related stress" "stress" or "stress and anxiety". H lodged a significant number of historic claims against DMC, all of which were dismissed. H told the Tribunal that he was dyslexic and asked for adjustments, which were made. The Tribunal however dismissed H's claim to be disabled on the basis of either his dyslexia or stress.

Stress versus depression: The EAT dismissed H's appeal. It distinguished between clinical depression (which is likely to amount to a disability) and stress as a reaction to adverse circumstances. The latter, it found, would usually not give rise to the requisite long-term substantial adverse effect on the individual's ability to carry out normal day-to-day activities. H fell within this latter category; his stress was a reaction to difficulties at work.

Long-term absence is insufficient: The EAT rejected H's argument that his long period of absence from work was evidence of the "long-term" adverse effect on H; the EAT noted that a long period off work is not conclusive of the existence of a mental impairment, since there can be cases (and this was one) where a reaction to adverse circumstances becomes entrenched, without amounting to a mental impairment.

Relevance of Tribunal treating H as disabled: The EAT also rejected H's argument that since the Tribunal had made adjustments for his dyslexia, it should have found him to be disabled. Such a finding would suggest that conducting employment tribunal proceedings should be classed as a "normal day-to-day activity" for these purposes. While the EAT noted that activities which are relevant to participation in professional life must be included in this definition, appearing at an employment tribunal was not an activity relevant to his professional life as a Design & Technology teacher. Although both activities require reading, writing and comprehension, the nature of these required in each case was seen as very different.

Practical considerations: This case is a useful reminder of the distinction between depression and stress for disability discrimination purposes. It is also helpful in demonstrating that if an ET agrees to make adjustments for a claimant, this is not determinative of the existence of a disability for employment law purposes (particularly since this must be judged at the material time for the matters which are the subject of the claim, not at the time of the litigation).

Points in Practice

Gender pay gap reporting: government response to second consultation on draft regulations

The government has published its response to its second consultation on the draft gender pay gap reporting regulations. The response comments on the changes made to the final form draft regulations (see our Employment Bulletin dated 16th December 2016), in particular:

- the requirement for group companies to report at individual entity level, rather than on an aggregate group basis;
- the introduction of the term "full-pay relevant employee" to exclude employees on reduced or nil pay during sick or family leave; and
- the valuation of shares and share options by reference to the point at which income tax liability arises.

The final draft of the gender pay regulations is currently before Parliament for approval, and is due to come into force on 6th April 2017. The government is also working with ACAS on non-statutory guidance, which it aims to publish once the regulations have been approved by Parliament.

Executive pay under fresh attack

The Financial Times has reported that a new academic study by Lancaster University Management School has found a "negligible" link between high executive pay and good business performance. The study found that:

- although executive pay increased by 82% in the ten years to 2014, business performance (as measured by the median economic return on invested capital) increased by less than 1% over the same period; and
- the median pay package for a FTSE 350 chief executive has increased from £1 million in 2003 to £1.9 million.

The High Pay Centre has also released research showing that the median earnings of a FTSE 100 CEO had surpassed the average UK annual earnings (£28,200) by midday on Wednesday 4 January 2017 (what it termed "Fat Cat Wednesday"). It also found that the average pay ratio between FTSE 100 CEOs and the average total pay of their employees in 2015 was 129:1.

The government has recently published a Green Paper on corporate governance reform (see our Employment Bulletin dated 16th December 2016), which (amongst other things) considers what changes might be appropriate to the current executive pay regime. The Green Paper invites responses by 17th February 2017.

If you would like further information on these issues or to discuss their impact on your business, please speak to your usual Slaughter and May contact.

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact Jonathan Fenn or your usual Slaughter and May adviser.

541644433