SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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Legal and regulatory developments in Employment/Employee Benefits

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Cases Round-up

Gross misconduct: negligent dereliction of duty

A manager who negligently failed to ensure that a key company policy concerning staff engagement was properly carried out was guilty of gross misconduct, according to a recent judgment of the Court of Appeal (*Adesokan v Sainsbury's Supermarkets Ltd*).

Key policy: A was employed by SS as a regional operations manager, responsible for 20 stores. SS had a key and longstanding company policy called "Talkback", designed to ensure staff motivation and engagement. Staff were asked to give information in confidence about their working environment. The results were used to influence performance progression, target setting and decisions about pay, bonus and staff deployment. SS placed great emphasis on the integrity and validity of the process.

Management failure: In June 2013, one of SS's HR managers (B) sent an email to A's store managers encouraging them to focus on getting their "most enthusiastic colleagues to fill in the survey". This would potentially undermine the Talkback survey results. When A became aware of the email, he told B to clarify what he meant with store managers. B failed to do so, and A did not check whether he had done so. When A became aware that B had failed to follow his instructions, A took no further action.

Summary dismissal: The CEO of SS was then anonymously sent a copy of the email, and commenced disciplinary proceedings against A. The disciplinary policy defined gross misconduct to include "*any [other] serious breach of procedure or policy that leads to a loss of trust and confidence*". A was found guilty of gross misconduct on this basis, for failing to take adequate steps to remedy the manipulation of the Talkback scores. A's wrongful dismissal claim was rejected by the High Court.

What is gross misconduct? The Court of Appeal dismissed A's appeal. It commented that it is not just dishonesty or intentional wrongdoing which may constitute gross misconduct; it can be conduct which is seriously inconsistent with the employee's duties (which in an appropriate case may include gross negligence). The focus must be on the damage to the relationship between the parties.

Serious dereliction of duty: The Court noted that A had been responsible for ensuring the successful implementation of the Talkback policy in his region. Once he was aware that the integrity of the process was at risk as a result of the email, it was his duty to ensure that it was remedied. Requiring B to clarify the situation was not enough, and was plainly insufficient once he knew that his order had been ignored. Given the significance placed by SS on Talkback, the High Court was entitled to find that it was a serious dereliction of A's duty. This constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. A seemed to have been indifferent to what in SS's eyes was a very serious breach of an important procedure. The fact that no harm was actually caused was not a mitigating factor.

Lessons for employers: This case is a useful illustration of how gross misconduct may be established without dishonesty or intentional wrongdoing. It demonstrates that managers have a responsibility not just to issue instructions, but to ensure that their instructions are followed. If there is a failure to follow through, and the manager knows that his instructions have not been followed, his inaction may amount to gross misconduct (although this will always depend on the surrounding circumstances).

Unfair dismissal for refusal to move under mobility clause

When two employees refused to relocate under a contractual mobility clause, their dismissals were found to be unfair. However, they were not entitled to statutory redundancy payments, despite the reason for the relocation being the closure of their workplace (*Kellogg Brown & Root (UK) Ltd v Fitton and Ewer*).

Mobility clause: F and E were both employees of KBR, based at its Greenford site. Their contracts contained the following mobility clause:

"The location of your employment is [ ] but the company may require you to work at a different location including any new office location of the company either in the UK or overseas either on a temporary or permanent basis. You agree to comply with this requirement unless exceptional circumstances prevail."

Relocation: In 2015 KBR decided to close its Greenford site and move its operations to its other base in Leatherhead, and to relocate all of the Greenford employees to Leatherhead using the mobility clause. F and E both objected to their relocation, primarily on the basis of the significant increase in travel time involved. KBR determined that F and E had refused a reasonable management instruction to relocate, which amounted to misconduct justifying their summary dismissal.

Redundancy? The Tribunal upheld F and E's claims of unfair dismissal and entitlement to a statutory redundancy payment (SRP). It found that they had been dismissed by reason of redundancy, the closure of the workplace constituting a redundancy for the purposes of section 139 of the Employment Rights Act 1996. The Tribunal also found the dismissals to have been unfair, whether that termination was by reason of redundancy or, as KBR had argued, for conduct.

No SRP: The EAT allowed KBR's appeal in relation to the SRP. Although there had been a redundancy situation, the reason for dismissal in KBR's mind was its honest and genuine belief that it was a reasonable instruction to invoke the mobility clause, and F and E had refused to obey that instruction. KBR had been entitled to rely on that conduct reason notwithstanding the background of the workplace closure. F and E were therefore not entitled to SRP.

Unfair dismissal: The EAT however dismissed the appeal on unfair dismissal. It found that the Tribunal had considered conduct as the reason for dismissal (in the alternative to redundancy), and had taken the right approach by posing the following three questions:

1. Was the instruction to relocate lawful? (i.e. was it capable of being given under the contract of employment?). The Tribunal found that it was not; the clause was very widely drafted and lacked certainty. It also noted that KBR had treated other employees with childcare or elderly parent caring responsibilities as having "exceptional circumstances" in order to avoid the application of the mobility clause, but it did not treat F and E as having exceptional circumstances;

2. Had KBR acted reasonably in giving that instruction? The Tribunal found that it had not, given the greatly increased travel time for F and E (an additional 20-30 hours' commute each week). The Tribunal had acknowledged the alleviating steps taken by KBR (namely, to make a contribution to increased travel costs for six months, offering flexible working where possible, and reducing core times to assist travel), but found them to be of no assistance in F and E's circumstances; and

3. Had F and E acted reasonably in refusing to comply with that instruction? The Tribunal had found that they had, given the substantial increase in travel time, and that F had brought a property near to his former workplace and did not have a car, and that E had worked near to his home town for KBR for 25 years, and was due to retire a year later.

The EAT concluded that these findings were permissible on the evidence before the Tribunal, and there was no basis for overturning the decision on unfair dismissal.

'Redundancy' and mobility: This case is a reminder that where a redundancy situation exists, "redundancy" will not necessarily be the reason for dismissal. It is also a reminder that mobility clauses must be exercised reasonably (and this is judged on an individual basis; the alleviating steps taken by the employer in this case were found to be insufficient for these particular employees).

Dismissal for misuse of stolen confidential information not related to union activities

The retention and sharing of stolen confidential information by a trade union representative did not constitute 'trade union activities'. His dismissal was therefore not automatically unfair, according to a recent EAT decision (*Metrolink Ratpdev Ltd v Morris*).

Restructuring: M was employed by MRL and was also a representative of the Workers of England Union (WEU). In June 2014 MRL carried out a restructuring exercise, and four of the five employees who applied unsuccessfully for new roles were members of WEU. M raised a grievance on their behalf, which was successfully resolved.

Stolen confidential information: M then received an email (he did not disclose who from) containing information taken from the diary of M's line manager. The suggestion was that the information related to the restructuring assessment, and was of concern to the members of WEU who failed the assessment as M's line manager was not one of the assessors. It was accepted that the information must have been unlawfully obtained.

M's response: M retained the information and showed it to a member of MRL's HR department. When the management of MRL became aware of this, M was dismissed for gross misconduct. M claimed that his retention and sharing of the information amounted to trade union activities, meaning that his dismissal was automatically unfair. The Tribunal upheld his claim, and MRL appealed.

Limits of "trade union activities": The EAT overturned the finding of unfair dismissal. It noted that not every act carried out for trade union purposes is protected; for example, wholly unreasonable extraneous or malicious acts done in support of trade union activities might be excluded. In the EAT's judgment, dismissal for the retention of unlawfully obtained information for trade union purposes in general does not enjoy protection.

Fact-specific: This case shows how fact-specific this area of law is. The EAT did acknowledge that if the unlawfulness plays only a small part in the activities, or the unlawfulness is not deliberate, protection may not be lost. However, in this case M knew that the information was unlawfully obtained. It was held to be fanciful for M to contend that he acted properly by taking the information to HR. The EAT was clear that he should not have asked for it (which he agreed that he did in the first place) and, having received it, he should have deleted it.

Scope of collective bargaining imposed by statutory union recognition

Statutory trade union recognition obliges the employer to negotiate over 'pay, hours and holidays'. This obligation is not (as was previously held) limited to core individual contractual terms governing pay, hours and holidays. In this case the employer was in fact required to negotiate over pilots' rostering arrangements, regardless of whether those arrangements were contractual or not (*British Airline Pilots Association v Jet2.com*).

Statutory recognition: BAPA sought and obtained statutory recognition by J in relation to its pilots. The statutory scheme dictated the scope of its recognition, and provided that "*References to collective bargaining are to negotiations relating to pay, hours and holidays*".

Rostering policy: J refused to negotiate over its rostering policy, which set out a framework for assigning work, allocating days off and ensuring adequate crewing on flights. BAPA brought proceedings asserting that J was in breach of its collective bargaining obligations. The High Court dismissed the claim, finding that J's obligation was limited to contractual terms and did not extend to the (non-contractual) rostering policy.

Contractual nature irrelevant: The Court of Appeal allowed BAPA's appeal. It found no limitation in the statutory language which would restrict the scope of collective bargaining to contractual terms. The Court was also persuaded by the fact that trade union representatives and managers may find it difficult to identify whether a proposal would give rise to contractual rights. To base the borderline between negotiability and non-negotiability on such a distinction would, in the Court's judgment, be unsatisfactory.

Wide interpretation: The Court also rejected J's argument that a restrictive approach should be taken to what matters would "*relate to pay, hours and holidays*" for these purposes. The Court found nothing in the statutory language or the context to support such an approach. It noted that in many employment contexts workers' entitlement to pay or what hours they are obliged to work may not be identifiable as a simple number, but may depend on the operation of processes or procedures, or the

exercise of a managerial discretion. There may, for example, be a performance element in pay, requiring an element of evaluation. The operation of such procedures and processes was, in the Court's view, integral to the identification of the rights and obligations in question (and should therefore be within scope of negotiation).

Impact on employers: The Court's decision is unlikely to be popular with employers with statutory trade union recognition arrangements, who may now be required to negotiate with their unions on a broader basis than the High Court's judgment suggested. It is however open to employers in this situation to provide that the wider-scope collective bargaining will not give rise to individually enforceable contractual rights (this was a key concern of J's in this case, as it would have found it unworkable for the rostering policy to be contractual).

Points in Practice

Executive remuneration update

There have been a number of recent developments which are of interest in relation to executive remuneration:

1. The Pensions and Lifetime Savings Association (PLSA) has published the latest version of its Corporate Governance Policy and Voting Guidelines (January 2017). The headline change is a **tougher stance on those who set executive pay policy**, with the guidelines now recommending that if shareholders vote against a company's remuneration policy, they should also oppose the re-election of the remuneration committee chair, if they have been in post for more than a year.

   The guidelines emphasise **growing concern at the size of executive pay packages and their structure**. The PLSA believes that there is questionable evidence that pay incentives are necessary to motivate or reward executives and to achieve success for companies. It urges remuneration committees to take a critical and challenging approach to pay increases and be prepared to exert downward pressure on executive pay.

   The following have been added to the list of circumstances which **may warrant a vote against the remuneration policy**:

   - pension payments or payments in lieu of pension worth over 50% of annual salary;
   - failure to disclose or retrospective disclosure of variable pay performance conditions for annual bonuses; and
   - excessively generous salary or performance-related pay awards.

   The PLSA adds that, given that the vote on the remuneration report is advisory only and that many companies are in its view too slow to heed the message on remuneration, it is more appropriate for shareholders to vote against any remuneration report that they feel unable to support than to abstain.

2. Blackrock, the world's largest asset manager, has published an updated statement of its approach to executive remuneration. The statement calls for a **closer alignment between the fixed remuneration of executives and the rest of the workforce**, noting that it expects to see a strong supporting rationale if executive pay increases are not in line with the rest of the workforce. The same approach is applied to pensions, since Blackrock expects pension contributions for executives to be in line with the rest of the workforce. The statement calls for contracts for new executives to reflect this alignment.

3. The Financial Reporting Council (FRC) has published its annual report, Developments in Corporate Governance and Stewardship 2016. The report includes analysis of the 2016 AGM season, which showed generally **reduced support for remuneration resolutions**, and concern about a **lack of transparency in the link between executive pay and performance**. The FRC welcomes the Government's focus on this issue (via its Green Paper on corporate governance reform).

Parliamentary report: "High heels and workplace dress codes"

A recent parliamentary report "High heels and workplace dress codes", has concluded that

dress codes which discriminate against women in the workplace remain widespread, despite the prohibition on sex discrimination in the Equality Act 2010. The report follows an inquiry prompted by a petition started by receptionist Nicola Thorp, who was sent home from work at PwC without pay for refusing to wear high heels. The report finds that the framework under the Equality Act 2010 may not be fully effective to tackle this issue, as for example employers are not currently expected to take dress codes such as high heels into account while calculating health and safety risks. The report calls on the Government to:

- review this area of law and to ask Parliament to change it, if necessary to make it more effective;
- promote understanding of the law on gender discrimination in the workplace among employees and employers alike; and
- substantially increase the penalties available to employment tribunals to award against employers, as at present, such penalties are not of sufficient deterrent value.

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.

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