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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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

### Trade Union Act 2016: implementation dates

The following provisions of the Trade Union Act 2016 will come into force on 1st March 2017:

- The requirement for at least 50% of all eligible members to vote in any ballot for industrial action in order for that ballot to be valid;
- The requirement for unions to give two weeks' notice of industrial action;
- New picketing rules; and
- The requirement for unions to provide more detailed information about the outcome of ballots.

The implementation dates were confirmed during the parliamentary debate on five sets of regulations defining what constitutes an "important public service" for the purposes of the additional 40% ballot threshold. These regulations will also come into force on 1st March 2017 (although the implementation date for the 40% threshold itself has not yet been confirmed).

### New rates of National Living Wage and National Minimum Wage for 2017/18

The draft National Minimum Wage (Amendment) Regulations 2017 have been published, and will increase the rates of the National Living Wage (NLW) and National Minimum Wage (NMW) with effect from 1st April 2017, as follows:

- the NLW for workers aged 25 or over will rise to **£7.50 an hour**
- the NMW for workers aged 21 to 25 will rise to **£7.05 an hour**
- the NMW for workers aged 18 to 21 will rise to **£5.60 an hour**
- the NMW for workers who are under 18 will rise to **£4.05 per hour**
- the NMW apprenticeship rate will rise to **£3.50 an hour**

# Cases Round-up

### Refusal of time off to attend religious festivals was not discriminatory

An employer did not discriminate against its Roman Catholic employee by denying his request for five weeks' leave in order to attend religious festivals in Sardinia. On the facts, the employee was not genuine in asserting that his religious belief required his attendance at these festivals; the real reason for him wanting leave was to spend time with his family (*Gareddu v London Underground Ltd*).

**Trips to Sardinia**: G was employed by LUL as a Quality Engineer. He was a practicing Roman Catholic, and each August he and his brothers returned to Sardinia in order to be with their mother and attend religious festivals. Between 2009 and 2013 LUL permitted him to take five consecutive weeks' leave in the summer for this purpose.

**Change in policy**: However, when a new manager was appointed in 2013, G was told that it was unlikely he would be granted more than 15 continuous days of leave during the school summer holiday period. His request for five weeks' annual leave in the summer of 2015 was accordingly denied.

**Claim**: G claimed that attending festivals in Sardinia in August with his family was a manifestation of his religious belief, and that LUL's denial of this amounted to indirect religious discrimination. The Tribunal dismissed G's claim, and he appealed.

**Manifestation of belief?** The EAT dismissed G's appeal. It accepted that participation in religious festivals might constitute a manifestation of a religious belief. However, this was not established on the facts of this case. G had initially asserted that he attended

the same 17 festivals every year, and that each one had a deep religious significance. However, G did not invariably attend the same festivals, and in 2013 he had only attended nine of the 17 festivals.

**Family time was real reason**: The Tribunal had therefore been entitled to find that G was not genuine in his assertion that he needed five weeks off work in August for religious purposes. G's attendance at any given festival over this period was a matter for family consultation and decision. It was also clear that G regarded the gathering of his extended family in Sardinia in August as important in his request for five weeks' leave at that time. This was, the Tribunal found, the true or genuine reason for G wanting leave. There was therefore no discrimination.

**Lessons for employers**: This is a helpful decision for employers, in what can be a difficult and sensitive area of law to navigate. It demonstrates that, whilst employers should always treat requests for time off for religious purposes carefully, they do not necessarily need to grant requests where the evidence shows that the religious belief may not be the genuine basis for the leave.

### Dismissal for using confidential information in disciplinary process was unfair

An employee who had used confidential patient information as part of her defence to disciplinary proceedings was found to have been unfairly dismissed. Her manager had taken an unreasonably constrained approach by treating any breach of confidentiality as gross misconduct (*Portsmouth Hospitals NHS Trust v Corbin*).

**Disciplinary process**: C was employed by PHT as a long-serving senior Radiographer. In the autumn of 2014, during the course of disciplinary proceedings against her, C put together a defence pack which included extracts from 69 patients' records with only partial redaction of identifying information. This gave rise to a separate disciplinary process against C. PHT considered C's use of this information was conduct in breach of its policies, and the decision was taken that C should be summarily dismissed by reason of her gross misconduct. The Tribunal however upheld C's unfair dismissal claim, and declined to make any deduction for contributory fault.

**Unfairness**: The EAT dismissed PHT's appeal against the unfair dismissal finding. It found that the Tribunal had been entitled to conclude that the dismissing officer had adopted an unreasonably constrained approach, by taking the view that "*a breach is a breach*". This failed to allow for lesser sanctions and ignored mitigating factors identified as potentially relevant in the investigation report. The dismissing officer had erroneously taken the view that any breach of confidentiality constituted gross misconduct, despite PHT's policy documents envisaging that there may be levels of seriousness in terms of patient confidentiality, thus entitling PHT to impose various sanctions short of dismissal. The Tribunal was therefore entitled to find that dismissal fell outside the band of reasonable responses.

**Admission was irrelevant**: The EAT noted that C had admitted in cross-examination that her actions amounted to gross misconduct, but she contended that a final written warning would have been the appropriate sanction. The EAT was clear that this admission was not relevant to the unfair dismissal finding, which must be judged on the facts known to the employer as at the time of the dismissal.

**Contributory fault**: The EAT however allowed PHT's appeal in relation to contributory fault. It acknowledged that here the approach was different to unfair dismissal; the Tribunal needed to ascertain what had actually happened (i.e. whether C had actually acted in breach of contract), not simply what the employer reasonably thought had happened. The Tribunal had not answered that question, which must therefore be remitted.

**Guidance for disciplinary proceedings**: One of the mitigating factors in C's favour was that PHT's policies did not give guidance to staff undergoing disciplinary procedures about use of confidential patient information. The Disciplinary Policy simply stated that "*clarity regarding what can be disclosed and to whom, should always be sought from the manager prior to disclosure, when in any doubt*". Although PHT argued that C had sight of this policy and that she did not give any adequate explanation for why she used the data without first taking advice, this was not enough to avoid the unfair dismissal finding. This demonstrates

the importance of clear guidance on use of confidential information during disciplinary proceedings.

### Employer made unlawful offer to employees to avoid collective bargaining

An employment tribunal has found that an employer acted unlawfully by approaching employees directly to agree a pay package which it was also negotiating with the recognised union. This was in contravention of section 145B TULR(C)A 1992, which prohibits any offer being made to a union member which, if accepted, would mean that all or any of his terms of employment would no longer be determined by collective agreement (and the employer's sole or main purpose in making the offer is to achieve that result) (*Dunkley v Kostal UK Limited*).

**Pay negotiations**: D was one of a group of K's shop floor/manual employees, who were also members of the recognised union, Unite. In late 2015 pay negotiations for 2016 began, and K made an offer of a 2% increase to basic pay plus a 2% Christmas bonus (payable in December 2015). The offer was conditional on acceptance to a number of other changes to terms, including reduced sick pay and overtime rates and changes to rest breaks. Unite decided to ballot its members, resulting in 78.4% of the turnout rejecting the offer.

**First offer**: K then decided to make the pay offer to each employee individually, ostensibly because it would otherwise run out of time to pay the Christmas bonus in December. It therefore wrote to all its employees on 10th December 2015 setting out the offer, and stating that if it was not accepted no Christmas bonus would be payable. This was "the first offer", and resulted in a majority of employees accepting the offer.

**Second offer**: On 29th January 2016 K wrote to the remaining employees who had not yet accepted the pay proposal. It offered a 4% pay increase in consideration for the changes to terms, but also threatened that if no agreement was reached the employees' contracts may be terminated. This was "the second offer", and led to a ballot for industrial action and an overtime ban.

**Collective agreement**: A collective agreement in respect of pay for 2016 was eventually reached in November 2016, which endorsed the terms of the first offer. D lodged claims that both the first and second offers amounted to unlawful offers under section 145B.

**Claim upheld**: The Tribunal upheld D's claim. It determined that: "*it is not permissible for an employer to abandon collective negotiation when it does not like the result of a ballot, approach the employees individually with whom it strikes deals, and then seek to show its commitment to collective bargaining by securing a collective agreement which is little more than window dressing - having destroyed the union's mandate on the point in question in the meantime*".

**Permanent change**: The Tribunal accepted that section 145B is only concerned with offers which would result in a permanent change to terms. However, it found that this is what K's offers were designed to achieve (despite its argument that the offers were intended as interim measures until the impasse with Unite could be resolved). The Tribunal decided that, although a collective agreement for 2016 pay was eventually reached, it did not alter the permanent status of the individual agreements with employees which preceded it.

**Dismissal and re-engagement**: The Tribunal rejected K's argument that in effect it was being prevented from agreeing terms with its employees if the trade union refuses to agree, even if there is no threat to collective bargaining. The Tribunal's solution was for the employer to dismiss and re-engage on the new terms. It did not accept that the offer of re-engagement would offend section 145B (although its reasoning is not entirely clear on this point).

**Purpose of the offers**: The Tribunal went on to consider whether the first and second offers had the sole or main purpose of avoiding collective bargaining. K contended that its sole or main purpose was to ensure that employees did not lose their Christmas bonus. The Tribunal noted that the bonus was introduced into the pay negotiations by K as a bargaining tool, and it would therefore be disingenuous for K to say that it made an offer to save D from the consequences of the threat it had made. It also noted that this could not have been the purpose of the second offer, as it was made after the

December deadline for paying the bonuses had passed. Further, it was significant that the contemporaneous correspondence showed that the making of the first offer was an immediate reaction to the rejection of the pay proposals at the union ballot.
The Tribunal therefore concluded that "*[K] took the conscious decision to by-pass further meaningful negotiations and contact with the union in favour of a direct and conditional offer to individual employees who were members of that union. We therefore agree with [D] that it was "exceptionally improbable" that [K] did not intend to circumvent the collective bargaining process when it made the offers.*"

**Employers beware**: The timing of the offers to employees counted significantly against the employer in this case. Approaching employees directly in the immediate wake of a disagreement with the union will risk allegations of a breach of section 145B. It was also unhelpful that the purpose argued by the employer was also flawed in terms of timing (it ceased to be effective by the time of the second offer). Employers should therefore be particularly careful of their timing when making any direct approach to employees, as well as being able to show a genuine alternative purpose for the approach.

# Points in Practice

### Gender pay gap reporting: ACAS/GEO draft guidance

ACAS and the Government Equalities Office (GEO) have jointly published their draft guidance on the draft Equality Act (Gender Pay Gap Information) Regulations 2017. The draft guidance, "Managing gender pay gap reporting in the private and voluntary sectors", provides commentary and worked examples based on the draft Regulations, and also provides suggestions for dealing with any gender pay gap which is discovered.

The key points of interest in the draft guidance are:

- **Employers with less than 250 employees** on the snapshot date of 5th April are not required to comply with the Regulations, but "*should give serious consideration to the business benefits of doing so*".

- There is no real guidance on when it will be "***not reasonably practicable***" for the employer to provide pay data for certain workers. However, the guidance suggests that "*new contracts should seek, where possible, to ensure that those employed under a contract personally to do work are required to provide the information needed for compliance*".

- **Agency workers** will only be in scope of the reporting requirements of the agency that provides them; they will not count as "employees" of the end user for these purposes. The same applies to individuals who provide their services through their own **service company**; they will be in scope of the service company, not the end user.

- As a general rule, **employees based overseas** will be within the scope of the Regulations if they can bring a tribunal claim under the Equality Act 2010. This will depend on whether the employment relationship suggests a stronger connection to Great Britain and British employment law than to the law of any other country.

- The guidance provides examples of where a **narrative** may be used, such as where measures to reduce a pay gap have already been taken which need time to take effect, and/or where the gap has reduced over time.

- The guidance also gives some indication of how **pension contributions** should be treated. For further details, see this week's Pensions Bulletin.

- On **timing of publication**, the guidance suggests that employers should aim to publish their results as soon after April as it is reasonable for them to do so, with the caveats that (i) it would make sense to add gender pay reporting in to a sensible point of their reporting cycle, and that (ii) there is no requirement for an employer to publish at the same time every year. The

guidance also suggests that employers may want to maintain the information on their websites beyond the minimum three years to show their long-term progress.

- The guidance stresses the importance of businesses not simply publishing the required information, but using it to encourage and initiate an **action plan** to reduce the gender pay gap in their workplace. Trade union representatives and employees should (it suggests) be given the chance to help shape any action plan.

- The guidance includes "**Essential considerations - reducing the gender pay gap**". Despite the terminology, these are not "essential" in the sense that they are not requirements of the Regulations, but are seen by ACAS and the GEO as best practice. These include effective gender monitoring, reviewing related policies and practices (with employee involvement being viewed as good practice), training and supporting line managers, and managing family friendly leave (giving comparable financial value to all types of leave is specifically mentioned, with the caveat that this should be considered carefully to ensure it is legally compliant). Employers are also encouraged to consider taking positive action to help close their gender pay gap, within the scope permitted by the Equality Act 2010.

**Practical impact**: Although the guidance does contain some helpful commentary, it also contains a few inaccuracies (not included in the summary above), so should be treated with caution. It is also worth remembering that the guidance is non-statutory, so has limited force. If you would like advice on the impact of the Regulations on your business, please speak to your usual Slaughter and May contact.

### Brexit: White paper on negotiations: Employment aspects

The Government has published a White Paper "The United Kingdom's exit from and new partnership with the European Union". The White Paper sets out the 12 principles on which forthcoming negotiations over the UK's withdrawal from the EU will be based.

Principle seven is "**Protecting workers' rights**". In this section of the White Paper (pages 31 to 33) the Government points out how UK employment law already goes further than many of the standards set out in EU legislation. It cites our 5.6 weeks annual leave as an example of this, alongside our 52 weeks' maternity leave and 39 weeks' pay, shared parental leave, and more generous unpaid parental leave. The chart intended to represent these enhancements is however inaccurate, as it mixes up the 5.6 weeks' entitlement to annual leave under UK law with the 14 weeks' minimum entitlement to maternity leave under EU, suggesting that UK law in fact offers 14 weeks' paid holiday (which has excited some commentators).

The White Paper also commits the Government not only to protect but also "**enhance**" workers' rights. In this respect it cites both the Taylor Review of employment practices in the modern economy, and the Green Paper on corporate governance (through which it intends to "*ensure that the voices of workers are heard on the boards of publicly-listed companies for the first time*").

In his statement to the House of Commons on the publication of the White Paper, Secretary of State for Exiting the EU, David Davis confirmed that a separate White Paper on the Great Repeal Bill will be published in due course.

### Employment tribunal fees: MoJ consultation

The Ministry of Justice (MoJ) has published a consultation, Review of the introduction of fees in the Employment Tribunals, setting out the government's review of employment tribunal fees. The review was prompted by a significant fall in the number of claims since the introduction of fees, and concerns that fees have discouraged many people from bringing proceedings and gaining access to justice. The MoJ states in the document that the introduction of fees has broadly met its objectives, insofar as:

- tribunal users are now contributing between £8.5m and £9m a year in fee income, in line with what was expected, transferring a proportion of the cost from the taxpayer to those who use the tribunal; and

- more people are now using Acas' free conciliation service than those who were previously using voluntary conciliation and

bringing claims to the ET combined. Just under half of those who refer disputes to ACAS have their disputes resolved without the need to go to the tribunal.

However, the MoJ is concerned that there does appear to be evidence that fees have discouraged some people from bringing proceedings, and that the fall in claims has been significantly greater than was estimated when fees were first introduced. The MoJ is therefore consulting on proposals for an adjustment to the Help with Fees scheme to extend the scope of support available to people on lower incomes.

The MoJ has also concluded that it is not appropriate to charge a fee for three types of proceedings in the tribunal which relate to redundancy payments and pension scheme contributions from the National Insurance Fund, on the basis that conciliation is rarely a realistic option in these types of case, and they often involve employers who are insolvent and are therefore unlikely to be able to satisfy an order for the fee to be reimbursed. These proceedings will be exempt from fees with effect from 31st January 2017. HM Courts and Tribunals Service have updated the guidance on their website to make this clear.

The consultation on the other proposals runs until 13th March 2017.

Meanwhile, UNISON's appeal against the rejection of its application for judicial review of tribunal fees is due to be heard by the Supreme Court on 27th and 28th March 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.



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