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: implementation on 1st March 2017

The Trade Union Act 2016 (Commencement No 3 and Transitional) Regulations 2017 will bring the majority of the Trade Union Act 2016 into force on 1st March 2017. The provisions which will be brought into force on that date include:

- the 50% ballot turnout requirement;
- the 40% support requirement for industrial action ballots in important public services;
- the requirement for additional information to be included on the voting paper, and to be given to members about the result of the ballot;
- the increase from seven to 14 days' notice to be given to employers of industrial action;
- the revised provisions regarding expiry of a mandate for industrial action; and
- new requirements for union supervision of picketing.

Gender pay gap reporting: in force 6th April 2017

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 have now been passed by Parliament and will come into force on 6th April 2017.

The ACAS/GEO guidance on the regulations remains in draft form at present, but is expected to be finalised shortly. For further details on the guidance, see last week's Bulletin.

New rates and limits from 6th April 2017

The Employment Rights (Increase of Limits) Order 2017 has been published, giving details of the annual increase to employment tribunal awards and other amounts payable under employment legislation. The key changes are:

- the limit on "a week's pay" will rise from £479 to **£489**;
- the maximum basic award for unfair dismissal (and statutory redundancy payment) will rise from £14,370 to **£14,670**; and
- the maximum compensatory award for unfair dismissal will rise from £78,962 to **£80,541** (or 12 months' pay, if lower).

The increase reflects a rise in the Retail Prices Index of 2.0% between September 2015 and September 2016.

The new rates apply where the event giving rise to the compensation or payment (typically, the effective date of termination) occurs on or after 6th April 2017.

Cases Round-up

Plumber was "worker" not self-employed

The Court of Appeal has found that a plumber working on behalf of a plumbing company was a "worker" within the meaning of the Employment Rights Act 1996 (ERA 1996) and the Working Time Regulations 1998 (WTR 1998), and not (as his contract suggested) a self-employed contractor (*Pimlico Plumbers Ltd v Smith*).

Plumber's contract: S was a plumber who worked for P between August 2005 and April 2011. His contract provided that he was an independent contractor in business on his own account. The agreement also provided for normal working hours consisting of five days a week in which S was required to complete a minimum of 40 hours. However, P had no obligation to provide S with work on any particular day, and if there was no work for him he was not paid. The agreement also restricted S's ability to work for himself or other companies, and only allowed him to swap jobs with other operatives of P.

Working arrangements: Throughout their relationship, S worked solely for P. He chose his jobs, decided his own working hours, and exercised his own discretion as to the plumbing work needed for a particular customer and whether to negotiate on price. P provided S with a company identity card, a uniform marked with P's logo, a mobile telephone and a van marked with P's logo (for which S paid a monthly rental charge). S was VAT registered and filed his accounts as a self-employed person. S accepted that while working for P he believed that he was self-employed.
Claims: S suffered a heart attack in January 2011 and his agreement was terminated by P in May 2011. He complained that he was unfairly or wrongfully dismissed and claimed entitlement to pay during medical suspension, written particulars of employment, holiday pay and arrears of pay. He also claimed direct disability discrimination, discrimination arising from disability, and failure to make reasonable adjustments.

Not "employee", but "worker": The Tribunal held that S was not an "employee" under ERA 1996, essentially because there was no obligation on P to provide any work and the obligation to pay S was limited. This finding was appealed unsuccessfully to the EAT and was not pursued further. However, the Tribunal held that S was a "worker" under ERA 1996 and WTR 1998 and also in "employment" under the Equality Act 2010 so that it had jurisdiction to hear the holiday pay, arrears of wages and disability discrimination claims. The EAT upheld that finding.

Personal service: The Court of Appeal dismissed P's appeal. It noted that a key issue in this case was the requirement for S to provide personal performance of his plumbing work. S's contract did not contain a right of substitution. The express wording in fact required personal performance by S; it referred throughout to "*You shall…*" "*You agree…*" and to S's own skills, competence and personal liability. The fact that there was some limited and informal swapping and sharing of jobs between P's operatives did not negate the requirement for personal service.

Contractual minimum hours: The Court of Appeal also rejected P's challenge to the Tribunal's finding that S was contractually obliged to work a minimum of 40 hours a week. The fact that the agreement also stated that there was no legal obligation on P to provide work did not alter this finding; it was consistent with the reality that there might not be work available to offer to S on any particular day. Similarly, the fact that S was not under any obligation to accept work meant that he could refuse any particular assignment, but not if it meant he worked less than 40 hours a week.

Control: The Court went on to find that the degree of control exercised by P over S was also inconsistent with P being a customer or client of a business run by S (so as to prevent S being a "worker"). S had a degree of autonomy in relation to job estimates and work done, but P exercised very tight control in most other respects. In particular, the Tribunal was right to place weight on the onerous restrictive covenants in the agreement, which included a covenant precluding S from working as a plumber in any part of Greater London for three months after termination.

Wider relevance? Although in one respect this is just the latest in a current trend of employment status gig economy cases, the Court of Appeal's judgment is (unlike the tribunal decisions involving Uber and CitySprint), binding on other courts and tribunals. The Court's reliance on the restrictive covenants in the agreement serves as a red flag to businesses seeking to impose such covenants on its self-employed contractors. That said, the extent to which general conclusions can be drawn from employment status cases is always limited, given their fact-specificity, and the Court issued a warning to this effect.

It was reported after the ruling that Charlie Mullins, founder and chief of Pimlico Plumbers, said that the company had changed its contracts with those who worked on a self-employed basis and that "*Like our plumbing, now our contracts are watertight*".

Recognition of 'sweetheart' union blocked recognition of independent union

The statutory scheme which allows an employer's limited recognition of a non-independent (or 'sweetheart') trade union can be used to prevent an independent union obtaining recognition, according to a recent judgment of the Court of Appeal. The Court held that this scheme was not incompatible with Article 11 of the European Convention on

Human Rights (ECHR), given that workers are able to secure the de-recognition of such a non-independent trade union (*The Pharmacists' Defence Association Union v Boots Management Services Ltd*).

Union seeks recognition: P is an independent trade union with a substantial membership among pharmacists employed by B. On B's refusal of P's request for recognition, P applied for compulsory recognition using the statutory procedure in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) (although it withdrew this application when B indicated it was willing to talk).

Employer recognises 'sweetheart' union: B then entered into a recognition agreement with a non-independent trade union, the Boots Pharmacists' Association (BPA). The agreement effectively only covered collective bargaining in respect of facilities for officials and machinery for consultation. P's renewed application to the Central Arbitration Committee (CAC) was held inadmissible under paragraph 35 of Schedule A1 because the BPA was already recognised for the same bargaining unit.

Challenge: P applied for a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998, arguing that the statutory recognition scheme failed to comply with the requirements of Article 11 ECHR. The High Court refused the application on the ground that, even if a trade union could in principle have Article 11 protection, its rights had not been breached because the obstacle to its recognition could be removed by an application for the de-recognition of the BPA.
No universal right of recognition: The Court of Appeal dismissed P's appeal. It acknowledged that the absence, or the inadequacy, of a statutory mechanism for compulsory collective bargaining might in theory give rise to a breach of Article 11. However, that did not mean that Article 11 conferred a universal right on any trade union to be recognised in all circumstances. The EU case law in this area made it clear that each Member State was to be accorded a wide margin of appreciation in its statutory rules governing recognition of trade unions.

De-recognition prevented breach: The Court adopted the High Court's view that the machinery for de-recognition in Part VI of Schedule A1 TULR(C)A 1992 prevented any breach of P's Article 11 rights. The Court was not prepared to find a breach of Article 11 based on the fact that an application for de-recognition must come from a worker, and cannot come from a trade union. As the High Court had noted, if P was unable to find a worker who would be willing to submit an application to de-recognise the BPA, it would indicate that P was unlikely to have sufficient support for any application for statutory recognition to succeed.

Positive outcome for employers: This is a helpful decision for employers who may wish to limit their exposure to collective bargaining with independent trade unions by recognising a non-independent union to a limited extent (subject always to the proviso that a worker may seek de-recognition of a sweetheart union).

Subject access request can be used to obtain early disclosure in litigation

An employee may make a subject access request (SAR) under the Data Protection Act 1998 (DPA) in order to seek early disclosure of information which may assist the employee in litigation against the employer. The fact that the SAR has that purpose should not prevent a court exercising its discretion to order compliance with the SAR, according to a recent judgment of the Court of Appeal (*Dawson-Damer v Taylor Wessing LLP*).

SAR in litigation: The case concerned litigation between the trustee of a number of Bahamian trusts and a beneficiary. In the early stages of that litigation, the beneficiary (D) submitted a SAR to the trustee's solicitors (TW), seeking all data of which she was the subject. When TW refused to comply, D sought an order compelling their compliance with the SAR.

High Court refuses order: The High Court refused D's application. It accepted TW's argument that the documents it held were privileged (whether under English or Bahamian law) and were therefore exempt from disclosure via the SAR. It also found that it was not a proper use of the DPA to assist D in her litigation against the trustee, since the purpose of a SAR is to enable a data subject to verify or correct data held about him.

Privilege exception is limited: The Court of Appeal allowed D's appeal. It held that the High Court had taken too wide an approach to the legal professional privilege exception in the DPA, which only covers documents which carry legal professional privilege for the purposes of English law. It does not cover documents which are privileged under the laws of other countries (such as the Bahamas), nor does it cover documents which are subject to a separate right of non-disclosure (such as the trustee's right of non-disclosure).

Disproportionate effort: The Court also found that TW had not shown that to comply with the SAR would involve disproportionate effort, as all it had done so far was review its files. The Court quoted extensively from the ICO's Subject Access Code of Practice, which makes it clear that compliance with a SAR may involve significant effort. The burden of proving disproportionate effort lies on the data controller, and the Court's judgment suggests this will be a heavy burden, given the substantial public policy reasons for giving people control over the data maintained about them. The Court also made the point that most data controllers can be expected to know of their obligations to comply with SARs, and to have designed their systems accordingly to enable them to make most searches for SAR purposes.

Purpose of SAR is irrelevant: The Court found that there is nothing in the DPA or the underlying Directive which limits the purpose for which a data subject may request his data, or (conversely) provides data controllers with the option of not providing data based solely on the requester's purpose. The Court found that *Durant v Financial Services Authority [2004] FSR 573* was not authority for a "no other purpose" rule; the Court of Appeal in that case was emphasising the limited nature of personal data, which was the principal issue in that case. It essentially held that a person could not claim that something was personal data simply in order to assist him in obtaining early disclosure in litigation.

Comment: The Court of Appeal's judgment has been eagerly awaited, but is disappointing from the perspective of employers who face SARs from employees who are contemplating or actively pursuing litigation against them. Such employers cannot rely on the employee's ulterior motive as the basis for refusing to respond to the SAR.

The SAR regime is set to become more stringent under the General Data Protection Regulation. For further details see our briefing: What do employers in the UK need to know about the General Data Protection Regulation (GDPR) from an employment perspective?

Points in Practice

Apprenticeship levy: online registration now open

The apprenticeship levy is due to come into effect from 6th April 2017, via draft regulations made under sections 98 to 121 of the Finance Act 2016. The levy will be payable by all employers who are liable for employers' NICs (secondary Class 1 NICs) in a tax year, and who have an annual wage bill of £3 million or more. The levy will be payable through PAYE, at a rate of 0.5% of the wage bill.

An employer whose wage bill exceeded £3 million in the preceding tax year, or is expected to exceed £3 million in any tax year commencing on or after 6th April 2017, must notify HMRC of the amount of its liability to the levy. The levy must be notified and paid monthly, at the same time as the employer's PAYE payments.

Employers who pay the levy can access a new digital apprenticeship service that allows them to spend available funds on apprenticeship training. The funds available will be greater than the amount of the levy paid in, due to government top-ups. Funds will however expire if they are not used within 24 months after they appear in the employer's digital account, at which point they will become available for use by other employers.

Registration for the new online digital service has now opened, and the Department for Education is encouraging large employers to register in advance (see its guidance). The Skills Funding Agency has also released an indicative online tool for employers to estimate their levy contribution.

Although research undertaken by City and Guilds suggests that one-third of UK employers

liable to pay the levy are still unaware of it, separate research shows that awareness is high in the financial services, engineering, legal and accountancy sectors. A survey of 100 employers in those sectors found that 53% would convert existing graduate schemes into apprenticeship programmes in order to profit from the apprenticeship levy.

Practical impact: Employers who are in scope of the levy can now register for the online digital service, and should (if they have not already) begin preparing for payment of the levy, and considering what use they can make of the funds.

Corporate governance update

There have been two recent developments of note in the field of corporate governance:

1. The FRC has announced a fundamental review of the UK Corporate Governance Code. This will take account of work done by the FRC on corporate culture and succession planning, and the issues raised in the Government's Green Paper and the BEIS Select Committee inquiry. The FRC will commence a consultation on its proposals later in 2017, based on the outcome of the review and the government's response to its Green Paper.

2. ICSA has published a report "The Future of Governance: Untangling corporate governance". The report finds that the term 'corporate governance' encompasses a much broader range of issues and purposes than when it was established 25 years ago, and is no longer well suited for delivering some of the other objectives that we now expect, such as preventing or effectively penalising bad behaviour by boards or directors. The report suggests a need to untangle the different components of what is now called corporate governance in order to address each of them effectively. The report suggests the following actions:

   - rethinking the policy approach to issues such as income inequality, tackling them across the economy as a whole using tools better suited to the purpose;
   - promoting good governance standards in all sectors, and in other investment asset classes that receive a significant amount of money from UK investors;
   - improving the effectiveness of the various mechanisms by which listed companies are held to account; and
   - introducing effective legal sanctions to punish bad business behaviour.

Employment Tribunal judgments now online

The online database of Employment Tribunal judgments has now been launched, and is available here. The database can be searched by legal topic, country (England and Wales or Scotland), or date. It also includes a free text search which allows users to search the texts of the judgments themselves. At the moment it seems that the database only includes judgments going back to May 2015; it is not yet clear if older judgments will be added to the database.

Practical impact: The online database will make it easier for interested parties, such as the media or workers considering bringing proceedings against an employer or prospective employer, to search for and read judgments. This is worth considering when employers are deciding whether or not they wish to settle complaints before they reach the tribunal.

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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