SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

10 March 2017 / Issue 5

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

Spring Budget Statement 2017: Employment aspects

The Chancellor Philip Hammond delivered his Spring Budget Statement on 8th March 2017. The key points of interest from an employment perspective are:

- The employment rate is at 74.6%, which is said to be a record high, with over 2.7 million more people in work than in 2010, and a higher proportion of women in work than ever before.
- The Chancellor referenced the Taylor review on employment status, which is due to report in the summer, and its preliminary findings that differences in tax treatment are driving the current trend towards self-employment.
- From April 2018, the main rate of Class 4 NICs for the self-employed will increase by 1% to 10%, with a further 1% increase in April 2019. This will coincide with the abolition of Class 2 NICs for the self-employed.
- Also from April 2018, the tax-free dividend allowance for shareholders and directors of small private companies will reduce from £5,000 to £2,000.
- There will be a consultation in the summer on options to address the disparities in parental benefits between employed and self-employed workers.
- There will be an extra £5 million to promote 'returnships', helping people back into employment after a career break.

Financial services: new regulatory references regime from 7th March 2017

The new regulatory reference regime for large financial services firms (mainly UK banks, building societies and insurers) came into effect on 7th March 2017.

In summary, the new regime involves:

- A requirement on a prospective new employer to seek references for a prospective new employee in certain senior management roles, covering the previous six years' employment history.
- The roles affected include senior managers and staff in the Senior Managers and Certification Regime (SMCR), senior insurance management functions (SIMFs), FCA controlled functions or significant harm functions, and (for PRA-regulated firms) notified non-executive directors.
- References must be obtained prior to appointment, in most cases no later than one month before the deadline for the application for regulatory approval for the individual.
- The FCA and PRA have produced a mandatory template which relevant firms will be required to use when responding to reference requests, and which is intended to improve the consistency of disclosures across relevant firms.
- The references must include matters where a firm has concluded either that there has been a breach of conduct rules or that the candidate was not fit and proper to perform a function. Although firms retain an obligation to disclose "all relevant information", the rules make it clear that there is no requirement to reveal the fact that an individual resigned during the course of an investigation. There will be other grey areas where firms will have to take a view on whether matters amount to other "relevant information".
- There is a continuing obligation on former employers to update any references given in the last six years, if the firm becomes aware of relevant information that means the reference is no longer accurate (this applies to any references provided on or after 7th March 2017).

- Form C (Notice of ceasing to perform controlled functions) and Form D (Notification of changes in personal information or application details) will no longer be submitted to the regulators.

- In order to ensure that firms are able to comply with the requirements to provide references, all authorised firms must retain records of ex-employees' conduct and fit and proper status for a period of six years following termination or resignation from a firm.

Practical impact: The regulatory reference regime includes an explicit rule that following an individual's resignation or dismissal, firms must not enter into arrangements that conflict with the regulatory reference rules. This will have an impact on the reference provisions of settlement agreements. Firms should ensure that any agreed reference wording includes any disclosures the firm is required to make, and reserves a right for the firm to deviate from such wording in order to comply with their obligation to provide required disclosures in the future.

Firms should also review their record retention policy, and their disciplinary policies, for example to ensure that records relating to expired disciplinary warnings will be retained and not disposed of when the warning expires.

Cases Round-up

TUPE: what is the "principal purpose" of the organised grouping on a service provision change?

In order for a service provision change (SPC) to take place under TUPE, there must be an organised grouping with the "principal purpose" of carrying out the activities on behalf of the client. If over time the level of activities drops, but the size of the organised grouping stays the same, it may be that the "principal purpose" of that grouping has changed, preventing a TUPE transfer taking place, according to a recent judgment of the EAT (*Tees ESK & Wear Valleys NHS Foundation Trust v Harland*).

Reduction in care activities: Between 2005 and 2015 TEWV was responsible for providing nursing care to a patient, CE. Initially, CE required seven-to-one care, but his condition improved so that from 2011 he only needed four-to-one care. As a result, the team looking after CE was reduced to 11 people, who also provided care for other service users in the same premises. From February 2014 CE's condition improved further so that he only needed one-to-one care during the day.

Retendering: The contract for CE's care was put out to tender and was won by DH, which took on his care from January 2015. TEWV maintained that seven of its employees were assigned to CE's care arrangements (those who in the year prior to June 2014 had worked for more than 75% of their shifts with CE), and would transfer to DH under TUPE. DH initially disputed that there was an organised grouping of employees with the principal purpose of caring for CE, but ultimately (reluctantly) agreed to employ them.

Employee challenge: The seven employees resisted their transfer, preferring to stay employed within the NHS, and brought claims of unfair dismissal against TEWV and DH.
SPC? At a preliminary hearing, the Tribunal found that there was an organised grouping of employees, since TEWV had deliberately put together a team to look after CE, and that that team had maintained its identity (albeit with differing numbers and identities of employees) until January 2015. However, the organised grouping provided working hours of some 375 against a need for CE of some 125 hours; it was a larger grouping than was required by some 66%. On that basis, the care of CE was no longer the "principal purpose" of the grouping, but was in fact subsidiary to the dominant purpose of providing care to the other service users in the same premises, on which the members of the organised grouping spent the majority of their time. There was therefore no SPC.

Principal purpose: The EAT upheld the Tribunal's approach to the "principal purpose" issue. It noted that the "principal purpose" for which any grouping of employees is utilised may change over time; TUPE requires an assessment of the position immediately before the SPC, and that might not be the same as the principal purpose at an earlier stage in the history. The question of "principal purpose" gives rise to a question of fact, which is answered primarily by

the actual performance of activities immediately before the putative transfer.

Relevant factors: The EAT noted that if the organised grouping in fact carries out other work, that might well point to its organisation being for a purpose other than the activities relevant to the SPC. Similarly, if the grouping comprises far too many employees than would be necessary for the activities in question, that might suggest either that not all the staff concerned were in fact assigned to it or that the real purpose behind the organisation of the group was other than the carrying out of the relevant activities for the client. The EAT commented that these are possibilities that a tribunal might properly consider relevant to its assessment. In this case, it found no error with the Tribunal's approach, and the finding that there was no SPC would therefore stand.

Tactics for service providers: This case suggests that a grouping of employees may not have the principal purpose of carrying out the relevant activities on behalf of the client if it carries out other activities, and/or has more employees than is necessary for the client's activities. The Tribunal acknowledged that if TEWV had reduced the size of the organised grouping as the needs of CE reduced, the result would have been different. It was not clear in this case why TEWV still retained the group as an identifiable team rather than reducing its size, but this will clearly be a relevant consideration for service providers who wish to ensure (or avoid) the operation of TUPE.

No harassment based on claimed disability

An individual is protected from discrimination or harassment based on a protected characteristic which they actually possess, or which is attributed to them, or which is possessed by someone they are closely associated with. However, an individual is not protected from harassment by simply claiming to be disabled, according to a recent judgment of the EAT (*Peninsula Business Service Limited v Baker*).

Claim of disability: B worked for PBS as a lawyer, providing legal advice and representation in tribunal hearings. In January 2014, B told his line manager that he had dyslexia. PBS acknowledged this and made enquiries of B about any reasonable adjustments he may need. In August 2014 B was referred to occupational health, which recommended reasonable adjustments and said that B was likely to be considered disabled. There were initially suspicions within PBS as to the extent to which B may have engineered the report in his favour.

Covert surveillance: Another manager (E) then instructed an external company (BG) to subject B to covert surveillance, ostensibly on the basis of E's suspicions that B was engaged in private work when he should be working for PBS. Although the surveillance report did not show that B was moonlighting, it did show him spending significant periods of his working days at his mother's house. PBS therefore decided to instigate disciplinary proceedings against B. During that process B was told for the first time that he had been subjected to covert surveillance, and a copy of the surveillance report was sent to him.

Claims: B lodged claims of disability-related harassment and victimisation. The Tribunal upheld those claims, finding that although B "may well not have been disabled", there was nonetheless a sufficient nexus for the harassment to be "related to" disability, since it found that E ordered the surveillance because of her suspicions about B's alleged disability.

No harassment: The EAT allowed PBS's appeal. On harassment, the EAT found that such a claim cannot be founded on a mere allegation of a protected characteristic. It accepted PBS's argument that a victimisation claim provides more appropriate protection for a person who alleges that he possesses a protected characteristic and claims that he has suffered a detriment as a result. This is because a victimisation claim cannot succeed where the claimant makes a false allegation in bad faith. There is no such bar to a harassment claim, and this class of claim would therefore be significantly widened if it could be based purely on an asserted protected characteristic.

Disclosure of evidence: The EAT also found that in any event, PBS telling B about the covert surveillance could not form the basis of a harassment claim. It found that it cannot be reasonable for a disclosure, made for the purposes of disciplinary proceedings and in order to comply with the ACAS Code of Practice, to have the proscribed effect. If that were right, it would mean that an employer in these circumstances would be compelled, for fear of

facing an allegation of harassment, to conceal the evidence it relies on in disciplinary proceedings, in circumstances where fairness and the ACAS Code require it to be disclosed.

No victimisation: The EAT also overturned the finding of victimisation. It found that since BG knew nothing about B's protected acts, it could have no liability for carrying out the actual surveillance, and there was therefore no liability on PBS. The knowledge and motivation of the principal cannot be attributed to the agent for these purposes.

Helpful for employers: This is the first appellate case to consider whether a harassment claim can succeed where the claimant simply asserts that he has a disability, without showing that he is in fact disabled. It is a welcome decision for employers in many respects, not least in finding that disclosing evidence for disciplinary purposes cannot be an act of harassment. Employers should however continue to exercise caution where an employee claims to be disabled, seeking further medical evidence where necessary and considering reasonable adjustments.

Redundancy: reason for dismissal and fairness of consultation

An employee was fairly dismissed for redundancy, despite his argument that the employer had an ulterior motive for his dismissal, and the employer concealing evidence that one of the managers involved in the consultation was very dismissive of his proposals for alternative employment (*Ostendorf v Barclays Capital Services Ltd*).

Proposals for new role: O was employed by BCS as its Global Head of Funding Structuring. Following the financial crisis of 2008, O's role was no longer productive, and despite O proactively making various proposals for new roles and responsibilities, none attracted the support of senior management. This led to O being warned by his manager (S) that his "*continued attempts to find a new role was [sic] causing irritation*". This was particularly true of one manager (A), who made it clear to O his antipathy to his proposals. When O continued to pursue them, A emailed S to say that "*Over my dead body [O] will have anything to do with me*".

Redundancy: O was formally placed at risk of redundancy in July 2010. There followed a consultation period in which two consultation meetings took place and efforts were made to find an alternate role. A was involved in one of the redundancy consultation meetings, but S decided not to tell O about the "*over my dead body*" email. O was given notice of termination of his employment in August 2010, to take effect in November 2010.

Claim: O lodged a claim of unfair dismissal. He claimed that redundancy was not the true reason for his dismissal, which he claimed was in fact based on his having devised a particular financial transaction (the 'Second Solution') which had considerable value for BCS. O maintained that S had seen potential in the transaction and made a decision to dismiss O so that S and others could take benefit from the transaction. He claimed that the Second Solution was in fact implemented in 2012, and adduced expert evidence to this effect. The Tribunal dismissed O's claim, and he appealed.

This was a 'redundancy': The EAT dismissed O's appeal. It found that the Tribunal had properly considered the reason for O's dismissal both at the time of the initial notification of his redundancy and throughout the consultation period until the termination of his employment. Having done so, it remained satisfied that this had not been informed by the Second Solution transaction O had proposed. The Tribunal was entitled to take into account the fact that O's position had been under consideration for some time before he came up with the Second Solution. While the existence of a redundancy situation will not necessarily mean that dismissal is for that reason, it is helpful background information. In the absence of any ulterior motive related to the Second Solution infecting the employer's reasoning, the reason for dismissal was properly found to be redundancy.

No fixed view: The EAT also rejected any suggestion that O had been 'frozen out' of the business in bad faith. Whilst BCS's normal practice was to require any senior person facing redundancy to stay away from the workplace, it mitigated that approach for O, who (with S's assistance) was able to have meetings with senior staff to explore opportunities of alternate positions. This was inconsistent with a fixed view that O should be dismissed.

Failure to disclose email was not fatal: The EAT also rejected O's claim that S's failure to disclose the "*over my dead body*" email rendered the consultation process a sham. It found that this was a judgment call for S, who wanted to avoid matters becoming personal, and felt that disclosure would not have assisted matters, given that O was already aware of A's antipathy towards his proposals. The same could be said of O's decision not to disclose the email to HR or seek others' advice about it; this was a judgment call, which did not fall outside the range of reasonable responses.

Lessons for employers: The EAT's judgment is a useful illustration of how the range of reasonable responses test operates. It allows managers such as S to take judgment calls in the course of a dismissal process, which another manager or employer may take differently, without necessarily jeopardising the fairness of the resulting dismissal, providing that the overall approach remains reasonable. The EAT was keen to stress that it was not downplaying the importance of redundancy consultation, which must be a genuine attempt to find alternatives to dismissal, entered into with an open mind. In this case, A was not the only manager involved, and his was not the only redundancy consultation meeting which O had. Helpfully, the EAT took into account the attempts to reallocate O which pre-dated the formal redundancy consultation, finding that these were a relevant part of the factual matrix.

Points in Practice

ICO consults on GDPR consent guidance

The Information Commissioner's Office (ICO) has published a consultation on draft guidance on consent under the EU's General Data Protection Regulation (GDPR). This is the first piece of detailed topic-specific GDPR guidance published to date by the ICO for public consultation.

The GDPR will be coming into force on 25th May 2018 and it sets high standards for consent. The draft guidance explains the differences between the current law on consent and the GDPR. It makes it clear that the ICO view it as inappropriate to rely on consent in an employment relationship where there is an imbalance of power. The guidance suggests that employers should avoid relying on consent and should instead look for another basis for processing personal data, such as performance of a contract and/or legitimate interests.

The ICO is inviting comments on the draft guidance by 31st March 2017. Following the consultation, the ICO aims to publish the final form guidance in May 2017.

HMRC launches new employment status service tool

HMRC has launched a new online tool to check an individual's employment tax status. The new tool replaces the old employment status indicator tool, and also allows users to check whether the intermediaries legislation (IR35) applies to a particular engagement. The service is anonymous and will not store any information entered or the result given. Users will be able to print their result for their own records.

The website states that HMRC will stand by the result given by the online tool unless a compliance check finds that the information provided is not accurate. It also makes it clear that HMRC will not stand by results achieved through contrived arrangements designed to get a particular outcome from the service, and that this would be treated as evidence of deliberate non-compliance (with associated higher penalties).

Industrial action update

BEIS has published the final versions of the revised Code of Practice on Industrial Action Ballots and Notice to Employers (March 2017) and the Code of Practice on Picketing (March 2017), reflecting the changes made by the Trade Union Act 2016. The revised Codes have been approved by the Houses of Parliament and have now superseded the old Codes of Practice with effect from 1st March 2017.

The Codes themselves impose no legal obligations, and failure to observe them does not of itself render anyone liable to proceedings. However, the provisions of the Codes are admissible in evidence and taken into account in proceedings before any court,

employment tribunal or Central Arbitration Committee where they consider them relevant.

Separately, BEIS has published a consultation that will inform an independent review of electronic balloting for trade union industrial action ballots. The Terms of Reference for the review set out four key issues to take into consideration:

1. The electronic and physical security of e-balloting methods, including risks of interception, impersonation, hacking, fraud or misleading or irregular practices

2. Whether any system can safeguard against risk of intimidation of union members and protect anonymity of ballot responses

3. The security and resilience of existing balloting of union members

4. The aims of the Trade Union Act 2016 to ensure strikes and related disruption to the public only happen as a result of a clear, positive decision by those entitled to vote.

The consultation closes on 10th May 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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