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

April 2017: Employment law changes

A reminder of the key changes to employment law taking effect in April 2017:

- **Gender pay gap reporting**: Employers with more than 250 employees will be required to produce annual gender pay gap reports. In summary, affected employers must analyse their gender pay data 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.

- **Apprenticeship levy**: The apprenticeship levy is due to come into effect from 6th April 2017. The levy will be payable by all employers who are liable for 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. Employers who pay the levy can access a new digital apprenticeship service that allows them to spend available funds on apprenticeship training.

- **Salary sacrifice restrictions**: For salary sacrifice arrangements entered into on or after 6th April 2017, the tax and NICs benefits are restricted to pension, childcare, cycle to work and ultra low emission cars (as well as intangible benefits, such as additional holiday). For salary sacrifice arrangements entered into before 6th April 2017, the restriction will apply from 6th April 2018 (unless the arrangement is ended, varied or renewed before that date).

- **New rates of statutory redundancy pay / unfair dismissal compensation**: With effect from 6th April 2017:
  - The limit on "a week's pay" rises to **£489**
  - The maximum basic award for unfair dismissal (and statutory redundancy pay) rises to **£14,670**
  - The maximum compensatory award for unfair dismissal rises to **£80,541** (or 12 months' pay, if lower)

- **New rates of statutory sick and family payments**:
  - Statutory sick pay **(SSP)** rises to **£89.35** per week, with effect from 6th April 2017
  - Statutory maternity pay **(SMP),** statutory adoption pay **(SAP),** statutory paternity pay **(SPP)** and statutory shared parental pay **(ShPP)** rise to **£140.98** per week, with effect from 2nd April 2017

- **New rates of National Minimum Wage and National Living Wage**: With effect from 1st April 2017, the rates of the National Minimum Wage (**NMW**) and National Living Wage (**NLW**) will increase as follows:
  - the NLW for workers aged 25 or over rises to **£7.50 an hour**
  - the NMW for workers aged 21 to 25 rises to **£7.05 an hour**
  - the NMW for workers aged 18 to 21 rises to **£5.60 an hour**

- the NMW for workers who are under 18 rises to **£4.05 per hour**

- the NMW apprenticeship rate rises to **£3.50 an hour**

Practical impact: 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

Religious dress codes in the workplace

Two high-profile recent ECJ cases concerned female Muslim employees who were dismissed for their insistence on wearing Islamic headscarves in the workplace. The decisions were that:

- a blanket prohibition on wearing religious symbols in the workplace does not constitute direct discrimination, but may constitute indirect discrimination unless it can be objectively justified; and

- an employer's desire to fulfil a customer's request that its employees should not wear Islamic headscarves cannot amount to a genuine and determining occupational requirement so as to avoid a finding of discrimination

(*Achbita v G4S Secure Solutions* and *Bougnaoui and ADDH v Micropole S.A.*)

Blanket ban: The first case (*Achbita*) concerned a Belgian Muslim (A) who was employed by G4S to work as a receptionist for a third party. In April 2006, A informed G4S that she had decided to start wearing the hijab at work (she had previously only worn it outside of work). This was contrary to G4S's policy that the wearing of any visible signs of employees' political, philosophical or religious beliefs were banned in the workplace. A refused to attend work without wearing her hijab, and this led to her dismissal.

Customer request: The second case (*Bougnaoui*) concerned a French Muslim (B) who was employed by M as a design engineer. B was told during the recruitment process that wearing an Islamic headscarf might pose a problem when she was in contact with customers. Initially during her internship M wore a simple bandana, but subsequently wore the hijab. Following a complaint from one of its customers about B wearing the hijab in its workplace, M asked B not to wear the hijab in future, reaffirming its need for neutrality as regards its customers. B refused and was subsequently dismissed.

No direct discrimination: The ECJ had little hesitation in finding that the policy in *Achbita* did not amount to direct discrimination under the Equal Treatment Framework Directive (the Directive), since it applied to all employees equally (there was no evidence that the policy was applied any differently to A than other employees).

Indirect discrimination? However, the ECJ found that such a rule could amount to indirect discrimination. It found that an employer's desire to project an image of political, philosophical or religious neutrality towards its customers is a legitimate aim. The ECJ also commented that a ban on the visible wearing of political, philosophical or religious symbols is an appropriate means of achieving that aim, provided that the policy is genuinely pursued in a consistent, systematic and undifferentiated manner, and (importantly) the ban only covers employees who interact with customers. The ECJ also commented that the national court would need to ascertain whether (taking into account G4S's constraints and without imposing an additional burden) it would have been possible for G4S to offer A a non-customer facing role, rather than dismissing her.

Customer request not sufficient: In *Bougnaoui*, the ECJ found that the 'genuine and determining occupational requirement' exception under the Directive is very limited. It held that this concept relates to a requirement that is objectively dictated by the nature of the occupational activities, or of the context in which they are carried out. It does not cover subjective considerations such as the employer's willingness to take account of the particular wishes of the customer.

Take care with blanket bans… The ECJ judgments do not (contrary to some press reports) mean that employers can freely prohibit the wearing of religious symbols in the workplace. The indirect discrimination risk remains a live one. The ECJ's comments are of

limited comfort to employers, since they only address the position for employees in customer-facing roles. If such a ban on religious symbols is applied more widely, to employees in non-customer facing roles, the employer will need to think carefully about whether it can justify this (for instance based on a desire to maintain neutrality internally, not just externally).

…and with customer requests: Employers should not simply acquiesce to the wishes of customers without considering whether this could involve discriminating against their employees. However compelling such a wish may be from a business perspective, it provides no automatic defence to discrimination claims from employees. Any such requests should be dealt via the same approach to an employer's policy on religious symbols in the workplace, as discussed above.

Discriminatory dismissal should also be unfair

The dismissal of an employee on long-term sickness absence may give rise to claims of disability discrimination as well as unfair dismissal. Where the dismissal is found to be discriminatory, this should also render the dismissal unfair, according to a recent decision of the Court of Appeal. Although the two tests are different, they should not lead to two different results (*O'Brien v Bolton St Catherine's Academy*).

Dismissal following long-term sickness: O was employed by the Academy as its Director of Learning ICT. She suffered a significant stress reaction after being assaulted by a pupil in March 2011. She was signed off sick in December 2011 and did not return thereafter. O was referred to the Academy's occupational health team, which sought information from her concerning her prognosis, but information was not readily forthcoming. Although O was receiving both psychological treatment and medication, there was no clear evidence of when she might be fit to return to work. O was therefore dismissed in January 2013.

New evidence on appeal: At her internal appeal in April 2013 O produced a "fit for work" note and other medical evidence which suggested that she had initially been misdiagnosed but was now receiving appropriate treatment for PTSD. The appeal panel nonetheless upheld the dismissal on the basis that the medical evidence was inconsistent and the fit note was an attempt to return before her condition had been fully treated.

Claims: O lodged claims of unfair dismissal and discrimination arising from a disability under section 15 of the Equality Act 2010. The Tribunal upheld her claims, finding that the Academy's aims in dismissing O were legitimate (i.e. the efficient running of the Academy, the reduction of costs and the need to provide a good standard of teaching), but that dismissal was disproportionate. It found that the Academy had adduced no satisfactory evidence about the adverse impact of O's continuing absence, and should reasonably have waited "a little longer" to see if she would be able to return. The Tribunal concluded that the disproportionate nature of O's dismissal also rendered it unfair. The EAT reversed this decision, criticising the fact that the Tribunal had conflated the tests for discrimination and unfair dismissal.

Dismissal not proportionate: The Court of Appeal allowed O's appeal, reinstating the Tribunal's decision. It noted that this case was "*borderline*" because of the length of O's absence and the unsatisfactory nature of the evidence about her prognosis. However, the key point was that, by the time of O's internal appeal, there was evidence that she was fit to return. The Tribunal had therefore been entitled to hold that it was disproportionate and unreasonable of the Academy to disregard that evidence. A more proportionate approach would have been for the Academy to obtain a further assessment by its own occupational health advisers to test the new evidence, before deciding to dismiss O. It found that the Tribunal was also entitled to expect some evidence of the severity of the impact of O's long-term sickness absence on the Academy.

Two tests, one outcome: The Court found it "*entirely legitimate*" for the Tribunal to conclude that its finding that the dismissal was disproportionate for discrimination purposes meant that it was not reasonable for the purposes of the unfair dismissal claim. The Court found that "*the law is complicated enough without parties and tribunals having routinely to judge the dismissal of an employee disabled by long-term sickness by one standard*

for the purposes of unfair dismissal, and by a different standard for the purposes of discrimination law". It concluded that the two tests, whilst having different burdens of proof, were both objective and should not lead to two different results.

Limited additional exposure? The finding that a discriminatory dismissal is also unfair will not typically lead to significantly greater financial exposure for an employer. An employee in that scenario would not typically be able to recover an unfair dismissal compensatory award in addition to any compensation for the discriminatory dismissal. The only additional award would likely be the unfair dismissal basic award, which would be capped at £14,670 (from April 2017).

Pointers for employers: This case provides some useful pointers for employers contemplating the dismissal of a disabled employee on long-term sickness absence:

- The impact of the absence on the employer will be a significant factor in showing whether dismissal is a proportionate response. If the impact is not immediately obvious, the employer should produce evidence to make the impact (and its severity) clear.

- Employers should take proper account of any new evidence that has come to light since the original decision and is adduced at the internal appeal.

That said, employers are ultimately entitled to some finality, particularly where (as here) the employee has not been wholly co-operative with the absence management process, and where the medical evidence the employee relies on is equivocal and produced late in the day.

When does contractual notice of termination take effect if it is sent by post?

When an employer gives notice of termination under an employment contract, the contract itself may specify how notice may be given (and when it takes effect). However, if it does not, there will be an implied term that the notice only takes effect when it is received by the employee. This may be problematic where the notice is sent by post during an employee's annual leave, and where the timing of notice is crucial to the employee's pension entitlements, as demonstrated by a recent Court of Appeal decision (*Newcastle upon Tyne NHS Foundation Trust v Haywood*).

Employer gives notice: H was employed by the NHS as an associate director of Business Development. In early 2011 the NHS decided that H's role was at risk of redundancy. H went off sick on 13th April, ostensibly caused by the stress of the redundancy consultation process. She was then on annual leave on holiday in Egypt from 19th to 27th April. In the meantime, the NHS determined that H was to be made redundant. On 20th April it sent three letters to H, one by recorded delivery to her address, one by ordinary post and one by email to H's husband's email address (H had not given the NHS permission to send her communications to this email address, although she herself had used it). H only read the letter on her return from holiday on 27th April (she read the emailed letter later the same day).

Why did timing matter? H's contractual notice period was 12 weeks. Her 50th birthday was on 20th July 2011, and if her dismissal took effect on or after that date, she would be entitled to an enhanced pension. The dispute turned on the date on which the notice of termination was validly given; it had to be 26th April or earlier in order to deny H the enhanced pension. H claimed that it did not take effect until she read the letter on 27th April. She therefore brought proceedings seeking an order that her employment continued until 20th July and she was entitled to the enhanced pension. The High Court granted the order, and the NHS appealed.

Implied term requires receipt: The Court of Appeal dismissed the appeal. It held that there is an implied term that a notice of dismissal must be received by the employee in order for it to take effect. On the facts of this case, the recorded delivery letter reached H's house on 26th April, when her father-in-law collected it for her from the Post Office. This, in the Court's judgment, gave rise to a rebuttable presumption of receipt on 26th April. The burden then shifted to H to show that she had not received it on that date (the Court noted that "*it might after all have been eaten by the dog*

or swept away by a visiting plumber"). The Court found that the presumption had been rebutted on the facts, since H had shown that she had not actually received the letter until 27th April 2011, on her return from holiday. Her 12 weeks' notice therefore did not expire before 20th July, and she was entitled to the enhanced pension.

Lessons for employers: This case shows the importance of including an express provision in the employment contract concerning how notice may be given, and when it takes effect. For example, the contract may specify that notices sent by post take effect forty-eight hours after they are posted. In the absence of such an express term, there will be an implied term that notice only takes effect when it is received (which may give rise to uncertainty, as this case shows). Fundamentally, it is always better for important notices to be delivered personally wherever possible.

Points in Practice

HMRC guidance on bonus claw back arrangements

HMRC has updated its Employment Income Manual (EIM00819 - EIM00845) to include additional guidance on the treatment of claw back of bonuses made to employees. The guidance is a follow-up to the Upper Tribunal's decision in *Martin v HMRC*, which held that repayment of a bonus could generate 'negative earnings' which would be available to be set off against positive earnings or to claim repayment of PAYE deducted.

The guidance confirms that a bonus which is repaid because the employee resigns would be 'negative earnings', whereas repayment of money obtained by theft or for breach of a restrictive covenant would not be. It does not specifically address clawback because of misconduct or poor financial performance, although by analogy with *Martin* it should be possible to argue that these amounts are negative earnings.

Corporate governance: Law Society responds to BEIS Green Paper

The Law Society has published its response to the BEIS Green Paper on Corporate Governance reform. The response suggests that the Government should not pursue three of its five options for giving shareholders more say over executive pay, namely:

- making all or some of the elements of the executive pay package subject to a binding vote;
- requiring or encouraging quoted company pay policies to (a) set an upper threshold for total annual pay, and (b) ensure a binding vote at the AGM where actual executive pay in that year exceeds the threshold; and
- requiring the existing binding vote on the executive pay policy to be held more frequently than every three years (but no more than annually), or allowing shareholders to bring forward a binding vote on a new policy earlier than the mandatory three year deadline.

The response also encourages the Government, companies and shareholders to provide further support and encouragement for the use of shareholder powers already in place, better engagement between companies and shareholders, and more effective remuneration committees (and improved understanding of their role, their composition and the consultants engaged by such committees).

Employment Tribunal quarterly statistics: Oct to Dec 2016

The Ministry of Justice has published its latest statistics on employment tribunal cases for October to December 2016. The statistics reveal that:

- Single claims increased 3% compared to the same quarter in 2015 (they have remained relatively stable following the initial decrease on the introduction of tribunal fees in 2013).
- Tribunals disposed of 18% more multiple claims (notably, equal pay claims) but 8% less single claims, compared to the same quarter in 2015.

37% of claims disposed of were settled via ACAS. 19% were dismissed on withdrawal, 16% were withdrawn, and just 5% were successful at hearing.

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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