SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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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

Finance Act 2017: Employment measures withdrawn

The Finance Act 2017 received Royal Assent on 27th April 2017. The Bill was fast-tracked through the legislative process, in light of the 8th June 2017 general election. The government therefore dropped a large number of measures from the Bill, including the changes to taxation of termination payments, which were due to take effect in April 2018. These measures would effectively require employers to subject to tax an amount equivalent to the employee's basic pay if notice is not worked, as well as making all termination payments subject to class 1A NICs above the £30,000 threshold.

The other employment-related measures which have been dropped are those concerning taxable benefits (in relation to the time limit for making good and ultra-low emission vehicles), the exemption from tax liability on employees for legal support provided by their employer if called on to give evidence in court, and PAYE settlement agreements.
If the Conservative government is re-elected, it intends to re-introduce the withdrawn provisions in a new Finance Bill as soon as possible after the general election.

Cases Round-up

Uncooperative attitude constituted gross misconduct

A senior employee who failed to engage with or properly lead a project to which she was opposed was guilty of gross misconduct, and was fairly (and not wrongfully) dismissed, according to a recent judgment of the Court of Appeal (*Adeshina v St George's University Hospitals NHS Foundation Trust*).

Lack of leadership or cooperation: A worked as a senior pharmacist in the prison service. She was asked to lead a project that she was opposed to. The employer took the view that she had behaved unprofessionally during a senior management meeting, and had failed to co-operate, support and lead the project. Following a disciplinary procedure, A was summarily dismissed for gross misconduct. Her appeal was conducted as a re-hearing, and was rejected.

Claims: The Tribunal dismissed her claims of wrongful and unfair dismissal. Although it found the initial dismissal decision to be unfair, as it was based in part on matters which had not been put to A, it was satisfied that these defects had been cured at the re-hearing, and that the appeal panel had been entitled to conclude that A's conduct merited dismissal. The EAT upheld the Tribunal's findings.

Gross misconduct: The Court of Appeal dismissed A's appeal. The Court was satisfied that the allegations against A had been said to potentially constitute gross misconduct. They correlated to examples of "gross misconduct" set out in the employer's disciplinary procedure. The Court also rejected A's contention that it was unfair for more serious findings to have been made at the re-hearing. It found that, in fact, the decision-makers at the original disciplinary hearing and the re-hearing had found the same allegations proved. It was only that the first decision-maker had used somewhat milder language. The Court went on to find that, even if the appeal panel had made more serious findings, there would have been no unfairness, because it did not impose a more serious sanction. The Court concluded that deliberate non-co-operation such as this was undoubtedly repudiatory conduct, which justified A's dismissal.

Employer had acted reasonably: The Court noted that, with more effective management, A's attitude of non-cooperation and passive resistance could have been confronted earlier and perhaps overcome. However, this would be "*to apply a standard of perfection rather than of reasonableness*". It was not fatal that the employer did not over the period up to the launch of the new project regard A's performance as a disciplinary matter, and that it was only at the end of the process, looking back through the prism of the final alleged

escalation of behaviour, that it appreciated that she had in fact been guilty of gross misconduct.

Lessons for employers: Employers are entitled to expect cooperation and leadership from their senior employees, and any deliberate failure may be actionable as gross misconduct. A separate point to remember is that where there is a procedural failing in a disciplinary process, this may be cured by conducting the appeal as a re-hearing.

Six month non-compete clause was valid and enforceable - even after garden leave

The High Court has enforced a six month non-compete covenant preventing a junior inter-dealer broker working for a competitor. The Court was satisfied that, in these circumstances, the employer would not be adequately protected by a non-solicitation covenant and confidentiality obligations. Although the broker was not placed on garden leave, the Court stated that it would also have upheld the covenant if it ran after a three month period of garden leave, resulting in a nine-month period of restriction (*Tradition Financial Services Ltd v Gamberoni*).

Contractual protections: G was employed by TFS as a trainee inter-dealer broker, and was assigned to its Italian power desk. His contract contained a non-compete clause preventing him from working for competitors within a specified territory for six months after termination of his employment. The clause also prevented G, for the same period, from soliciting TFS's clients or employees, or disclosing confidential information belonging to TFS. The contract also provided that G could be placed on garden leave, and that time spent on garden leave would not be set off against the period of the post-termination restrictions unless garden leave exceeded three months.

Departure: On 1st July 2016, G told TFS that he was resigning and going to work for a competitor of TFS (SS). He was not placed on garden leave during his notice period, but was placed on "back office duties", ostensibly to restrict his access to clients. G's employment with TFS ceased on 31st October 2016, and he was told that he was not free to work for a competitor until 1st May 2017. However on 3rd January 2017 G commenced employment with SS on its European power desk. TFS sought an injunction, asserting that G was not free to work for competitors until 1st May 2017.

Injunction granted: The High Court granted the injunction to enforce the non-compete covenant in G's contract. It was satisfied that a non-compete covenant was necessary in this case since non-solicitation and non-dealing covenants would be difficult to police, and there were material disputes as to what information was confidential.

Duration was reasonable: The Court found that a non-compete clause which kept a broker out of the market for between 6 and 12 months was not excessive by the current standards of the industry. Six months reflected a reasonable pre-estimate of the time it would take for TFS to shore up its client contacts and find a replacement to take over from G, in order to protect its legitimate interests.

Garden leave could have been added: Notably, the Court went on to find that if G had been put on garden leave for three months and then made subject to the non-compete covenant for a further six months, a total period of nine months would not have been unreasonable.

Breadth was permissible: The Court found that even if the clause would prevent G from taking a back office job for a competitor during the non-compete period, that did not make the clause too wide. It was needed to protect TFS's confidential information; the knowledge of such confidential information was achieved no less by working in the back office than by working on the broking desk. The Court found it noteworthy in this regard that during his notice period at TFS, G had sent a list of some of TFS's clients to SS, and in the few days that G had worked for SS in January 2017, he had contacted a number of his former clients.

Protection for employers: This decision is a useful example of a six-month non-compete being validly imposed on a relatively junior employee, but one whose position and client connections were such that his departure posed a risk to the employer's legitimate business interests. It also demonstrates that, depending on all the other circumstances, there may be scope for a restrictive covenant to be validly imposed after a period of garden leave, so as to extend the overall period of protection. The court will then assess the whole period of restriction (garden leave and post-termination

covenant) to determine if it goes no further than is necessary to protect the employer's legitimate business interests.

Multiple choice recruitment test constituted disability discrimination

A job applicant with Asperger's syndrome who was required to sit a multiple choice "situational judgment test" as the first stage in a recruitment process suffered disability discrimination, according to a recent EAT decision. The employer's refused to adjust the format of the test also amounted to a failure to make reasonable adjustments (*The Government Legal Service v Brookes*).

Recruitment test: B is a law graduate and has Asperger's syndrome. The GLS operates a "fiendishly competitive" recruitment process for its lawyers which includes at the first stage a multiple choice 'Situational Judgment Test' (SJT). When B applied to join the GLS as a trainee lawyer, she asked if, on account of her Asperger's, she could provide short narrative answers to the questions instead of having to choose between multiple choice answers. The GLS refused, indicating that an alternative format was not available. B took the test and scored 12 out of 22 points (the pass mark was set at 14).

Claims: B brought claims for indirect disability discrimination, discrimination arising from her disability, and failure to make reasonable adjustments, which were upheld at first instance. The Tribunal found that the medical evidence (while not conclusive) could support a conclusion that B was put at a disadvantage by the requirement to sit a multiple choice test. It also found that the discrimination was not justified; while the GLS was pursuing a legitimate aim (i.e. testing applicants' ability to make effective decisions), the means by which it did this were not proportionate. Finally, it found that allowing short written answers to be supplied to the SJT would have been a reasonable adjustment.

Particular disadvantage: The EAT dismissed GLS's appeal, which was based partly on whether B had suffered particular disadvantage. The EAT noted that the medical evidence (while inconclusive in parts) showed that B fitted the profile of a person likely to be disadvantaged, i.e. someone who lacked social imagination and would have difficulties in imaginative and counter-factual reasoning in hypothetical scenarios. Further, B's university had accepted that she required similar adjustments to exams on her degree course. It was also relevant that there was no other apparent reason for B failing the SJT. The fact that other Asperger's sufferers had not requested the adjustment did not mean that B was not personally disadvantaged, since the same disability may affect different people in different ways.

No justification: The EAT also upheld the Tribunal's findings on justification. The GLS had argued that where a test of competency is inextricably linked with the competency itself (as it claimed the SJT was), it should be treated as justified and should not require adjustment. The GLS maintained that short written answers would not be as useful a tool because (amongst other things) it would require the application of subjective human judgment, it would be expensive and would cause logistical difficulties. The EAT found that the Tribunal had been entitled to reject the contention that the format of the test was inextricably linked to the core competency being tested, and to find that any inconveniences to the GLS were outweighed by the disadvantage suffered by B. In any event, the Tribunal had found that the GLS's refusal to agree to amend the SJT was "on principle rather than on practical grounds". The EAT concluded that the Tribunal's reasoning could not be faulted and should stand.

Points to note on recruitment: Many UK employers use some form of multiple-choice psychometric test in the initial stages of a recruitment process. This case confirms that employers must consider making adjustments to such tests, not just for any applicants suffering from Asperger's syndrome, but potentially those with other forms of Autism Spectrum Condition. The medical evidence in these cases may be inconclusive, so the safest approach is to make adjustments wherever possible, rather than seeking conclusive medical evidence to support them. Employers should be aware that in such circumstances there may be a need to run two different methods of assessment in parallel, which may lead to difficulties in comparing candidates' responses and potentially a degree of subjectivity in the determination. These should not however detract from the obligation to make adjustments.

Points in Practice

Gender pay gap reporting: website now live

The Government Equalities Office (GEO) has launched the website to host the data which employers are required to publish under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

The website is searchable by employer name, and can be filtered by sector. The data can also be downloaded in an Excel spreadsheet.
So far, five employers have uploaded their data, most of which had quite positive stories to tell (three showed a relatively modest gender pay gap in favour of men, and one showed women were actually paid 6.4% more on average (15% more using a median measure)).

The website only hosts the bare minimum data which is required by the Regulations, and does not include any additional narrative which the employer may have provided. There is however the potential for a link to be added to the full gender pay gap on the employer's website.

Action point: Employers should begin collating the data required to produce their gender pay gap reports (if they have not already done so). If you require any assistance with this process, please speak to your usual Slaughter and May contact.

Employment Status: Work and Pensions Committee report on gig economy

The House of Commons Work and Pensions Committee has published its report on Self-employment and the gig economy. This follows an inquiry which took evidence during February and March 2017 from witnesses including representatives of companies such as Uber, Amazon, Hermes and Deliveroo.

The report finds that many companies are using self-employed workers as cheap labour whilst excusing themselves of responsibilities towards workers. Profit is said to be the main driver behind the self-employment model; the report finds that companies have been promoting a 'myth' that flexible employment is contingent on self-employed status. In particular, the report notes that this model is being used to avoid the extra costs of National Insurance contributions, pension auto-enrolment and the apprenticeship levy. It also finds that the ease with which companies are able to classify their workforce as self-employed fails to protect workers and increases their reliance on the welfare state.

The report calls on the incoming government (following June's general election) to:

- Introduce a **default employment status of 'worker'**, rather than 'self-employed', which would provide basic employment rights commensurate with 'worker' status. The burden of proof for deviating from this status would fall on the company engaging the worker, which would need to present the case for doing so. As there is no 'worker' status in tax law, it is intended that tax status would be unaffected.

- Set out a roadmap for **equalising the NICs of employees and the self-employed**. The report finds that, with the introduction of the single-tier state pension in April 2016, the last major difference between employees and the self-employed (in terms of them being beneficiaries of the welfare state) was removed, so the inequality of contribution is no longer defensible.

  - Comment: the government's recent U-turn on increasing NICs for the self-employed suggests that there will be little appetite for this change if a Conservative government is returned.

- Encourage the **self-employed to save for retirement**. The report recommends that consideration should be given to re-designing the tax return form, so that the presumption is that people make contributions to a pension, with there being an option to "opt out" of this presumption.

Next steps: The Taylor review is due to report within the next few months, and will undoubtedly inform what legislative changes are taken forward.

Government rejects high heels ban but promises new guidance on dress codes

The Government has rejected a petition (which had gained more than 152,000 signatures) calling for a ban on employers requiring women employees to wear high heels at work. The Government's response is that existing legislation is sufficient and provides enough scope for redress for employees who suffer discrimination. However, the Government has committed to produce guidance on the law on dress codes. This adopts the recommendation of a joint report from the Petitions and Women and Equalities Committees, 'High heels and workplace dress codes', which in January called for urgent action to prevent discriminatory practices relating to dress at work.

Next (sensible-shoed) steps: The government has undertaken to produce new guidance during summer 2017, and to explore other options for raising further awareness of the law on dress codes.

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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