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

General Election 2017: Employment manifesto pledges

With the General Election less than a week away, the political parties are making the final push for public support for their agendas. Employment law features prominently in the manifestos of all three major political parties.

The **Conservatives** claim to be promising "*the greatest expansion in workers' rights by any Conservative government in history*". Their manifesto includes a commitment to maintain workers' existing rights post-Brexit, to continue the Taylor review into employment status, and to introduce a measure of employee representation on listed company boards. They would strengthen regulation of executive pay, and give more support to those caring for sick relatives or returning to work after family leave. They also promise to extend discrimination protection for those with mental health problems, and take further action to address the gender pay gap and ethnicity pay gap.

The **Labour** party has set out a "*20 point plan for security and equality at work*". Its manifesto proposes a comprehensive reform of employment law, including making all existing employment rights 'day one' rights and extending them to all workers, as well as shifting the burden of proof towards employment status. They would repeal the Trade Union Act 2016 and give unions new rights in the workplace. An Excessive Pay Levy would tackle high executive pay, while a maximum 20:1 pay ratio would limit those bidding for public contracts. Labour would also increase the length of maternity and paternity pay, and introduce new ethnicity pay gap reporting. All existing EU law rights would be preserved following Brexit.

The **Liberal Democrats** are offering a second referendum on the Brexit deal, and would campaign to remain in the EU. Their other manifesto promises include introducing the potential for two-tier boards to facilitate employee representation, and new disclosure requirements for executive pay ratios. They would extend gender pay gap reporting to cover race and sexual orientation, make flexible working, paternity and shared parental leave 'day one' rights, and create an additional month's leave for fathers.

With initial predictions of a Conservative landslide fading, and some polls even predicting a hung parliament, it remains to be seen which of these proposals will be taken forward.

Cases Round-up

How much is a day's pay?

Employers often need to calculate a day's pay for their employees, for example when making deductions for a day of unpaid leave. But how should the daily rate be calculated for an employee on an annual salary who may be required to work outside their normal Monday to Friday working week? The Supreme Court has recently confirmed that the appropriate daily rate in these cases should be 1/365 of annual salary (*Hartley v King Edward VI College*).

Teachers' contracts: A group of teachers (H) were employed at a sixth form college (KEC) on annual salaried contracts. Their contracts required them to work up to 195 days a year of "directed time" (which includes teaching), and an unspecified amount of undirected time (which included lesson preparation and marking work). H taught five days a week but regularly performed undirected duties outside of normal term-time hours, i.e. during evenings, weekends and/or days of annual leave.

Deductions for strike action: In November 2011, H participated in a full day of lawful strike action. The KEC made deductions from their pay at a rate of 1/260 of their annual pay (260 being the number of weekdays in a calendar year). H brought proceedings for breach of contract, arguing that the KEC was only entitled to deduct 1/365 of their annual

pay. Their argument was based on section 2 of the Apportionment Act 1870 (AA 1870), which provides that "*all...annuities* [which includes salaries]...*shall…be considered as accruing from day to day, and shall be apportionable in respect of time accordingly*". H's claim was dismissed by both the County Court and the Court of Appeal, which accepted that the KEC's approach of using the rate of 1/260.

Daily rate: The Supreme Court allowed H's appeal, overturning the earlier decisions. Its approach was that:

- H's contracts provided an annual salary which was payable for all the work under that contract. Given the wide scope of the responsibilities of teachers, H were not able to carry out all of their work during directed time, therefore they carried out much of their work in undirected time outside of the normal college day on evenings, weekends and days of annual leave.

- Section 2 AA 1870 deems that payments are to accrue day by day at an equal rate. Given that H worked under annual contracts, with equal monthly payments, their salaries must therefore be apportioned on a daily basis over 365 days, yielding a daily figure of 1/365.

- The principle of equal daily apportionment under section 2 will apply unless the contract clearly provides otherwise (as per section 7 AA 1870). In this case, there was nothing in H's contracts which stipulated for any apportionment other than apportionment on a calendar day basis. The correct rate was therefore 1/365.

Type of contract is key: This decision provides helpful clarification for employers who need to calculate a daily rate for employees on annual salaries, particularly those who are required to carry out duties outside their normal working days. It is worth noting that the approach would be different where for example the contract sets down an hourly rate, or is not an annual contract, or where the contract otherwise clearly provides for a different daily rate of accrual.

Wider relevance? The daily rate of pay may be of wider relevance (beyond deductions for strike action). The same approach would likely apply to other types of unpaid leave, such as unpaid sick leave, sabbatical leave, dependants' or compassionate leave. It may also apply to holiday pay, and payment in lieu of untaken holiday on termination, subject to the separate line of case law dealing with what amounts should be included and what reference periods should be used for the calculations.

Whistleblowing: Employer's belief that disclosure not protected was irrelevant

An employee who is dismissed for making protected disclosures will be automatically unfairly dismissed. In such cases, whether the disclosure is in fact 'protected' is determined objectively, by reference to the statutory test. The employer's belief that the disclosure is not protected is no defence to the claim, according to a recent judgment of the Court of Appeal (*Beatt v Croydon Health Services NHS Trust*).

'Dysfunctional' workplace: B was employed as a consultant in the interventional cardiology department at Croydon University Hospital. The department was described as 'dysfunctional' as B did not get on with the other consultant and his colleagues; each had made numerous allegations about the conduct of the others. **Incident**: In June 2011, one of the nurses (SJ) was called to a meeting to answer allegations of abusive conduct towards her colleagues. B initially accompanied SJ at that meeting, but was called away to take over a procedure. During B's absence, SJ was suspended. In the meantime, complications had developed in B's procedure, and the patient (X) tragically died.

Allegations and dismissal: B claimed that it was irresponsible to suspend SJ during her clinical responsibilities, and that her absence contributed to X's death. He expressed these views on a number of occasions in the following days and weeks, including to senior management of the NHS Trust, and to the coroner investigating X's death. The NHS Trust took the view that he was making unsubstantiated and unproven allegations in bad faith (motivated by his personal antagonism towards his other colleagues) and dismissed him for gross misconduct.

Claim: B claimed that he had been unfairly dismissed for making protected disclosures. The Tribunal upheld B's claim, finding that the disclosures had been made in good faith, and

that they had been the real reason for dismissal rather than misconduct as alleged. The EAT however allowed the Trust's appeal.

Employer's belief: The Court of Appeal allowed B's appeal. It rejected the Trust's main contention that it was sufficient that its management had genuinely believed that B's allegations were not protected disclosures. The Court found that in whistleblowing cases it was necessary to distinguish between two questions:

(i) whether the making of the disclosure was the principal reason for the dismissal; and

(ii) whether the disclosure was a protected disclosure.

The Court clarified that the first question requires a subjective enquiry into what facts or beliefs caused the decision-maker to decide to dismiss. The second question, whether a disclosure was protected, is to be determined objectively by the tribunal.

Whistleblower protection: The Court noted that it would enormously reduce the scope of the protection afforded by the whistleblowing provisions if liability could only arise where the employer itself believed that the disclosures for which the employee was being dismissed were protected. Parliament had quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. The Court therefore reinstated the Tribunal's finding of automatically unfair dismissal.

Employers beware: It is a high-risk strategy for an employer to say explicitly that an employee is being dismissed for making allegations of impropriety, as the Trust did in this case. If the employee can show that his allegations amounted to protected disclosures, the employer will be (as the judge put it in this case) "*condemned out of its own mouth*" in an unfair dismissal claim. It will not be relevant that the employer viewed the whistleblower as a 'troublemaker' whose disclosures were not protected.

Good faith less relevant: The difficulty for employers is even more pertinent since the requirement for disclosures to be made in good faith, which the employer relied on in this case, was removed in June 2013, and replaced with the potential for the tribunal to reduce compensation by up to 25% where there is a lack of good faith. Since this amendment, the scope for an employer to successfully defend a whistleblowing unfair dismissal claim has narrowed. It remains possible (although difficult in practice) to establish that the employee was dismissed for the manner in which the disclosures were made, rather than the disclosures themselves.

Expatriate employees: relevance of English law contract

Expatriate employees (i.e. those who live and work outside the UK) can only bring claims in the UK if they have a stronger connection to Britain and British employment law than the place where they are working. In showing this stronger connection, the choice of English law to govern the contract of employment is a relevant consideration and must not be disregarded, even if an English contract is chosen principally as a matter of convenience (*Green v SIG Trading Ltd*).

Expatriate employee: SIG was a British company, which employed G as Managing Director of its business in the Kingdom of Saudi Arabia (KSA). G lived in Lebanon, and commuted to work in the KSA for two to four days each week. Given that the KSA operation had only recently been established, G reported to a manager based in the UK, and other staff and support services were also located in the UK. G was paid in UK sterling and registered with HMRC (although he was treated as exempt from UK tax and NICs). G was not a member of SIG's pension scheme, and only travelled to the UK on limited occasions for training and some business meetings.

English contract: G was given one of SIG's standard UK contracts, which recorded that it was to be governed by English law, and included references to UK policies and British statutory employment protections. It also contained a mobility clause which allowed that G might be required to work in the UK, and post-termination covenants relating to the UK and Ireland.

Dismissal claim: When G was made redundant (a decision that was taken and implemented by the UK employer), the Tribunal dismissed his claims under the Employment Rights Act 1996. It held that G could not bring himself within the jurisdictional exceptions which allow claims by expatriate workers. Balancing the various factors, it concluded that G had stronger connections to KSA and the Middle East than to Great Britain and British employment law, and thus that it did not have jurisdiction to hear his claims.

Choice of law was relevant: The EAT allowed G's appeal. It accepted (as the Tribunal had) that G could not class himself as a posted worker, working abroad for the purposes of a UK business, and that this was properly categorised as an expatriate worker case. However, in assessing whether the stronger connection was really with Great Britain and British employment law, the Tribunal had disregarded the fact that the parties had agreed that G's contract should be governed by English law. It was not suggested that the contractual term in this regard did other than properly represent the parties' intentions. It was therefore wrong of the Tribunal to have regard to SIG's subjective explanation for this (i.e. that G was put on a UK contract "*for convenience*").

Other English provisions less so: The EAT accepted that the Tribunal had been entitled to disregard references to British statutory protections, or post-termination covenants that related to "UK and Ireland territories", as simply examples of standard form terms and conditions arising from the use of SIG's 'off the shelf' UK contract, allowing for the fact that the KSA business was newly founded and SIG did not have other organisational support in the KSA at that stage. This was seen as simply a pragmatic arrangement and said little about any connection between G's employment and Great Britain.

Balancing act: There may be many reasons why a UK business chooses to use English contracts for employees who live and work in its overseas operations. There will also be many factors weighed into the balance when determining whether the expatriate worker has a stronger connection to Great Britain than his place of work. However, UK businesses should be aware that by choosing English law to govern such contracts, they are tilting the balance in favour of such employees having UK employment rights. The fact that an English law contract is used 'for convenience' where the overseas operations are not yet properly established does not detract from the relevance of the choice of law. Including references to UK policies or statutory protections or UK restrictive covenants may not, however, have the same relevance as the choice of law.

Points in Practice

Employment status: Union claims for expansion of TUPE and recognition rights to "workers"

The Independent Workers' Union of Great Britain (IWGB) has announced that it is bringing an employment tribunal claim on behalf of Andrew Boxer, a bicycle courier engaged by CitySprint. Mr Boxer was transferred over from Excel when the company was taken over by CitySprint. The IWGB argues Mr Boxer is being unlawfully classified as an independent contractor and denied holiday pay. The claim is to determine whether TUPE applies to protect "workers" as well as employees.

Under Regulation 2, TUPE applies to "employees" defined as "*any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services*". The inclusion of the phrase "*or otherwise*" has given rise to uncertainty about whether workers may be included within the definition (although there has yet to be any UK case law on this issue).

Separately, the IWGB has asked the Central Arbitration Committee (CAC) to determine whether Deliveroo riders are "workers" within the definition in section 296(1) of the Trade Union & Labour Relations (Consolidation) Act 1992. This applies to an individual working

under a contract of employment or "*any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his*". If the riders fall within this definition, it would allow the IWGB to seek statutory recognition by Deliveroo in respect of the riders. The hearing took place on 23rd – 25th May, and the CAC's judgment is awaited.

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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