SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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New Law

General Election 2017: What does the result mean for employment law?

The general election on 8th June 2017 resulted in a Hung Parliament, with the Conservative Party winning only 318 seats, short of the 326 needed for an outright majority. The Prime Minister Theresa May has said she will go ahead with forging a minority government, working with the Democratic Unionist Party (DUP).

The question now is how much of the Conservative manifesto the party will be able to implement. There has already been speculation (for instance from the Brexit Secretary David Davis) that some parts of the manifesto will have to be "pruned".

The DUP Manifesto says very little about employment law. At just 22 pages, the focus is on restoring devolution and achieving the best deal for Northern Ireland as the UK leaves the EU. From an employment law perspective, the only relevant content is that the DUP supports:

- "*the maintenance of the present workers' rights framework (and for the UK to lead the way in improving this framework as it has throughout its history)*";
- "*continued increases in the National Living Wage (NLW)*"; and
- "*firm action against companies who fail to pay their staff the NLW*".

The DUP also supports the maintenance of the pensions 'triple lock' and "*an end to the unfair treatment of women pensioners*".

There is concern in some quarters about what impact the Conservative Party's reliance on the DUP may have on equalities laws, since the DUP has opposed the introduction of same-sex marriage in Northern Ireland. The Prime Minister has however confirmed (to the 1922 Committee of Conservative MPs) that there would be no watering down of equalities laws.

The House of Commons returned on Tuesday 13th June. The Queen's Speech was scheduled to take place on Monday 19th June, but has now been delayed until Wednesday 21st June. We will report further in the next edition of this Bulletin.

Cases Round-up

Share sale did not involve TUPE transfer; garden leave enforced

Employees who wish to join a competitor can be very creative in finding ways to avoid or set aside their contractual obligations to their current employer. A recent case involved an argument from a company CEO that a share sale of a parent company of his employer involved a TUPE transfer, which entitled the CEO to object to the transfer and treat his employment (and the garden leave he was currently serving) as terminated, allowing him to join a competitor. The High Court however rejected the CEO's argument, and granted his employer an injunction to enforce his 12 month garden leave provision (*ICAP Management Services Limited v Berry & BGC Services (Holdings) LLP*).

Group structure: B was employed by IMSL as the CEO of the Global e-Commerce division of the ICAP group of companies. IMSL was a service company which provided services to other ICAP group companies. IMSL was wholly owned by another group company (IHL), which in turn was wholly owned by IGBHL, which was wholly owned by ICAP plc.

Notice and garden leave: On 21st July 2016, B signed a forward contract with BGC (a competitor of the ICAP group). The next day, B gave 12 months' notice to terminate his contract with IMSL. Three days later, BGC announced that B would be joining it as an executive managing director in its global electronic and hybrid execution team (subject to his outstanding legal obligations). On 26th July, IMSL placed B on garden leave.

Share sale: On 30th December 2016, ICAP plc sold the shares in IGBHL to Tullet Prebon plc

(TP). The transaction also involved ICAP restructuring the commercial organisation of its global broking business under the ownership of IGBHL.

Departure: B claimed that the transaction with TP amounted to a TUPE transfer. He therefore purported to object to the transfer of his employment, with the effect that his employment would terminate, under regulation 4(8) of TUPE. In response, IMSL issued an application for an injunction to enforce garden leave. An interim injunction was granted on 3rd March 2017, preventing B from working for BGC (having started his new role 3 days earlier) pending full trial.

No TUPE transfer: The High Court granted an injunction for the full period of garden leave, to expire on 21st July 2017. It rejected B's argument that there was a TUPE transfer in this case. While it is possible for there to be a TUPE transfer as part of a share sale, this requires a transfer of the business in which the employee is employed, so that the purchaser takes over the day-to-day running of the business and assumes responsibility as employer. On the facts, notwithstanding the share sale, IMSL continued to be responsible for its own business and bore the obligations of employer to its staff, including B. Although the ICAP and TP businesses now had common ownership, they remained two distinct, competing brands. There was therefore no transfer of an economic entity for TUPE purposes. It followed that B was not entitled to object to the transfer of his employment, or treat that employment as terminated.

Confidential information: Moving on to consider garden leave, the Court found that IMSL had a legitimate interest to protect, notably its confidential information. The evidence showed that B held a senior and important position with access to confidential and strategic information which he accepted "*you would not want in the hands of a competitor*". Further, despite his evidence at trial which attempted to convey the contrary, the Court found that B could recollect some of this information a year after seeing it. The Court was satisfied that that information would remain of great interest to competitors, and its disclosure would cause significant harm to IMSL.

12 months was reasonable: In terms of the period of protection, the Court began with the contractual garden leave provision, which was agreed by the parties and was commonly employed in the industry. The Court also noted that the garden leave provision was similar to that which B had 'happily consented to' in his new contract with BGC. It also found the forward contract relevant insofar as (i) it was clearly anticipated that BGC would not be able to secure B's services for at least 12 months (the Court also took this as evidence against the suggestion that B's skills would stagnate or atrophy whilst on garden leave); and (ii) B had negotiated a substantial indemnity for his lost bonus, which meant he would not be out of pocket despite being on garden leave. The Court therefore saw no basis on which not to enforce the full 12 month period of garden leave against B.

Relevance for transactions: This decision provides a useful analysis of the circumstances in which a share sale may involve a TUPE transfer. It makes it clear that integration of the target business into the purchaser group must be judged at the level of day-to-day management; simple shared ownership or strategic oversight at a higher level will not be sufficient.

Garden leave is not a given: The case is also a reminder to employers that simply inserting a garden leave clause in the contract does not guarantee that it will be enforceable. The courts will approach garden leave in much the same way as restrictive covenants, requiring a legitimate interest which the provision goes no further than is reasonably necessary to protect. As with the TUPE analysis, this will be very fact-specific.

AG Opinion on holiday pay and payments in lieu on termination

Employers must provide their workers with 'adequate facilities' to exercise their right to paid annual leave. This means that where an employer has not provided a worker with paid leave (for example, because he had wrongly classified the individual as self-employed), the right to paid leave carries over until the worker has the opportunity to exercise it, according to a recent Advocate General's Opinion. Further, on termination of employment, the worker has the right to payment in lieu of leave that remains outstanding, potentially reaching back over the entire period of employment (*King v The Sash Window Workshop Ltd*).

Salesman denied paid holiday: K was engaged by SWW in 1999 as a commission-only salesman. Both parties operated on the basis that K was self-employed and had no entitlement to paid holidays. SWW offered K an employment contract in 2008, but he rejected it in favour of remaining self-employed. Although he usually took several weeks leave each year, he did not take the full 5.6 weeks' guaranteed under the Working Time Regulations 1998 (WTR 1998), nor was he paid for any holiday which he did take. K was dismissed in 2012, and he subsequently brought a claim for paid leave stretching back over the entire 13 year period of his working relationship with SWW.

Claim: The Tribunal found that K was, in fact, a worker and therefore was entitled to claim for paid leave under the WTR 1998, which it found included an entitlement to pay for holiday not taken in previous years. The EAT however allowed the employer's appeal. The Court of Appeal made a reference to the CJEU to clarify the position under the EU Working Time Directive (WTD).

'Adequate facilities': The AG's Opinion was that European law requires that employers must provide adequate facilities to workers for the exercise of their entitlement to paid annual leave. In terms of 'adequate facilities', he gave the examples of a specific contractual term concerning paid annual leave, or a legally enforceable administrative procedure. The AG left it to the UK courts to decide whether SWW's offer of an employment contract in 2008 to K constituted an 'adequate facility' for the exercise of the right to paid annual leave.

Payment in lieu: If (as in K's case) no such adequate facility has been made available (or if it is only made available part way through the relationship), the AG found that the worker may rely on the WTD to secure payment in lieu of untaken leave.

Carry-over: It followed that, if a worker does not take all or some of the annual leave to which he is entitled in the leave year, in circumstances where he would have done so but for the fact that the employer does not pay him for any period of leave he takes, the worker can claim that he is prevented from exercising his right to paid leave, such that the right carries over until he has had such opportunity to exercise it.

Termination: The AG went on to find that, on termination of the employment relationship, a worker is entitled to an allowance in lieu of paid annual leave that has not been taken up, until the date on which the employer made available to the worker an adequate facility for the exercise of the right to paid annual leave. If this never occurred, then an allowance is due to cover the full period of employment until termination of the employment relationship.

Another risk in employment status disputes? This Opinion is topical given the current trend for ostensibly self-employed individuals (particularly in the gig economy) to establish themselves as workers. If followed by the CJEU, this Opinion could potentially expose employers of such workers to claims for unpaid holiday pay stretching back over the entire period of the worker relationship. Currently there are limits on such exposure under UK law under both:

- the *Bear Scotland* rule (requiring a gap of no more than three months between periods of WTD leave in order to maintain the series of deductions required for an unlawful deductions claim to stretch back further than three months from the date of the claim); and
- the Deductions from Wages (Limitation) Regulations 2014, which limit an unlawful deductions from wages claim for these purposes to the period of two years prior to the date of the claim.

Action for employers: From a practical perspective, the AG's Opinion clearly puts the onus on employers (rather than workers) to, in his words, "*take all the necessary steps to ascertain whether they are bound to create an adequate facility for the exercise of the right to paid annual leave, whether those steps be the taking of legal advice, consultation with relevant unions, or seeking counsel from Member State bodies that are responsible for the enforcement of labour law*". Employers will therefore need to be proactive, once the case has been finally determined (we will report further at that stage).

Shared parental leave: Denial of enhanced pay to father was direct discrimination

Many employers offer enhanced pay to women on maternity leave, but fewer offer the same

enhancement to both mothers and fathers who opt in to the new shared parental leave (ShPL) regime. Does this give rise to direct sex discrimination, and can the father on ShPL compare himself to the mother on maternity leave? An employment tribunal has recently answered yes to both these questions, in a decision which may have implications for ShPL schemes (*Ali v Capita Customer Management Limited*).

ShPL deterrent: A father (A) took two weeks paternity leave at full pay, but then sought to take 12 weeks' ShPL to enable his wife to return to work (following medical advice that this would help with her post-natal depression). A was however deterred from taking ShPL by the employer (CCML)'s policy of only offering statutory pay for ShPL. It seems that this policy applied to both mothers and fathers taking ShPL, whereas mothers taking maternity leave were entitled to 14 weeks' full pay. A therefore claimed to have suffered direct sex discrimination.

Valid comparison: The Tribunal upheld A's claim. It allowed A to compare himself to a woman taking maternity leave, in the period after the two week period following the birth. A had conceded that there was a material difference between women and men during the initial two week period following the birth, given the requirement for the mother to take compulsory maternity leave which is related to her biological/physiological condition and recovery following childbirth. However, the Tribunal agreed that this distinction no longer applied after the initial two weeks, noting that the ShPL regime allows mothers to transfer their leave and pay entitlements from this point.

Parenting roles: The Tribunal found it was important to consider this claim "*in the context of parental roles and choices as they are in 2016*" (when the relevant events occurred). It found that either parent can perform the role of caring for the baby in its first year depending on the circumstances and choices made by the parents (as reflected by the ShPL regime). That choice, in its judgment, should be "*free of generalised assumptions that the mother is always best placed to undertake that role and should get the full pay because of that assumed exclusivity*". The Tribunal therefore upheld the direct discrimination claim, finding that A should have been entitled to the 12 weeks' leave at full pay.

Watching brief: This is only a tribunal decision and is not binding in future cases. It is also reportedly being appealed to the EAT, so employers would be best advised to wait for further guidance from the EAT before changing their policies. Nevertheless, employers should be on notice that they may need to make changes to ensure that men and women are treated equally as regards enhanced pay (or indeed, by offering no enhanced pay at all), whatever type of family leave they are taking.

Restrictive covenants: relevance of career progression

Restrictive covenants are interpreted as at the time they are agreed, not at the later stage when they are enforced. What impact does career progression therefore have on the enforceability of restrictive covenants? This was the subject of a recent High Court decision (*Egon Zehnder Ltd v Tillman*).

'Up and out': The case involved an individual (T) who was originally engaged in a junior position as a consultant, but progressed rapidly to principal and subsequently partner within the same business. T's original contract included a six-month non-compete restrictive covenant. When T came to leave the business, the employer (EZL) sought an injunction to enforce the covenant.

Career plan is relevant: The High Court granted the injunction. It confirmed that the reasonableness of the restraint had to be judged as at the time the contract had been agreed, and not some later point in time. However, that was not to say that only the actual position as at the date the employment started can be considered. The Court found that what had been in the parties contemplation had to be considered, and that this could include promotion.

Partnership not the touchstone… Applying this to the facts of the case, T's status as a partner was discounted. The Court found that the level of expectation arising when the contract was concluded was not sufficiently high to allow the clause to be justified against what might happen in terms of partnership. It would be wrong to assume engagement at some future

level of employment if that level had not been clearly provided for. Therefore, the validity of the clause had to be judged by reference to her status as a consultant and what had been contemplated by both parties as a result of that.

…but more than just consultant: However, on the facts, the individual had not been a 'normal' consultant. She had become more steeped in client affairs more often and to a deeper extent that might have been expected of another consultant without her large and valuable experience. The Court held that that level of engagement justified restraint. It was satisfied that the non-compete restraint was an appropriate mechanism of protecting the business' legitimate interests, and lesser restraints were not sufficient by themselves. It also found that six months was a reasonable period in the circumstances.

Regular review is best: This case demonstrates that the parties' expectations as to career progression when the contract is entered into will be relevant to the enforceability of that covenant down the line. Nonetheless, the safest approach is always to keep the covenants under regular review and to redraft them where necessary to reflect changes in the individual's role (for instance, the move to partnership in this case).

Points in Practice

GDPR: ICO warns businesses to prepare

The Information Commissioner's Office (ICO) has issued a press release warning businesses that they must prepare for the commencement of the General Data Protection Regulation (GDPR), which will apply in the UK from 25th May 2018. The government has confirmed that the UK's decision to leave the EU will not affect the commencement of the GDPR.

The ICO describes the GDPR as '*the biggest change to data protection law for a generation*'. It urges businesses to be aware of the commercial benefits of sound data protection, and act to ensure they're compliant by 25th May 2018.

The European Commission has also issued a statement in which it says that it will be stepping up its work with member states and engaging with companies to ensure harmonisation in the implementation of the GDPR. It is also intending to launch an EU-wide campaign to raise awareness among European citizens of their rights.

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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