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

Queen's Speech 2017: employment aspects

The Queen's speech was delivered on Wednesday 21st June, marking the state opening of Parliament after the recent general election. The key points of interest from an employment perspective are:

- The government will put forward a Repeal Bill to repeal the European Communities Act 1972 and convert EU law into UK law.

- A separate Immigration Bill will end free movement of EU nationals into the UK, and make EU nationals within the UK subject to relevant UK law.

- The Queen's speech stated that the government "*will make further progress to tackle the gender pay gap and discrimination against people on the basis of their race, faith, gender, disability or sexual orientation*". However, no specific detail was given on the manifesto commitment to create an ethnicity equivalent to gender pay gap reporting.

- The accompanying government document described the Taylor Review as "*an important step towards us ensuring fairness for everyone in work and we look forward to receiving the report shortly*". The document also promises that the government will "*seek to enhance rights and protections in the modern workplace*", which indicates that it intends to act on the Taylor Review's recommendations.

- The Queen's speech also promised a reform of mental health legislation, with the underlying document confirming that this will include "*ensuring that those with mental ill health are treated fairly, protected from discrimination, and employers fulfil their responsibilities effectively*". This seems to be a reference to the Conservative manifesto plans to extend protections under the Equality Act 2010 to mental health conditions that are 'episodic and fluctuating'.

- The National Living Wage will be increased to 60% of median earnings by 2020 (as per the Conservative manifesto), and then subsequently raised in line with median earnings. There was no mention of extending the increases to the other rates of the National Minimum Wage.

- There will be a Data Protection Bill to replace the current Data Protection Act 1998, which will be designed to strengthen individuals' rights and introduce a "right to be forgotten", as well as making the other changes required by the General Data Protection Regulation (GDPR).

- There will also be a National Insurance Contributions Bill, to legislate for the National Insurance contribution (NICs) changes announced in the 2016 Budget and the 2016 Autumn Statement. The Bill is intended to make the NICs system fairer and simpler, but does not relate to the discussion of Class 4 NICs for self-employed individuals at the time of the Spring Budget 2017.

- Finally, there was confirmation that the government's legislative programme will also include three Finance Bills to implement budget decisions, with Summer Finance Bill 2017 set to include a range of tax measures including those to tackle avoidance. There was however no specific detail on when or how the proposals to amend tax on termination payments, which were removed from the Finance Act 2017 before it received Royal Assent, will be included.

The fate of the Conservative's remaining employment-related manifesto pledges (as set out in our 2nd June Bulletin) is uncertain. In particular, the speech made no mention of the manifesto pledges to require listed companies

to publish the ratio of executive pay to broader workforce pay, and to implement employee representation on their boards.

The government has cancelled next year's Queen's speech, so the legislative programme announced in this speech will cover a two-year period. This is intended to give MPs more time to debate all the Brexit legislation.

Cases Round-up

Employees rights are maintained on a transfer from pre-pack administration

The EU Acquired Rights Directive (ARD), which TUPE implements in the UK, provides for the transfer of employees and the protection of their accrued rights on the transfer of an undertaking. There is however an exception under Article 5(1) ARD, where the transferor is subject to "*a bankruptcy procedure or any analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor and being under the supervision of a competent public authority*". If Article 5(1) applies, employees do not automatically transfer, and certain key employment rights do not transfer.

The CJEU has recently confirmed that a pre-pack administration does not fall within the Article 5(1) exception, meaning that the usual provisions for transfer and protection of employees' rights under the ARD will apply to a pre-pack administration (*Federatie Nederlandse Vakvereniging v Smallsteps BV*)

Insolvency: Estro Groep (EG) was at one time the largest childcare company in the Netherlands. It had almost 380 childcare centres and employed approximately 3,600 workers. However, on 5th June 2014 EG submitted a court application for the appointment of a prospective insolvency administrator, which was done on 10th June. Ten days later, a new company (S) was created by an associated company of EG's principal shareholder, in order to take over a large part of EG's childcare centres.

Pre-pack and dismissals: On 5th July, EG was declared insolvent. That same day, a 'pre-pack' agreement was signed between the insolvency administrator and S. On 7th July, the insolvency administrator dismissed all the EG employees. S offered new employment contracts to almost 2,600 of the EG employees, but over a thousand were not re-engaged.

Transfer of employees? The Federatie Nederlandse Vakvereniging (FNV), a Netherlands trade union organisation, and four dismissed employees brought an action before the District Court. They claimed that the ARD must apply to the 'pre-pack' agreement, with the consequence that those four workers must be regarded as having transferred to S's employment.

Liquidating assets is not the aim: The CJEU held that a pre-pack administration does not come under the exception laid down in Article 5(1) ARD, so that the protection scheme laid down in Articles 3 and 4 of the ARD applies to a transfer of an undertaking as part of such a pre-pack. The CJEU found that (subject to verification by the Dutch court) a pre-pack administration is not ultimately aimed at liquidating the undertaking. The mere fact that a pre-pack procedure may also be aimed at maximizing satisfaction of creditors' collective claims does not make it a procedure instituted with a view to the liquidation of the assets of the transferor.

Not properly supervised: The CJEU also found that the pre-pack administration in this case was not "under the supervision of a public authority", as required by Article 5(1). The procedure was not in reality carried out under the supervision of a court, but rather by the undertaking's management, which conducted the negotiations and adopted the decisions concerning the sale of the insolvent undertaking. The Court accordingly concluded that a pre-pack procedure such as that at issue in these proceedings did not satisfy all the conditions laid down in Article 5(1) and that, therefore, there could be no derogation from the protection scheme provided for under the ARD.

Relevance to UK transactions: This is the first time the CJEU has considered the application of the ARD to pre-pack administrations. Its decision is consistent with UK case law, notably *Key2law (Surrey) LLP v Gaynor De'Antiquis* [2012] IRLR 212, where the Court of Appeal held that pre-pack administration is akin to "relevant

insolvency proceedings" under Regulations 8(2) - 8(6) of TUPE. This means that TUPE applies as normal, save that certain liabilities do not transfer (and are instead met by the National Insurance Fund), and there is slightly greater scope for changes to terms and conditions.

Discrimination: causation and relevance of institutional attitudes

When facing an allegation of discrimination from an employee, it is not uncommon for the employer to propose a secondment or transfer to another role, as a means of resolving the dispute. If the employee is unhappy with some aspect of that secondment, can he bring further discrimination proceedings based on the initial discrimination complaint being the reason for the secondment? And what is the relevance of broader evidence that discriminatory conduct or attitudes exist within the employer institution, when bringing such a claim? The Court of Appeal addressed these issues in a recent case, with mixed outcomes for employers (*Chief Constable of Greater Manchester v Bailey*).

Secondment: B, a black man, was employed by the Greater Manchester Police (GMP) as a detective constable. He had previously made a claim of race discrimination, which the GMP settled on terms that B would be seconded to the regional intelligence unit, with the use of a car for work, for two years. B's secondment was terminated after three years, and he lost his entitlement to the car. He complained to the GMP's professional standards branch. The assistant chief constable (S) rejected his complaint of unfair treatment, but no further investigation was conducted, and his allegations of racial discrimination were not addressed.

Discrimination? B issued fresh proceedings complaining of racial discrimination and victimisation arising from the termination of the secondment and its consequences (claim 1), and the handling of his subsequent complaint (claim 2). The Tribunal upheld claim 1 in respect of victimisation, having found that the ending of the secondment and removal of the car amounted to a detriment flowing from a protected act, namely the earlier settlement. In respect of claim 2, the Tribunal upheld both the victimisation and discrimination complaints on the basis that S was, consciously or sub-consciously, affected by the embarrassment to the GMP of having to investigate a further race complaint by an officer who had already made such a complaint, and that had influenced her decision not to take matters any further. The EAT upheld that decision.

No causal link: The Court of Appeal allowed the GMP's appeal in respect of claim 1. Whilst it was correct to say that there would have been no secondment to terminate if B had not brought his earlier claims, that kind of "but for" causative link was not the correct test for discrimination purposes. The reason why the secondment was terminated, and why B had to leave it, was that the agreed two-year period had expired: it had nothing to do with B's race, or the existence of the settled claims. The Court therefore substituted a finding of no discrimination or victimisation on claim 1.

Broader evidence of discrimination: The Court did however find that, in respect of claim 2, material showing discriminatory conduct or attitudes elsewhere in a particular institution was admissible, as it may make it more likely that the alleged conduct had occurred, or that the alleged motivations were operative. In the present case, the fact that the GMP had been the subject of two recent reports of racist conduct or attitudes by its members might have served to increase the sensitivity or embarrassment which the Tribunal found had influenced S's thinking. However, the Court stressed that such material must always be used with care, and the tribunal must identify with specificity the particular reason why it considers the material in question to have probative value. The Tribunal in this case had failed to do so, and its findings about S's motivation were therefore unsafe. Claim 2 was therefore remitted for rehearing.

Lessons for employers: Employers who have previously faced allegations of discrimination will often be more alive to the reputational and other risks involved. This should compel them to investigate such allegations thoroughly (rather than, as it seems happened in this case, deter them from doing so). These employers may also find themselves in a more difficult position when defending such allegations, if evidence of

other discriminatory conduct or attitudes is admitted.

Employers should however at least be able to take steps to address discrimination complaints (such as the secondment in this case), without finding that any issue with the secondment can be traced back to the initial complaint as a means of founding a further claim.

Weekly rest break can be granted at any time within seven day period

Under the Working Time Directive (WTD), workers are entitled to a weekly rest break of 24 hours in each seven-day period. Does this mean that the rest break must be granted on the seventh day following six consecutive working days? Not according to the Advocate General, whose preferred approach was that the rest break may be granted on any day within that period, at the employer's discretion (*Maio Marques da Rosa v Varzim Sol - Turismo, Jogo e Animação, SA*).

Weekly work: The case concerned a casino worker in Portugal who was occasionally required to work for seven consecutive days. He claimed that he was being denied his right to a weekly rest break under the WTD.

Within seven-day period, not at the end: The AG adopted a literal interpretation of the phrase 'per each seven-day period' in the WTD, which does not refer to a precise moment in time when the weekly rest period must fall. He felt that this phrase must be given an independent and uniform interpretation throughout the EU. His view was that EU law does not require that the weekly rest period is granted on the seventh day following six consecutive working days, but that the period must be granted within each seven-day period.

UK law is consistent: The consequence of the AG's interpretation is that a worker may, in principle, be required to work up to 12 consecutive days (with a 24 hour rest break before and after that 12 day period), as long as other requirements of the WTD are complied with, such as those relating to daily rest and the maximum weekly working time. This reflects the position taken as regards weekly rest breaks under Regulation 11 of the Working Time Regulations 1998. UK law is therefore compliant with EU law in this respect, if the CJEU upholds the AG's opinion.

Travel time may be "working time", but pay depends on contract

Back in 2015, the CJEU decided that when peripatetic workers travel to and from the first and last assignment each day, they are at their employer's disposal. This time is therefore "working time" for the purposes of the Working Time Directive (WTD) (*Federacion de Servicios Privados del sindicato Comisiones obreras v Tyco Integrated Security [2015] IRLR 935*).

The EAT has now confirmed that the same approach applies under the Working Time Regulations 1998 (WTR). However, that does not necessarily mean that the worker must be paid for that travelling time. The issue of pay for this time must be determined by the terms of the contract (*Thera East v Valentine*).

Peripatetic support worker: V was a support worker for a charity (TE), assisting disabled people in the community. He used his own car to travel to assignments. His contract provided that he would be paid for 1815.07 hours each year, and that his working hours did not include his travel from his home to his first assignment and from his last assignment to return home each day.

Working time? Following the decision in *Tyco*, V claimed that his travel to his first, and from his last, assignment each day was working time. He sought 'time credit' in respect of that travel time because his contract provided that hours worked in excess of 1815.07 each year 'will generally be taken as time off in lieu'. He also claimed mileage expenses 'if appropriate'. The Tribunal upheld V's claim, and also found that TE had made unlawful deductions from V's wages by failing to pay him for his travelling time.

Contract is key to pay: The EAT allowed TE's appeal, finding that there had been no unlawful deductions from wages in this case. It was clear from V's contract that he had no entitlement to payment of wages in respect of time spent travelling to the first place of work and from the last place of work. The CJEU had made it clear in *Tyco* that the WTD is not generally concerned with questions of payment, and that the employer in that case remained free to determine remuneration for time spent

travelling between home and customers. TE had done so here, as per the clear terms of the contract, and no right to payment therefore arose.

Drafting points: This decision provides useful confirmation that it is open to employers to exclude payment for travelling time for peripatetic employees via clear contractual wording. That said, UK employers must also consider whether this sort of travel time could amount to "hours of work" for the purposes of the National Minimum Wage Regulations 2015, which could then entitle the worker to the National Living/Minimum Wage (as applicable).

Points in Practice

ICO revised Code of Practice on subject access requests

The Information Commissioner's Office (ICO) has published a revised Code of Practice on subject access requests. The revised code incorporates the principles from a number of recent cases on SARs, and also sets out how the ICO expects to see subject access requests dealt with in practice. The key points are:

- Data controllers (such as employers) are required to take reasonable and proportionate steps to comply with a SAR. They must: "*evaluate the particular circumstances of each request, balancing any difficulties involved in complying with the request against the benefits the information might bring to the data subject, whilst bearing in mind the fundamental nature of the right of subject access*".

- The ICO expects to see parties engage in productive dialogue about SARs (and will take this into account when considering a complaint about the handling of a SAR). They stress that having an open conversation with the applicant about the information they require may help the organisation to reduce the costs and effort that it would otherwise incur in searching for the information.

- The Code makes it clear that the requester's purposes are irrelevant to data controller's duties, but (in the spirit of dialogue) "*they may help you ensure you find what they are really looking for*".

- The Code also confirms that organisations should have procedures in place to find and retrieve personal data that has been electronically archived or backed up. This data must be provided in response to a SAR, even if it is more difficult to access than "live" data. However, organisations are not required to expend time and effort reconstituting information that they have deleted as part of their general records management.

- The Code helpfully confirms that, generally speaking, the ICO does not expect organisations to instruct staff to search their private emails or personal devices in response to a SAR unless the organisation has a good reason to believe they are holding relevant personal data.

Article 29 Working Party Opinion on data processing at work

The European Commission's Article 29 Data Protection Working Party has published a new Opinion 2/2017 on data processing at work. The Opinion is expressed to "*complement*", rather than replace, the previous opinion 8/2001 on processing personal data in the employment context, published in September 2001.

The latest Opinion has been published in light of the new technologies which have been adopted since 2001 and which enable more systematic processing of employees' personal data at work. The Opinion makes a new assessment of the balance between legitimate interests of employers and the reasonable privacy expectations of employees, by outlining the risks posed by new technologies and undertaking a proportionality assessment of a number of scenarios in which they could be deployed. These scenarios include:

- accessing candidates' social media profiles as part of the recruitment process;

- accessing employees' social media profiles on an ongoing basis (including those of former employees during the term of their restrictive covenants, to monitor compliance);
- monitoring electronic communications both inside and outside the workplace (for example, via remote working, wearable devices and bring your own device (BYOD) policies); and
- disclosure of employee data to third parties (for example, providing employee names, locations and potentially photos to customers).

Whilst primarily concerned with the Data Protection Directive, the Opinion also considers the additional obligations placed on employers by the General Data Protection Regulation (GDPR).

The Opinion restates the Working Party's previous position, namely that when processing employees' personal data:

- employers should always bear in mind the fundamental data protection principles, irrespective of the technology used;
- the contents of electronic communications made from business premises enjoy the same fundamental rights protections as analogue communications;
- consent is highly unlikely to be a legal basis for data processing at work, unless employees can refuse without adverse consequence;
- performance of a contract and legitimate interests can sometimes be invoked, provided the processing is strictly necessary for a legitimate purpose and complies with the principles of proportionality and subsidiarity;
- employees should receive effective information about the monitoring that takes place; and
- any international transfer of employee data should take place only where an adequate level of protection is ensured.

The Article 29 Working Party is an independent European advisory body on data protection and privacy. It is composed of representatives from data protection supervisory authorities from each EU member state (including the ICO in the UK). The Working Party's Opinions are non-binding, but represent good practice guidance for organisations on how to comply with their data protection obligations.

Employers should therefore take account of this latest Opinion when preparing, reviewing and implementing their policies on monitoring and processing employee data.

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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