SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

2 August 2017 / Issue 13

Legal and regulatory developments in Employment/Employee Benefits

In this issue

New Law

Private Member's Employment Bills ...more

Cases Round-up

Employment Tribunal fees are ruled unlawful ...more

Whistleblowing: NEDs personally liable for detriment claims ...more

Non-compete covenant which prevented shareholding was unenforceable ...more

Ill-health retirement terms were not 'unfavourable treatment' of disabled person ...more

Points in Practice

Consultations on the extension of the Senior Manager and Certification Regimes ...more

Finance Bill to follow summer recess ...more

There is no Pensions Bulletin this week.

Back issues

More about our pensions and employment practice

Details of our work in the pensions and employment field

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

Private Member's Employment Bills

A number of Private Member's Bills were introduced into the House of Commons on 19th July 2017. None of the Bills have yet been published, but the government has made available the following information:

- The **Parental Bereavement (Pay and Leave) Bill 2017-19** would entitle employed parents who have lost a child to statutory paid leave. Although this is a Private Members' Bill, it is supported by the government and meets a Conservative manifesto commitment. It is expected to have its second reading on 20th October 2017.

- The **National Living Wage (Extension to Young People) Bill 2017-19** would extend the National Living Wage to people aged 18 to 24, and is due to have its second reading on 6th July 2018.

- Finally, the **Employment and Workers' Rights Bill 2017-19** is a bill, somewhat cryptically, "*to make provision about employment conditions and workers' rights; and for connected purposes*". It is expected to have its second reading on 27th April 2018.

Cases Round-up

Employment Tribunal fees are ruled unlawful

The Supreme Court has ruled that the employment tribunal fees regime is unlawful under both domestic and EU law. It found that the regime has the effect of preventing access to justice, and is also indirectly discriminatory against women. The Court therefore quashed the offending legislation - the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013 (*R (on the application of UNISON) v Lord Chancellor*).

Access to justice: The Supreme Court unanimously ruled that a right of access to the courts is inherent in the rule of law: it is needed to ensure that the laws created by Parliament and the courts are applied and enforced. The Court strongly emphasised the wider public interest in access to justice, and that employment tribunals are more than merely the providers of a service which is only of value to those who bring claims. It found that the Fees Order created a real risk that persons will effectively be prevented from having access to justice, and the degree of intrusion into access to justice is greater than is justified by the purposes of the Fees Order.

Fees are unaffordable: The Court found that in order for tribunal fees to be lawful, they must be set at a level that everyone can afford. This was simply not established on the evidence, which showed a fall in the number of employment tribunals claims that was so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable. The Court also noted that, even where fees are affordable, they prevent access to justice where they render it futile or irrational to bring a claim (for example in claims for modest or no financial awards).

Discrimination: The Court also found that the Fees Order was indirectly discriminatory under the Equality Act 2010. The higher fees for certain 'type B' claims (including unfair dismissal and discrimination) put women at a particular disadvantage, as a higher proportion of women bring those claims. The Court found that the higher fees could not be justified; the Fees Order had not been shown to be more effective at transferring the cost of the service from taxpayers to users. Further, the Court found that meritorious as well as unmeritorious claims might be deterred by the higher price.

Implications: The Supreme Court's judgment has huge practical significance for employment tribunal claims:

- As of 26th July 2017, fees are no longer payable for claims in the employment tribunal, or for appeals to the EAT.

- The government has committed to repay all fees which were paid in the past, although details of the refund scheme have yet to be announced. The cost of refunding all past fees has been estimated at around £32m.

- It is not yet clear whether employers will be able to seek refunds where they have been ordered to pay costs to winning claimants to reimburse them for their fees, or where they have paid sums in settlement of a claim which included reimbursement of the tribunal fee.

- It also remains to be seen whether claimants who did not lodge proceedings because of the fees regime may do so now, and argue that the tribunal should extend the usual time limits on the basis that the fees regime made it "not reasonable practicable" to bring the claim in time, or that it is "just and equitable" to extend time.

- Looking further ahead, there is a possibility that (Brexit-related time pressures permitting) the government may seek to reintroduce employment tribunal fees in a different form. If so, it seems inescapable that the fees would need to be lower to avoid the new regime also being struck down as unlawful. Further changes to the design of the fees regime would also seem prudent, based on the Supreme Court's judgment.

- Finally, it seems likely that the level of employment tribunal claims will increase as a result of the abolition of fees, although given the 70% drop-off in claims since fees were introduced, it remains to be seen whether (and when) pre-2013 levels are reached.

Whistleblowing: NEDs personally liable for detriment claims

Since 2013, workers have been able to bring a whistleblowing claim not just against their employer, but also against a fellow worker who subjects him to detrimental treatment on the grounds that he has made a protected disclosure. Where the worker is an employee and is dismissed, the dismissal is only actionable against the employer via a claim of unfair dismissal, rather than detrimental treatment. But can the employee also bring a detriment claim against the fellow worker who dismissed him? The EAT has recently confirmed that he can, in a claim by a CEO which saw two non-executive directors (NEDs) made jointly and severally liable with the company for over £1.7m in compensation (*International Petroleum Ltd v Osipov*).

Board-level dispute: O was employed as the CEO of IP, an oil and gas exploration company. He came into conflict with T (a NED who was also the majority shareholder in IP) and S (another NED), who both exercised what were effectively management functions. O believed that T and S were prepared to engage in serious wrongdoing, and were subjecting him to undue pressure and interference in his role as CEO.

Protected disclosures: O made a number of protected disclosures relating to IP's business, for example concerning a proposal to appoint a contractor without a tender (which O contended would be in breach of IP's contractual obligations),and the lawfulness of data held by IP in its data room. Three days after the final disclosure, S sent O an e-mail dismissing him with immediate effect.

Claim: O claimed that his dismissal by IP was automatically unfair by reason of his protected disclosures. He also claimed that T and S, acting during the course of their engagement as workers of IP, had personally subjected him to detrimental treatment, by excluding him from the major part of his role, undermining and humiliating him, and ultimately summarily dismissing him without any form of process. He relied in particular on an e-mail mistakenly sent to O, which T had intended to send to S, and which clearly indicated that the view that O was an obstacle had been behind T's instruction that O should be removed as CEO. The Tribunal upheld O's claims, and IP appealed.

Disclosures were "protected": The EAT dismissed the appeal, confirming that O's disclosures were protected and that they were the reason for the detriments and dismissal. Many of the arguments centred on whether the disclosures were of "information" and not merely allegations, but the EAT also rejected arguments that O did not reasonably believe his

disclosures were "in the public interest". It accepted the Tribunal's findings that O's disclosures were made for the benefit of IP and all its shareholders, including any potential shareholders and investors. It noted that IP was a publicly traded company and even if trading in its shares was suspended (as they were for a time), discussions about a sale or merger were then in progress and engaged the interests of a wider group than just O and IP.

NEDs were personally liable: The EAT also confirmed that T and S were personally liable for losses flowing from the dismissal. It held that the insertion of section 47B(1A) into the Employment Rights Act 1996 in 2013 had created '*a framework for individual liability of a fellow worker for detriments without restriction*'. There was nothing in the wording of that provision to limit the detriments caught by it or to exclude from individual liability detriments amounting to the termination of the working relationship. The Tribunal had therefore been entitled to hold IP, T and S jointly and severally liable for £1,744,575.56 of losses which flowed from O's dismissal (save for the basic award for which IP was solely liable).

Who to sue? This case confirms that a worker may bring a claim against a fellow worker for whistleblowing detriment, where the detriment is a dismissal. The EAT acknowledged that it is likely to be an unusual case where an employee will wish to pursue a claim against a fellow worker for a whistleblowing detriment amounting to dismissal, rather than pursuing the claim against the employer. Such a claim may however be attractive in a number of circumstances:

- where the claimant is not an employee (and cannot therefore claim unfair dismissal);
- where a claim may lie against a high value individual (as directors often are);
- where the employing company has gone into liquidation;
- where the claimant seeks an award for injury to feelings, which is available via a detriment claim, but not unfair dismissal; or
- in light of the different causation tests. In an unfair dismissal claim, the claimant must show that the reason (or principal reason) for dismissal was the protected disclosure. This is a higher threshold causation test than that which applies for other forms of detrimental treatment, which only requires that the protected disclosure was more than a trivial reason for the detrimental treatment.

Non-compete covenant which prevented shareholding was unenforceable

A six-month non-compete covenant which provided that a former employee should not "*directly or indirectly engage or be concerned or interested in*" any competing business was found to prevent the employee from becoming a shareholder in a competing business. This made the clause impermissibly wide and an unreasonable restraint of trade, despite the fact that the former employee was in fact seeking employment with (not a shareholding in) the competitor (*Tillman v Egon Zehnder Ltd*).

Contract: T was employed by EZ as global head of its financial services practice group. Her contract of employment included a non-compete covenant which provided that she should not "*within the period of six months from the termination date ... directly or indirectly engage or be concerned or interested in any business carried on in competition with any of the businesses of the company ... which were carried on at the termination date or during such period*". T's contract also permitted her (at clause 4.5) to take a shareholding in a publicly quoted competitor, provided that it did not exceed 5% of the company's total equity. However clause 4.5 only applied during her employment, and not after termination.

Departure: T resigned and sought to take employment with a competitor (RRA). EZ sought an injunction to enforce the non-compete covenant and restrain T from working for RRA for six months post-termination. T argued that the covenant was in unreasonable restraint of trade because it prevented her from becoming a shareholder in a competitor. The High Court however granted the injunction, finding that the presence of clause 4.5, which expressly dealt with shareholding, demonstrated that the

non-compete clause was not intended to deal with shareholding at all.

Shareholding was caught: The Court of Appeal allowed T's appeal and set aside the injunction. Its view was that the phrase "*interested in*" in T's covenant would include a shareholding. The Court also rejected EZ's argument that the words "*engage or be concerned or interested in*" should be construed as meaning "actively participate in". It found that such a construction was inherently unsatisfactory it would be unclear what constitutes "active participation". The Court's conclusion was that the covenant did prohibit shareholdings and was impermissibly wide and in restraint of trade. The fact that T did not propose to become a shareholder in RRA was irrelevant.

No severance: The Court went on to consider whether the clause could be saved by severing the words "*or interested*" from the covenant. It rejected this suggestion for several reasons:

- First, even if the words were omitted, the covenant would still be too wide. The question would then be whether a shareholding was covered by the words "*directly or indirectly engage or be concerned ... in any business carried on in competition*". The Court took the view that being a shareholder in any company carrying on a business was being "concerned" in that business at any rate "indirectly".

- Second, the Court found that parts of a single covenant cannot be severed; severance can only take place where there are distinct covenants. The covenant in question was a single covenant preventing T from engaging or being concerned in a competing business in any one of several capacities. It had to be read as a whole and could not be severed.

Careful drafting needed: This case is a reminder that non-compete covenants must be tightly drafted. They will usually use the terms "engage" / "concerned" / "interested" in competing businesses. If they also cover indirect as well as direct actions, there is a significant risk that shareholdings will be caught, and that the clause will be rendered unenforceable as a result. The solution is to either adopt tighter wording, or expressly carve out shareholdings from the non-compete. Ultimately, as the Court stated, it is "*no business of the courts to create a valid covenant in order to replace an impermissibly wide covenant which an employer has sought to impose on the employee.*"

Ill-health retirement terms were not 'unfavourable treatment' of disabled person

A disabled employee who had reduced his hours from full-time to part-time before taking ill health retirement had not been treated "unfavourably" under section 15 of the Equality Act 2010 (EA 2010) when his pension benefits were calculated by reference to his final part-time salary rather than his previous full-time salary, according to a recent judgment of the Court of Appeal (*Williams v Trustees of Swansea University Pension and Assurance Scheme*).

Ill-health retirement: W was employed by the University as a technician, initially on a full-time basis. He suffered from Tourette's Syndrome, obsessive compulsive disorder and depression. The University agreed to W working half time from May 2010 onwards in order to accommodate his disabilities. However, W's doctors ultimately concluded that he was permanently incapable of fulfilling his duties, and he accepted ill-health retirement in July 2013 at the age of 38.

Enhanced pension benefits: Under the University's pension scheme, W was entitled to a pension calculated as if he had worked until the retirement age of 67, payable immediately and without actuarial reduction, but based on his pensionable salary at the date of ill-health retirement. In W's case, this was his part-time salary. Nonetheless, in overall financial terms, the enhancement to W's pension benefits was valued at some £335,000 over and above the value of the benefits already accrued by him.

Unfavourable treatment? W argued that, had he suffered a different disability that struck him down suddenly such that there was no period of part-time working, his benefits would have been calculated on a full-time basis; therefore, the enhancement to his pension should have been calculated using full-time equivalent salary. W brought a claim against the University and the Trustees, claiming that he had suffered unfavourable treatment in consequence of something arising from his disability (his

reduced hours), contrary to section 15 EA 2010. The Tribunal upheld his claim, but the EAT allowed the Trustees' appeal.

Advantageous treatment: The Court of Appeal dismissed W's claim. The Court found that the critical question raised by this case was whether treatment that conferred advantages on a disabled person, but would have conferred greater advantages had the disability arisen more suddenly, amounted to "unfavourable treatment" within section 15. The Court had little hesitation in concluding that it did not.

By analogy… The Court noted that, if W's circumstances had been sufficient to establish disability discrimination, it would be difficult to see why the same would not apply to a disabled claimant who secured a part-time job because that was all that they could manage, but would otherwise have worked full-time. That claimant would be paid a part-time salary because of something arising in consequence of his disability. Similarly, the Court found it would be remarkable if a disabled employee could maintain an entitlement to the same retirement pension as they would have received had they worked full-time throughout their employment, having only ever worked part-time (or only having worked for some months on a full-time basis and then, because of their disability, moved to part-time hours for the next 13 years or so before taking ill health retirement). The Court felt that Parliament could not have intended that such an individual should be able to claim that they had been subject to unfavourable treatment under section 15 and for the onus to be put upon the employer to justify that treatment.

Implications for employers / trustees: The Court's judgment is good news for employers and pension scheme trustees. If W's claim had been upheld, it would have called into the question the terms of pension schemes or insurance contracts conferring increased benefits in respect of disability caused by one type of disease (for example cancer). It also means such schemes can continue to provide enhanced benefits to those who are unable to continue to work through ill health, without an inherent risk that they will be seen as treating ill health retirees 'unfavourably' if they retire from part time service and their benefits are calculated on the basis of their part time pensionable earnings.

Points in practice

Consultations on the extension of the Senior Manager and Certification Regimes

The FCA and PRA have published three consultation papers (**FCA CP17/25**, **FCA CP17/26** and **PRA CP14/17**) on the extension of the Senior Manager and Certification Regimes (SMCR) to all firms authorised under the Financial Services and Markets Act 2000 (FSMA). The extension would bring approximately 47,000 firms within the scope of the SMCR, which will then replace the approved persons regime.

The FCA's proposed approach to the extension of the SMCR is that the Senior Managers Regime, Certification Regime and Conduct Rules would apply to every firm, but some extra requirements will only apply to the largest and most complex firms (fewer than 1% of firms regulated by the FCA). For example, these firms would need to have responsibilities maps, handover procedures, and to make sure that there is a Senior Manager responsible for every area of their firm.

The consultations close on 3rd November 2017. The FCA and the PRA will then publish policy statements and the final rules during summer 2018. The implementation date for the extended regime is expected to be during 2018.

Finance Bill to follow summer recess

The government has **confirmed** that it will publish a Finance Bill as soon as possible after the summer parliamentary recess, to re-introduce the provisions withdrawn from Finance Act 2017 (which included the provisions to amend the rules on taxation of termination payments).

The statement also confirms that the forthcoming Finance Bill will legislate for policies that have already been announced. In this regards, there is no change of policy and the dates of application previously announced will be retained. Those affected by the provisions should continue to assume that they will apply as originally announced. In the case of some provisions that will apply from a time

before the Bill is introduced, technical adjustments and additions will be made on introduction to ensure that they function as intended. To maximise certainty about the exact provisions that will apply, the Government has published updated draft provisions.

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.

© Slaughter and May 2017

This material is for general information only and is not intended to provide legal advice.

546325152