SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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Legal and regulatory developments in Employment/Employee Benefits

In this issue

Cases Round-up

Points in Practice

To access our Pensions Bulletin visit the Slaughter and May website.

Contents include:

- Early exit charges and ban on member-borne commission
- Auto-enrolment consultation – DB alternative quality requirement; seafarers; offshore workers
- State Pension Age (SPA) review
- VAT
- Finance Bill
- IBM Court of Appeal decision
- Ill-heath retirement of disabled person not unfavourable – CA
- LGPS investment guidance not for pensions purpose
- Pensions Ombudsman and PPF Ombudsman Annual Report and Accounts

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

Cases Round-up

Holiday pay must include voluntary overtime

The EAT has decided for the first time that payments for voluntary overtime must be taken into account when calculating holiday pay, if the payments are made with sufficient regularity to constitute 'normal remuneration' under the Working Time Directive (WTD) (*Dudley Metropolitan Borough Council v Willetts*).

Working arrangements: A group of roofers, plumbers and electricians (together W) were employed by DMBC to carry out repairs and improvements to its housing stock. W were all employed on set contractual hours (usually 37 hours per week) which represented their normal working hours. A number of them also volunteered to perform additional duties (and were paid voluntary overtime rates for this work).

Holiday pay: W claimed that they had not received the correct rate of statutory holiday pay for the four weeks' minimum leave required by the WTD. They contended that their holiday pay should reflect contractual overtime, call-out payments, standby allowances and travel allowances, as well as payments for their voluntary overtime.

Voluntary overtime included? The Tribunal upheld W's claim. In respect of voluntary overtime, the Tribunal noted that one of the employees worked regular overtime which was in fact expected of him under his job description, and another worked regular Saturdays and saw it as an extension to his working week. In both cases their voluntary overtime payments were found to fall within normal pay. However, a third employee only undertook voluntary overtime very rarely. His overtime pay was not found to be part of his normal pay.

'Normal remuneration': The EAT dismissed DMBC's appeal. It noted that holiday pay should correspond to 'normal remuneration' (so as not to discourage workers from taking leave); and that the division of pay into different elements cannot affect a worker's right in this regard. As regards whether voluntary overtime counts as 'normal remuneration', the EAT gave the following guidance:

- The payment must have been paid over a sufficient period of time. This will be a question of fact and degree. On the facts of this case, it was sufficient that voluntary overtime payments were made for one week each month, or one week in every five weeks, over a number of years.

- Items which are not usually paid or are exceptional do not count for these purposes, while items that are usually paid and regular across time may do so.

- If there is an intrinsic link between the payment and the performance of tasks required under the contract, that is decisive of the question whether it is included within normal remuneration. However, the absence of such a link does not automatically mean that a payment need not be taken into account. The EAT did find such a link for voluntary overtime payments, on the basis that the arrangement for voluntary overtime would not exist in the absence of a contract of employment, and once W commenced a shift of voluntary overtime, they were performing tasks required of them under their contracts of employment.

- The similarity between the tasks carried out during voluntary overtime and the work ordinarily required during normal working hours will also be relevant.

- The exclusion of payment for voluntary overtime which is normally undertaken would amount to an excessively narrow interpretation of 'normal remuneration'. It would also carry the risk of employers setting artificially low levels of basic contracted hours and categorising the remaining working time as "voluntary overtime" which does not have to be accounted for in respect of paid annual leave. The EAT categorised this as "*not a fanciful but a real objection…as demonstrated by the current proliferation of zero hours contracts*".

Implications for employers: Employers will now need to consider voluntary overtime when calculating holiday pay. In each case there will need to be an assessment of whether the payments are regular and/or recurring and over a sufficient period of time to be regarded as part of 'normal' pay. This is fact sensitive; in this case it was sufficient that the payments were made at least one week a month, over a number of years. The fact-sensitivity of this issue does generate uncertainty for employers, since it may mean that voluntary overtime needs to be taken into account for some employees, but not others (as in this case).

Limitations: It is worth noting that this judgment applies only to the four weeks of statutory holiday under regulation 13 of the Working Time Regulations 1998, and not to the additional 1.6 weeks holiday under regulation 13A, or any extra contractual holiday (in respect of which voluntary overtime payments can usually be excluded).

Suspension and postponed investigation amounted to breach of employer's duty of care

An employer that suspended an employee from work for a lengthy period and postponed its investigation into his alleged sexual misconduct was found to have breached its common law duty of care to that employee. The delay was found to be a maintaining factor in the employee's depression, for which the employer was liable in damages (*Marsh v Ministry of Justice*).

Alleged misconduct: M was employed by the MoJ as a prison officer. In February 2010, he was arrested after being accused by a female prisoner of sexual misconduct. He was suspended from work and Surrey police executed a search warrant at his home, but by November 2010 it was decided that no criminal charges were to be brought against him.

Delay: However, M's suspension from his job was not lifted until June 2012, due to an internal investigation by the MoJ being postponed. The prison governor eventually invited M to return to work, but by that time he was suffering from depression and unable to work. In May 2013, he was dismissed on the grounds of his ill health. M issued proceedings for damages for personal injury on the basis that the psychiatric injury and consequential losses had been caused by the MoJ's negligence and/or breach of contract.

Breach of duty of care: The High Court upheld M's claim. It found that in November 2010, in breach of contract and in breach of its duty of care at common law, the MoJ had postponed the internal investigation after M had been exonerated by the police. The Court found that the disciplinary process should have been concluded by May 2011, when the suspension should have been lifted.

Damages: It was also clear that, but for the MoJ's breach of duty, M would have recovered from the psychiatric injury and would have returned to work in the prison service by May 2012. The prolongation of the suspension until June 2012 had been a maintaining factor in M's depression. Accordingly, M was entitled to recover damages for the prolongation of his illness from May 2012 and for the losses consequent upon that prolongation, including his suffering, medical expenses and lost earnings. The damages awarded included general damages of £23,500, £2,175 for medical expenses and £4,965.59 for loss of pension.

Employers beware: It is good practice (and a requirement of the ACAS Code of Practice on Disciplinary and Grievance Procedures) that suspension should be as brief as possible and kept under review. While an employer may wish to postpone internal procedures pending the outcome of a linked criminal investigation, it will need clear justification for continuing to postpone its internal procedures once the criminal case has concluded.

Discretion in share option agreement must be exercised rationally

An option which was only exercisable with the consent of the company's board did not give the board an unconditional right to veto the exercise of the option, according to a recent judgment of the High Court (*Watson v Watchfinder.co.uk Limited*).

Consent not unfettered: The Court held that if the consent clause were interpreted literally, to give the board an unfettered discretion as to whether to allow exercise, it would render the option meaningless, because the grant of shares would be entirely within the board's gift.

Rationality required: Instead, the Court applied *Braganza v BP Shipping [2015] UKSC 17*, finding that the discretion in the option agreement must be exercised in a way which was not arbitrary, capricious or irrational in the public law sense. This means that there must be a proper process for the decision in question, taking into account the material points and not taking into account irrelevant considerations, and not reaching an outcome outside that which any reasonable decision-maker could decide.

On the facts… In this case, the Court found that the board should have considered whether the option holders had made a real or significant contribution to the company. However, there had been barely any considered exercise by the board of the discretion at all. The board had not focussed on the correct matters, it had proceeded on a mistaken view of what it was about, and it had acted arbitrarily. The Court was therefore clear that there had been no proper exercise of discretion.

Specific performance ordered: Since all the formal steps required for the exercise of the option by the option holders had been fulfilled, the Court proceeded as if consent had been given under the clause. The High Court therefore granted specific performance of the option agreement in favour of the option holders.

Unusual clause: Although the clause in question is not typical of most share option agreements, this case gives a useful general example of how the *Braganza* principles operate on a seemingly unfettered discretion.

Addison Lee cycle courier was a "worker"

A cycle courier who worked for Addison Lee for seven years has succeeded in establishing before London Central Employment Tribunal that he was a "worker" and as such was entitled to holiday pay (*Gascoigne v Addison Lee Ltd*).

Control: The Tribunal found that couriers were given Addison Lee branded bags and T-shirts, responded to a central controller and used Addison Lee IT devices, including a system that had no "decline" button when a job was offered. Couriers needed to be responsive and work quickly during a tightly controlled working day.

Contractual provisions: The Tribunal also noted with disapproval Addison Lee's efforts to "frighten off" the courier from challenging his employment status, by included contractual clauses which asserted that he was an independent contractor, not an employee or worker, and required him to indemnify Addison Lee against any liability for any employment-related claim or any claim based on worker status. The Tribunal's view was that the indemnity suggested that Addison Lee knew the risk of portraying the courier as self-employed.

Reality: The Tribunal was clear that the contractual provisions did not reflect the reality of the relationship between the parties, which was that the courier was expected to regularly carry out work personally for Addison Lee, under its direction. There was no question of Addison Lee being a customer of a business undertaken by the courier. Although the courier was registered with HMRC as self-employed and paid his own tax and national insurance, the Tribunal acknowledged that this was not incompatible with "worker" status.

What next for the gig economy? This is the latest in a line of employment status claims affecting the gig economy, where the contractual provisions suggesting self-employment have not reflected the reality of the working relationship. The case law is still developing however: Uber's appeal is due to be heard by the EAT at the end of September 2017, and Pimlico Plumbers have recently been given leave to appeal their case to the Supreme Court.

Points in practice

Review of FTSE 100 executive pay packages

The Chartered Institute of Personnel and Development (CIPD) and the High Pay Centre have produced a joint report, Executive pay: Review of FTSE 100 executive pay packages. The report reveals that:

- Average FTSE 100 CEO remuneration has dropped by 17% in the past year, from £5.4m to £4.5m per annum (as at March 2017).
- In 2016, the pay ratio between FTSE 100 CEOs and the average pay package of their employees was 129:1. This is down from 148:1 in 2015.

- There are only six female FTSE 100 CEOs – although this is one up on 2015. This means that as a FTSE 100 CEO, it is more likely that your name is David (there are eight) or Steve / Stephen (there are seven) than you are female.

- The gender pay gap for FTSE 100 CEOs stands at 77%. Male CEOs earned on average £4.7m last year, compared with £2.6m on average for women.

- The same proportion of FTSE 100 companies (77%) have no female executive directors.

The report calls on the government to introduce a bill to reform executive remuneration before the year end. It recommends that all publicly listed companies should be required to disclose:

- their FTE figures alongside their headcount numbers, and include a breakdown by region of both FTEs and staff costs so a comparison of pay ratios can be made;

- employee figures for contractors as well as permanent staff, for a deeper understanding of the true size of the business;

- pay ratios within their organisation - to include the ratio from the highest to the lowest paid employee, pay ratios between management tiers, as well as the ratio between the pay for the CEO and the median worker;

- a graph showing the skew of company income distribution over time, to show if it is becoming more evenly distributed or not; and

- how they invest in, lead and manage their workforce for the long term.

The report also recommends that all publicly listed companies should have employee representation on their remuneration committee, and establish a human capital development sub-committee with a wider remit to focus on all aspects of people, culture and organisation.

Brexit: Call for evidence and briefing note on EEA workers in the UK labour market

The Migration Advisory Committee (MAC) has launched a call for evidence on the economic and social impacts of Brexit and how the UK's future immigration system should be aligned with modern industrial strategy. The MAC has been commissioned by the government to advise on these areas, and the call for evidence identifies the information that the MAC will find helpful during the initial phase of the commission.

The call for evidence seeks views on a number of issues, including:

- The economic, social and fiscal costs and benefits of EEA migration to the UK economy.

- The characteristics of EEA migrants in their particular sector, local area or region (for example, the recruitment practices used, the types of jobs migrants perform, their skill level etc), and how these differ from UK and non-EEA workers.

- The extent to which EEA migrants are seasonal, part-time, agency-workers, temporary, short-term assignments, intra-company transfers or self-employed.

- How employment of EEA migrants has changed since 2000 and the Brexit referendum, the advantages and disadvantages of employing EEA workers, and how these have changed following the Brexit referendum result.

- The extent to which EEA and non-EEA migration has affected the skills and training of UK workers.

- The impact a reduction in EEA migration would have on their sector, local area, or region and how they feel they would cope.

- Whether they have made any contingency plans in the event of a reduction in EEA migration to the UK.

- How well aware they are of current UK migration policies for non-EEA migrants.

MAC has also issued an accompanying briefing note outlining some preliminary analysis of the UK labour market and other countries'

migration systems. This is intended to 'kick-start' the call for evidence; it does not make any policy recommendations or provide any conclusions. Some of the issues raised in the briefing note include:

- Preferential treatment for EEA migrants between 18 and 30, who are believed to be more likely to contribute to public finances for longer.
- Numerical limits on the number of visas that could be granted to EEA migrants.
- Labour market tests to assess whether a job vacancy could be filled by a native worker rather than an EEA migrant.
- Minimum salary thresholds for lower-skilled roles to ensure that migration adds economic value.
- Limiting the ability to sponsor EEA nationals to work in the UK to only those employers who obtain some form of accredited status.
- A points based approach where EEA migrants with characteristics that are desired (for example, education, age, occupation) receive more points so that entry to the UK is conditional on skills and employability.

The call for evidence will close on 27th October 2017.

Tribunal claims stayed following Supreme Court fees decision

The President of the Employment Tribunals (England & Wales) has issued a case management order that all claims and applications brought in the Employment Tribunal in England and Wales in reliance upon the decision of the Supreme Court in *R (UNISON) v Lord Chancellor* shall be stayed to await decisions of the Ministry of Justice (MoJ) and Her Majesty's Courts and Tribunals Service (HMCTS) in relation to the implications of that decision.

The stay will affect:

- claims issued without a fee or remission application – either those submitted since the *UNISON* judgment, or prior to the judgment where there is a live application relating to the non-payment of fees or a remission application, or for reimbursement of fees; and
- claims submitted out-of-time following the *UNISON* judgment, which argue that the fees regime made it 'not reasonably practicable' to submit the claim in time and/or that following the *UNISON* judgment it is 'just and equitable' to still hear the claim.

As the order was handed down, reports emerged of a tribunal case, *Dhami v Tesco Stores Ltd*, in which the Southampton employment tribunal reportedly granted an extension of time for filing a claim, based in part on this 'just and equitable' argument. It therefore seems that, unless the MoJ and HMCTS take a different approach, tribunals may well be sympathetic to this argument.

EHRC recommends new 'fair opportunities for all'

The Equality and Human Rights Commission (EHRC) has recommended six new 'fair opportunities for all' strategies to tackle gender, ethnicity and disability pay gaps in the UK. Current figures calculate the gender pay gap at 18.1%, the ethnic minority pay gap at 5.7% and the disability pay gap at 13.6%.

The six recommendations are:

1. All jobs should be advertised as available for flexible working.
2. Fathers should be given extra 'use it or lose it' paternity leave, so that men and women are encouraged to share childcare responsibilities.
3. Gender pay gap reporting should be extended to cover ethnicity and disability.
4. Employers should be encouraged to tackle bias in recruitment, promotion and pay, to increase diversity at all levels and in all sectors. A new national target should be introduced for senior and executive management positions.#
5. The government should invest in sector-specific training and regional enterprise, in

order to improve work opportunities for everyone, no matter who they are or where they live.

6. The government should unlock the earning potential of education by addressing differences in subject and career choices, educational attainment and access to apprenticeships.

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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