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

Data Protection Bill published

The Data Protection Bill 2017-19 has been published (along with explanatory notes). The Bill will replace the Data Protection Act 1998 (DPA) and provide a comprehensive legal framework for data protection in the UK, including implementing the General Data Protection Regulation (GDPR).

The Bill preserves many of the existing exemptions in the DPA, including the exemption for processing of sensitive personal data (now known as "special categories of data") without consent to allow employers to fulfil employment law obligations.

The Bill had its first reading in the House of Lords on 13th September. The second reading, which will involve general debate on all aspects of the Bill, is scheduled for 10th October.

Cases Round-up

Does an employer need to collectively consult when imposing changes to terms?

The Collective Redundancies Directive (CRD) requires employers to undertake collective consultation with employee representatives when they are contemplating "dismissals effected by an employer for one or more reasons not related to the individual workers concerned" (and certain employee thresholds are satisfied). The CJEU has recently given important guidance on the circumstances in which dismissals to effect changes to employees' terms may fall within this definition (Socha v Szpital Specjalistyczny im. A. Falkiewicza we Wrocławiu ("Socha") and Ciupa v II Szpital Miejski im. L. Rydygiera w Łodzi, now Szpital Ginekologiczno-Położniczy im. dr L. Rydygiera sp. z o.o. w Łodzi ("Ciupa"))

Employers in financial difficulty: Both cases concerned Polish hospitals which were experiencing financial difficulties. In order to avoid liquidation, the hospitals decided they needed to make changes to employees' terms and conditions.

Changes to terms: In *Socha* the employer sought to change the method of calculating length of service for the purposes of its length of service pay awards. It was undisputed that failure to accept the amendment of the contractual terms could result in the termination of the employees' contracts. In *Ciupa* the employer proposed a temporary 15% pay cut to all employees (which around 20% of the employees accepted). The other employees were given a notice of amendment of working and pay conditions which provided that the employees, after expiry of their notice period, would receive a pay cut that would apply for several months.

Challenge: A number of the affected employees challenged the hospitals' actions, claiming that the hospitals should have followed the consultation procedure required by the Polish law implementing the CRD before issuing the notifications of changes to terms. The Polish court made a reference to the CJEU to determine whether the CRD applied in these circumstances.

What is "redundancy" for these purposes? The CJEU held that if employer — unilaterally and to the detriment of the employee — makes significant changes to essential elements of his employment contract, for reasons not related to the individual employee concerned, this falls within the concept of 'redundancy' under the CRD. If however the changes are not significant, and/or the element of the contract is not essential, this will not amount to a 'redundancy' for these purposes.

What is "significant"? On the facts of *Socha*, the CJEU held that the change to the method of calculating length of service could not be considered a "significant" change (the CJEU did not need to determine whether the length of service award constituted an essential element of the employment contract). The CJEU therefore found that the notice of amendment did not fall within the concept of 'redundancy'.

What is "essential"? On the facts of *Ciupa*, the CJEU found that it cannot be disputed that remuneration is an essential element of the employment contract. However, whilst a 15% reduction of remuneration could in principle be regarded as a 'significant change', the temporary

nature of the reduction markedly reduced the impact of the proposed amendment of the contract of employment. It would be for the Polish court to determine in the light of all the circumstances of the case whether the temporary reduction of remuneration in this case should be regarded as a significant change.

Dismissals assimilated to redundancies: However, the CJEU nonetheless found that both cases the dismissals should be assimilated to "redundancies" under the CRD (this was because of the way Poland has implemented the CRD, under provisions which do not apply under UK law).

When should consultation start? The CJEU therefore went on to consider at what point the employer is obliged to engage in the consultations provided for under the CRD. The CJEU confirmed that the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken. In the context of changes to terms which are designed to avoid collective redundancies, the consultation process must therefore begin once the employer intends to make such changes.

Implications for UK employers: The CJEU's judgment suggests that collective redundancy consultation may only be required in the UK where the employer is seeking to implement significant changes to essential elements of employees' contracts, via dismissal and re-engagement, for reasons not related to the individual employees concerned. Remuneration should always be regarded as an "essential" element of the contract for these purposes, but temporary changes may not be classed as "significant" (and may therefore not trigger the need for consultation). Similarly, changes to how length of service is calculated for remuneration purposes may not be classed as "significant".

Since the trigger for collective consultation is quite fact specific (and very time sensitive), employers should always seek advice at an early stage on their particular circumstances.

Where can multi-jurisdictional employees bring claims?

Employers will often insert a jurisdiction clause into employment contracts, which specify where the employee can bring a claim against the employer. Employers should be aware of the limitations of such clauses however, under the Brussels Recast Regulation (BRR). A recent case provides an example of such an exclusive jurisdiction clause being found to be ineffective (*Nogueira and ors v Crewlink, Osacar v Ryanair*).

EU rules: The BRR provides that an employer can be sued either in the place in which the employee habitually works, or in default, where the employer's business for which the employee works is situated. It also provides that a jurisdiction clause in the employment contract only applies if it is non-exclusive, and allows the employee to bring proceedings in other locations. An exclusive jurisdiction clause is only enforceable if it is entered into after the dispute arose.

Irish jurisdiction clause: Ryanair and Crewlink (which recruits and trains cabin crew for airlines) are companies established under Irish law, and have their registered offices in Ireland. Between 2009 and 2011, various Portuguese, Spanish and Belgian employees were recruited as members of cabin crew. Their contracts of employment were expressly subject to Irish law and included a jurisdiction clause providing that the Irish courts had jurisdiction. The contracts stipulated that the employees' work was regarded as being carried out in Ireland, given that their duties were performed on board aircraft registered in Ireland.

Belgian workplace: The contracts also however designated Charleroi Airport in Belgium as the employees' home base, and the employees were contractually required to reside less than one hour from Charleroi Airport. The employees started and ended their day's work at Charleroi Airport, and received their instructions at Charleroi Airport by consulting the employers' intranet site.

Belgian claim: Six of the employees brought actions before the Belgian courts. The employees took the view that Belgian law applied to their employment and that the Belgian courts had jurisdiction to deal with their claims. Ryanair and Crewlink argued that, pursuant to the contracts of employment, the Irish courts had jurisdiction for these claims. The Belgian Court doubted its jurisdiction and decided to refer a question to CJEU on the interpretation of the BRR, in particular the concept of the 'place where the employee habitually carries out his work'.

Jurisdiction clause unenforceable: The CJEU confirmed that the BRR prohibits a jurisdiction clause which is concluded before the disputes arose, and which seeks to prevent employees from bringing proceedings before courts which have jurisdiction under the BRR. The jurisdiction clause in this case was therefore not enforceable.

The 'place where the employee habitually carries out his work': The CJEU confirmed that this is the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer. This must be determined by reference to a number of indicative factors, such as:

- the place from which the employee carries out his tasks,
- (in this case) the place where the aircraft aboard which the work is habitually performed is stationed,
- the place where the employee receives instructions concerning his tasks, organises his work, and returns after his tasks, and
- the place where his work tools are to be found.

Although the determination on the facts was left to the Belgian courts, this strongly suggested that the Belgian courts should have jurisdiction to hear the employees' claims.

Drafting limitations: Employers of employees who work within other EU member states should remember that exclusive jurisdiction clauses will not be effective to prevent employees bringing claims in the place in which they habitually work (according to the factors identified by the CJEU). This does not prevent employers inserting non-exclusive jurisdiction clauses in employment contracts (which are more common).

Are pregnant employees protected from dismissal before the employer knows of their pregnancy?

EU law provides special protection for pregnant employees, by limiting the circumstances in which they can be dismissed. Until now, it has seemed that this protection only arises when the employer is informed of the pregnancy (and this is reflected in UK law). A recent Opinion from an Advocate General of the CJEU has suggested otherwise, and that the protection may apply even if the employer is unaware that the employee is pregnant. The Opinion also suggests that UK law may not provide sufficiently broad dismissal protection for pregnant employees in other ways (*Porras Guisado v Bankia SA, Fondo Garantía Salarial*).

EU rules: The Pregnant Workers Directive (PWD) prohibits the dismissal of workers from the beginning of their pregnancy to the end of their maternity leave (the 'protected period'), save in exceptional circumstances not connected with their condition which are permitted under national legislation and/or practice (Article 10). A pregnant worker is defined as a "pregnant worker who informs her employer of her condition " (Article 2(a)).

UK law: Article 10 is implemented in UK law by:

- Section 18 of the Equality Act 2010, which prohibits unfavourable treatment in relation to pregnancy during the protected period;
- Section 99 of the Employment Rights Act 1996 (ERA 1996), which provides for automatic unfair dismissal where the reason or principal reason for the dismissal is the employee's pregnancy; and
- Regulation 20 of the Maternity and Parental Leave Regulations 1999 (MAPLE), which makes a dismissal automatically unfair where an employee is dismissed for redundancy, and either there was suitable alternative work available but not offered (in circumstances where Regulation 10 required such an offer), or the circumstances of the redundancy also affected other employees and it is shown that the employee was selected for redundancy for a reason related to her pregnancy.

Redundancy situation: The case involved an employee (PG) of BSA. In January 2013, BSA opened a period of consultation with workers' representatives with a view to effecting collective redundancies. In February 2013, the negotiating committee reached an agreement with BSA on the selection criteria. Special protection was afforded to married couples or de facto married couples and certain disabled employees, but not pregnant employees.

Dismissal: On In November 2013, BSA gave PG notice of termination of her employment. The dismissal letter stated that in the assessment process, her score had placed her among the lower scores in her province. PG was pregnant, although BSA claimed they were not aware of her pregnancy at this stage.

Challenge: PG challenged her dismissal before the Spanish courts. She was unsuccessful at first instance, and the appeal court made a reference to the CJEU for guidance on how to interpret the prohibition on the dismissal of pregnant workers in Article 10 in the context of a collective redundancy procedure.

Employer's knowledge of pregnancy: AG Sharpston's Opinion was that the PWD protects female workers during the protected period, even though they may not yet have informed their employer of their condition (despite the definition in Article 2(a)). The AG was persuaded by a purposive interpretation of the PWD, taking into account that European law has long recognised that pregnant women are a vulnerable group, deserving of special protection in the workplace.

How should employers manage this? The AG acknowledged that, on her reading of Article 10, an employer may unwittingly but unlawfully dismiss a pregnant worker. However, the AG's position was that if the employer is made aware of the error soon after the dismissal (and the employee should be under a duty not to delay unreasonably in notifying her employer), it has the opportunity to change its position.

Redundancy of pregnant employees: The AG went on to find that not every collective redundancy will be an "exceptional cases not connected with pregnancy" under the PWD. The AG did suggest that if an establishment's activities are terminated or a whole section of its activities cease this might be sufficient, but it would be for the national courts to determine in each case.

Reassignment of pregnant employees: The AG went on to find that, in order to rely on the "exceptional cases" exception, there must also be no plausible possibility of reassigning the pregnant worker to another suitable post (if there is, the pregnant worker must be reassigned rather than made redundant – even if this means transferring another worker to yet another post to create the vacancy).

Dismissal notice for pregnant employees: The AG also stated that, in order for a notice of dismissal to fulfil the requirements of the PWD, it must state duly substantiated grounds for the exceptional case not connected with the pregnancy that permits the dismissal. In the context of a collective redundancy, a notice of dismissal which simply provides the general reasons for the redundancies and selection criteria, but does not explain why the dismissal of a pregnant worker is permissible because the specific circumstances of the collective redundancy in question make it an 'exceptional case', will not satisfy that test.

Implications for UK law: The AG's Opinion is controversial insofar as it suggests that Article 10 protection applies even before the employer is aware that the employee is pregnant. This is not the position which is currently taken in UK law, where it generally must be shown that the employer was aware of the pregnancy in order for the employee to be protected.

The Opinion also suggests that the UK may not have properly implemented Article 10 in several other respects:

- the combination of unfair dismissal and discrimination provisions noted at "UK law" above arguably does not provide a sufficiently broad prohibition on dismissing pregnant workers which limits lawful dismissals to 'exceptional' cases;
- the right to be offered any suitable available vacancy in a redundancy situation under Reg 10 MAPLE only applies during maternity leave, and not if the worker is pregnant but still at work; and
- the dismissal notices required for pregnant employees under section 92(4) and (4A) ERA 1996 would typically (in a redundancy context) focus on the redundancy in general terms and the individual's selection, and not (as the AG indicates is required), how this constitutes an "exceptional case" for Article 10 purposes.

It remains to be seen whether the CJEU will follow the AG's approach to these points. We will report further when the CJEU decision is handed down.

Points in practice

Corporate governance reforms: BEIS response to BEIS Committee report

The government has published its response to the BEIS Committee's report on corporate governance, which was published earlier this year (see our Bulletin dated 7th April 2017 for further details). As regards executive pay, the response essentially echoes the government's response to its green paper on corporate governance, which was published last month (see our last Bulletin for further details), by calling for CEO to employee pay ratio reporting, but rejecting the abolition of LTIPs or any additional binding shareholder votes on executive pay. The response also repeats the government's commitment to enhance employee engagement by requiring listed companies (via the UK Corporate Governance Code) to either "comply or explain" with one of three employee engagement mechanisms: a designated non-executive; a formal employee advisory council; or a director from the workforce.

Next steps: The FRC will consult on the proposed amendments to the Code in late Autumn 2017. The government plans to lay draft statutory instruments before Parliament by March 2018, and consult on them "where necessary". The proposals are intended to be brought into force by June 2018, to apply to company reporting periods commencing on or after that date.

Taylor Review: Matthew Taylor to appear at Commons hearing

The DWP Select Committee and BEIS Select Committee have announced a joint hearing with Matthew Taylor, the author of the Taylor Review. The hearing will take place on 11th October 2017.

The Committees will question Mr Taylor on his recently published report, and how the government should act to ensure rights and fair pay for gig economy workers. The Committees are expected to cover areas including employment status, support for the self-employed, flexibility for workers and employers, National Insurance Contributions and welfare state entitlements for the self-employed and the role and impact of enforcement of existing employment laws.

Ahead of the Government's formal response to the Taylor Review, the Committees will consider what legislative and other changes could be made to secure the rights of workers and a flexible economy.

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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