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

New bereavement leave and pay announced

The Government has announced a new entitlement to statutory parental bereavement leave and pay for employees who lose a child under the age of 18. This was part of the Conservative Party's manifesto for the general election which took place earlier this year.

Currently, bereaved parents have a day-one right to take a "reasonable" amount of leave to deal with an emergency involving a dependant, including making arrangements following the death of a child. Any such leave is however unpaid.

The Parental Bereavement (Pay and Leave) Bill was published on 13th October. The Bill will give employees:

- a day-one right to two weeks' parental bereavement leave. The details will be set out in regulations which are yet to be published, but the Bill suggests that parental bereavement leave will attract similar rights during leave and on return to work as currently apply to other types of family leave; and

- a right to parental bereavement pay, if they have a minimum of 26 weeks' continuous service. Again, the details (including the rate of pay) will be set out in regulations which are yet to be published.

We will report further as the Bill progresses and its associated regulations are published. Employers are likely to have a long lead-time to prepare for the change however, as the Government intends for the Bill to become law in 2020.

Cases Round-up

Whistleblowing: when is the employer liable?

In a whistleblowing claim, the employer will be liable for automatic unfair dismissal if the whistleblowing is the sole or principal reason for the dismissal. If the decision maker has no knowledge of the whistleblowing, this will make it difficult to establish that the employer is liable. However, if another employee is motivated by the whistleblowing to orchestrate the dismissal, the employer may be vicariously liable for their actions, as demonstrated by a recent judgment of the Court of Appeal (*Royal Mail Ltd v Jhuti*).

Whistleblowing: J worked within the employer's sales division, to promote the use of mail by businesses engaged in marketing. J informed her line manager (W) that she suspected some of her colleagues had breached the employer's rules on providing discounts to customers. W responded by questioning J's understanding of the rules, and (at his request) she retracted her allegations. W then began criticising J's performance, imposing strict targets and requirements for improvement, in a way which J attributed to her earlier allegations. J was later signed off sick and she raised a formal grievance.

Dismissal: An investigating officer (V) was appointed to review J's future with the company (but not her grievance). V was not initially told about J's disclosures, but when she asked J to comment on the possibility of termination of her employment, J referred to her previous allegations. When V raised this with W, he stated that J's concerns were based on a misunderstanding of the process, and gave V a copy of J's email retracting her allegations in support of this. V therefore accepted that this issue was appropriately dealt with. V concluded that J's performance was unsatisfactory, and she was dismissed on three months' notice. J's appeal and grievance were not upheld.

Claim: J claimed automatic unfair dismissal and detrimental treatment on grounds of whistleblowing. The Tribunal upheld J's detriment claim, finding that she had been bullied, harassed and intimidated by W on the ground that she had made protected disclosures. The Tribunal however rejected J's unfair dismissal claim, on the basis that it could only consider V's knowledge and motivation for the dismissal. Since V had had a genuine and reasonable belief that J should be dismissed for poor performance (albeit based on partial and misleading evidence from W), the unfair dismissal claim failed. The EAT

allowed J's appeal, finding that W's motivation could be attributed to the employer so as to make the dismissal unfair.

Dismissal not unfair: The Court of Appeal allowed the employer's appeal, finding that J's dismissal was fair. It found that the statutory right not to be unfairly dismissed depended on there being unfairness on the part of the employer; and unfair or even unlawful conduct on the part of individual colleagues or managers was immaterial unless it could properly be attributed to the employer.

Whose knowledge/motivation matters? The Court went on to explore the effect of this principle in various scenarios:

- Where a colleague with no managerial responsibility for the victim procured their dismissal by presenting false evidence which misled an innocent decision-taker, the dismissal would not be unfair.

- Similarly, where the manipulator is the victim's line manager, but did not have responsibility for the dismissal, the dismissal would not be unfair.

- Where the manipulator is a manager with some responsibility for the investigation or dismissal, though not the actual decision-taker, there is a strong case for attributing their motivation and knowledge to the employer, even if they are not shared by the decision-taker. However, this did not assist J, as although W had supplied evidence to V, he was not an investigator or sufficiently involved in the dismissal process.

- Where the manipulator is someone at or near the top of the management hierarchy (for example the CEO), but does not have formal responsibility for making the dismissal decision, the situation is more complicated. The Court of Appeal declined to express a concluded view, but did suggest there may be some scope for finding the employer liable in these circumstances.

Employer liable by other means? The Court went on to find that J could nonetheless be entitled to recover compensation from the employer for the financial consequences of her dismissal. The Tribunal had upheld J's claim of detrimental treatment by W, for which the employer was vicariously liable. The Tribunal also apparently accepted that J's dismissal was caused by W's detrimental treatment. There was, therefore, no obstacle to J recovering compensation from the employer for the losses flowing from her dismissal. This issue was however remitted to the Tribunal to be decided at the remedy hearing.

Lessons for employers: This case provides useful guidance on the circumstances in which an employer may be liable for detrimental treatment of a whistleblower by a fellow employee in a dismissal context. Although employers may avoid liability for unfair dismissal if the decision-maker acts innocently, they may nonetheless be vicariously liable for detrimental treatment by fellow employees.

Defence: Employers do however have a defence to vicarious liability if they can show that that they took all reasonable steps to prevent the whistleblower being subjected to detrimental treatment. This emphasises the importance of having a robust whistleblowing policy and ensuring that managers and HR are properly trained in how to handle protected disclosures. Doing so will not only ensure the subject matter of the disclosure can be appropriately dealt with, but will also help mitigate the risk of a whistleblowing claim.

TUPE: liability for personal injury

A TUPE transfer operates to transfer the employment-related duties and liabilities of the transferor to the transferee (with a few exceptions concerning criminal liabilities and certain occupational pension scheme rights). The EAT has recently confirmed that a transferee was liable for personal injury to a transferred employee, which occurred following the transfer, but as a result of a breach of the transferor's obligations before the transfer (*Baker v British Gas Services*).

Injury: B was employed as an electrician, originally by CCES. B's employment transferred to BGS under TUPE in October 2010. In 2012, B was called out to fix a light fitting at a shop. Unfortunately, it had been wired so that mains voltage electricity was running through the fitting. When B handled the fitting, he suffered a massive electric shock and was thrown off his ladder, striking his head on the floor of the shop and sustaining a severe brain injury.

Claim: B brought a claim for damages for personal injury against BGS and another company, JLE. He contended that JLE was liable for its employees having incorrectly installed the light fitting in 2004. The lighting circuit had then been the subject of electrical maintenance work by CCES, and periodic inspections had been undertaken in 2009 and 2010 (shortly before the TUPE transfer). B contended that BGS had become liable, as the transferee under TUPE, for the failure of CCES's employees to identify the fault during the periodic inspections.

Liability: The High Court upheld B's claim. It had little hesitation in finding JLE liable for the mis-wiring, and that CCES had failed in its duty of care to properly inspect the light fitting. It also found that there was no contributory negligence on B's part. B had followed what was, at that time, a common practice of looking to see if the light fitting could be disconnected without isolating it from the mains supply. B could not be expected to have foreseen that the light fitting would have been mis-wired in the way it was.

Transfer of liability: The Court also found that TUPE had the effect of transferring CCES's liabilities across to BGS. The Court rejected BGS's argument that there was no liability to pass across at the time of transfer, because the accident had not happened at that stage. The Court noted that the whole purpose of TUPE was to provide protection to employees in the event of a change of employer. It would frustrate this purpose if an employee injured after the transfer as a result of a breach occurring prior to the transfer could not recover damages.

Apportionment: As regards how liability was to be divided between JLE and BGS, the Court found that JLE bore a greater share of responsibility for having created the mis-wiring in the first place. It therefore apportioned liability as 75% to JLE and 25% to BGS.

Lessons for transferees: This is the first case to confirm that TUPE has the effect of making the transferee liable for a breach of duty committed by the transferor, in circumstances where the accident, and hence liability, did not arise until after the TUPE transfer. This type of situation may not be picked up by due diligence, and it may be difficult commercially for the transferee to obtain warranties and/or indemnity protection for pre-transfer breaches of duty which may give rise to liability on the transferee some years post-transfer. Transferees in this position should therefore aim to ensure they have appropriate employer's liability insurance to cover this type of liability.

Points in practice

Employee engagement: new guidance

ICSA and the Investment Association (IA) have jointly launched new guidance: The Stakeholder Voice in Board Decision Making. This is in response to the government's call for practical guidance on stakeholder engagement in its recent response to the green paper on corporate governance reform (see our Bulletin dated 18th September 2017 for further details).

The guidance includes useful content on designing employee engagement mechanisms. This will be particularly relevant to listed companies, in light of the proposal to amend the UK Corporate Governance Code to require such companies to "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.

Workforce directors: The guidance includes a section on worker representatives, with some questions for the board to consider if it decides to appoint one or more directors to represent the views of the workforce. These include:

- **How many representatives should there be?** (taking into account the size and balance of the board, in terms of skills, experience and independence);
- **What process should be followed for appointing them?** Options include election by the workforce, or nomination by trade unions or some form of representative committee, followed in all cases by ratification of the appointment by shareholders (which may impact on timing);
- **What support will they need to fulfil their duties?**
- **What arrangements should be put in place for them to communicate with their colleagues?** (given the need to receive and

communicate feedback with colleagues, without breaching board confidentiality).

Employee forums: The guidance also considers employee forums and advisory panels, again with some questions for the board to consider if it decides to set up a forum or panel. These include:

- What will be the formal remit of the panel?
- How will members of the panel be selected?
- Will a single panel with a wide range of stakeholders be effective, or would a number of panels for different stakeholders be needed?
- Will the panel engage directly with the board or through management?
- How frequently should the panel meet?
- What administrative, financial or other support will the panel and its members need from the company?

Other: The guidance also looks at other engagement mechanisms, including surveys and social media, employee 'AGMs' and annual open meetings, 'Town Hall' meetings; and comment boxes and email equivalents.

Next steps: ICSA and the IA state that, if necessary, the guidance will be updated following the government's corporate governance reforms (expected to come into effect in June 2018), to reflect the new reporting requirements and potential UK Corporate Governance Code changes. In any event, they will review it in the second half of 2019 to reflect companies' experience of applying the guidance.

Brexit: PM's open letter to EU citizens in the UK

The Prime Minister has published an open letter to EU citizens in the UK, promising a streamlined digital process for EU citizens to apply for settled status in the UK. The letter states that the UK and EU are 'in touching distance' of an agreement on citizen's rights, and that the criteria to be applied will be simple, transparent and strictly in accordance with the Withdrawal Agreement.

The new digital process is promised to be designed with users in mind and will cost 'no more than the cost of a UK passport'. People applying will not have to account for every trip they have taken in and out of the UK and will no longer have to show comprehensive sickness insurance as they currently have to under EU rules. There will also be a simple process in place for EU citizens who hold permanent residence under the old scheme to swap their current status for UK settled status.

The government has also announced that it will be setting up a user group to consist of representatives of EU citizens in the UK, and digital, technical and legal experts, who will meet regularly to ensure the needs of users are met and that the process is transparent. It will also work closely with EU Member States to ensure their processes are streamlined to take account of these changes.

Modern slavery statements: updated guidance

The Home Office has published an updated version of its guidance, Transparency in supply chains: a practical guide. The guidance (which was first published on 20th October 2015) relates to the requirement under section 54 of the Modern Slavery Act 2015 for certain organisations to develop a slavery and human trafficking statement each year. The slavery and human trafficking statement should set out what steps organisations have taken to ensure modern slavery is not taking place in their business or supply chains.

There are no fundamental changes in the new guidance, which still covers who is required to publish a statement; how to write a slavery and human trafficking statement; and how to approve and publish the statement. There is however a greater emphasis on voluntary compliance, scrutiny of statements by third parties, and on companies undertaking wider due diligence. Some of the content, approval and timing requirements have also been more tightly worded.

The guidance comes as many businesses are preparing their next slavery and human trafficking statement. Businesses are advised to publish their statements as soon as possible after their financial year end (and in any event within six months after the financial year end).

Corporate governance: Parker Review final report on ethnic diversity on boards

The Parker Review has published its final report into the ethnic diversity of UK boards. The report notes that only 8% of the director positions in the FTSE 100 are held by people of colour, despite the UK population being made up of 14% of people from a non-white ethnic group. The report urges businesses to make improvements in boardrooms as that is 'where leadership, stewardship and corporate ethics are of utmost importance'.

The report makes several key recommendations for UK businesses. These include, among other things:

- increasing the ethnic diversity of UK boards. All FTSE 100 boards should have at least one director from an ethnic minority background by 2021, and all FTSE 250 boards should do the same by 2024;
- Nomination Committees of all FTSE 100 and FTSE 250 companies should require their human resources teams or search firms to identify and present qualified people of colour to be considered for board appointment when vacancies occur;
- the relevant principles of the Standard Voluntary Code of Conduct for executive search firms in the context of gender-based recruitment should be extended to apply to the recruitment of minority ethnic candidates as board directors of FTSE 100 and FTSE 250 companies; and
- enhanced transparency and disclosure to record and track progress against the objectives. The company's annual report should contain a description of the board's policy on diversity, including a description of the company's efforts to increase ethnic diversity at board level and elsewhere within its organisation. Companies that do not meet board composition recommendations by the relevant date should disclose in their annual report why they have not been able to achieve compliance.

Next steps: The Parker Review Committee intends to meet at least annually to assess the efforts being made and the progress achieved in relation to its recommendations. The Committee encourages members of the FTSE 100 and FTSE 250 to adopt the recommendations on a voluntary basis. However if there is insufficient progress towards the goals on that basis, the Committee may revise its approach and suggest that the recommendations (or relevant parts of them) become mandatory.

And finally…

Your feedback is sought (and appreciated)

Many thanks to those who have already provided their feedback on the Employment/ Employee Benefits Bulletin. Your views are much appreciated.

If you have not yet had a chance to do so, we would appreciate your feedback on the following points in particular:

1. **The format** – is a regular newsletter summarising various key recent developments useful to you? Would you also value ad hoc shorter briefings which focus on one particular issue or development?
2. **The content** – are you happy with the current range of topics covered by the Bulletin, and the level of detail? Are there any additional topics you would like to see covered?
3. **The style** – would you be interested in receiving more in-depth thought or opinion-led pieces (in addition to the Bulletin)?
4. **The timing** – is the current fortnightly distribution of the Bulletin suitable for your needs? Would you prefer it to be sent monthly (or on a less frequent basis?)
5. **The technology** – do you tend to view the Bulletin on a mobile device or via a desktop? Are you happy with the current PDF format, or would you prefer summary text in an email (with website links for more information)?
6. **Other** – are there any other comments you would like to make about the Bulletin?

Please send your comments to **clare.fletcher@slaughterandmay.com**

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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