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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Cases Round-up

Refusal of employment on grounds related to union membership - or activities

An employer may not refuse employment to a person because he is, or is not, a member of a trade union (section 137(1)(a) of the Trade Unions & Labour Relations (Consolidation) Act 1992). The EAT has recently held that this prohibition is not narrowly limited to a refusal of employment based on trade union membership itself, but extends to trade union activities that are incidental to membership. It therefore upheld a claim from a pilot who was refused employment with an airline because of his prior advocacy for the trade union BALPA to be involved in collective bargaining at the airline (*Jet2.com Ltd v Denby*).

Union member: D was a pilot, who initially started work with J in 2005. He became increasingly involved with BALPA, a trade union of which he was a member.

Union activities: In July 2009, D spoke to J's Executive Chairman (M), explaining that there was a groundswell of opinion that BALPA might have a role in representing the interests of J's pilots. M resisted that suggestion in hostile and aggressive terms. BALPA did subsequently obtained statutory recognition, but problems continued in its relationship with J over the following years.

Application for re-employment: In 2011, D left to work for another airline. In 2015 he applied to return to J's employment as a pilot (D was no longer a BALPA member by this time). Having not heard back, he e-mailed M to query what had happened to his application. Although D did not receive a reply, M sent an e-mail to J's director of flight operations, in which he said of D:

"*He told me that he was a shop steward at his previous company before us as well - so I don't know why this Leopard will change his spots*".

Claim: D subsequently brought a claim, arguing that he was refused employment because of his trade union membership. The Tribunal found that the decision to refuse D employment had been taken by M, who felt continuing animosity towards D because of his advocacy for BALPA in 2009 (not because of the mere fact of his membership of BALPA). The Tribunal rejected J's case that D had been turned down for other reasons. Accordingly, the Tribunal upheld the claim.

Wide interpretation: The EAT dismissed J's appeal. It held that "membership" for the purposes of section 137(1)(a) was not to be construed narrowly as meaning mere membership (the carrying of the union card). An objection to trade union activities that were incidental to membership should be treated as an objection to membership itself for these purposes.

Timing of membership: The EAT upheld the Tribunal's conclusion that D's earlier activities as an advocate for BALPA's representational role in the workplace were incidental to D's trade union membership. It did not matter that D was no longer a member of BALPA at the date of refusal, since he had been a member at the time he carried out the relevant activities, and the Tribunal had been entitled to find that sufficient for section 137(1)(a) purposes.

Other reasons irrelevant: The EAT also held that, although other members of staff at J may have had other reasons for rejecting D's application for employment that were not related to his union membership – such as concerns over his loyalty and behaviour at the time of his resignation in 2011 – this was beside the point, because M alone had made the decision to refuse employment. The EAT considered that, if a tribunal is satisfied that the person making the relevant decision did so for a prohibited reason, that conclusion cannot be avoided because others would have made the same decision for legitimate reasons.

What are 'incidental activities'? The EAT's judgment does not provide much clarity in terms of what activities will be sufficiently incidental to trade union membership so as to be protected under section 137(1)(a). The EAT declined to give a steer on this, finding instead that each case will be fact specific. Employers should therefore exercise caution when rejecting an applicant based on his trade union activities, particularly where those activities consist of seeking

representation for his union in the workplace. Employers should remember that if the person making the decision to refuse employment does so for a prohibited reason, that decision cannot be vindicated on the basis that others would have made the same decision for legitimate reasons.

Blacklisting: Employers should also be aware that the Employment Relations Act 1999 (Blacklists) Regulations 2010 now provide a remedy for applicants refused employment because they are on a prohibited blacklist of trade union members or activists.

Take care with emails: On a more general note, the employer in this case was condemned largely due to the content of contemporaneous emails, which made it clear that M objected to D's re-employment based on his previous trade union activities (and that D was instrumental in the decision not to re-hire D). This serves as another reminder of how important the employer's paper trail is when defending allegations from employees, and in this case prospective employees.

Points in practice

Investment Association (IA) Principles of Remuneration (2017)

The Investment Association (IA) has produced an updated version of its principles of remuneration. The IA Principles of Remuneration (November 2017) set out IA members' views on the role of shareholders and directors in relation to remuneration, and the manner in which remuneration should be determined and structured.

The Principles are predominantly designed for companies with a main market listing, but are also relevant to companies on other public markets, such as AIM.

The changes to this version of the Principles are mostly incremental, following extensive changes to the previous version in 2016. The main changes are as follows:

- **Reporting** - the Principles now specify that, when fulfilling reporting obligations on workforce pay (such as gender pay gap reporting or CEO/employee pay ratios), the IA expects remuneration committees to provide the numbers in the context of the business, and to fully explain why the figures are appropriate. In addition, any discretion specific to a particular incentive scheme should be disclosed in the remuneration policy (as well as the plan rules).

- **Relocation benefits** — IA members expect relocation benefits to be disclosed at the time of appointment, be in place for a limited time, and be fully detailed in the Remuneration Report.

- **Annual bonus** — the IA has updated this section to reflect its members' expectation that bonus targets are disclosed within twelve months of the bonus payment, and that deferral is expected for any bonus opportunity greater than 100% of salary.

- **LTIPS** — this section has been reorganised so as to give a clearer picture of members' attitudes to specific examples of schemes. For LTIPs, performance conditions should be carefully chosen (and long-term), threshold vesting amounts should not be significant in comparison to base salary, and full vesting should reflect exceptional performance. For restricted share awards, the total vesting and post-vesting holding period should be at least five years.

- **Dilution** - the IA have removed the previous statement that commitments to issue new shares or re-issue treasury shares under executive schemes may exceed 5% in a rolling ten year period, where vesting is dependent on the achievement of significantly more stretching performance criteria.

The Principles are accompanied by a letter of introduction, which sets out some key issues for the 2018 AGM season, from the perspective of its members. These are as follows:

- **Levels of remuneration** — the IA notes that some progress has been made by some larger companies in addressing executive pay levels in their 2017 remuneration policy renewals, by reducing potential variable remuneration awards and limiting overall pay. The IA welcomes this action, and expects it to be replicated across the broader market. The IA is concerned by incremental increases to the maximum amount of variable remuneration and salary in revised remuneration policies. It considers it essential that companies

adequately justify remuneration levels and take the wider social context into account rather than benchmarking alone (and stresses that investors will be looking at this closely in 2018).

- **Pay ratios** - the IA welcomes the government's decision to require disclosure of the pay ratio between CEO and median or average employee in future. The IA however encourages all companies to voluntarily disclose their pay ratios in 2018.

- **Remuneration structures** — the IA notes the emergence of restricted share plans in a number of companies. IA members' views on these plans 'continue to evolve', with the overall impression being that investors will support a pay structure that is carefully chosen, well-justified and appropriate for the business, and is not proposed 'only when the current remuneration structures are not paying out to the executives'.

- **Shareholder consultation** — the IA notes that a failure to properly understand the views of shareholders has led a number of companies to withdraw their resolutions prior to the AGM. It advises that such companies should conduct a full analysis of shareholder feedback and consult further before re-submitting their remuneration policies.

- **Performance targets** — the Principles continue to press for full disclosure of threshold, target and maximum performance targets following payment of a bonus. There is concern where metrics used to set financial targets for executive remuneration differ significantly, or have been adjusted from reported numbers. In those circumstances, the IA expects companies to set out why this is appropriate, and provide a breakdown of how the remuneration target has been adjusted. On personal and strategic performance targets, IA members expect a thorough explanation as to why they have paid out, not just a description of non-financial performance indicators. Further, where financial metrics do not warrant a bonus payment, IA members will scrutinise the payment and rationale for the payment of any personal or strategic elements to ensure that such a payment is warranted.

- **Voting against the RemCo chair** — the IA points out that the last AGM season saw investors increasingly voting against the re-election of individual directors based on decisions they make on the RemCo. It notes that IA members have a range of escalation approaches in their voting policies: for example, some members may vote against the re-election of the RemCo Chair if they vote against a remuneration resolution in two successive years, or if the remuneration resolution does not get majority support.

Listed companies (and potentially others) should take the above points into account when engaging with shareholders on remuneration issues in advance of their 2018 AGMs.

FRC Annual Review of Corporate Reporting: Remuneration aspects

The FRC has published its Annual Review of Corporate Reporting for 2016/2017. The Annual Review includes a section on remuneration reporting, which notes that there has been no particular improvement in remuneration reporting this year, although some companies appear to have made an effort to improve accessibility and clarity. This is judged as disappointing, particularly as other parts of the annual report, notably strategic reports, are improving incrementally, and companies engage extensively with shareholders on remuneration. The Review also notes that:

- In 2016/2017 the length of remuneration reports increased again, reaching an average of 21.5 pages in the FTSE 350, up from 18 in 2015/2016. One important factor in the overall length is the inclusion (or not) of the remuneration policy within the remuneration report. Many companies submitted their remuneration policy to a shareholder vote this year, which may explain some of the additional length.

- There is considerable scope for companies to improve the quality of the discussion in annual reports around the link between strategy and remuneration. In 2016 fewer than 25% included a table or diagram showing how performance metrics in the remuneration report link to strategy, while around 40% included boiler-plate narrative and around 35% included no reference to

strategic alignment. The FRC notes that companies can improve users' understanding of how directors are incentivised to deliver the strategy by clearly articulating the links between KPIs, long-term objectives and performance-related pay-outs.

Very few companies have addressed the impact on executive pay of broader societal issues such as fairness or explained how executive pay links to pay and conditions across the wider workforce. A handful of companies are voluntarily disclosing CEO to average UK employee pay ratios. The FRC expects more companies will choose to voluntarily disclose this information in advance of the proposed secondary legislation to require companies to report annually on the ratio between CEO and average pay of the UK workforce.

The FRC does not however believe that publishing pay ratios alone will have a discernible impact on levels of executive remuneration. Encouraging companies to justify quantum on the other hand, may encourage remuneration committees to think harder about what is proportionate and just. A dual approach of published pay ratios and an expanded remit for remuneration committees to oversee pay and incentives across the wider workforce would encourage greater focus on the strategic rationale for executive pay levels in a broader context and on the linkages between remuneration and the discussion on strategy and KPIs in the strategic report.

Gender pay gap: the latest

The Office for National Statistics (ONS) has published its latest statistics on the UK gender pay gap. The statistics confirm that as at April 2017:

- the gender pay gap (for median earnings) for all employees has risen slightly, from 18.2% in 2016 to 18.4% in 2017;
- the full-time gender pay gap has fallen from 9.4% in 2016 to 9.1% in 2017; and
- the part-time gender pay gap has risen from -6.1% in 2016 to -5.1% in 2017 (meaning that women are still paid more than men in part-time positions, although the gap is moving closer to zero).

The TUC has criticised the slow pace of change, pointing out that at the current rate of progress it will take around forty years to achieve pay parity between men and women. It has called on the Government to increase pressure on employers, proposing that companies should not only be required to publish their gender pay gaps; they should be forced to explain how they will close them, and employers who fail to comply with the law should be fined.

The Prime Minister responded to the statistics by announcing a new drive to end the gender pay gap. The Prime Minister is calling on companies to:

- improve the pipeline to ensure progress on female representation at senior levels, including supporting women to progress to middle management and offering return to work schemes;
- publish their gender pay gap data, including companies with fewer than 250 employees; and
- make flexible working a reality for all employees by advertising all jobs as flexible from Day 1, unless there are solid business reasons not to.

The ONS statistics will provide a point of references for companies who are currently preparing to publish their gender pay gap data. Companies may also wish to take into account the Prime Minister's recommended steps as part of their narrative to accompany their data.

Employment tribunal fees may return… as refund scheme is launched

The Lord Chancellor David Lidington has stated that the Ministry of Justice intends to bring back employment tribunal fees. His comments were made in proceedings before the Justice Select Committee on 25th October 2017.

Mr Lidington reportedly stated that fees are necessary as a contribution to costs, and also "*necessary and sensible as a deterrent to frivolous or vexatious litigation*". Mr Lidington accepted that, in setting the level of fees, the

government needs to have very careful in regard to questions of access and affordability.

It remains to be seen when and how the MoJ will take these proposals forward. We will report further when more details are available.

In the meantime, Her Majesty's Courts and Tribunals Service (HMCTS) has launched the first stage of the scheme to reimburse employment tribunal fees. According to HMCTS's announcement:

- Up to around 1,000 people will now be contacted individually and given the chance to complete applications, before the full scheme is opened up in around 4 weeks. No details are given about how those people will be chosen.

- As well as being refunded their original fee, successful applicants to the scheme will also be paid interest of 0.5%, calculated from the date of the original payment up until the refund date.

- Further details of the scheme, including details of how it can be accessed, will be made available when the scheme is rolled out fully.

- For those who have paid ET fees, but have not been invited to take part in the initial stage, HMCTS is setting up a pre-registration scheme, so that they can register an interest in applying when the full scheme is rolled out. Those who wish to do so can register either by email at ethelpwithfees@hmcts.gsi.gov.uk; or alternatively by post to the addresses specified in the announcement.

- HMCTS is also working with trade unions who have supported large multiple claims potentially involving hundreds of claimants.

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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