SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

19 January 2018 / Issue 01

Legal and regulatory developments in Employment/Employee Benefits

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New Law

What to expect in employment law in 2018

As we embark on another new year, here are the key developments expected in employment law in 2018:

- **Brexit**: As the Withdrawal Bill progresses, we should get a clearer idea of the rights for EU nationals currently living and working in the UK. In the longer term, questions are already being asked about which European employment laws could be amended or revoked; the Working Time Regulations 1998 and the Agency Workers Regulations 2010 being the most frequently quoted examples.

- **Employment status**: we expect the Government to formally respond to the Taylor Review in early 2018, and the Supreme Court will hear the appeal in *Pimlico Plumbers v Smith* in February. *Uber BV v Aslam* will be heard by the Court of Appeal at some stage, and the IWGB's claim that TUPE applies to workers (in *Boxer v Citysprint*) will also be heard at first instance.

- **Gender pay gap reporting**: to date, just over 500 employers have published their gender pay gap information on the government's website. It is estimated that around 7,000 employers are subject to the reporting obligation. Employers have until 4th April 2018 to comply, meaning that we are likely to see a flurry of activity in Q1 2018.

- **GDPR**: The GDPR comes into force on 25th May 2018. The Data Protection Bill, currently progressing through Parliament, will replace the Data Protection Act 1998 and implement permitted derogations to the GDPR. Again, we anticipate a flurry of activity in the first half of the year as employers prepare for the new requirements.

- **Termination payments**: Finance (No.2) Act 2017 makes changes to the taxation of termination payments, with effect from April 2018. Broadly, all PILONs (or 'post-employment notice pay', as the Act calls it) will be taxable, whether or not they are paid under the contract.

- **Corporate governance**: In August 2017, the government announced a package of proposed corporate governance reforms. These included requiring listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce, and adopt one of three employee engagement mechanisms: a designated NED; a formal employee advisory council; or a director from the workforce. The reforms will be implemented via secondary legislation and amendments to the UK Corporate Governance Code. The current intention is to bring the reforms into effect by June 2018, to apply to company reporting years commencing on or after that date.

- **Shared parental pay enhancements:** The EAT is due to determine separate appeals in *Hextall v Chief Constable of Leicestershire Police* and *Ali v Capita Customer Services*, concerning whether it is directly or indirectly discriminatory on grounds of sex to pay enhanced maternity pay but not enhanced shared parental pay.

- **Protection for pregnant workers:** The CJEU will give its judgment in *Porras Guisado v Bankia SA*. The AG's Opinion was that the employer need not know of the worker's pregnancy in order for that worker to be protected under the Pregnant Workers' Directive. If the CJEU agrees, this could have significant implications for the rights of pregnant workers under UK law, particularly in redundancy situations.

- **Other Conservative Manifesto proposals**: It is questionable to what extent the Brexit agenda (and reduced majority) will permit the Government to fulfil its manifesto commitments as regards employment law. As a reminder, these included (i) giving workers a new statutory entitlement to carer's leave; (ii) giving parents a new right to two weeks' paid leave if a child under the age of 18 dies (The Parental Bereavement (Leave and Pay) Bill 2017 has been published to implement this); (iii) extending the Equality Act 2010

protections against discrimination to mental health conditions that are episodic and fluctuating; (iv) potentially introducing ethnicity pay gap reporting; and (v) updating the rules that govern mergers and takeovers, to require bidders to be clear about their intentions from the outset of the bid process, and ensure that all promises and undertakings made in the course of takeover bids can be legally enforced afterwards, and that the government can require a bid to be paused to allow greater scrutiny.

- **Tribunal fees making a comeback?** At the end of 2017, the Lord Chancellor stated in proceedings before the Justice Select Committee that the Ministry of Justice intends to bring back employment tribunal fees. It remains to be seen when and how the MoJ will take these proposals forward, in light of the Supreme Court's judgment striking down the previous fees regime.

Cases Round-up

Employer found vicariously liable for employee's data breach

An employer has been held vicariously liable for the actions of an employee who disclosed the personal information of around 100,000 colleagues on the internet. Although the disclosure took place outside working hours and from the employee's personal computer, the High Court found there was a sufficient connection between the employee's employment and the wrongful conduct for the employer to be held liable. (*Various Claimants v Wm Morrison Supermarket Plc*).

Aggrieved employee: S, a senior IT internal auditor employed by M, was involved in assisting the external auditors (KPMG) in 2012 by providing payroll data. In July 2013 he was subject to disciplinary proceedings for an unrelated incident, which resulted in a warning. Aggrieved at the disciplinary action, S resolved to 'retaliate' against M.

Data breach: Using his work computer, S downloaded M's payroll data to a USB stick. He then attempted to use software capable of disguising the individual identity of a computer which had accessed the internet. A few weeks later, from his home computer, S posted a file containing the personal and financial details of around 100,000 employees on a file sharing website. Two months later, a CD containing a copy of the information was sent anonymously to three newspapers, one of which notified M of the incident (none of them published the data). M immediately took steps to remove the data and links to the website.

Legal action: S was arrested and convicted of offences under the Computer Misuse Act 1990 and the Data Protection Act 1998 (DPA). He was sentenced to a term of eight years' imprisonment. A group of 5,518 employees of M then sought compensation from M for breach of statutory duty under the DPA, as well as an equitable claim for breach of confidence and the tort of misuse of private information. The issue was whether M was liable, directly or vicariously, for S's actions.

Employer not directly liable: The High Court held that M was not directly liable under the DPA; M was not the data controller when S disclosed the information on the internet. The Court did find that M had failed to discharge its duty under the DPA to take appropriate measures to guard against unlawful disclosure and/or data loss. However, it also found that that failure neither caused nor contributed to S's misuse. The Court also found that M had not otherwise tortiously misused the payroll data or acted in breach of confidence; S had acted criminally and without authority.

Employer could not have done more: The Court rejected various arguments as to ways in which M should have taken further steps to protect its data. The Court noted for instance that it would be impracticable and disproportionately expensive for M to routinely monitor all internet searches. In any event, it felt that such monitoring would probably amount to an unlawful interference with employees' rights to privacy and family life.

But employer still vicariously liable: However, the Court went on to hold that M was nonetheless vicariously liable for the misuse of its data. This was on the basis that S was 'acting in the course of his employment' when he criminally disclosed the data online. The Court reached this conclusion despite the fact that S's entire criminal venture was designed and intended so as to damage his employer's interests. The Court took into account several factors justifying this conclusion, including:

- M had deliberately entrusted S with the payroll data. He was not merely given access to the data; dealing with the data was a task specifically assigned to him.
- S was appointed on the basis that he would receive confidential information.
- S's role in respect of payroll data was to receive and store it, and to disclose it to a third party (i.e. KPMG). The fact that he chose to disclose it to others who were not authorised was nonetheless closely related to what he was tasked with doing.
- M took the risk that it might be wrong in placing its trust in him.
- The fact that the disclosures were made much later, from home, outside working hours and by use of personal equipment did not break the connection with S's employment.

What more can employers do? This decision is concerning for employers. The Court acknowledged that there is no failsafe way for employers to ensure that such data breaches do not occur, and that employers do not face vicarious liability for them. There was significant evidence that M had several appropriate measures in place to ensure the security of such information. It is not clear what changes (if any) employers like M could make to their data handling and security measures to protect themselves from this sort of liability.

Restrict access, and insurance: Organisations should already be ensuring that no employee, however trusted, has access to data beyond what is absolutely necessary for their role. Beyond that, employers should ensure they have appropriate insurance policies in place to cover this sort of liability.

Impact of GDPR: Although this was the first class action data breach case heard under the DPA, such actions are likely to become more common under the GDPR. Claims may also be made against data processors under the GDPR, not just data controllers. Finally, the fines which the ICO may levy on organisations are significantly higher under the GDPR; up to EUR20 million for an undertaking or up to 2 or 4% of the total annual worldwide turnover of the preceding financial year (depending on the nature and severity of the infringement).

Appeal: The High Court granted M permission to appeal, and M has publicly confirmed that it intends to appeal. The appeal is likely to focus on the aspect which most troubled the High Court; the extension of the "in the course of employment" test to this sort of activity. If its appeal is unsuccessful, M will face a significant compensation award, initially to the 5,518 claimants in this claim, but potentially also the other 94,480 employees whose data was disclosed, if they decide to also make a claim.

Whistleblowing: self-interested disclosure not protected

In order to claim protection as a whistleblower, the worker must have a reasonable belief that their disclosure is in the public interest. The EAT has recently found that an employee who raised compliance issues solely out of concern for her own potential liability did not satisfy this test, and her unfair dismissal claim therefore failed (*Parsons v Airplus International Ltd*).

Disclosures by compliance lawyer: P was employed as Legal and Compliance Officer by AI. Complaints were made from colleagues about P's rude and disrespectful manner, and that she alleged non-compliance by AI without fully informing herself of the facts and/or the law. Among other things:

- P had suggested that AI was in breach of its obligations by not having a consumer credit licence (CCL), when it was far from clear that AI was required to have one; and
- P had raised the fact that AI did not have a Money Laundering Reporting Officer (MLRO), which AI did not believe was required.

In raising all of these issues, P made clear that she was concerned about her own personal liability for any breaches.

Dismissal: In order to address her concerns, AI agreed to change P's job title to Analyst for Regulatory Affairs and Contract Management. However, there was insufficient improvement in

P's performance and conduct. AI therefore decided to dismiss P, citing a 'cultural misfit'. P claimed that she had been automatically unfairly dismissed for having made protected disclosures.

Disclosures did not cause dismissal: The Tribunal rejected the claim. It was satisfied that what caused AI concern was not the information that P raised, but P's inability to give rational and cogent reasons for her belief in AI's non-compliance, her failure to investigate the background, and her irrational fixation on, and fear of, her personal liability. In the Tribunal's view, this conduct was genuinely separable from the disclosure.

Self-interest was fatal: The EAT dismissed P's appeal. It held that the Tribunal had been entitled to find that the reason why P raised her concerns was wholly in her own self-interest. The EAT confirmed that a disclosure does not have to be made entirely in the public interest in order to be protected – a self-interested disclosure may still qualify. However, crucially, the Tribunal made no finding that P's disclosure was in anything but her own interest. It was therefore entitled to conclude that P's disclosure was not protected.

Some comfort for employers: This decision provides employers with a potential response to whistleblowing claims from employees in compliance roles, who are effectively responsible for the breach which forms the basis of their disclosure. Employers should however be aware that the facts of this case were quite extreme, and courts and tribunals will typically interpret the public interest requirement quite broadly and generously in favour of workers making disclosures

Unlawful inducement to avoid collective bargaining

Section 145B of the Trade Union & Labour Relations (Consolidation) Act 1992 prohibits any offer being made by an employer to a worker and union member which, if accepted, would mean that all or any of his terms of employment would no longer be determined by collective agreement (and the employer's sole or main purpose in making the offer is to achieve that result). The EAT has for the first time upheld a claim under section 145B, in a decision of importance to any employer which recognises a trade union (*Kostal UK Ltd v Dunkley)*.

Pay negotiations: D was one of a group of 57 shop floor/manual employees of K, who were all also members of the recognised union, Unite. The recognition agreement provided for any proposed changes to terms and conditions to be negotiated between K and Unite. In late 2015 pay negotiations for 2016 began, and K made an offer of a 2% increase to basic pay plus a 2% Christmas bonus (payable in December). The offer was conditional on acceptance of a number of other changes to terms, including reduced sick pay and overtime rates and changes to rest breaks. Unite decided to ballot its members, resulting in 78.4% of the turnout rejecting the offer.

First offer: K then decided to make the pay offer to each employee individually, ostensibly because it would otherwise run out of time to pay the Christmas bonus in December. It therefore wrote to all its employees on 10th December setting out the offer, and stating that if it was not accepted no Christmas bonus would be payable. This was "the first offer", and resulted in a majority of employees accepting the offer.

Second offer: On 29th January 2016 K wrote to the remaining employees who had not yet accepted the pay proposal. It offered a 4% pay increase in consideration for the changes to terms, but also threatened that if no agreement was reached the employees' contracts may be terminated. This was "the second offer". This led to a ballot for industrial action and an overtime ban. A collective agreement in respect of pay for 2016 was eventually reached in November 2016, which endorsed the terms of the first offer.

Claim: D lodged claims that both the first and second offers amounted to unlawful inducements under section 145B. The Tribunal upheld D's claim, and awarded the mandatory fixed award of £3,830 to each employee in respect of each of the unlawful offers (so two awards were made to employees who received both the first and second offer).

What is the 'prohibited result'? The EAT dismissed K's appeal. It rejected K's argument that the 'prohibited result' for section 145B purposes is that the workers' terms will not or will no longer *in the future* be determined collectively (emphasis added). K relied on the fact that it never intended to (and did not in fact) cease collective bargaining with Unite following the offers. This however was of no consequence to the EAT, which focused on the

effect of the offer itself, rather than any future bargaining relationship. It found nothing in section 145B that deals with the duration of the effect, or requires a permanent surrender of collective bargaining for the future.

What is the 'sole or main purpose' of the offers? K contended that its sole or main purpose was to ensure that employees did not lose their Christmas bonus. The EAT found that, since the bonus was introduced into the pay negotiations by K as a bargaining tool, it would be disingenuous for K to say that it made an offer to save D from the consequences of the threat it had made. It also noted that this could not have been the purpose of the second offer, as it was made after the December deadline for paying the bonuses had passed. The Tribunal did not in any event accept the evidence that the December deadline was genuine. Further, it was significant that the contemporaneous correspondence showed that the making of the first offer was an immediate reaction to the rejection of the pay proposals at the union ballot.

Two offers, two awards: Finally, the EAT rejected K's appeal on quantum. K had sought to argue that only one award should be payable for the two offers, since they effectively amounted to one unlawful course of conduct. The EAT found that the two offers were clearly different; the first made provision for payment of a Christmas bonus, whereas the second did not, and the second offer communicated a threat of dismissal if the offer was not accepted, whereas the first did not. It was therefore appropriate for each offer to attract its own award of compensation.

Employers beware: This decision provides a warning to employers facing difficult negotiations with their unions over terms and conditions. Even if there is no intention to permanently abandon collective bargaining, they need to be wary of making direct offers to employees with the purpose and effect of circumventing collective bargaining (even temporarily).

Can direct offers ever be made? The EAT did accept that:

> *"there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process…where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose."*

Employers should therefore be able to show a genuine alternative purpose for any direct approach to employees (such as a genuine business need to make the changes to terms).

Timing: Employers should also be particularly careful of their timing when making direct offers; clearly approaching employees directly in the immediate wake of a disagreement with the union will invite allegations of a breach of section 145B. It was unhelpful that the purpose argued by the employer in this case was also flawed in terms of timing (it ceased to be effective by the time of the second offer).

Exhaust collective bargaining first: Employers will also be in a better position if they have exhausted the mechanism of collective bargaining by the time the offers are made, and in effect have reached an impasse. Tribunals are likely to be far more sympathetic to employers in that scenario than they were in this case, where there was an ongoing dispute resolution procedure at the time of the offers, negotiations were ongoing, and further meetings were lined up.

Discrimination because of perceived disability

The EAT has for the first time expressly confirmed that an employer may directly discriminate against an employee based on his perceived disability. The claim was upheld in respect of an employee with hearing difficulties, when the employer denied her transfer based on its concerns that she would end up on restricted duties. This indicated that it perceived her to have a progressive condition which, by virtue of paragraph 8 of Schedule 1 to the Equality Act 2010 (EA 2010), met the statutory definition of disability (*Chief Constable of Norfolk v Coffey*).

Police officer: C was recruited by the Wiltshire Constabulary in 2011 as a police constable. She suffers from hearing loss which put her marginally outside the range set down by the Home Office for police recruitment. Nonetheless, the Wiltshire Constabulary arranged a practical functionality test, which C duly passed before going on to work on front-line duties.

Transfer denied: In 2013, C applied to transfer to the Norfolk Constabulary. C attended a pre-employment health assessment, where the medical adviser noted her hearing issues and recommended that she undergo an 'at work' test. This recommendation was not carried through by the Assistant Chief Inspector (ACI), who declined C's request to transfer on the basis that her hearing was below the acceptable and recognised standard. The ACI took the view that it would not be appropriate to step outside that standard, given the risk of increasing the pool of officers on restricted duties.

Claim: C brought a claim for direct discrimination. It was not alleged that she actually had a disability; her case was that her hearing loss did not have, and was not likely to have, a substantial adverse effect on her ability to carry out day-to-day activities, including working activities. Instead, it was argued that she had been treated less favourably because she was perceived to have a disability, in the form of a progressive condition that could well develop to the point of having a substantial impact on her ability to carry out day-to-day activities. The Tribunal upheld the claim, and the Constabulary appealed.

Perceived disability: The EAT dismissed the appeal. On the perceived disability point, the EAT stressed that whether a putative discriminator A perceives B to be disabled will depend on whether A perceives B to have an impairment with the features which are set out in the EA 2010. Paragraph 8 of Schedule makes it clear that where a person has a progressive condition, it will be treated as a disability if it is likely that it will result in a substantial adverse effect in future. Although the ACI protested that she did not consider C disabled with the meaning of the EA 2010, her knowledge of the law was incomplete. The reference to the risk of C being on restricted duties could only be read as the ACI perceiving that C had a progressive condition which could worsen. Thus, the Tribunal had been entitled to find that she perceived her to be disabled.

Direct discrimination: Turning to whether the Tribunal had been correct to find that there had been direct discrimination, the EAT found that a person with the same abilities as C, whose condition the employer did not perceive to be likely to deteriorate so that he or she would require restricted duties, would not have been treated as C was. It followed that C had been subjected to direct discrimination.

Implications for employers: This case confirms that direct discrimination encompasses perceived protected characteristics, i.e. it is discriminatory to treat a person less favourably because it is mistakenly thought that they have a disability, even if they do not in fact meet the legal definition of disability.

Performance standards: Employers should be aware of this issue when setting performance standards and assessing candidates against those standards (including their likely future abilities).

Without prejudice: what is "unambiguous impropriety"?

The "without prejudice" rule allows parties to negotiate a settlement of a dispute without either side being able to rely on the content of those negotiations in any subsequent proceedings. There is however an exception whereby disclosure may be allowed if one party engages in conduct which amounts to "unambiguous impropriety". The EAT has recently given guidance on the scope of this exception (*Martin v McDevitt & Community Legal Services CIC*).

ACAS conciliation: The case concerned an employer's email sent through ACAS as part of early conciliation. The email rejected the employee's disability discrimination claims as "*nonsense in law and fact*". It also stated that, if the employee were to pursue his "*spurious*" claims to tribunal, the employer would "*ensure that the local political establishment, local employers and the public are made aware of our opinion that he is attempting to grossly abuse the protection afforded within the Equality Act*". The email made it clear that this could hinder the employee's ability to find other employment locally, and could harm his fledgling political career.

What is "unambiguous impropriety"? The Tribunal ruled the email admissible, finding that the employer's words constituted unambiguous impropriety. The EAT overturned the decision, finding that the Tribunal had wrongly considered whether the words used were unambiguous, rather than whether they constituted

unambiguous impropriety. Although the case was remitted to the Tribunal for redetermination, the EAT gave the following guidance:

- It is clearly acceptable to draw attention to the fact that a tribunal hearing is in public, and that the press may be there.
- It is even acceptable to draw attention to the fact that the press may be notified that the case is to be heard.
- It is also acceptable to allege that the employer will take the position that the claims are spurious.
- However, the words in this case could well be said to go beyond those acceptable limits, in that it was said that steps would be taken which could or would affect the employee's future employment chances, and damage his putative political career.

Lessons for employers: This decision gives some useful guidance on the boundaries of the exception for unambiguous impropriety. When advising on settlement correspondence, employers should always try to ensure that their correspondence remains on the right side of the line, if it is to remain privileged.

Points in practice

Gender pay gap reporting: EHRC publishes enforcement strategy for consultation

The Equality and Human Rights Commission (EHRC) has published for consultation its enforcement strategy, to ensure that employers with over 250 employees comply with their gender pay gap reporting obligations.

The strategy confirms that, although the EHRC will take steps to encourage compliance and engage informally with employers who are in breach of the regulations as a first port of call, it will ultimately enforce against all employers who do not publish their gender pay gap information. These businesses could face unlimited fines and summary convictions.

Meanwhile, the number of companies who have published their gender pay gap data has now passed 500. According to analysis by The Independent:

- 80% of the organisations who have so far published their data paid women less on average than men.
- Men were paid nearly 65% more at the high street fashion store Phase Eight, and nearly 53% more at budget airline EasyJet. Both companies cited a majority female workforce in their lowest paid jobs (store workers and cabin crew respectively) as the basis for the discrepancy.
- Employers with low or no gender pay gaps include the British Museum and the armed forces, which both reported a gap of 0%.
- Firms such as mattress retailer Sweet Dreams and nursery business Yellow Dot pay women 46.4% and 35.4% more respectively.

The EHRC's consultation closes on 2nd February 2018.

IA publishes register of FTSE companies with significant votes against resolutions

The Investment Association (IA) has launched The Public Register, an aggregated list of publicly available information regarding meetings of companies in the FTSE All-Share who have received significant shareholder opposition to proposed resolutions, or have withdrawn a resolution prior to the shareholder vote. The Register currently shows companies who received more than a 20% vote against resolutions tabled in 2017. Analysis of the data reveals that:

- over 22% of FTSE All-Share companies feature on the Register, due to having at least one resolution that received over 20% dissent or was withdrawn;
- pay issues top the list of shareholder concerns, with almost 38% of resolutions listed on the Register being due to high votes against pay resolutions, such as shareholders voting against companies' annual remuneration reports, remuneration policy or other remuneration related resolutions;

- the second most frequent resolutions are the re-election of company directors with 32% of resolutions listed on the Register, due to a high vote against the re-election of a company director in 2017; and

- almost one third (31%) of companies named on the register have provided a public response explaining how they are addressing their shareholders' concerns.

GDPR: Article 29 Working Party publishes consultation on guidelines on consent

The EU Article 29 Working Party (WP29) has published guidelines on consent under the General Data Protection Regulation (GDPR) for public consultation. The Article 29 Working Party was set up under the EU Data Protection Directive to provide the European Commission with independent advice on data protection matters, and to help develop harmonised policies for data protection across the EU.

As expected, the guidelines specifically acknowledge that an imbalance of power exists in an employment context, and it is unlikely that an individual will be able to deny their employer consent to data processing without fear of detriment. The guidelines therefore state that for the majority of data processing at work, the lawful basis cannot and should not be the consent of the employees.

The guidelines go on to state that there may be some exceptional circumstances in which an employer can rely on consent as a lawful basis for processing, where it can demonstrate that consent is actually freely given, and where it will have no adverse consequences at all if the employee does not give consent. It gives the following as an example:

> *"A film crew is going to be filming in a certain part of an office. The employer asks all the employees who sit in that area for their consent to be filmed, as they may appear in the background of the video. Those who do not want to be filmed are not penalised in any way but instead are given equivalent desks elsewhere in the building for the duration of the filming."*

The WP29 welcomes comments on the document by 23rd January 2018.

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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