SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

16 February 2018 / Issue 02

Legal and regulatory developments in Employment/Employee Benefits

In this issue

New Law

'Good work': Government response to the Taylor Review ...more

Cases Round-up

Age discrimination: transitional pension provisions ...more

Union denied recognition for outsourced staff ...more

TUPE: personal reasons for dismissal do not preclude automatic unfairness ...more

Employer had no constructive knowledge of disability ...more

Points in Practice

PLSA publishes 2018 corporate governance policy and voting guidelines and AGM review ...more

Government to investigate whether share buybacks are used to inflate executive pay ...more

Gender pay gap: new ONS analysis ...more

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

Contents include:

- Government considers punitive fines, clearance and trustees' insolvency ranking
- PPF to recognise bridging pensions
- Impact of amendment power restriction on 2006 closure to accrual
- Residency status reports

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

New Law

'Good work': Government response to the Taylor Review

The Government has published Good work: a response to the Taylor Review of Modern Working Practices. The Taylor Review made suggestions for amending and clarifying the law governing employment status, as well as some far-reaching proposals on the scope of various employment protections (for full details, see our Employment Bulletin dated 14 July 2017).

The Government has generally agreed with the Taylor Review, and stated that it intends to act on all but one of the 53 recommendations. It rejected the proposal that the difference between NICs of employed and self-employed people should be reduced, and stated that there are no plans to revisit the issue.

The Government has chosen to consult on many of the recommendations of the Taylor Review before setting out firm policy changes (see below for details of the consultations). It has however confirmed the following policy changes, albeit that the detail will in many cases still be subject to consultation:

- a new definition of 'working time' for gig economy workers;
- a new right to written particulars of employment and a payslip for all workers (as compared with only employees currently);
- a new right for all workers to request a more 'stable/predictable' contract;
- the pay reference period for holiday pay to be increased to 52 weeks to take account of seasonal variations;
- extending, from one week (possibly to one month), the relevant break in service for the calculation of the qualifying period for continuous service, and clarifying the situations where cessations of work could be justified;
- a list of day-one rights including holiday and sick pay entitlements for all workers;
- asking the Low Pay Commission to consider the impact of higher minimum wage rates for workers on zero-hour contracts and advise on any alternative options in their October 2018 report; and
- working with the Financial Reporting Council (FRC) to consider how its guidance for companies on the content of annual reports can be revised to encourage companies to provide a fuller explanation of their workforce structure, including their employment model, use of agency services, requests received (and number agreed) from zero hours contracts workers for fixed hours after a certain period. If companies do not become more open about such matters as part of good corporate governance, the Government has said that it will take further action, perhaps involving a new requirement on companies to publish a 'People Report', bringing together gender pay gap and diversity data along with additional specific metrics relating to workforce structure.

The four specific consultations launched alongside the Good work report are:

- Employment status consultation: This seeks views on how to make the employment status rules for employment rights and tax clearer for individuals and businesses. The consultation considers the Taylor Review recommendations for better statutory definitions of employment status (and how these could be achieved), as well as alternative approaches. The consultation also asks whether workers (who are not employees) should be rebranded as "dependent contractors", as Taylor suggested, and whether an online tool for determining worker status might be an alternative to legislative change. The consultation closes on 1 June 2018.
- Increasing transparency in labour market consultation: This examines the following recommendations of the Taylor Review:

- the proposal to extend the right to a written statement to workers as well as employees;
- increasing the holiday pay reference period from 12 to 52 weeks;
- the proposal to extend the relevant break in service for the calculation of the continuous service qualifying period from one week, and to clarify the circumstances in which a temporary cessation of work breaks continuity;
- proposals relating to the introduction of a right for workers to request a change in contract to improve predictability; and
- the effectiveness of the Information and Consultation of Employees Regulations 2004 in improving employee engagement in the workplace.

The consultation closes on 23 May 2018.

- Agency workers consultation: This seeks views on the recommendations made in the Taylor Review to improve the transparency of information which must be provided to agency workers (in terms of rates of pay and those responsible for paying them), and to repeal the legislation that allows work-seekers to opt out of equal pay entitlements, known as the "Swedish derogation". The consultation closes on 9 May 2018.
- Enforcement of employment rights consultation: this seeks views on Taylor Review recommendations relating to the enforcement of employment rights, including:
  - the maximum penalty for failure to pay a tribunal award should be increased to £20,000, and the circumstances in which aggravated breach penalties should be imposed should be reviewed;
  - strong action should to be taken against employers who repeatedly ignore both their responsibilities and the decisions of employment tribunals;
  - simplifying the enforcement process;
  - the state should take responsibility for enforcing a basic set of core rights for vulnerable workers; and
  - establishing a naming and shaming scheme for those employers who do not pay employment tribunal awards within a reasonable time.

  The consultation closes on 16 May 2018.

What next? Despite the media fanfare surrounding the publication of the Good Work Report, there is in fact little in terms of substantive change. This is perhaps most stark in relation to employment status, where the consultation makes it very clear that "*No decisions have been made about whether or how to reform employment status*". It seems very unlikely that there will be any legislative change to employment status tests soon. The consultation also makes it clear that the government will "*take into account any significant changes in the case law precedents as work in this area progresses*". There are a number of key case law developments expected this year, including the Supreme Court's decision in *Pimlico Plumbers Ltd v Smith* (due to be heard on 20 and 21 February 2018). These cases may well influence the Government's direction of travel on this issue. We will publish further updates as soon as they become available.

Cases Round-up

Age discrimination: transitional pension provisions

The EAT has handed down judgment in two cases, confirming that transitional provisions attached to reforms of public sector pension schemes amounted to unlawful age discrimination. The EAT accepted that the Government pursued a legitimate social policy aim of protecting those closest to retirement from the effects of pension reforms. However, in neither case were the Government's means found to be proportionate (*The Lord Chancellor and the Secretary of State for Justice and the Ministry of Justice v McCloud and Sargeant v London Fire And Emergency Planning Authority*).

Transitional provisions: Both cases concerned reforms to public sector pension schemes (the judicial pension scheme in *McCloud*, and the firefighters' pension scheme in *Sargeant*) which

were implemented in 2015. The new schemes provided for substantially less favourable benefits, and the Government therefore decided to introduce transitional provisions to protect those members who were closest to retirement. Those closest to retirement were given full protection (and no change in their pension entitlement), and some others were given tapered protection. All other members transferred immediately to the new pension schemes.

Challenge: Two groups of unprotected and taper protected members claimed that the transitional provisions constituted direct age discrimination, as well as indirect sex and race discrimination and a breach of the right to equal pay.

Government's position: The government conceded that the provisions gave rise to prima facie discrimination on these grounds, but argued that the transitional schemes were a proportionate means of achieving their legitimate aim of protecting those closest to retirement from the financial effects of pension reform, and that any differences in treatment were justified and lawful.

Tribunal decisions: The Tribunal in *McCloud* upheld the members' claims, finding that the Government had failed to establish a legitimate aim, and that even if it had, the transitional provisions were disproportionate, in light of the very significant financial impact on unprotected and taper protected members. The Tribunal in *Sargeant* reached the opposite conclusion, finding that the Government had legitimate aims and that its actions were proportionate, relying in both respects on the margin of appreciation afforded to member states in social policy matters.

Legitimate aims: The EAT dismissed the appeal in *McCloud* (although reversing the decision with respect to legitimate aims), and allowed the appeal in *Sargeant*. In relation to legitimate aims, the EAT found that:

- the tribunal is required to recognise the margin of discretion which the CJEU line of authority accords Governments when taking and implementing decisions about social policy (although the tribunal should also consider whether the aim is legitimate in the particular circumstances of the employment);
- In *McCloud*, the Tribunal had failed to accord the margin of discretion to which the Government was entitled on social policy aims;
- In both cases, the Government had established a legitimate aim of seeking to protect those closest to retirement when justifying the age discriminatory effects of the transitional provisions.

Proportionality: In relation to proportionality, the EAT found that:

- the tribunal was not required to accord the Government a "margin of discretion". The employer's means must be carefully scrutinised in the context of the particular business concerned, in order to see whether they meet the objective and that there are no other, less discriminatory, measures which would do so;
- the Tribunal in *Sargeant* had therefore been wrong to simply apply the Government's margin of appreciation, rather than make up its own mind on proportionality. Since the EAT was not in a position to determine proportionality for itself, this question would need to be remitted;
- In *McCloud*, the EAT could not fault the Tribunal's enhanced level of scrutiny, or its conclusions that the extremely severe impact of the transitional provisions on the members far outweighed the public benefit of applying the policy consistently across the whole public service sector. The EAT therefore agreed with the Tribunal's findings that the Government had failed to show their treatment of the members to be a proportionate means of achieving a legitimate aim.

Race / sex discrimination: The EAT also overturned the *Sargeant* Tribunal's rejection of the indirect race and sex discrimination claims. It found it was clear that the transitional provisions put women and those from a black or minority ethnic background at a particular disadvantage, because they were more likely to be in the group excluded from any protection. These claims were also be remitted for consideration of objective justification alongside the proportionality question in the age discrimination claims.

Lessons for employers: These decisions demonstrate the difficulty which employers may face in justifying policy changes with a discriminatory impact. While employers may be able to establish a legitimate aim following the implementation of a social policy objective, a higher level of scrutiny should be adopted when considering the proportionality of the means of achieving that legitimate aim. The decisions are highly relevant in the public sector, given that similar transitional provisions were used in other, larger, public sector pension schemes, but of less direct relevance to most private sector schemes.

Next steps: We understand that the Government intends to appeal the EAT's decisions in both *McCloud* and *Sargeant* (and that permission to appeal has been granted), so we may yet have further guidance from the Court of Appeal on these issues.

Union denied recognition for outsourced staff

The Central Arbitration Committee (CAC) has declined an application for statutory recognition from the IWGB union in respect of personnel supplied to the University of London (UoL) by a third party as part of outsourcing arrangements. Since there was no contract of employment or other contract to do or perform personally any work or services between UoL and the personnel, the application for statutory recognition was ruled inadmissible (*Independent Workers' Union of Great Britain (IWGB) and University of London*).

Recognition request: In October 2017 the IWGB made a request to UoL for recognition for collective bargaining in respect of around 75 personnel comprising '*Security Guards, Postroom Workers, AV Staff, Porters and Receptionists, working for Cordant Security and/at University of London*'. UoL refused the IWGB's application on the grounds that it was not the employer of the personnel. They in fact had contracts of employment with Cordant Security, and were already covered by an existing voluntary agreement in respect of collective bargaining between Cordant and Unison.

Application: The IWGB then applied to the CAC for recognition by UoL under Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). The IWGB argued that the existence of employment contracts with Cordant should not preclude UoL from being a de facto employer of the personnel for these purposes, on the grounds that UoL substantially determined the personnel's terms and conditions with Cordant, specifically pay, hours and holidays.

Outsourced staff were not 'workers': The CAC found that the IWGB's application was inadmissible, because UoL was not the 'employer' of the 'workers' in the proposed bargaining unit. The definition of 'worker', found at section 296(1) TULR(C)A 1992 makes it clear that, in the absence of a contract of employment, what is required is '*any other contract whereby [the worker] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his*'. On this basis, the CAC found that it is an absolute requirement that there be a contract between each individual worker in the bargaining unit and UoL. The absence of such a contract in this case was fatal to the IWGB's application.

No extended definition: The CAC rejected the IWGB's argument, based on the extended meaning of worker in respect of protected disclosures, to include as an employer an entity which substantially determines the terms and conditions of the workers. In a collective bargaining context, the CAC found that an extended definition of 'worker' of this type would not just be novel, but would transform the statutory machinery for collective bargaining, and would be 'a recipe for chaotic workplace relationships'.

Good news for outsourcing: The IWGB's application attracted significant interest amongst employers with outsourcing arrangements. However, the CAC's decision maintains the status quo; businesses may face statutory recognition applications from trade unions in respect of their contractual workers, but not in respect of workers of service providers.

TUPE: personal reasons for dismissal do not preclude automatic unfairness

Under TUPE, the dismissal of an employee will be automatically unfair if the sole or principal reason for the dismissal is the transfer. The EAT has recently confirmed that the existence of purely personal reasons does not preclude the transfer from being the reason for the dismissal, where an employer essentially takes the

opportunity of a business transfer to dismiss the employee. In this case, the dismissal of an employee two days before a TUPE transfer was automatically unfair, despite the employer relying on personal issues for her dismissal (*Hare Wines v Kaur & H and W Wholesale)*.

Transfer and dismissal: K was a cashier working for HandW. She was dismissed two days before the stock and employees of HandW were transferred under TUPE to Hare Wines. K alleged that she had been automatically unfairly dismissed because the sole or principal reason for her dismissal was the transfer. She argued that she had a strained working relationship with a colleague (C), and she thought that Hare Wines did not want C to have to manage her. HandW denied this and defended the claim on the basis that K's employment had ended because she had objected to the transfer.

Reason for dismissal: The Tribunal held that K's dismissal was automatically unfair because the reason for the dismissal was the transfer. It held that she had been dismissed because Hare Wines had anticipated that there would be ongoing difficulties in the working relationship between her and C and, therefore, decided that it did not wish her contract of employment to transfer.

Automatically unfair: The EAT dismissed the appeal. It rejected the argument that the existence of purely personal reasons precludes the transfer from being the reason for the dismissal:

- Given that TUPE was designed to protect workers' rights, it was loathe to expand or introduce what might appear to be new categories of defence, which may undermine the protection afforded to employees in these situations;

- An important factor to take into account in determining the reason for the dismissal is the proximity to the transfer (and in this case the dismissal was effective just two days before the transfer);

- Another significant factor was that the difficulties in the working relationship between K and C were ongoing. They did not arise just on the point of transfer and were not going to end just afterwards;

- The EAT commented that, in a situation where an employer had not taken action to resolve an ongoing relationship difficulty prior to the transfer, but does so only at the point of transfer by dismissing one of the parties in that difficult relationship, it is open to the tribunal to conclude that the reason for the dismissal was the transfer.

The EAT acknowledged that the reason for the dismissal (and the link to the transfer) will depend upon the facts of individual cases. In this case, it was clear on the evidence that Hare Wines did not want K to transfer, particularly in light of the fact that C would be assuming a management position. The EAT therefore upheld the Tribunal's conclusion that the dismissal was by reason of the transfer and was automatically unfair.

Lessons for employers: This judgment illustrates that employers should not use the occasion of a business transfer to dismiss employees with whom there is some ongoing difficulty, as it is likely to result in an automatically unfair dismissal. Whether a transfer is the sole or principal reason for a dismissal will be a question of fact in each case. However, the fact that there is a personal reason for a dismissal will not prevent a tribunal from finding that the sole or principal reason for the dismissal was the transfer.

Employer had no constructive knowledge of disability

An employer is only under a duty to make reasonable adjustments if it has actual or constructive knowledge that the relevant employee is disabled. The point at which constructive knowledge is established can be difficult to ascertain, when the employer has conflicting advice from occupational health and other medical professionals, and when the employee is being uncooperative. The Court of Appeal recently declined to find constructive knowledge in one such case, finding that an employer's efforts need not be perfect and, in the circumstances, the employer had taken reasonable steps to ascertain the nature of the employee's illness and could not reasonably have been expected to do more (*Donelien v Liberata UK Ltd*).

Sickness absence: D was employed by LUK Ltd as a court officer. From 2008 onwards she took substantial periods of sick leave, giving numerous different explanations for her ill health, including stress, breathing difficulties, viral infections and high blood pressure. D's manager agreed to a change in working hours, and D was eventually referred to occupational health (although D refused to allow the OH consultant to contact her GP). The OH consultant advised that D did not have a disability, and that her problems were 'managerial not medical'.

Dismissal: Following further significant absences, LUK had more meetings with D, but she was uncooperative. In 2009, LUK instituted disciplinary proceedings against D, and she was dismissed on the basis of her failure to work her contracted hours and her failure to comply with notification procedures for sickness absence (since she would not always tell LUK that she was going to be absent).

Duty to make reasonable adjustments? D brought several claims, including that LUK had failed to make reasonable adjustments. The Tribunal found that, in the last two months of her employment, D had been suffering from a disability. However, it dismissed the claim on the basis that LUK did not at any material time know, nor could it reasonably have been expected to know, that D was disabled. On appeal, the EAT upheld this conclusion.

No constructive knowledge: The Court of Appeal dismissed D's further appeal. It was satisfied that LUK should not be treated as having constructive knowledge of D's disability:

- It noted that D's GP's letters did not give a clear or consistent picture, and D's sick notes also referred to a wide range of further symptoms and conditions.
- Further, the OH consultant not only advised that D was not disabled; he also suggested that she was not in fact suffering from any mental or physical impairment at all; her problems were "managerial not medical". That advice was highly relevant to the question of what the employer could reasonably have been expected to know.
- LUK had not simply 'rubber stamped' the OH adviser's report; LUK had its own meetings with D, and took account of the GP letters.
- Further, allowing D to start late because she complained of tiredness in the morning did not imply any knowledge of an impairment sufficiently substantial to constitute a disability.

The Court went on to observe that LUK Ltd had been presented with a good deal of 'not very clear' information, which was further compounded by D's uncooperative and confrontational stance. Moreover, not all of D's absences reflected her being truly unable to work; there was an element of unwillingness too, mixed in with substantive complaints she had made about pay and working conditions. LUK had to disentangle what D could not do from what she would not do, which was far from easy. In these circumstances, the Tribunal had been entitled to conclude that LUK did all they could reasonably be expected to have done to find out about the nature of the health problem that D was experiencing, and could not reasonably be expected to have known that D satisfied the definition of 'disability'.

Using occupational health advice: This case demonstrates that employers are entitled to place significant weight on the opinion of occupational health, provided that they do not simply 'rubber stamp' it. Employers will be expected to take reasonable steps to obtain (and then take into account) other evidence, including that provided by the employee and their GP. Employers will then be given a certain amount of credit where the evidence is inconclusive and/or the employee is uncooperative.

Points in practice

PLSA publishes 2018 corporate governance policy and voting guidelines and AGM review

The Pensions and Lifetime Savings Association (PLSA) has published its Corporate Governance Policy and Voting Guidelines 2018. The guidelines provide its members with examples of good stewardship practice and recommendations for key votes at the annual general meetings of their investee companies, on subjects such as executive pay, the re-election of directors and the approval of the annual report.

The PLSA has also published its AGM voting review which examines the results and causes of shareholder dissent for FTSE 350 companies

during 2017. Overall, the AGM review shows relatively steady levels of shareholder dissent at company AGMs for the past two years, with roughly one fifth of companies (56 of the FTSE 250 and 17 of the FTSE 100) experiencing significant dissent (of at least 20% of the AGM votes) over at least one resolution at their AGM.

Executive pay awards continue to be the most controversial aspect of corporate governance. The election and re-election of directors are the next resolutions most likely to attract shareholder dissent at AGMs. The review illustrates some progress in holding board members to account for flawed executive pay practices at FTSE 100 companies.

The report also includes an analysis of reporting of employment models and working practices across the FTSE 100, which found highly varied levels of reporting. For example:

- only 4% of companies provide a breakdown of workforce by full-time and part-time workers;
- only 7% provide data or policies on their use of agency workers;
- only 18% of companies provided any figures on staff turnover, and just 3% provided figures disaggregated by group;
- only 21% provided concrete data in relation to their investment in staff training and development or of numbers of staff trained.

This is topical in light of the Taylor Review recommendation for companies to be subject to a reporting obligation on their workplace modelling, and the Government's commitment to work with the FRC on possibilities for implementing this (see the first item in this Bulletin).

Government to investigate whether share buybacks are used to inflate executive pay

The Government has announced plans to research whether companies buy back their own shares to artificially inflate executive pay, in light of concerns that executive pay can be 'disconnected from company performance'. The research, which is being conducted by PwC consultants and supported by LSE academic Professor Alex Edmans, will highlight how companies use share buybacks, and whether further action to prevent misuse is necessary.

The findings will be published later this year.

Gender pay gap: new ONS analysis

The Office for National Statistics (ONS) has released a new article, Understanding the gender pay gap in the UK, which provides insight into the factors surrounding the difference in men's and women's pay. The ONS report analyses the median gross hourly earnings for men and women full-time employees. It reveals that:

- the pay gap in the UK has reduced in the last ten years;
- between 2011 and 2017, men's pay has grown by 10.4%, while women's pay has grown by 12%;
- however, the gap for full-time workers is entirely in favour of men in every occupation;
- in 2017, men were paid on average £1.32 more per hour than women, creating a gap of 9.1%; and
- the gap for full-time workers remains small at younger ages.

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.

550689500